Appeal No. UKEAT/0165/17/DM
UKEAT/0166/17/DM

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 & 31 January 2018

**Before**

**THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

**(SITTING ALONE)**

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MS K P K PUTHENVEETTIL — APPELLANT

(1) MR S ALEXANDER
(2) MS R J GEORGE
(3) SECRETARY OF STATE FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MS AKUA REINDORF<br>(of Counsel)<br>Instructed by:<br>Anti Trafficking and Labour Exploitation Unit<br>Islington Law Centre<br>232 Hornsey Road<br>London<br>N7 7LL |
| For the First and Second Respondents | MS REHANA AZIB<br>(of Counsel) |
| For the Third Respondent | MR MATHEW PURCHASE<br>(of Counsel)<br>Instructed by:<br>Government Legal Department<br>Employment Group<br>One Kemble Street<br>London<br>WC2B 4TS |

**SUMMARY**

**NATIONAL MINIMUM WAGE**

1. The Employment Tribunal did not address the Appellant's compatibility challenge in relation to Regulation 2(2) **NMWR 1999** and refused reconsideration of this issue. That was an error of law. The compatibility issue is remitted for consideration, preferably, by a Regional Employment Judge.

2. The Employment Tribunal would need to reconsider the question of the number of hours of housework performed by the Appellant and whether that was voluntary or contractual as a matter of custom and practice or otherwise.

3. The perversity ground failed.

**THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

1. There are two appeals in this matter pursued by the Appellant. I shall refer to her and to the other parties in this case as they were referred to below, for ease of reference. The first appeal is against a Judgment of the London South Employment Tribunal (comprised of Employment Judge Balogun and members, Ms Bharadia and Mr Shaw), promulgated on 11 February 2017. The second is an appeal from the Judgment of the same Employment Tribunal refusing the Claimant's application for reconsideration, promulgated on 16 May 2017.

**The Factual and Procedural Background**

2. As the Employment Tribunal observed when giving the First Judgment, the facts in this case were substantially disputed and there was little common ground. In those circumstances, to the extent necessary, I adopt the facts as found by the Employment Tribunal in recording this short background.

3. The Claimant was employed by the First and Second Respondents as a domestic worker between 14 November 2005 and 23 April 2013, when she resigned. She and the First and Second Respondents are Indian by national origin, all from Southern India. Before she started working for the First and Second Respondents, the Claimant worked for Mr Alexander, the First Respondent's father, from about July 2005 until he returned to India in October 2005. It was then agreed that she would stay in the UK to work for the First and Second Respondents. She had been recruited in India, but worked throughout for the Respondents in the UK.

4. Over the period of her employment, the Claimant required visas. The Home Office was provided with contracts between the Claimant and the First Respondent, together with other

documents in support of those visas. The first contract, dated 14 November 2005, provided that the Claimant was employed as a domestic worker, to act as a nanny to the First and Second Respondents' child, and that her role involved cooking his meals, stimulating him in play and work, and doing his washing and ironing. In return, she would be provided with free food and accommodation, including a single room for her exclusive use, and the sum of £110 a week, to be paid at monthly intervals. That contract was signed, both by the Claimant and the First Respondent.

5. The contract of employment was updated for visa renewal purposes. The terms of the updated contracts did not materially differ, save to say that a contract signed on 13 October 2008 purported to increase the Claimant's weekly pay from £110 to £120 per week.

6. There was a significant conflict in the accounts given by the parties about a number of matters: the exact duties the Claimant was required to undertake and her working hours; the control exercised over the Claimant by the First and Second Respondents; whether the Claimant's passport was held by the First and Second Respondents throughout her employment; the Claimant's treatment by the First and Second Respondents; whether she was given time off; and whether she received her full entitlement to contractual pay.

7. On 23 April 2013, the Claimant walked out of her employment with the First and Second Respondents. The exact circumstances for her departure are in dispute, but she subsequently made claims to the Employment Tribunal by a claim form dated 22 July 2013. Her claims were for:

(i) constructive unfair dismissal;

(ii) unlawful deduction from wages based on non-payment of the national minimum wage;

(iii) breach of Regulation 11 (dealing with weekly rest breaks) and Regulation 14 (dealing with annual leave) of the **Working Time Regulations 1998**;

(iv) a failure to provide a written statement of employment particulars, pursuant to section 38 of the **Employment Act 2002**;

(v) failure to provide itemised payslips, pursuant to section 8 of the **Employment Rights Act 1996**; and

(vi) there were direct and indirect race discrimination claims, pursuant to sections 13 and 19 of the **Equality Act 2010**, although these were not pursued at the substantive hearing.

8. In response to the claim based on the national minimum wage by reference to the **National Minimum Wage Regulations 1999** ("NMWR 1999"), the First and Second Respondents relied on the "family worker exemption" in sub-regulation 2(2) **NMWR 1999**. In the course of pre-trial correspondence, the Claimant contended that Regulation 2(2) was unlawful and should be dis-applied, and that the Secretary of State for Business, Energy & Industrial Strategy should be informed of the Claimant's challenge to the lawfulness of that Regulation.

9. The challenge was listed in a list of issues produced by the Employment Tribunal on 11 July 2014, at paragraphs 14 and 15. Specifically, the Claimant argued that Regulation 2(2) was *ultra vires* section 2 of the **European Communities Act 1972**, and/or should be dis-applied as incompatible with Article 157 of the **Treaty of the Functioning of the European Union** ("TFEU") and/or should be read consistently with the **Recast Directive 2006** (2006/54), all on

A the premise that the Regulation 2(2) exemption unlawfully indirectly discriminates against women, putting them at a particular disadvantage, and cannot be objectively justified.

