Appeal No. UKEAT/0277/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 March & 7 November 2017
Judgment handed down on 28 November 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

GRAYSONS RESTAURANTS LIMITED	APPELLANT
MISS C JONES AND OTHERS	RESPONDENTS
SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	INTERESTED PARTY

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SEAMUS SWEENEY (of Counsel) Instructed by: Croner Group Ltd Litigation Department Croner House Wheatfield Way Hinckley LE10 1YG
For the Respondents	MR RICHARD STUBBS (of Counsel) Instructed by: Simpsons Solicitors 3rd Floor Thorne House 36 Station Road Cheadle Hulme Cheshire SK8 7AB
For the Interested Party	MS KATHERINE APPS (of Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

TRANSFER OF UNDERTAKINGS - Insolvency

RIGHTS ON INSOLVENCY

1. Two short questions of construction arise in an employer insolvency context concerning rights of employees to arrears of pay under Part XII ERA 1996. The first is whether a claim for equal pay arrears is a claim for "arrears of pay", and in circumstances where the claim has not yet been determined, whether it gives rise to a debt to which the employee is entitled on the "appropriate date". The second is whether liability for only that debt does not transfer from the insolvent employer (or transferor) to the transferee under Regulation 8 TUPE Regulations 2006, or whether the whole liability for past equal pay arrears is extinguished so far as the transferee is concerned.

2. The Employment Judge concluded that:

(i) equal pay arrears are not a debt payable at the time of transfer (or on the appropriate date) where the equal pay claims have not been determined and quantified. The debt will only be due if the equal pay claims succeed and not before.

(ii) If wrong about that, any liability in excess of the eight week sum guaranteed by the statutory scheme in Part XII, transfers to the transferee and is not extinguished.

3. The appeal succeeded in part:

(i) equal pay arrears can be 'arrears of pay' within s.184(1) ERA, and therefore a debt within s.182 ERA.

(ii) The Employment Judge was in error in concluding that arrears of pay arising from an equal pay claim that is as yet undetermined cannot be a claim for 'arrears of pay' within s.184(1) ERA.

(iii) There is a presumption that equality clauses operated in the Claimants' contracts since their work has been rated as equivalent to their comparators. If that presumption is not rebutted by genuine material factor defences the Claimants had a legal entitlement to be paid in accordance with the equality clauses for work they performed before the appropriate date. To the extent that they were not so paid, they were entitled to arrears of pay on the appropriate date. They are in no different position to suppliers of goods who were unpaid on the appropriate date, or employees who did not receive pay due under implied or disputed oral agreements for work done before the appropriate date.

(iv) The wider point relied on by the Respondent failed. Only liabilities for up to eight weeks of arrears of equal pay do not transfer to the transferee if they constitute sums payable under Part XII ERA by the Secretary of State because the necessary conditions in ss.182 and 184 ERA are established. To the extent that the liabilities exceed the statutory limits in Part XII ERA, liability transfers to the transferee.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This appeal by Graysons Restaurants Limited, the transferee company, raises two short questions of construction in an employer insolvency context. They concern the rights of employees to have arrears of pay owed by the insolvent employer (the transferor company) paid by the Secretary of State from the National Insurance Fund under Part XII of the Employment Rights Act 1996 (" ERA"). The first question is whether a claim for equal pay arrears is a claim for "arrears of pay", and in circumstances where the claim has not yet been determined, whether it gives rise to a "debt" to which the employee is entitled on the "appropriate date" (here, the employer's insolvency). If so, the second question is whether liability limited to the debt does not transfer from the insolvent employer (or transferor) to the transferee under Regulation 8 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE 2006"), or whether the whole of the arrears of equal pay accrued prior to the appropriate date is effectively extinguished and does not transfer to the transferee.

2. In a judgment with reasons promulgated on 16 June 2016, Employment Judge Robinson concluded that:

(i) equal pay arrears are not a debt payable at the time of transfer or on the appropriate date where the equal pay claim has not been determined and quantified. The debt will only be due if the equal pay claims succeed and not before.

(ii) If wrong about that, any liability in excess of the eight week sum guaranteed by the statutory scheme, transfers to the transferee and is not extinguished.

3. I refer to the parties as they were below. The Employment Judge's conclusions are challenged by the Respondent who appears by Mr Seamus Sweeney of counsel, as he did below. For the Claimants who resist the appeal, Mr Richard Stubbs of counsel, appears as he did below. I am grateful for the assistance I have received from them both.

4. It emerged that neither side had informed the Secretary of State of the appeal prior to the hearing. Because it seemed to me that the Secretary of State has an obvious interest in the outcome, it was agreed that the EAT would notify the Secretary of State of the appeal following the hearing and offer the opportunity to make representations on the issues at stake. That opportunity was taken up by the Secretary of State who applied to be joined as an interested party pursuant to Rule 18 of the EAT Rules 1993. I acceded to the application and having considered the representations made on behalf of the Secretary of State, directed a further hearing. Ms Katherine Apps of counsel appeared on behalf of the Secretary of State at the resumed hearing on 7 November 2017, and I am grateful for her submissions, both in writing and developed orally at the hearing.

The facts in summary

5. The background facts can be summarised briefly as follows. Equal pay claims were brought against Liverpool City Council in around 2007 by a group of women who worked (and are still working) at various schools throughout Liverpool as cooks and kitchen assistants (the Claimants). The claims date back some years before this, and have not been finally determined. However, it is common ground that all (or the vast majority) of the Claimants have been doing work rated equivalent to their male comparators, and have been paid less for the work they do. A presumption of equal pay therefore arises in their cases, but material factor defences are pursued in all cases, and liability has not been finally determined or quantified.

6. The Claimants' employments transferred from Liverpool City Council to a private company called Hopkinson Catering Limited and then to Duchy Catering Ltd ("Duchy") on 27 February 2007. Duchy went into administration in early 2009 and Administrators (from KPMG LLP) were appointed on 9 January 2009. The Respondent purchased Duchy's assets on 9 January 2009 and took over the contracts of employment of the Claimants as transferee.

7. It is common ground that insolvency proceedings were opened and that a transfer took place under the supervision of an insolvency practitioner from Duchy to the Respondents.

The Employment Judge's Judgment

8. The Employment Judge referred to the Acquired Rights Directive (2001/23/EC) and the Insolvency Directive 2008/94/EC and observed that their paramount concern is to safeguard and protect employee rights either where there is a transfer or an insolvency of the employer (see [21]). He said neither suggests that it is the protection of the transferee organisation that is the purpose, though he accepted that the object of administration in English law is to continue the business if possible. He saw no tension between the rescue culture that runs through Regulation 8 and the general purpose of the TUPE 2006 which is to protect the rights of employees.

