

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 5 July 2019
Judgment handed down on 16 August 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR A BRITLIFF

APPELLANT

BIRMINGHAM CITY COUNCIL

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR ADRIAN BRITLIFF
(The Appellant in Person)

For the Respondent

MR J MEICHEN
(Counsel)
Instructed by:
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Legal and Democratic Services
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SUMMARY

DISABILITY DISCRIMINATION

The Claimant is pursuing claims of disability discrimination in the Employment Tribunal, which are defended. It is common ground between the parties that for the purposes of an **Equality Act 2010** claim the 2006 **United Nations Convention on the Rights of Persons with Disabilities** has indirect effect. At a Preliminary Hearing the Employment Tribunal correctly held that it does not have direct effect.

A **HIS HONOUR JUDGE AUERBACH**

Introduction

B 1. This matter is proceeding in the Birmingham Employment Tribunal (“ET”). I shall refer to the parties as they are there, as Claimant and Respondent. This is an appeal by the Claimant. In both the ET and the Employment Appeal Tribunal (“EAT”) the Claimant has, throughout, been a litigant in person. The Respondent has, throughout, been represented by solicitors and counsel.

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D 2. The Claimant is a social worker. He was employed by the Respondent from December 2008 until he was dismissed with effect on 15 May 2017. Following this he presented a claim to the ET complaining of treatment going back a number of years, and in respect of the dismissal. Stella Manzie was named as a Second Respondent. However, at a subsequent hearing in the ET it was agreed that the claims against her should be dismissed; and the parties both told me that they did not object to her being dismissed from this appeal. An Employment Judge has now dismissed her from the Employment Tribunal claims, and I have done so in respect of this appeal.

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F 3. In section 8 of the claim form the Claimant indicated that he was complaining of unfair dismissal and disability discrimination. He also ticked the box labelled: “I am making another type of claim which the Employment Tribunal can deal with”; and he wrote there: “Violations of the United Nations Convention on the Rights of Persons with Disabilities and breaches of the Charter of Fundamental Rights of the European Union. Breaches of the Treaty of Europe. Breaches of European Union Directive 2000/78.” Accompanying the claim form were particulars of claim running to more than one hundred closely typed pages.

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A 4. In those particulars he wrote: “At all material times I manifested (and continue to manifest to date) either depression, anxiety, dysexecutive syndrome or sleep apnoea, and sometimes all of them. I have a disposition to long-term impairments of sleep apnoea and depression in the future.

B As a consequence, I was at all material times a person with disabilities as defined by the **United Nations Convention on the Rights of Persons with Disabilities** (“CRPD”) and therefore the **Equality Act 2010** and **EU Directive 2000/78** as read in the light of the **CRPD**.”

C 5. I too shall refer to that UN Convention, made in 2006, as the **CRPD**.

D 6. The particulars of claim also highlight the approach taken by the **CRPD** to the definition of disability, as a social, rather than a medical, phenomenon, and the principles of equality and non-discrimination espoused in Article 5. Further on they assert that the Claimant is disabled by reference to severe sleep apnoea and anxiety and meets the definition of disability “as defined under Article 1 of the **CRPD**. I therefore also meet the definitions of disability under section 6 of the **Equality Act 2010** and **EU Directive 2000/78** which I understand must be read and understood in the light of the **CRPD**.”

F 7. Further on, the particulars of claim highlight, non-exhaustively, a number of provisions of the **CRPD**, Preamble and Articles. Further on, after citing the foundational Treaties of the **European Union** (“EU”) and the **Charter of Fundamental Rights of the EU**, the particulars **G** assert: “As the **Equality Act 2010** has to be read in light of the **CRPD** the articles above related to the **CRPD** have to be available in the **Equality Act** as well as any more favourable rights in the **Equality Act**.” The remainder of the particulars of claim periodically assert that various **H** alleged treatment amounted to a breach of one or more Articles of the **CRPD**.

A 8. A response was entered defending the claims, with accompanying particulars setting out the Respondent's account of events. The particulars sought further information in relation to the claimed disabilities and as to each specific allegation of discrimination. They denied that there
B had been any unlawful discrimination and asserted that the Claimant had been fairly dismissed for a reason related to capability arising from long term ill health.

C 9. The Respondent has subsequently accepted that the Claimant is a disabled person, for the purposes of the **Equality Act 2010**, by reference to sleep apnoea, anxiety and depression.

D 10. At a Preliminary Hearing ("PH") in the ET held in September 2018, the particular alleged treatment of which the Claimant seeks to complain, and the types of discrimination asserted, as referred to in the **2010 Act**, in respect of each complaint, were all identified and recorded. Following that, the Respondent tabled amended grounds of resistance.

E 11. At a case management PH, held in the ET on 23 February 2018, Employment Judge Self directed, by agreement, that there should be a further PH to decide the following:

F **"Whether or not the No 1181 EC (Definition of Treaties) United Nations Convention on Rights of Persons with Disabilities Order 2009 is of direct effect and thereby incorporates the Convention into UK law and provides the Claimant with a route to claim for disability discrimination outside of the Equality Act 2010."**

G 12. The Order there referred to is, to give it its precise title: **The European Communities (Definition of Treaties) (United Nations Convention on Rights of Persons with Disabilities) Order 2009 No 1181**. I shall refer to it as the **2009 Order**.