B 10. On behalf of the Secretary of State, the Government Legal Department wrote to the Tribunal by letter dated 17 November 2013, proposing that the Tribunal should first decide whether Regulation 2(2) applied to the Claimant's employment and, if so, at a subsequent hearing, should go on to determine the lawfulness challenge to that Regulation. That would C enable the Secretary of State to participate in a subsequent hearing without having to take part in the earlier hearing that did not concern the Secretary of State. Although not recorded in a Tribunal Order, that approach appears to have been agreed between the parties, as the D Employment Tribunal noted in the First Judgment at paragraph 5.

E 11. By the First Judgment, the Employment Tribunal held that Regulation 2(2) did apply to the Claimant's employment as the First and Second Respondents contended. That meant that the lawfulness challenge fell to be considered before the Employment Tribunal could dismiss the claim for unlawful deductions based on the **NMWR 1999**. However, in fact the claim was simply dismissed by the First Judgment and the Employment Tribunal did not list the F Claimant's challenge to the lawfulness of Regulation 2(2) for a further hearing.

G 12. In consequence, on 23 February 2017, the Claimant requested a reconsideration of the Tribunal's decision to dismiss that part of her claim, together with a further hearing to determine the Regulation 2(2) challenge. By letter dated 3 March 2017, the Government Legal Department took a neutral stance on the Claimant's application for reconsideration, stating that H there should be an oral hearing if the application was granted. By letter dated 29 March 2017, the First and Second Respondents objected to the application for reconsideration. The

A Employment Tribunal refused the application for reconsideration by its Second Judgment, promulgated on 16 May 2017.

B 13. The Claimant challenged the Employment Tribunal's First Judgment by Notice of Appeal lodged on 24 March 2017. Grounds 1 and 2 of the first appeal concern the Tribunal's failure to address the lawfulness of Regulation 2(2) of the **NMWR 1999**, which excludes from the definition of "work" for the purposes of the **NMWR 1999** work of whatever description C related to the employer's family household, done by a worker treated as a member of the family, where certain conditions are satisfied. Further, a number of factual findings were challenged by grounds 3 and 4.

D 14. Subsequently, following the Employment Tribunal's Reconsideration Judgment, the Claimant lodged a Notice of Appeal dated 26 June 2017, in which she challenged, as I have already indicated, the refusal to reconsider. The second appeal is concerned exclusively with E the Regulation 2(2) challenge.

15. The Claimant has been granted permission to appeal on all grounds in both her first and F second appeals.

**The Judgments of the Employment Tribunal**

G 16. Insofar as the issue raised regarding Regulation 2(2) **NMWR 1999** and its compatibility with EU law is concerned, the Employment Tribunal noted that the parties had agreed not to consider that issue at the substantive hearing in October 2016. At paragraph 5 of the First Judgment, the Employment Tribunal held: H

> **"5. … Ms Reindorf, counsel for the claimant informed the Tribunal that an agreement was reached early on in the proceedings that the preliminary issue at paragraph 14 and 15 of the**

> **Case Management Order (whether the Tribunal has jurisdiction to determine whether regulation 2(2) NMWR 99 are compatible with Article 157 of the European Treaty and Equal Treatment Directive and if so, whether it is so compatible) would not be considered on this occasion but deferred until after the Tribunal's decision. The Tribunal can find no record of such an agreement on file but as both parties having the same understanding of the agreed position, we have not addressed that issue."**

17. The Employment Tribunal noted that the accounts of the parties on almost every issue in the case were diametrically opposed to such an extent that the differences could not be explained by confusion or imperfect recall. At paragraph 7, the Employment Tribunal said:

> **"7. We have not approached the question of credibility globally but have looked at each allegation individually. We have done so recognising that just because a party is not credible on one matter does not mean that they cannot be credible in relation to another. That is pertinent here because we have concerns about the credibility of both the claimant and the respondents in a number of different respects, which we will highlight as we go along."**

18. The Employment Tribunal made clear that it did not seek to make findings on all disputed matters, but proposed to focus on matters that were relevant to the issues in the case. On that express footing, it found the following facts:

(1) The Claimant commenced work for the First Respondent's father, Mr Alexander, in around July 2005.

(2) The Claimant's passport was not held by the Respondents against her will, contrary to her evidence.

(3) Again contrary to the Claimant's evidence, the Claimant was provided with her own bedroom and was not required to share a bedroom.

(4) Again contrary to the Claimant's evidence, the Claimant was not required to eat separately from the family.

(5) The Claimant was invited to join the First and Second Respondents on social occasions and events and to the extent that she did not do so, that was a matter of choice for her to exercise as she did.

(6) The Claimant did housework but this was ad hoc and performed on a voluntary basis as a member of the First and Second Respondents' household. I return to this issue in more detail below when addressing ground 3.

(7) The First and Second Respondents addressed the Claimant as "Chechi", which means "older sister" in their common language and is not an expression of social hierarchy.

(8) The Claimant was not required to work at weekends, again, contrary to her case.

(9) The First and Second Respondents neither verbally nor physically abused the Claimant, as she had asserted.

(10) The Claimant left the employment of the First and Second Respondents on 23 April 2013, however, there was no verbal abuse by the Second Respondent which precipitated this, again, contrary to the Claimant's case.

(11) The First and Second Respondents did not refuse the Claimant annual leave. Moreover, she was given cash in Rupees when she went on annual leave to India on a number of occasions.