9. The Employment Judge was referred to a number of cases listed by him at paragraph 14. In particular, he said that he took from Hartlepool Borough Council v Llewellyn [2009] ICR 1426 that until an actual award is made in relation to an equal pay claim (or there is an agreement between the parties that there is such a debt) no debt or payment is due. In this regard he relied on footnote 5 to paragraph 33. He also derived assistance from paragraphs 57 and 77 of the judgments of the Employment Appeal Tribunal (Cox J) in Pressure Coolers v

Molloy [2012] ICR 51 and Secretary of State for Business, Innovation & Skills v Dobrucki (2015) UKEAT/0505/13 respectively.

10. Applying the principles he derived from those cases, he concluded that Regulation 8 does not defeat the equal pay claims pre-January 2009 and that even if it did, it would not stop the Claimants pursuing the chance of any monies due over and above what the Secretary of State might pay out under section 184 ERA. His essential reasons were:

(i) he did not accept that the expression "arrears of pay" or "debts payable before the TUPE transfer" include arrears of pay or debts arising out of the breach of the equality clause because a payment under the equality clause is not a debt at the time of the transfer in this case: paragraph 54.

(ii) A claim to modify or include the equality clause has to be presented as a complaint to a tribunal. If that is the case, it could not be a debt which is identifiable at the time of the transfer. It would have to be proved as a debt: paragraph 55.

(iii) Moreover, s.184 specifically sets out which payments the Secretary of State will pay in order to satisfy the 2008 Directive: paragraph 56.

(iv) At paragraph 57 the Employment Tribunal held:

> **"57. What Mr Sweeney is arguing is that no liabilities transfer to Graysons because the state has set up a guarantee process. I cannot find in his favour in that regard. My view is that if the liability falls outside Part XII of the 1996 Act then those liabilities pass under TUPE because at the point of transfer the claimants are not entitled to be paid what is due to them and the debt has not fallen due. The claimants would not at the time have been able to present a claim to the Secretary of State for payment of their equal pay claims. Indeed they may not be able to quantify the debt. The Secretary of State, if an application were made, would refuse such a request because it would be a payment outside the ambit of the legislation. The debt to the claimants will only become due if they succeed in their equal pay claims and not before. If that date is obviously a date after the date of the transfer to Graysons then Graysons will be liable unless they can successfully defend those claims at the final hearing.**

(v) If wrong in reaching that conclusion, he concluded that any liabilities exceeding what the Secretary of State is liable to pay under Part XII transfer to the transferee in any event. The Employment Judge regarded this as a strong pointer in the Claimants' favour generally: paragraph 59.

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The applicable legal framework

11. In accordance with its obligations under Directive 2008/94 which consolidated the original Insolvency Directive 80/987/EEC and subsequent amendments, the UK guarantees certain payments to employees of insolvent employers. These are governed by Part XII Employment Rights Act 1996. Section 182 is headed "Employee's rights on insolvency of employer" and sets out the conditions that give rise to an obligation on the Secretary of State to pay debts to which Part XII applies. It provides as follows:

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> **"s.182 If, on an application made to him in writing by an employee, the Secretary of State is satisfied that :-**
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> **(a) the employee's employer has become insolvent,**
>
> **(b) the employee's employment has been terminated, and**
>
> **(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this part applies,**
>
> **the Secretary of State shall, subject to s.186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt."**

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12. Accordingly, to be entitled to payment from the National Insurance Fund, the employee must (among other things) be entitled to payment of a Part XII debt on 'the appropriate date'. The appropriate date is defined by s.185 ERA and varies according to the nature of the debt claimed. For the purposes of arrears of pay, the appropriate date is the date on which the employer became insolvent.

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13. Section 184 defines the categories of debt that qualify for payment under s.182 ERA. They are:

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> **"(1)(a) any arrears of pay in respect of one or more (but not more than) eight weeks**
>
> **(b) any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) or (2) or for any failure of the employer to give the period of notice required by section 86(1),**
>
> **(c) any holiday pay…**
>
> **(d) any basic award of compensation for unfair dismissal or so much of an award under a designated dismissal procedures agreement as does not exceed any basic award of**

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> **compensation for unfair dismissal to which the employee would be entitled but for the agreement, and**
>
> **(e) any reasonable sum by way of reimbursement… of the … premium paid by an apprentice or articled clerk"**

14. Section 184(2) identifies certain specific amounts that are required to be treated as arrears of pay for the purposes of s.184(1)(a) ERA. They are a guarantee payment, any payment for time off, remuneration on suspension on various grounds, and remuneration under a protective award under s.189 of the Trade Union and Labour Relations Consolidation Act 1992. The list is exhaustive. It does not include remuneration under other kinds of protective award, or compensatory awards for unfair dismissal. Payments as compensation for unlawful discrimination or under an equality clause are not separately listed. Although at an earlier stage the Claimants sought to argue that the list in s.184(2) qualified or limited the definition of 'arrears of pay' in s.184(1)(a), it is now (correctly) common ground between the parties, though not the Secretary of State, that is not its effect.

15. Ms Apps on behalf of the Secretary of State contends that 'arrears of pay' is defined by s.184(2) and is an exhaustive definition, subject only to adding basic pay as defined by s.s.220-224 ERA because pay for work done is not included within s.184(2). She relies on Benson & Others v Secretary of State for Trade and Industry [2003] ICR 1082 at [21] where the Employment Appeal Tribunal held:

> **"21. That is plainly a powerful argument. However, we are persuaded that section 184 (I)(a) cannot be so construed. The answer lies rather in looking at the rest of section 184. The statutory provisions are all separately dealt with under section 184(2); and all those amounts are to be, by express statutory definition, treated as arrears of pay, but that is simply because they are expressly so treated. We thus set aside section 184(2) and concentrate on section 184(I). By paragraph (b) a payment due to an employee in respect of a period he has not worked, but which was in fact his contractual notice period, is expressly brought into the legislation and defined as a relevant debt. It is not defined as arrears of pay under paragraph (a), but it is to be a recoverable debt. Mr Lumsden says that that is correct, because it is not arrears of pay, and would thus not come within paragraph (a), but would be effectively a damages claim, and the fact that it is payment to an employee for not working does not make it analogous with a payment for not working under clause II when the employee is laid off. But he has a more difficult task in explaining the presence in section 184(I) of paragraph (c). That is a provision whereby a payment to an employee for not working, because he is on holiday, is expressly provided to be a debt; and, although we suggested to Mr Lumsden that he might seek to argue that section 184(I)(c) is simply declaratory of what is already included in**