H 13. That PH took place before EJ Woffenden on 13 July 2018. As before me in the EAT, the Claimant was in person and the Respondent was represented by Mr J Meichen of Counsel.

A 14. EJ Woffenden’s reserved Judgment and Reasons were sent to the parties on 11 September 2018. Her Judgment was recorded thus:

B “The No 1181 EC (Definition of Treaties) United Nations Convention on Rights of Persons with Disabilities Order 2009 is not of direct effect and does not incorporate the Convention into UK law and does not provide the Claimant with a route to claim for disability discrimination outside of the Equality Act 2010.”

C 15. In her Reasons, after an introductory section, EJ Woffenden summarised the Claimant’s main submissions and then those of the Respondent, and then the Claimant’s response. In the last sub-paragraph relating to the Claimant’s submissions, she wrote:

D “6.15. I asked the claimant to identify for me the rights afforded to him under the UN Convention which were not provided by EqA. He told me they were the right to the highest attainable standard of health, the right to rehabilitation, the right to work and that there were no time limits within which claims have to be brought.”

E 16. The Judge’s conclusions are set out in paragraphs 9 to 16, which I reproduce in full:

F “9. The EU has implemented most of its equality issues by way of Directives e.g. the Framework Directive.

G 10. In the United Kingdom domestic legislation is enacted or amended to comply with its obligation to transpose Directives into domestic law.

H 11. One such piece of domestic legislation is the EqA which prohibits discrimination on grounds of protected characteristics (which include disability). It confers jurisdiction to the employment tribunal to determine complaints relating to a contravention of Part 5 of the Act (work) and a contravention of section 108 (relationships that have ended), section 111 (instructing, causing or inducing contraventions) and section 112 (aiding contraventions) that relates to Part 5.

I 12. If there is a conflict between a provision of EU law and a provision of domestic law, EU law takes precedence. Individuals may, in certain circumstances rely directly on a provision of EU law as giving rise to rights which are enforceable before domestic courts (the principle of ‘direct effect’). However, such a provision would only have direct effect if it was sufficiently clear and precise, unconditional and left no room for discretion in its implementation by the EU or member states and the deadline for implementation must have expired. In this case the claimant was unable to identify with precision the rights to which he says the UN Convention gives rise and on which he wishes to rely.

J 13. However be that as it may I am not concerned with whether the claimant can rely on directly on a directive or for that matter the European Convention on Human Rights or the European Union Charter of Fundamental Rights. I am concerned with the CRPD Order 2009. It does no more than specify the UN Convention as a community treaty for the purposes of the EC Act. The UK has ratified the UN Convention but has not incorporated it into domestic law. The Explanatory Memorandum to the CRPD Order 2009 states clearly at paragraph 7.1: *‘The UN Convention builds on existing international human rights instruments in order to explicitly reaffirm the human rights of disabled people. The UN Convention does not aim to establish new human rights for disabled people but sets out with greater clarity the obligation on States to promote, protect, and ensure the human rights that disabled people already have, so that they are treated on an equal basis with other people.’*

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14 The approach taken to the effect of the UN Convention in domestic courts is illustrated in R (Davey) v Oxfordshire County Council 2017 EWHC 354 in which Lord Justice Bean agreed with the conclusion of Morris J in the court below who had held that the UN Convention “*is an unincorporated international treaty which, absent incorporation, creates no direct obligations in UK domestic law. But by ratifying a convention a State undertakes that wherever possible its laws will conform to the laws and values that the convention enshrines. A domestic UK statute must be interpreted in a way that is consistent with the obligations undertaken by the UK under any relevant international conventions. Words of a UK statute passed after the date of the treaty and dealing with the same subject matter are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it: see A v SSHD [2005] UKHL 71.*”

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15 Lord Justice Bean went on to say there was a strong presumption in favour of interpreting an English statute in a way that did not place the UK in breach of its international obligations, and accordingly the UN Convention could be resorted to as a construction of a particular provision in case of ambiguity or uncertainty. However, he warned great care must be taken in deploying provisions of a convention or treaty which set out broad and basic principles as determinative tools for the interpretation of a concrete measure such as a particular provision of a UK statute. Provisions which are aspirational could not qualify the clear language of primary legislation.

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16 Thus the UN Convention may be used by the claimant as an interpretive aid to construction but it is not, as submitted by the claimant, a source of substantive domestic legal rights. There are no ‘free standing’ rights under the UN Convention. The CRDP Order 2009 is not of direct effect. It does not incorporate the UN Convention into UK law. The CRDP Order 2009 does not provide the claimant with a route to claim for disability discrimination outside of the EqA 2010.”

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17. An application by the Claimant for reconsideration was unsuccessful.