19. On the issue of whether the Claimant received her contractual pay, the Employment Tribunal described this as a difficult issue to resolve because of the credibility issues of both parties; see paragraph 34. Since the Employment Tribunal's findings on this issue forms the basis of ground 4, which is a perversity ground, it is necessary to set out the Employment Tribunal's findings in full. They appear at paragraphs 34 to 49, as follows:

> **"34. This dispute was a difficult one for us to resolve as we had issues with the credibility of both parties in certain respects. There is a dispute between them as to the sums the claimant was actually paid and the method of payment. According to the written contracts we have seen, the claimant's salary was initially £110 per week then increased to £120 in 2008. We accept the respondent's evidence that the claimant had the contracts read to her and was aware of the figures contained therein, as we found in relation to her initial contract with VM Alexander.**
>
> **35. The claimant says that the salary figures in the contracts were not the amounts that she actually received and says regardless of what is written, she was told that she would be paid**

**30000 rupees a month and that this would be paid into her daughter's account. She says that contrary to that agreement, the respondent was sending only 6000 rupees a month to the account. The claimant contends that she received no other income from the respondent.**

**36. [The First Respondent] contends that the claimant was paid the contractual sums set out in the written contracts and that, in accordance with her wishes, it was paid in 3 ways: i) sterling cash in the UK; ii) cash in rupees during holidays in India and; iii) bank transfers to Indian accounts. Indeed, [the First Respondent] says that he has overpaid the claimant.**

**37. It is common ground that over the period of employment, the respondent sent 863,000 rupees by bank transfer to accounts in India, mainly the claimant's daughter, Bindu's, account. Both parties say that the amount requested to be transferred from September 2011 was 20000 rupees a month. There is a slight difference between the parties as to what this equates to in sterling as they have used different conversion rates. However as the claimant has provided an online source for her rates, we have relied on those. We find therefore that the total figure in pounds sent by bank transfer over the course of the employment was £10,778.73, which clearly does not equate to the totality of the contractual sums agreed for the period.**

**38. [The First Respondent] has produced a schedule of payments which he claims to have created contemporaneously with events. However we have concerns about the provenance of this document. Firstly, the schedule for 2008 is based on the claimant's salary between 11.10.08 and 31.12.08 being £110 per week. However, we have already referred to the 2008 contract that increased the claimant's pay to £120 per week. The respondent told us that he was an auditor and treasurer and kept meticulous records. If he was reconciling the payments made to the claimant at the end of each year, as he contends, the fact that she had received an increase in salary a couple of months earlier would have been fresh in his mind at the time and so would have been reflected in the paperwork.**

**39. [The First Respondent] told us that the cash payments to the claimant were ad hoc and irregular in amount. In those circumstances, we are surprised that the reconciled figure at the end of each year is, for the large part, within a few pounds of what was said to have been agreed e.g. 2006 (£2); £2007 & £2009 (£6); 2010 (£3). [49-57] In the years where the difference recorded is larger, this is always a credit in the respondent's [sic] favour rather than the claimant's.**

**40. This looks suspiciously contrived and our feeling is that the schedule was created long after the event, most likely for these proceedings, to provide a retrospective record of sums the respondents may or may not have paid. We therefore place little reliance on the document except to the extent that the sums recorded are evidenced elsewhere or otherwise agreed.**

**41. In relation to the supposed cash payments set out in the schedule, [the First Respondent] produced copies of his bank statements showing withdrawals in corresponding amounts. He contends that the withdrawn sums were given to the claimant. Given our view on the timing of the schedule's creation, and in the absence of any receipts or payslips for the cash, it would have been near impossible for [the First Respondent] to attribute any particular withdrawal as having been made on behalf of the claimant distinct from any other withdrawal.**

**42. [The First Respondent] opened a bank account in the Claimant's name in 2006 and at various points in time paid money into the account by standing order. However the claimant did not use the account, apparently because she did not feel comfortable doing so; and none of the money in it was hers. [The First Respondent] had full control of the account, which he was able to access online and did so. Between May 2006 and January 2007 [the First Respondent] made regular standing order payments of £110, in line with the salary figure set out in the pre-2008 contracts. A lump sum payment of £3600 was transferred out by [the First Respondent] on the 15 January 2007, leaving a balance of £30.99. [S9] The account was then dormant until August 2007 when [the First Respondent] paid £1500 into the account and then resumed the £110 monthly credits. These continued until February 2008, when [the First Respondent] made a lump sum withdrawal of £4000 leaving a balance on the account of £62.50. [S19] The account was again dormant for a period of time but became active again in late 2011 when sums in varying amounts were credited and withdrawn. [S53-60]**

**43. The periods of activity on the account seemed to coincide with applications for visa renewals and [the First Respondent] confirmed in evidence that the bank statements were submitted with such applications in 2007 and 2008. The question however is whether this was done in order to deceive the Home Office into believing the claimant was paid £110 a week**

**when she was not or; was it to assist the visa renewal process. Either way, the picture the respondent sought to portray was a misleading one.**

**44. That is not to say, however, that the respondents did not give the claimant any cash. The respondents [sic] difficulty is that it has no documentary evidence to show what, if anything, was paid hence its attempt to create these retrospectively.**

**45. The claimant's evidence on what she received in salary was contradictory. At paragraph 15 of the particulars of claim, she says that on payment of her first salary, only 6000 rupees was paid into her daughters [sic] account; not 30000 as [the First Respondent] claims. When the claimant was asked in cross-examination "*Are you saying your daughter has never been sent 30000 rupees?*["], her response was: "*Never*". However [the First Respondent's] bank statement shows that 30000 rupees was sent by bank transfer to the claimant's daughter's account on 8.2.06.**