> **subsection 184(I)(a), so rendering the definition or the inclusion of holiday pay superfluous and redundant, but not thus affecting the definition in section 184(I)(a), it appears to us that that is not an argument that can stand up here. It is clear that the paragraphs in section 184(I) are not intended to be declaratory or explanatory of section 184(I)(a); they are intended to be items which would not have been included but for their express inclusion. "Arrears of pay" is, therefore, not intended to include holiday pay. Mr Lumsden sought to say that in some circumstances holiday pay might be forward looking, and thus might need to be expressly provided for in those circumstances, because it would not fall within the definition of the word "arrears", but that is, I am afraid, not supportable in this case, because it is only arrears of holiday pay which is claimable by the employee in any event, by virtue of section 184(I)(c) and section 184(3) taken together, including, of course, arrears of accrued entitlement to holiday pay."**

16. Further, although the Employment Appeal Tribunal in Benson held that s.184 is intended to define and thus limit the debts which are protected and to be paid by the Secretary of State, the Employment Appeal Tribunal did not hold that 'arrears of pay' in s.184(1)(a) is defined or limited by s.184(2). Rather, s.184(2) is separate from s.184(1)(a). It treats the four matters listed at s.184(2)(a) – (d) as elements of 'arrears of pay' that go towards the eight week total that is protected and to be paid by the Secretary of State under s.184(1)(a), but does not define 'arrears of pay'. The Employment Appeal Tribunal's judgment in Connor v Secretary of State for Trade & Industry (2005) UKEAT/0589 & 0890/SM is to similar effect: see [26] where Burton P made clear that the definition of the debts to which s.184 applies is exclusive and the only obligation the Secretary of State has is in respect of the five categories of debts defined in s.184(1). I respectfully agree, and accordingly, the fact arrears of pay under a modified term of a contract as a result of a statutorily implied or deemed equality clause (referred to as 'equal pay arrears') is not listed in s.184(1) is not determinative. The real question is whether 'equal pay arrears' can fall within s.184(1)(a) as 'arrears of pay'. I return to this question below.

17. Section 186 limits the total amount payable by the National Insurance Fund to an employee in respect of a debt to which s.182 applies by imposing to a ceiling on the amount payable for any one week. With effect from 6 April 2016 this was £479 per week.

18. Where an application for payment under s.182 ERA is made to the Secretary of State but the Secretary of State fails to make such payment or makes a payment that is less than the amount which should have been paid, the individual can present a complaint to an employment tribunal under s.188 ERA and if the employment tribunal finds that the Secretary of State ought to have made a payment under s.182, the tribunal must make a declaration to that effect and declare the amount of any such payment which it finds the Secretary of State ought to have made.

19. The TUPE Regulations 2006 were made to give effect to the Acquired Rights Directive 2001/23/EC ("the ARD") (which consolidated Directive 77/187/EC and a subsequent amending Directive 98/50/EC). Although the clearly stated purpose of the ARD is to protect and safeguard employee rights in the event of a transfer (as the Employment Judge recognised), Article 5 recognises that there are circumstances where the primary purpose must give way to some extent to a different interest, namely the rescue of the business as a going concern.

20. Article 5 of the ARD allows Member States in the context of a transfer during insolvency proceedings the option of taking advantage of two potential exceptions from the protection otherwise given to employees on a transfer under Articles 3 and 4 ARD. It provides:

> **"5 (1) Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).**
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> **5 (2) Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that –**
>
> **(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of the Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the**

protection of employees in the event of the insolvency of their employer, and, or alternatively, that,

(b) the transferee, transferor or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, in so far as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business."

21. So, in the case of "bankruptcy proceedings or any analogous insolvency proceedings … instituted with a view to the liquidation of the assets of the transferor" Articles 3 and 4 of the ARD may be excluded altogether by virtue of Article 5(1). On the other hand, a partial derogation only is permitted by Article 5(2) in the case of all insolvency proceedings, as regards (a) debts covered by guarantee provisions pursuant to Directive 80/987/EEC and (b) so as to allow renegotiation of terms and conditions "designed to safeguard employment opportunities by ensuring the survival of the undertaking" which would not otherwise be allowed.

22. Regulation 8 TUPE 2006 headed 'Insolvency' implements Article 5 ARD in the UK. Regulation 8(7) enacts Article 5(1) ARD for liquidation proceedings. Further the two options in 5(2) have been implemented by the UK in the case of insolvency proceedings other than liquidation proceedings. This appeal is concerned only with the Article 5(2)(a) option which is implemented domestically by Regulation 8(1) to (6) TUPE 2006.

23. Regulation 8 TUPE 2006 provides as follows:

"(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.

(2) In this regulation "relevant employee" means an employee of the transferor –

(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or

(b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in Regulation 7(1).

(3) The relevant statutory scheme specified in paragraph 4(b) (including that sub-paragraph as applied by paragraph 5 of Schedule 1) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.

> **(4) In this regulation the "relevant statutory schemes" are –**
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> **(a) Chapter VI or Part XI of the 1996 Act;**
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> **(b) Part XII of the 1996 Act.**
>
> **(5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the statutory schemes.**
>
> **(6) In this regulation "relevant insolvency proceedings" means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.**
>
> **(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."**

24. Elias P considered the rationale behind Regulation 8 and the fact that applying the full force of TUPE to insolvent businesses would discourage potential purchasers of the business from acquiring it to the detriment of the employees, in Secretary of State for Trade and Industry v Slater [2008] ICR 54. At paragraphs 15 to 19 he held:

> **"15. Regulation 8 therefore aims to relieve transferees of the burdens which would otherwise apply in certain defined circumstances.**
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> **16. Essentially this is done in two quite distinct ways. The most extensive exception from the effect of TUPE is created by Regulation 8(7) (which is intended to reflect the provisions of Article 5.1 of the Directive). This provides that where the insolvency proceedings are analogous to bankruptcy proceedings and have been instituted with a view to liquidation of the assets, then neither Regulations 4 nor 7 apply at all. There is no transfer of staff to the transferee and no claim for unfair dismissal against him (although other provisions of TUPE, such as the information and consultation regulations, continue to operate).**
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> **17. A narrower exception is carved out where Regulation 8(6) applies. This applies to insolvency proceedings where the purpose is *not* with a view to liquidation of assets. This does not altogether exclude, but it does modify, the effects of Regulations 4 and 7. It means that the transferee does not pick up all of the liabilities which would otherwise transfer to him.**
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> **18. Regulation 8(3) has the effect of making the Secretary of State liable for the obligations still outstanding at the date of transfer which are caught by Part XII of the 1996 Act. There is a deemed dismissal at that stage for purposes of fixing those liabilities even although there has been no actual dismissal. However, to the extent that the liabilities exceed the statutory limits, liability transfers to the transferee.**
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> **19. Regulation 8(5) has the effect of making the insolvency fund rather than the transferee liable to meet any redundancy liabilities. (These will typically arise where there are dismissals for redundancy which are not for economic, technical or organisational reasons. The issue does not arise here.)"**

This explanation was adopted with approval by Rimer LJ in Key2Law (Surrey) LLP v De'Antiquis (CA) [2012] ICR 881 at [24].