**46. Having asserted in her witness statement that she was not given any cash by the Respondent on her trips to India, she conceded in cross examination to being given some cash but significantly less than the amounts claimed. So when it was put to her that she was given 70000 rupees on 22 February before her trip, she claimed it was around 1000 rupees, and when it was put to her that on 28 October 2007 the respondent gave her 100,000 rupees, she said she was only given 1000 rupees. Yet she does not refer to any of these payments in her witness statement.**

**47. In relation to many of the disputed facts, we have preferred the respondents' evidence. That is because the claimant's account of her treatment has at times been exaggerated beyond credibility or has been contradictory. Throughout her evidence she sought to portray the respondents in the worst possible light and made no concessions to this at all. Even benign or positive acts by the respondents were given a negative spin in order to diminish their effect. For example, when it was put to her that the respondents bought her presents every Christmas, she agreed but added that she did not consider them to be presents.**

**48. We have reviewed the emails between the claimant and respondents dated 3.4.13 and 24.4.13. We are conscious that by this stage the claimant was acting under the guidance and assistance of others. Her email, though addressed to the respondents was, we would suggest, written with a wider audience in mind. In the emails, the claimant demands 6 months arrears of pay, which she calculates as 120,000 rupees, and threatens legal action if her demands are not met. [439A] In his response, [the First Respondent] sets out the electronic payments transferred to India. [439C] It was submitted on behalf of the claimant that the absence of any reference to cash payments by the claimant or respondent supports the claimant's case that she only received bank transfer payments. We disagree. The claimant's demand for outstanding wages relates specifically to electronic transfers agreed in 2011 and the Respondent has replied accordingly. There would be no need for either of them to refer to cash payments if they were being paid, as agreed, just as there was no need for either of them to refer to the electronic transfers that occurred prior to 2011.**

**49. Looking at all of this evidence in the round, and having, with great difficulty, weighed up the relative credibility of the parties, we find the claimant's assertion that she received no cash at all during her 8 years with the Respondent highly implausible. Whilst we are not able to say with any great certainty that she received all her contractual pay, we find, on balance of probabilities, that she did."**

20. Having made findings of fact, the Employment Tribunal then addressed the legal claims pursued by the Claimant. In relation to the constructive dismissal claim, the Employment Tribunal concluded, in light of the factual findings, that the Claimant had not proved that there was a fundamental breach of her employment contract. The constructive dismissal claim therefore failed; see paragraphs 80 to 81. At paragraph 80b, the Employment Tribunal held that

the failure to pay NMW was not made out because the Claimant was treated as a member of the family for the purposes of Regulation 2(2)(a)(ii) **NMWR 1999**, and the other conditions of Regulation 2(2)(a) were satisfied. The First and Second Respondents were, accordingly, exempt from paying the NMW in her case; see paragraph 80b.

21. At paragraph 80c, the Employment Tribunal held that:

> **"c. … In determining the claimant's likely hours of work, we have worked on the basis that her contractual duties were limited to childcare and tasks associated with this i.e. feeding, bathing, dressing, school run etc. we have identified those duties, as best we can, from the claimant's Schedule of Activities and applied, what we consider to be, a reasonable amount of time for their completion. Having done so, we have concluded that the claimant would have spent an average of 6 hours a day on her duties and was not required to perform these at the weekend. …"**

22. The unlawful deduction claim was dismissed because of the two-fold conclusion in relation to the NMW and because the Claimant was paid the contractual sums due; see paragraph 82. The Claimant was, however, entitled to £297.23 holiday pay in respect of her final leave year; see paragraphs 83 and 84. The claim for failure to provide particulars of employment succeeded and the Claimant was awarded £240.00; see paragraph 85. In addition, the failure to provide pay slips claim succeeded, but no award was made; see paragraph 86. The First and Second Respondents were thus ordered to pay the Claimant £537.23 in total.

23. Subsequently, when giving Judgment on the application for reconsideration, Employment Judge Balogun refused the application because she concluded that there was no reasonable prospect of the original decision being varied or revoked. Her reasons were as follows:

> **"1. The tribunal has no jurisdiction to disapply Regulation 2(2) of the National Minimum Wage Regulations 1999 (the Regulation) and it is unlikely that the Regulation can be read in such a way as to resolve any compatibility issues with European law.**
>
> **2. Regardless of any agreement or understanding the parties had regarding further submissions, by virtue of section 4(5) Human Rights Act 1998, the Employment Tribunal is**

**not the appropriate forum to challenge the lawfulness of the Regulation as it has no jurisdiction to make a declaration of incompatibility."**

24. There are four grounds of appeal pursued by the Claimant on the first appeal against the First Judgment. They are as follows:

(1) The Tribunal failed to consider or reach any conclusion as to the Claimant's argument that Regulation 2(2) is *ultra vires* section 2 of the **European Communities Act 1972** and/or should be dis-applied as it is incompatible with Article 157 of the **TFEU** and/or should be read consistently with the **Recast Directive 2006** (ground 1).

(2) The Tribunal erred in law in concluding that Regulation 2(2)(a) **NMWR 1999** applied to the Claimant's employment by failing to dis-apply that Regulation (ground 2).

(3) The Tribunal failed to make a necessary finding of fact as to the Claimant's hours of work (ground 3).

(4) The Tribunal erred in concluding, at paragraph 49, that the Respondents had paid the Claimant in accordance with her contract of employment (ground 4).

25. There are also four grounds of appeal in relation to the Reconsideration Judgment. They are as follows:

(1) The Tribunal erred in concluding that it did not have jurisdiction to dis-apply Regulation 2(2) of the **NMWR 1999** (ground 1).

(2) The Tribunal erred in refusing the application for a reconsideration on the basis that it is unlikely that the Regulation can be read in such a way as to resolve any compatibility issues with European law (ground 2).

(3) The Tribunal erred in concluding that it was unlikely that Regulation 2(2) could be read in such a way as to resolve any compatibility issue, so far as EU and legislation is concerned (ground 3).

(4) The Tribunal erred in concluding that it was precluded by section 45 of the **Human Rights Act 1998** from determining this point (ground 4).

26. Both the Claimant and the First and Second Respondents accept the submissions made on behalf of the Third Respondent that ground 2 of the first appeal and ground 3 of the second appeal are not apt for determination by the EAT at this stage, given that the necessary factual findings and the necessary evaluation of the issues raised by these grounds has not been carried out by the fact-finding Tribunal. Those grounds have, accordingly, been stayed and will not be addressed on their merits in this Judgment and were not addressed in the course of the appeal in those circumstances. The Third Respondent takes a neutral stance on the remaining issues raised by this appeal.

27. The issues for determination on these appeals are, accordingly:

(1) Whether the Employment Tribunal erred in failing to consider and address the Regulation 2(2) challenge, first by dismissing the Claimant's NMW claims and then by refusing the reconsideration application.

(2) Whether there was an error of law in the failure to make findings of fact about the hours of housework performed by the Claimant.

(3) Whether the Employment Tribunal was perverse in concluding that the First and Second Respondents paid the Claimant her full contractual entitlement for the work she performed.

**Issue 1 - Failure to consider and address the Regulation 2(2) challenge**

28. I can deal with this issue shortly because, although the First and Second Respondents agreed that the Regulation 2(2) challenge would be held over to a subsequent hearing and not addressed at the October 2016 hearing, and although they thereafter resisted reconsideration and resisted these appeals on this issue, Ms Azib of counsel (who appears on their behalves) now accepts that a hearing to determine these issues is required and no longer pursues the argument that the Employment Tribunal had no jurisdiction to consider this challenge.

29. I consider that Ms Azib was right to make those concessions. In my judgment, it is quite clear that there should have been a further hearing to consider the compatibility of Regulation 2(2), and that was the position unless a view could properly be formed that that issue was bound to fail. As no reconsideration hearing took place, the question whether the Reconsideration Decision is legally flawed depends on whether the compatibility challenge was doomed to fail for want of jurisdiction or some other purely legal question unaffected by the facts. If not, the Reconsideration Decision must be flawed. I am sure that it was flawed.

30. First, the Employment Tribunal was wrong to hold that the Tribunal has no jurisdiction to dis-apply Regulation 2(2) of the **NMWR 1999**. It is settled law and beyond argument that the Employment Tribunal does have jurisdiction to dis-apply that Regulation; see for example, **Biggs v Somerset County Council** [1996] IRLR 203 CA.

31. Secondly, the Employment Tribunal's statement that it was unlikely that the Regulation could be read compatibly misses the point. The Claimant is asking for a compatible interpretation or, in the alternative, for the Regulation to be dis-applied. The Employment

A Tribunal's statement is premised on the mistaken view that the Tribunal does not have jurisdiction to dis-apply domestic law.

B 32. Thirdly, the Tribunal held that section 4(5) of the **Human Rights Act 1998** means that the Employment Tribunal is not the appropriate forum to challenge the lawfulness of the Regulation. However, as both parties recognise, this misunderstands the Claimant's claim. She seeks to rely on EU law, not on the **European Convention on Human Rights**. Section 4(5) is C irrelevant to the question the Employment Tribunal was considering.

D 33. In those circumstances, I am quite sure that the Reconsideration Decision cannot stand and that the submissions made, both to resist reconsideration and to resist this appeal on behalf of the First and Second Respondents, did not meet those concerns. The submission that jurisdiction is contingent upon the Claimant proving that Regulation 2(2)(a) unlawfully E indirectly discriminates against women and cannot be objectively justified, is logically incoherent. The Employment Tribunal has jurisdiction to dis-apply the Regulation, but can only do so if and when the basis for dis-application has been established. These are different stages of the argument. The compatibility stage of the process has not occurred, because the F parties agreed to defer consideration of it until the substantive decision as to whether Regulation 2(2) applied to the Claimant's case had been determined. Having concluded that Regulation 2(2) does apply, the Claimant is plainly entitled to have her compatibility challenge G determined and no want of jurisdiction arises.

H 34. The Respondents' remaining arguments, that specific EU laws are not breached or engaged or do not have horizontal direct effect, may be arguments appropriate for consideration at the hearing to consider whether Regulation 2(2) is incompatible with EU law, but they are

not relevant to the question whether the Tribunal should have entertained reconsideration of this issue. It plainly should have done and plainly erred in law in failing to reach that conclusion.

**Issue 2 - Finding in relation to housework hours worked**

35. The Employment Tribunal dealt with the housework duties performed by the Claimant at paragraphs 12 and 29 to 31 as follows:

> **"12. Notwithstanding what is written in those contracts, there is a dispute between the parties as to the duties the claimant was required to undertake and her working hours. The claimant claims that she was responsible for the majority of the household tasks and worked 17 hours a day, 7 days a week. The respondents, on their part, contend that the claimant's role was limited to the matters set out in the contract, (save that it later included Johann) and that she was not responsible for housework generally. Her working hours were said by the respondents to be, on average, 4 hours a day, Monday to Friday. The respondents do not say that the claimant did not do any housework; what they say is that anything she did over and above chores related to the children was done on a voluntary shared basis with other members of the family. We shall come back to this point later.**
>
> **…**
>
> **29. There is a dispute between the parties as to the extent to which the claimant was required to undertake household chores and cooking. The claimant says that in addition to her childcare responsibilities, she cooked all of the meals and did all of the washing, ironing and cleaning. The claimant contended that she worked 18 hours a day, 7 days a week. In her statement to Kalayaan, she states that she worked from 6am to 11pm, sometimes later if there were guests over. [390F] However, when challenged on her hours in cross examination, she said that she never looked into the hours she was working. As part of her evidence, she has produced a Schedule of Activities breaking down her basic duties and the period of time spent on them. The footnote to the schedule indicates that this was the state of affairs prior to the other 2 children being born (pre 2010) and states that the duties listed continued thereafter. In addition to childcare duties, the schedule contains a list of household chores that she says she was required to perform.**
>
> **30. It is not the respondents' case that the claimant did not do housework and we believe that she did. They say that it was not part of her job and that any housework was done voluntarily on a shared basis with other members of the house. [The Second Respondent] said that she did most of the cooking for the week at the weekend and the claimant would offer to assist.**
>
> **31. We have difficulty with the claimant's schedule. When the claimant started, Ryan was enrolled in nursery for some days of the week, then started going every day from age 2½. He started school full time in 2008. None of that is reflected in the Schedule. There are a number of household chores on the Schedule which are unlikely to have been carried out on a daily basis yet the schedule assumes that they are. e.g. window cleaning, which the claimant says she did for an hour a day. It may well be the case that the claimant did the majority of the housework and that would not be surprising given that she was at home most of the day and the respondents went out to work. However, we do not believe she did so to the extent set out in the schedule. We believe it was more ad hoc - she did what needed doing as and when it was needed - and on a voluntary basis rather than the regimented regime her Schedule suggests."**

36. At paragraph 80c, the Tribunal held as follows:

> **"c. The claimant's contention that she worked 18 hours a day, 7 days a week is rejected for the reasons at paragraphs 29-31 of our findings. In determining the claimant's likely hours of**

> **work, we have worked on the basis that her contractual duties were limited to childcare and tasks associated with this i.e. feeding, bathing, dressing, school run etc. we have identified those duties, as best we can, from the claimant's Schedule of Activities and applied, what we consider to be, a reasonable amount of time for their completion. Having done so, we have concluded that the claimant would have spent an average of 6 hours a day on her duties and was not required to perform these at the weekend. The average hours take into account the birth of the 2 additional children, Johann and Megan, though we don't believe that this impacted significantly on the claimant's hours as by the time they were born, Ryan had started school full time and [the Second Respondent] undertook most of their childcare while on maternity leave. As the claimant was not required to work at the weekend, it follows that she was not deprived of her Reg 11 WTR weekly rest break."**

37. The conclusions reached by the Tribunal in relation to the Claimant's housework hours and her other hours of work were reached on the basis that her contractual duties were limited to childcare and associated duties and did not include the housework hours worked, which were described and found to be voluntary, although undoubtedly performed. The Claimant challenges that approach. She contends that the Employment Tribunal failed to make a clear finding as to how many hours of housework she performed. The finding that the Tribunal did make - that the Claimant undertook six hours of work a day, five days a week - was premised on the finding that the Claimant's paid work consisted only of childcare duties. If the Claimant's challenge to the 'family worker exception' in Regulation 2(2) succeeds, she contends that the finding that the housework was voluntary must fall away.

38. Against that, the First and Second Respondents submit that this ground of appeal is entirely misconceived because the Employment Tribunal made specific findings of fact as to the Claimant's working hours. First, the Tribunal found her evidence to be unreliable in different ways. Secondly, it found her contractual duties to be limited to childcare. Thirdly, it found that her additional housework duties were ad hoc and performed on a voluntary basis. They submit that those findings were open to the Tribunal on the evidence and not arguably legally flawed. Moreover, there was no need to make any further finding about the number of hours of housework performed by the Claimant because the Employment Tribunal concluded

A that the family worker exemption under Regulation 2(2)(a) applied in this case and resolved the question of NMW entitlements.

B 39. It seems to me that the finding in relation to housework is indeed, bound up with the Employment Tribunal's acceptance that the Claimant fell to be treated as a member of the Respondents' family household. It is only in that context that the Employment Tribunal could to my mind, permissibly conclude that work she undoubtedly performed over many years, day in, day out, on a consistent basis, was to be regarded as voluntarily undertaken by her as an employee of the First and Second Respondents. In those circumstances, it seems to me that the question of the housework duties she performed should be looked at again, if the legal challenge to Regulation 2(2) succeeds.

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E 40. As a matter of logic, the Claimant's validity challenge to Regulation 2(2) must, at least arguably, encompass the housework duties as well. If the Claimant was entitled to the NMW because Regulation 2(2) is dis-applied, it is difficult to see how the housework duties can be described as truly voluntarily undertaken, given that this will then be an ordinary employment situation with the Claimant performing duties for the Respondents on a regular and consistent basis, over many years, and it will, without some exceptional facts, then be a matter for the Tribunal to determine on what basis she should or should not be paid.

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G 41. For all those reasons, although I do not consider that ground 3 is made out in terms of a separate error of law, it seems to me that this issue is so bound up with the Regulation 2(2) challenge that the point should be looked at afresh by the Tribunal if, but only if, the Claimant's challenge to Regulation 2(2) and its compatibility with European law succeeds.

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**Issue 3 - Perversity challenge to findings regarding pay**

42. The Claimant contends that the Tribunal's findings as to pay and the conclusion, set out at paragraph 49, that she received her full contractual entitlement is perverse and fails to have regard to relevant considerations. She relies on two particular aspects of the First and Second Respondents' behaviour that reflected what Ms Reindorf described as damning credibility matters. She submits that the Tribunal did not identify these as credibility points against the Respondents. Rather the Employment Tribunal closed its collective eyes to those matters in respect of the First and Second Respondents, whilst exaggerating more benign credibility issues so far as the Claimant's evidence is concerned, thereby reaching a decision that was legally perverse.