25. Because at the time of the transfer from Duchy to the Respondent, Duchy was in "relevant insolvency proceedings" (it was in administration pursuant to Schedule B1 of the Insolvency Act 1986 with the purpose, not of liquidating the assets of the company, but of rescuing its business), it was common ground before the Employment Tribunal and before me that Regulation 8(2) to (6) TUPE 2006 (and not Regulation 8 (7)) applied to this transfer.

The 'prior issues' raised by the Secretary of State

26. Against that background, I turn to address the grounds of appeal. Two prior issues not addressed by the parties below (or earlier on this appeal) and not determined by the Employment Tribunal therefore, are raised by the Secretary of State. Neither side objects and the issues raised are pure questions of law that ought to be addressed. They are:

(a) whether a claim for equal pay is in principle a claim in debt for arrears of pay; and

(b) if so, whether this equal pay claim has been made as a claim for debt.

Ms Apps contends that the answer to both questions is no and this answers the statutory question whether equal pay claims fall within the scope of Part XII in the negative. On that basis she submits that the Respondent's appeal does not get off the starting blocks. I deal with these prior issues first on that basis.

27. Ms Apps submits by reference to Benson and Connor that in the same way as it was not open to the Employment Appeal Tribunal in those cases to expand the interpretation of 'pay' or treat the list in s.184(1) as non-exhaustive, it is not possible to interpret 'arrears of pay' in s.184(1)(a) as including an award for an equal pay claim. Equal pay claims are qualitatively and conceptually different to ordinary pay claims. Had there been an intention to include them, s.184(1)(a) or (2) would have referred specifically to equal pay arrears but did not. She submits that it is clear from both judgments (Benson at [18] and Connor at [29]) that the Employment

A Appeal Tribunal considered equal pay claims were not included. Not all payments to which an employee can claim to be entitled are included; were it otherwise, holiday pay would not have been specified in s.184(1)(c). Moreover, equal pay claims are complex and to include them as arrears of pay would impose an unfair administrative burden on the Secretary of State. The Claimants adopt these submissions, but they are resisted by the Respondent.

28. I do not accept these arguments. I accept that Article 2(2) of the Insolvency Directive leaves the definition of 'pay' to national law. Further 'pay' for the purposes of 'arrears of pay' in s.184 may be narrower than "pay" under Article 157 (formerly Article 141) of the Treaty of the European Union which is defined to include a wide variety of rewards for work, including pension (which is deferred pay), and rewards by way of non-monetary benefits or consideration in kind, that might be regarded as falling outside the category of "arrears of pay". However, I do not consider that this answers the question in this case. Although s.184 sets limits on the categories of debt within scope, 'pay' has not been defined for the purposes of Part XII. In the context of the category of "arrears of pay" it must mean remuneration for work that has been performed by the individual for the employer.

29. Neither Benson nor Connor concerned equal pay arrears and those cases are not authority for the proposition that equal pay arrears cannot be arrears of pay within s.184(1)(a). That does not entail treating the five categories of debt in s.184(1) as non-exhaustive. They are exhaustive and it is only if equal pay arrears can be "arrears of pay" that they can be said to fall within the scope of the protection in Part XII. It is therefore necessary to consider the nature of these claims to determine this question.

30. The equal pay arrears claims in this case are claims in respect of periods that pre-date the insolvency. They relate to work performed by the Claimants that was, as a matter of fact, rated as equivalent to work done by their male comparators, but for which they received less pay than their male comparators received for the equivalent work. The claims are not quantified but at some stage the Claimants will be in a position to identify what the precise pay shortfall is by reference to each particular comparator relied on.

31. That is different from Benson where the payments sought to be claimed as within scope were not remuneration for work actually done, and moreover, statutory guarantee payments are listed in s.184(2) to be treated as arrears of pay, whereas contractual guarantee payments are not. It is also different from the compensatory award claim in issue in Connor which on any analysis is not arrears of pay for work already done, but reflects future lost earnings. The remuneration in issue on this appeal is for work actually done by the Claimants but not paid. For the reasons developed below there is a presumption that an equality clause operated in their contracts that can only be rebutted if material factor defences are established by the employer.

32. Further, unlike in Benson and Connor there is no express provision in s.184(1)(b) to (e) or (2) that militates against an equal pay arrears claim in respect of remuneration for work performed falling within "arrears of pay".

33. I can see no conceptual or qualitative distinction between arrears of pay claimed in consequence of a failure to pay sums contractually due under express or implied terms of a contract for work done, and sums claimed as due for work done under an equality clause implied by statute. There is no principled reason for the Secretary of State's assumption that

A ‘equal pay’ is somehow different from pay. Nor has any policy justification for this distinction been identified.

B 34. I accept that there may be an additional administrative burden imposed on the Secretary of State in challenging entitlement to equal pay arrears, but that is an insufficient basis for excluding them altogether. The Secretary of State is in fact in no different position to the transferee employer, and must be satisfied of the entitlement before it is paid. The C Administrator can be asked for a statement of the amount of the debt claimed: see s.187 ERA. If the Secretary of State is not satisfied and does not pay the issue can be litigated in the Employment Tribunal on a complaint by the employee concerned: s.188 ERA. Moreover, by D s.190 ERA the Secretary of State can require production of relevant records from any person in control or who has custody of such records.

E 35. Ms Apps submits that even if an equal pay claim can be included in arrears of pay, it is not necessarily a claim in debt. She relies on the fact that both under the Equal Pay Act 1970 and s.132 Equality Act 2010, tribunals can make a declaration or award damages as well as or instead of awarding arrears of pay where an equality clause has been breached. She contends F that claimants may elect to claim damages rather than making debt claims and s.184 only applies to debt and not damages claims. Moreover, in this case, the Claimants have made no election, as Mr Stubbs confirms.

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36. Although Ms Apps is entitled to point to the different remedies available for equal pay claims, they do not assist her argument. If equal pay arrears are ‘arrears of pay’ then by virtue H of s.184 they constitute a ‘debt’. Section 184 begins: ‘This Part applies to the following debts’.

A It then lists the 'debts', the first of which is 'arrears of pay'. Therefore, if equal pay arrears are 'arrears of pay' they are, by virtue of s.184 'debts'.

B 37. I accept that an equal pay claim may result in a damages award as opposed to an 'arrears of pay' award. However, that is not to say that an employment tribunal simply has a choice to label what is clearly an award of arrears of pay as one of damages. The power to award damages is there to reflect a different sort of equal pay claim. The Equal Pay Act 1970 and the C Equality Act 2010 are not concerned solely with 'pay' but with contractual terms. The protection applies to benefits in kind, which must, if there is to be a successful remedy, be converted to a monetary value. A successful claim of this type is likely to result in an award of D damages, not an award of 'arrears of pay'. It seems to me however, that as a matter of contractual analysis, rather than election, these proceedings are not concerned with damages claims but with arrears claims.

E 38. In any event, as already indicated s.184 does not require the amount for which the Secretary of State is liable to be classed as a 'debt' at common law. For example, the provision in s.184(1)(b) for 'any amount which the employer is liable to pay the employee…for any F failure of the employer to give the period of notice required by s.86(1)' cannot necessarily be regarded as a 'debt' on common law principles, and may properly be seen as a damages claim. The Secretary of State is however expressly made liable to pay it in cases of insolvency under G Part XII, and it is treated as a debt for these purposes.

39. The focus is not on whether the claim is a 'debt' at common law but whether it is one H for 'arrears of pay'. If it is a claim for arrears of pay it falls within one of the categories of debt exhaustively defined by s.184 (1) ERA and therefore is a debt claim within the meaning of

s.182. It does not matter that there may also be the facility within the Equality Act and/or the Equal Pay Act for a tribunal to make an award of damages in appropriate circumstances.

40. For all these reasons, I do not accept the arguments advanced by the Secretary of State as prior issues in this case.

The appeal

41. Grounds 1-4 taken together challenge the Employment Judge's conclusion that an equal pay claim cannot be a claim for "arrears of pay" for Part XII ERA purposes in circumstances where the equal pay claims have not yet been determined so that there is no debt to which the employee is entitled to be paid on 'the appropriate date'; and challenge his reliance in reaching those conclusions, on Hartlepool Borough Council v Llewellyn [2009] ICR 1426, Pressure Coolers v Molloy [2012] ICR 51 and Secretary of State of Business Innovation & Skills v Dobrucki [2015] UKEAT/0505/13 as misplaced.

42. In summary Mr Sweeney contends (as he did before the Employment Tribunal) that a claim for equal pay is a claim for arrears of pay irrespective of any determination by an employment tribunal. Modification occurs automatically if the required conditions apply and is not dependent on any decision to that effect by a tribunal. Such an approach, he submits, is necessary to justify an award of arrears of pay which accrues pay-day by pay-day over the period to which the claim relates even though that entitlement is not recognised or satisfied by the employer at that time. He relies on Llewellyn at [30] and [31].

43. Mr Sweeney criticises the Employment Judge's reliance on Molloy as demonstrating a misunderstanding or misapplication of that judgment. Moreover, he submits that if Cox J at

A paragraph 57 of Molloy intended to state as a matter of law that equal pay arrears are not payable until such time as a claim is made, that is wrong. There was a similar error of approach, he submits, in the Employment Judge's misplaced reliance on Dobrucki. Both Molloy and Dobrucki are authority for the proposition that only those debts which have accrued as such prior to or at the same time as the transfer, remain the liabilities of the transferor and hence potentially the liabilities of the Secretary of State. Neither is authority for the Employment Judge's conclusion at paragraph 54 that a payment under the equality clause is not a debt at the time of the TUPE transfer, because it requires a claim to be made, presented to a tribunal and adjudicated on before this can be so.

D 44. The right to equal pay for the purposes of these claims, is enshrined in s.1 of the Equal Pay Act 1970 (now s.66 of the Equality Act 2010) which implies an "equality clause" (now a "sex equality clause") into all contracts of employment. It operates by deeming that all contracts of employment at an establishment in Great Britain include an equality clause whose effect is to modify any term of a claimant's contract of employment that is less favourable than the corresponding term of a comparator's contract.

F 45. Section 1 of the Equal Pay Act 1970 (which was in force at times material to this claim) provides so far as relevant:

> **"1. Requirement of equal treatment for men and women in the same employment**
>
> **(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.**
>
> **(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that –**
>
> **…**
>
> **(b) where the woman is employed on work rated as equivalent with that of a man in the same employment –**
>
> **(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in**

the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term;

(3) An equality clause falling within subsection (2)(a), (b) or (c) above shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor –

(a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's;…"

46. Section 2 (1) gives employment tribunals jurisdiction to determine

"any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration… in respect of the contravention."

47. As the Employment Appeal Tribunal (Underhill P) observed in Llewellyn at [12]:

"Two features of s.1 of the 1970 Act need to be noted, although they are not controversial:

(1) The mechanism employed to achieve equal pay is contractual. Every contract of employment is deemed to include an "equality clause", whose effect is, when the necessary conditions are satisfied, that its terms will be "treated as" altered (whether by modification of an existing term or inclusion of an absent term) so as to achieve equality with the relevant terms of the comparator's contract.

(2) The effect of sub-sections (2) and (3) taken together is that if one of the "comparable situations" defined at (a)–(c) under s.1 (2) arises, there is a presumption that the equality clause will "operate"; and that presumption can only be rebutted by virtue of s.1(3) if the employer can demonstrate (in effect) that the differential is not discriminatory – see the pellucid summary in the speech of Lord Nicholls in Glasgow City Council v Marshall [2000] ICR 196, at paragraphs 202F–203A"

48. The Employment Appeal Tribunal in Llewellyn continued at [30] to [33]:

30. "We agree with Mr Allen that the conceptual approach adopted by the draftsman of s.1 appears to be that the modification of the term in "the woman's contract" occurs automatically if the required conditions apply and that it is not dependent on any decision to that effect by the Tribunal; and such an approach would indeed seem to be necessary to justify the award of arrears. But that does not necessarily answer the question whether a term so modified is "available" to a piggyback claimant of the opposite sex. The essence of the Council's argument is that s.1(2) provides for comparison only with terms which have been "really" modified rather than modified by a retroactive fiction.