43. The two matters relied on are as follows. First, the creation by the First Respondent of a bank account in the name of the Claimant and the use of that bank account to credit the weekly contractual sum of £110.00 due to her, but only during certain particular periods, in order to be able to provide those bank statements as evidence to the Home Office about the Claimant's pay for visa renewal purposes. That occurred in circumstances where, it is now accepted, the Claimant was never aware of the account; she had neither access to nor control over it and the money put into that account was, throughout, dealt with as belonging to the First Respondent. Furthermore, the sums credited were removed by the First Respondent after each visa application was granted at each renewal, and during periods where there was no ongoing visa renewal process, the account lay dormant. The First Respondent gave no disclosure, either of the existence of that account or of the bank statements relating to it, and it only came to light as a consequence of digging by the Claimant's advisers after exchange of witness statements and other disclosure had occurred.

44. The second matter concerns a schedule of payments which the First Respondent claimed to have created, contemporaneously, with events. The schedule purported to record cash payments to the Claimant, at ad hoc times and in irregular amounts, from 2005 to 2013. Notwithstanding the ad hoc irregular payments, the Tribunal observed that at the end of each year, the figures, somewhat surprisingly, reconciled within a few pounds of what was said to have been agreed by way of the Claimant's contractual entitlement. The schedule was described by the Employment Tribunal as suspiciously contrived. It found that it had been created long after the events, and specifically for the Tribunal proceedings to provide a retrospective record of sums the First and Second Respondents may or may not have paid.

45. Those are, undoubtedly, serious matters. The first is evidence of a deliberate and premeditated course of action designed to deceive the Home Office by falsely representing a bank account as having been set up for the Claimant to receive her weekly contractual salary, when no such thing occurred. Ms Azib conceded that each transaction amounted to a false representation, done to secure a visa renewal. Furthermore, advancing the schedule as a contemporaneous record of ad hoc cash payments was also misleading and the First Respondent behaved dishonestly; again, as is conceded now by Ms Azib on the First and Second Respondents' behalves.

46. Ms Reindorf submits that those serious matters were not properly put into the balance by the Tribunal and no proper account was taken of them when dealing with the question whether the Claimant received her full contractual pay entitlement. On the other hand, Ms Reindorf submits that there were adverse credibility findings made by the Tribunal, particularly at paragraphs 46 and 47, but these paled into insignificance in comparison with the serious matters to which I have just referred in relation to the First and Second Respondents.

Moreover, she submits that those inconsistencies and contradictions identified by the Employment Tribunal in relation to the Claimant are explicable by reference to the fact that the Claimant is illiterate, has little or no spoken English, and was at a disadvantage in the course of cross-examination when answering questions, by reference to documents in the case. She submits that the findings by the Tribunal in relation to the Claimant are much more benign when objectively viewed, and have nothing directly to do with the pay issue.

47. On the basis of those two contrasting points, Ms Reindorf submits that, in reaching its conclusions on the question of pay the Tribunal had regard to the wider global credibility issues against the Claimant, but wrongly failed to bring into account the First Respondent's serious dishonesty. In those circumstances, she argues that the decision was perverse in that no reasonable Tribunal could prefer the First Respondent's evidence on the question of pay in light of his dishonesty and his fabrication of evidence.

48. It is common ground that perversity is a high hurdle to establish. The EAT must be satisfied that an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law, could have reached. Ms Azib emphasises, on behalf of the First and Second Respondents, the limited jurisdiction of the EAT on an appeal. That is particularly so, she submits and I accept, in a case where evidence is heard over numerous days, and where, as here, the Tribunal had more than 900 pages of documents available and the EAT has seen a fraction only of those documents.

49. Ms Azib relies, here, on the extensive adverse credibility findings made by this Tribunal against the Claimant. By contrast, she submits, that there were less serious and less numerous

concerns about the Respondents' evidence. Furthermore, on almost every point in dispute, she relies on the fact that the Tribunal preferred the evidence of the First and Second Respondents. She also submits that the Tribunal did, in fact, conduct the exercise of considering why the First Respondent engaged in dishonest conduct and whether it was to mislead either the Home Office or the Employment Tribunal into believing that the Claimant was paid £110.00 or £120.00 a week when, in fact, she was not; or whether, rather, so far as the Home Office was concerned, it was done to assist the visa renewal process; and so far as the Tribunal was concerned, it was done because the First and Second Respondents were concerned that they did not have the documentary evidence to prove what had been paid and, therefore, created the schedule retrospectively in order to have that documentary evidence available.

50. Ms Azib submits that the Tribunal did not discount the credibility issues and relies on paragraph 49 of the Judgment, which shows the difficult task that this Tribunal was faced with and which it recognised. Here, she submits that the Tribunal identified the concerns it had regarding the First and Second Respondents. It balanced those concerns and what those concerns went to, against the concerns it identified regarding the Claimant and what they went to, and it reached a conclusion, ultimately, that was open to the Tribunal and one that cannot be interfered with by the EAT.

51. I have concluded, not without considerable hesitation, that the submissions of Ms Azib on this ground are to be preferred and that an overwhelming case has not been made out that the Tribunal reached a perverse decision. Although, in light of the creation of the false bank account to deceive the Home Office and a schedule designed to deceive the Tribunal into believing it was a contemporaneous record of payments made to the Claimant, I do not feel sure that I would have reached the conclusions reached by the Employment Tribunal in this case,

A that is nothing to the point. The only question for me is whether the conclusions reached by the Employment Tribunal on this issue were open to it on the evidence and in light of its findings, and reflect an adequate consideration of all relevant factors. I have concluded that is the case.

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52. The findings of fact made by a Tribunal are inherently an incomplete statement of the impression made by the primary evidence and the full weight of that plays an important part in the overall examination of the evidence. Particular care must, accordingly, be taken by the C EAT in dealing with a perversity appeal. As the Tribunal expressly acknowledged, the question whether the Claimant received her full contractual pay entitlement was a difficult one to determine because of the credibility issues on both sides. It seems to me that the Tribunal did D conduct an analysis of the credibility of the accounts given by both parties in relation to pay. Insofar as the Claimant is concerned, her witness statement asserted that she received no cash payments at all, whether for trips to India or during her time in the UK, notwithstanding that, in E cross-examination, she conceded that she did receive cash payments but she disputed the amounts. The position, accordingly, was that there were cash payments made, even on the Claimant's account. During the course of cross-examination, as the Tribunal observed, the Claimant was plainly able to identify amounts she received before each trip to India, and yet F she failed to address those payments in her witness statement. The Tribunal found that the assertion that she received no cash at all during her long employment with the Respondents was a highly implausible one.

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53. There were other matters on which the Tribunal expressed considerable doubt about the Claimant's credibility. It found she gave a misleading account to Kalayaan, the charity giving H legal advice to migrants. It preferred the evidence of the Respondents in relation to numerous issues, as I have identified above. Throughout the Judgment there are examples where the

Tribunal rejected the account given by the Claimant and accepted that given by the First and Second Respondents. Although it was right for the Tribunal to make credibility findings in relation to the evidence on each particular issue, I am in no doubt that the Tribunal was also entitled to have a broader regard to all the circumstances, including the other credibility matters, when assessing the weight and reliability of the Claimant's evidence so far as the payments she received were concerned.

54. Insofar as the Respondents' evidence is concerned, whilst I do not accept Ms Azib's submission that the credibility issues raised in relation to them were less serious than those raised in relation to the Claimant, it seems to me that the Tribunal weighed their credibility in the balance. I accept Ms Azib's submission that the Tribunal, either expressly or implicitly, concluded in this case that the deception the First Respondent engaged in as regards the Home Office was designed to assist the visa renewal process and not to deceive the Home Office into believing that the Claimant was paid sums due when she was not. That emerges not only from paragraph 5 but, implicitly, from the findings at paragraphs 43, 44 and 49.

55. In relation to the schedule, it is clear that the Tribunal did not rely on it in relation to cash payments. There was no documentary evidence to support cash payments and, therefore, the Tribunal's view that the schedule carried no weight was the one it observed. However, read fairly and by reference to the whole Judgment, it seems to me that the Tribunal's conclusion that the Respondents' difficulty was that they had no documentary evidence to show what, if anything, was paid, hence their attempt to create the schedule retrospectively, was an acceptance by the Employment Tribunal that the First Respondent's actions were not designed to deceive the Employment Tribunal into believing the Claimant was paid cash when she was not.

56. In those circumstances, and notwithstanding the absence of documentary evidence to support their account that cash payments were made on an ad hoc basis and in irregular amounts, it seems to me that the Employment Tribunal was entitled to accept the Respondents' evidence in preference to that given by the Claimant that she received no cash payments at all (or small amounts of cash payments in the course of cross-examination), and to conclude that the First and Second Respondents' evidence was not so badly undermined by the two serious matters to which I have referred, given the Tribunal's conclusions as to their motivation in that regard.

57. Although the burden of proof was on the First and Second Respondents, as the Claimant's submissions made clear to the Employment Tribunal (see Regulation 28 **NMWR 1999**), the Tribunal did not rely on the burden of proof in reaching its decision and reached a decision on the balance of probabilities in light of the evidence, as difficult an exercise as that undoubtedly must have been. There is no doubt that a different Tribunal might well have come to a different conclusion on the evidence and, as already indicated, I cannot say I would have come to the same conclusion as this Tribunal. However, that is irrelevant, given that I am satisfied that the Tribunal reached a conclusion which it was entitled to reach. For those reasons, this ground of appeal must be and is dismissed.

58. In the result, therefore, the appeal on issues 1 and 2 succeeds and the question of the compatibility of Regulation 2(2) **NMWR 1999** must be remitted to the Tribunal to be considered and addressed, together with the question, if the lawfulness challenge succeeds, of how many hours of housework were performed and whether it was performed as a matter of contract or on a voluntary basis. The perversity ground of appeal is dismissed.

**Disposal**

59. Accordingly, the question of the compatibility of Regulation 2(2) with Article 157 of the **TFEU** and/or whether the Regulation can be read consistently with the **Recast Directive**, must now be remitted together with, if it arises, the issue as to the number of hours of housework the Claimant was required to perform in the course of her employment with the First and Second Respondents.

60. The compatibility challenge is an important matter that raises a largely discrete issue unaffected by the matters already decided by the Employment Tribunal in this case. Furthermore, 15 months have now passed since the October 2016 hearing, and I have concluded that, in all likelihood, there will be no increased costs or prejudice to either side in remitting those discrete issues to a fresh Employment Tribunal rather than to the same Employment Tribunal in this case. In the circumstances and having regard to the factors set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, these issues will be remitted to a freshly constituted Employment Tribunal and, if possible, in light of the compatibility challenge, they should be heard by the Regional Employment Judge as the parties suggested. That, of course, will be a matter for the President of the Employment Tribunals and my indication is not binding on him.

61. I will deal with any further consequential matters following receipt of any applications made in writing, within seven days of receipt of this transcribed Judgment.