31. It does not seem to us that the language of the Act gives any assistance on that question: as we have already observed, it is doubtful whether the draftsman specifically considered the possibility of piggyback claims. It is necessary to consider the question as a matter of principle. The starting-point is that the arrears awarded to F1 represent pay, albeit paid late and only as a result of her bringing a tribunal claim: that seems to us to be clearly the case on a purely domestic law analysis, but if there were any doubt about the matter EU law adopts a very broad definition of "pay". The entitlement to that pay accrued to F1, pay-day by pay-

day, over the period for which M2 was an available comparator, by way of (part) consideration for the work done by her over that period, even though that entitlement was not recognised or satisfied by the employer at the time. That being so, it is hard to see any principled reason why that pay should be excluded from consideration in deciding whether M1 has received equal pay with F1. He has been working alongside her throughout the relevant period. If she had received the pay in question at the time that it fell due he would have been entitled to its equivalent: Why should it make a difference that it has been received in arrears? We have no difficulty with the submission that the Act should be concerned only with real, as opposed to notional, discrimination (in fact we apply it at paragraph 32 below); but we believe that in such a case M1 does indeed suffer real discrimination, on the straightforward basis that F1 has received £10 per hour for the period 2000-2005 and he has received only £9.

32. We do not accept that this approach would allow the kind of claim hypothesised by Mr Jeans and Mr Bowers in order to frighten us, under which men could advance piggyback equal pay claims even where the female comparator on whom they relied had brought no claim herself (see paragraph 28 above). As they themselves assert, EU equal pay law, to which UK law conforms, depends on concrete comparison. That is well-established in the context of the need for a complainant to found her claim on comparison with an actual, as opposed to hypothetical, male comparator: see the decision of the European Court of Justice in Macarthys Ltd v Smith [1980] ICR 672 (especially paragraph 15, at page 691) and the recent decision of Elias P. in Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley [2008] IRLR 588. In our judgment a similar approach based on concrete comparison should be followed in the present context. The law should be engaged when, but only when, there is a substantial, rather than potential or notional, difference in the treatment of claimant and comparator – i.e. in practice in cases where the comparator actually receives better pay than the claimant.

33. In short, we agree with Mr Allen that F1's entitlement to equal pay with M2 arises – or, as Elias P. put it in Sodexo Ltd. v Gutridge (see paragraph 35 (2) below), "bites" – as soon as the conditions specified in section 1 (2) are satisfied. But for the purpose of a claim by M1 there is no actual discrimination unless and until F1 is paid, or receives an award (footnote 5), in respect of that period. His claim depends on the payment or award of the arrears, not on the accrual to F1 of the underlying theoretical right. We should add, however, that if the comparators receive interest on the arrears, the male claimants should do so too. Though their entitlement may be triggered by the payment to the comparators, it represents pay for a past period."

"Foot note 5: Strictly it is the date of the award – which recognises, and for practical as opposed to theoretical purposes creates, a right to payment of the arrears to F1 – which triggers M1's entitlement, not the date of payment: but in principle payment of the amount awarded should follow forthwith, and we refer to payment and award as synonymous."

49. Relying on that analysis Mr Stubbs submits that rights to equal pay arrears that have not been determined remain notional or potential entitlements and there must be a successful claim to enforce the equality clause in order for the right to equal pay to crystallise as a debt.

50. Although he accepts that an individual can rely on "arrears of pay" that generate a debt by reference to written or oral contractual provisions even where these are disputed and might only be established at a later date well after the appropriate date, he contends that rights under the Equal Pay Act are different. The former gives rise to a debt due under a contract whereas the latter is a debt due under, what he describes as, a fictional equality clause read in by the

Equal Pay Act. The legal fiction means that until the rights have been established and declared by a tribunal there can be no debt. Moreover, the date that the declaration by the tribunal is made is the due date of payment so that there cannot be a debt at any earlier date. Mr Stubbs relies on the analysis in Llewellyn that distinguishes between notional and actual rights in the context of equal pay claims; and on the analysis in both Molloy and Dobrucki which he submits the Employment Judge was fully entitled to adopt.

51. On this aspect of the appeal, I prefer the submissions of Mr Sweeney. It seems to me that the legal position is as follows.

52. The statutory obligation of the Secretary of State under s.182 is to pay to the employee the amount which, in the opinion of the Secretary of State, the employee is "entitled in respect of that debt" if the Secretary of State is satisfied that, on the relevant date, the employee "is entitled to be paid the whole or part of any [qualifying] debt.". Qualifying debts include "arrears of pay" owed by the insolvent employer at the relevant date. So the obligation of the Secretary of State is to pay the employee the amount "which the employee is entitled to be paid in respect of that debt". Entitled must mean legally entitled so the critical question is whether there is a debt in respect of which the employee was legally entitled to be paid by his employer on the relevant date. The answer to that question in the case of arrears of pay under a contract of employment is found by determining the legal position as between the employee and employer in accordance with the relevant principles of contract law. If the contractual entitlement is disputed it must be capable of being enforced (in other words, not time-barred).

53. Here, the employees rely on their contracts of employment as modified by the equality clause deemed by statute to be incorporated into those contracts. This is no less a claim in

contract than a claim based on an express term said to have been breached and resulting in claimed arrears of pay. Section 182 makes no distinction between entitlements deriving from express contractual rights, implied contractual rights or those modified by statute, and I see no relevant legal difference between the two nor any principled basis for distinguishing between them. Moreover, there is no time limit for making an application under s.182. Rather, where the Secretary of State refuses to pay or pays less than the amount applied for, any complaint about that must be presented before the end of the period of three months beginning with the date on which the decision of the Secretary of State is communicated to the applicant (or within such further period as is considered reasonable where it is not reasonably practicable for the complaint to be presented within the three month period.)"

54. The Claimants have all commenced proceedings for equal pay so no question of limitation arises. Their claims can be enforced. Their jobs have all been rated equivalent to those of the comparator men, and they are paid less than those men so the presumption that the equality clause operates arises, but can, of course, be defeated by the material factor defences that are pursued.

55. I accept Mr Sweeney's submission (adopting the approach of the EAT in Llewellyn) that the conceptual approach adopted by s.1 of the Equal Pay Act 1970 is that the modification of the term in the woman's contract occurs automatically if the required conditions apply and is not dependent on any decision to that effect by a tribunal; and such an approach seems to be necessary to justify the award of arrears of pay in any event. Any arrears awarded to an equal pay claimant represent pay, albeit paid late and only as a result of her bringing a tribunal claim. The entitlement to that pay is treated as having accrued to the claimant pay-day by pay-day, over the period for which her comparator was an available comparator, by way of (part)

consideration for the work done by her over that period, even though that entitlement was not recognised or satisfied by the employer at the time.

56. The claims in this case are not piggyback claims (nor is the piggyback comparator in a similar position to the Secretary of State as Mr Stubbs contends in writing). To my mind, Mr Stubbs' analysis involves a false focus on what is said about piggyback claims, rather than considering what is said about the implication of an equality clause into the contract of an original claimant (as is the case here). The two are different for the reasons explained in Llewellyn, and I do not consider that the remaining analysis in Llewellyn that deals with the question whether a term modified in a female employee's contract is available to a piggyback claimant of the opposite sex assists. Nor does it justify the conclusion that there is no entitlement to arrears of pay in the case of these Claimants unless and until a tribunal award is made.

57. For the Claimants here, their entitlement to arrears of pay under an equality clause occurs automatically once the conditions identified in s.1(2) of the Equal Pay Act 1970 for its application are met. On the assumption that they have established or will establish the necessary conditions they are treated as always having had an entitlement to be paid the difference in pay by reference to the equality clause. This is no different to a situation where an employee relies on an asserted (but disputed or unproved) oral agreement to increase her pay from £5 per hour to £10 per hour. If prior to the date of insolvency, the employer fails to pay the increased sum, the employee can make an application to the Secretary of State for the asserted arrears of pay. If the Secretary of State is not satisfied of her entitlement to be paid and refuses to pay, the employee can make an application to the tribunal under s.188 ERA. The tribunal will have to resolve any contractual dispute as to the increase but once resolved, the

A tribunal simply recognises that the debt was due and declares that the employee was entitled to be paid those arrears at the date of the insolvency. I cannot see why there should be any difference where the claim is one based on an equality clause implied by statute. The practical way in which a dispute about a claimant's entitlement to arrears of pay based on an equality clause is resolved is a separate matter and does not affect the question whether such entitlement arises and is treated as having always existed.

58. Nor do I consider that the decisions in Molloy and Dobrucki justify a different approach. The critical issue to be resolved in Molloy was whether in circumstances where a claimant was dismissed by reason of redundancy after the date of transfer, the Secretary of State was liable for payment of a basic award or a redundancy payment. The Secretary of State was held not liable because since the dismissal post-dated the transfer, on any analysis the basic award and redundancy payment were not payable before the transfer (the 'appropriate date' in this case) and accordingly there was no entitlement to those payments. The entitlement to payments only arose on dismissal after the appropriate date.

59. The Employment Judge relied expressly the italicised passage in paragraph 57 of the Employment Appeal Tribunal's judgment (Cox J) in Molloy which reads as follows:

> **"57. Thus in general terms the Part XII regime bestows various rights on an employee should his or her employer become formally insolvent. One of these rights is that the employee may obtain payment of certain "guaranteed debts" from the National Insurance Fund, i.e. the Secretary of State.** ***In general, the scheme applies only to certain, identified debts as set out in the relevant sections. There is no right to protection in respect of claims which have not been made at the date of the insolvency and which therefore have not given rise to a debt of the relevant kind."***

This is a general description of the scheme and not part of the ratio of the Employment Appeal Tribunal's judgment. However, if by the last sentence, Cox J was intending to state as a matter of law that arrears of pay (of whatever kind) are not within scope unless a claim has been made

at the date of the insolvency, then I can see no justification for that in the words of s.182 ERA. If that was her intention (and she was not merely commenting on the overall operation of the statutory scheme) I respectfully disagree. The conditions set out in s.182 do not include the requirement that a claim has been made at the date of insolvency; rather by that date (or the appropriate date) the employee must be legally "entitled to be paid." In Molloy, the claimant's employment was only terminated after the transfer, by the transferee or acquiring employer. The claimant therefore had no entitlement to debts from the insolvent former employer arising in connection with that dismissal, and could not bring himself within the scope of the protection of the scheme. The transferee therefore remained liable.

60. Before the Secretary of State must pay sums in respect of arrears of pay under s.182 to an employee whose employer has become insolvent, the employee must make an application in writing. Once that is done and provided the Secretary of State is satisfied that the conditions in s.182 are fulfilled, he is required to pay out of the National Insurance Fund the amount which, in the opinion of the Secretary of State, the employee is 'entitled in respect of the debt'. That the Secretary of State might not be liable to make a payment under s.182 until an application in writing is made is a different issue to whether the employee was entitled to be paid arrears of pay by his former employer. If at the date of the transfer, the employee had no such entitlement then the Secretary of State cannot be liable. The fact that the Secretary of State may not be required to make any payment until an application is made in writing pursuant to s.182 does not determine the question whether the sums were a debt which the employee was entitled to be paid at the date of transfer.

61. For similar reasons, I agree with Mr Sweeney that the Employment Judge was wrong to rely on Dobrucki to reach the conclusion he did at paragraph 54. Dobrucki, like Molloy, is

authority for the proposition that only those debts which have accrued as such prior to or coincident with the transfer can constitute potential liabilities of the Secretary of State under s.182.

62. Finally, so far as paragraph 57 of the Employment Judge's judgment is concerned and for the reasons already given, I consider that he was wrong to conclude that the Claimants would not have been able to present a claim to the Secretary of State for payment of their equal pay arrears. I see nothing in the statutory scheme that precludes a claim for arrears of pay arising from a breach of an equality clause implied by statute. Difficulties in quantification of such a claim are irrelevant to the question whether arrears have accrued and give rise to entitlements to be paid. Moreover, the date of success of the equal pay claim does not determine the question whether the arrears were payable and had accrued prior to or coincident with the transfer.

63. For all these reasons I consider that the Employment Judge fell into error in concluding that arrears of pay arising from an equal pay claim that is not yet determined cannot be a claim for arrears of pay for Part XII purposes. In my judgment they can constitute arrears of pay for these purposes.

Ground 5

64. This ground raises a wider issue with potentially significant ramifications. Mr Sweeney contends that by virtue of Regulation 8(5) read alone or in conformity with recitals 3, 6 and 7 and Article 5(2)(a) ARD, qualifying arrears of pay accrued at the date of insolvency are guaranteed (subject to conforming minimum limits) to be paid under Part XII ERA but that any balance of historic arrears of pay are otherwise not transferable to the transferee at all. In other

words, while only part of the debt within the scope of the state guarantee frozen at transfer is paid by the Secretary of State, the whole liability is extinguished, leaving employees unable to pursue these rights at all. He accepts that looking forwards from the insolvency date the transferee will be liable for any equality clause modification to employment terms and conditions making the transferee liable to make payments accordingly in future. However, he contends that it would run counter to the rescue culture inherent in administration proceedings, which underpins the legislation, if transferees were to be liable for amounts in excess of the Secretary of State's guaranteed sums. It cannot have been intended that transferees in one member state might have a competitive advantage over transferees in another member state according to the extent of the guarantee provided by the guaranteeing institutions or according to whether the guaranteeing institution exercised its option to limit the liability to employees.

65. I do not accept this submission and on this part of the case I prefer the submissions of Mr Stubbs, supported by Ms Apps for the Secretary of State. My reasons follow.

66. First, Regulation 8(5) TUPE 2006 limits the disapplication of Regulation 4 to "sums payable" to the relevant employee under the statutory schemes. On a plain reading of these words, only the sums payable by the Secretary of State do not transfer under Regulation 4, but Regulation 4 continues to operate in respect of sums not payable and accordingly everything in excess of the sums payable does transfer. The interpretation relied on by Mr Sweeney requires the words "sums payable" to be interpreted as "debts payable" but these are recognised as different concepts in the statutory scheme and s.182(1)(b) expressly contemplates that an employee's entitlement to be paid may only be to "part of the debt". Had the draftsman intended that Regulation 4 should not operate to transfer the debt, the regulation could and would have said so.

67. Secondly, I do not consider that Mr Sweeney's reliance on the ARD assists him. Recitals 2 and 3 of the ARD show that its primary purpose is "to provide for the protection of employees" in the event of a change of employer as a result of the transfer of the undertaking in which they are employed and "in particular, to ensure that their rights are safeguarded". I agree with Mr Stubbs that this is the starting point for any consideration of the proper construction of Article 5(2)(a) ARD.

68. Article 5 permits member states if they choose to do so, to provide for two possible derogations from that important protection and safeguarding of employees' rights. The first in Article 5(1) applicable in 'terminal' liquidations only, affords the potential for a full derogation from the application of Article 3 where the transferor is the subject of bankruptcy or analogous insolvency proceedings because in some circumstances the safeguarding of individual employees' rights must be subordinated to the greater interests of facilitating the survival of the undertaking (see OTG Ltd v Barke [2011] ICR 781 at [21]). However, the second derogation, in Article 5(2)(a), affords a partial derogation only. Neither derogation is required to be provided for by member states; they simply have the option. Moreover, both limbs of Article 5 create a ceiling on the exception to the wide protection afforded by Article 3 that may be provided for by the member state. They do not create a floor or minimum exception that must be provided. It is open to member states to provide no exception at all, or alternatively some protection by way of exception to the application of Article 3, or alternatively to take full advantage of the derogations offered by Article 5.

69. Accordingly, while Article 5(2)(a) refers to provision being made by member states for "the transferor's debts arising from any contracts…" and "payable before the transfer" not to be transferred to the transferee, there is nothing to prevent a member state from making provision

for a more limited exception to the protection afforded by Article 3. In these circumstances there is no warrant for a requirement to read Regulation 8(5) TUPE 2006 in conformity with Article 5(2)(a) and no basis for extending the scope of the clear words in Regulation 8(5) beyond the clear meaning conveyed by those words. These are derogations from the primary purpose of TUPE 2006 and the ARD and any doubt as to the extent of the carve-out should be resolved by adopting a narrow rather than a wide construction consistently with the primary purpose of the legislation.

70. In my judgment, properly construed, while liability for the sums payable by the Secretary of State under the Part XII ERA guarantee scheme do not transfer to the transferee in consequence of Regulation 8(5), sums exceeding the guaranteed amounts do transfer to the transferee and are unaffected by Regulation 8(2)-(6) TUPE 2006. Thus the rescue culture is promoted because the Secretary of State shoulders the burden of some of the transferor's debts arising from contracts of employment or employment relationships at the point of transfer (subject to certain limits) and these do not pass to the transferee. This acts to mitigate disincentives to rescue. However, it does not trump employees' rights altogether. As the Employment Appeal Tribunal (Underhill P) recognised in OTG Ltd v Barke at [23], the ARD

> **"plainly proceeds on the basis that a balance requires to be struck between [the interests of the workers generally] and the rights of individuals prejudiced by a transfer by an insolvent transferor. It is for that reason that it maintains the distinction… between liquidation proceedings on the one hand and other forms of insolvency proceedings on the other. In the case of the former, Articles 3 and 4 are simply disapplied, so that any disincentive to rescue (at least on this account) disappears altogether; whereas in the case of the latter the disincentives to rescue are only mitigated, by the derogations permitted by Article 5(2)… Those derogations… go a considerable way to diminishing the disincentives to rescue. But the Directive chooses not to allow the rights of the employees to be trumped altogether."**

71. My conclusion on this issue is supported by the highly persuasive dicta of Elias P in Slater at [17] and [18] and in particular his observation that "to the extent that the liabilities exceed the statutory limits, liability transfers to the transferee." As already indicated, this passage was quoted with approval by the Court of Appeal in Key2Law by Rimer LJ.

72. For all these reasons, ground five accordingly fails. Liability for up to eight weeks of pre-transfer arrears of pay only (subject to the ceiling on a week's pay), is potentially the liability of the Secretary of State under Part XII ERA and if so, does not transfer to the transferee. Liability for any arrears of equal pay in excess of the eight week limit within Part XII does transfer to the transferee. On this issue, I therefore agree with the Employment Judge's alternative conclusion at paragraph 59.

Conclusion

73. Accordingly, the appeal succeeds in part:

(i) equal pay arrears can be 'arrears of pay' within s.184(1) ERA, and therefore a debt within s.182 ERA.

(ii) The Employment Judge was in error in concluding that arrears of pay arising from an equal pay claim that has not yet been determined cannot be a claim for 'arrears of pay' within s.184(1) ERA.

(iii) There is a presumption that equality clauses operated in the Claimants' contracts since their work has been rated as equivalent to their comparators. If that presumption is not rebutted by genuine material factor defences the Claimants had a legal entitlement to be paid in accordance with the equality clauses for work they performed before the appropriate date. To the extent that they were not so paid, they were entitled to arrears of pay on the appropriate date. They are in no different position to suppliers of goods who were unpaid on the appropriate date, or employees who did not receive pay due under implied or disputed oral agreements for work done before the appropriate date.

(iv) The wider point relied on by the Respondent fails. Only liabilities for up to eight weeks of arrears of equal pay (subject to any statutory limit) do not transfer to the transferee if they constitute sums payable under Part XII ERA by the Secretary of State

because the necessary conditions in ss.182 and 184 ERA are established. To the extent that the liabilities exceed the statutory limits in Part XII ERA, liability transfers to the transferee.