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18. The Claimant appealed against that Decision. On considering his Notice of Appeal on paper, HHJ Shanks considered the appeal not arguable. However, at a hearing under Rule 3(10) of the EAT’s Rules of Procedure HHJ Tucker considered two grounds were arguable and should proceed to a Full Hearing.

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19. Those grounds of appeal are expressed as follows:

“Ground 1: The Judge erred because she failed to take proper account:

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(1). That the 2009 Order No 1181 provides in s1(2) that the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD) “is to be regarded as one of the Community Treaties” as defined in s 1(2) of the *European Communities Act 1972* (ECA 1972);

(2). The effect of s2(1)¹ ECA 1972 is that the rights, powers liabilities etc set out in the UNCPRD “are without further enactment to be given legal effect or used in the UK ...” etc. The words of that statute have to be read in light of

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Bulmer v Bollinger [1974] EWCA Civ 14, particularly paragraph 5 and paragraph 10 and Miller v Secretary of State for Justice [2017] UKSC 5 paragraph 17 and 60 – 62. See also Davey

¹ The Judge wrote “section 1(2)” at this point but it is agreed that that was clearly a typo.

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v Oxfordshire County Council [2017] EWCA Civ 1308 at paragraphs 62 – 64 and the comments at paragraph 64, (noting at 64 that the Judge would say no more without hearing full argument).

(3). Decisions of the CJEU that as a matter of EU law the Directive 2000/78 must be read in accordance with its provisions because it is “an integral part of the EU legal order.” See Case C-395/15 Daouidi v Boots Plus SL and case C-263/12 Z v a Government Department at paragraphs 71 – 76

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(4). That notwithstanding the effect of the UNCRPD on EU legislation as set out in those cases it effect in the UK is more ‘direct’ or immediate because of the consequences which flow from s1(2) of the ECA 1972.

Ground 2: The Judge failed to identify the significant extent of the interpretative obligation arising out of the UNCRPD as set out in the CJEU cases cited above”.

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20. As requested by the Claimant, we started the hearing of this appeal a little later than is usual in the EAT, and we further discussed adjustments at the start of the hearing, in particular by way of breaks as needed. The hearing proceeded without any difficulty. I had a main bundle together with copies of authorities and other legal materials, to which both sides made some additions at the start of the hearing. I had written skeleton arguments on both sides. I heard oral argument on both sides. I reserved my decision.

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The Legal Framework

21. Section 1(2) **European Communities Act 1972**² gives a definition of “the Treaties” or “the EU Treaties” for the purposes of that Act, which is expressed to be subject to section 1(3).

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22. Section 1(3) provides:

“If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the EU Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament”.

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23. Section 1(4) provides:

“For purposes of subsections (2) and (3) above, “treaty” includes any international agreement, and any protocol or annex to a treaty or international agreement”.

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² I refer to the 1972 Act, and other measures, where appropriate, as amended.

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24. Sections 2(1) and (2) provide:

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(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies.

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—

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(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

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and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid. In this subsection “designated Minister or department” means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

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25. It is not necessary to set out here all of the provisions of the CRPD. However, I note in particular the following provisions.

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26. Article 1 states:

“Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

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Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

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27. The definitions in Article 2 include the following:

“...

Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental

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freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;”

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28. Articles 3, 4 and 5 provide:

“Article 3 – General Principles

The principles of the present Convention shall be:

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(a). Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;

(b). Non-discrimination;

(c). Full and effective participation and inclusion in society;

(d). Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

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(e). Equality of opportunity;

(f). Accessibility;

(g). Equality between men and women;

(h). Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

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Article 4 – General Obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

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(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

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(d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

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(f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

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(g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

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(i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

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3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

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5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 5 equality and non-discrimination

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1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

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3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention”.

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29. Article 27 is headed “Work and Employment”. It provides:

“1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

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(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

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(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

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(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

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(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

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(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour".

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30. The Council Decision of 26 November 2009 (2010/48/EC) provides at Article 1:

"The UN Convention on the Rights of Persons with Disabilities is hereby approved on behalf of the Community, subject to a reservation in respect of Article 27.1 thereof".³

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31. The **2009 Order** was made pursuant to section 1(3) of the **1972 Act**. It contains only two Articles. Article 1 is concerned with citation and commencement. Article 2 provides:

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"2. The United Nations Convention on the Rights of Persons with Disabilities signed in New York by the European Community and by the United Kingdom on 30 March 2007 is to be regarded as one of the Community Treaties as defined in section 1(2) of the European Communities Act 1972".

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³ The reservation has no bearing on this case.

A 32. The pertinent EU Directive in relation to disability is **Council Directive 2000/78/EC**, commonly referred to as the Framework Directive. The relevant provisions of the **Equality Act 2010** are intended to secure domestic compliance with that Directive.

B 33. It is well-established, and has never been disputed by the Respondent, that, in any field in which there is applicable EU law, UK Courts and Tribunals have an interpretative obligation, that is, an obligation to construe and apply domestic legislation so far as possible in a manner that gives effect to EU law. This is sometimes called the *Marleasing* principle (**Marleasing SA v La Commercial Internacional de Alimentation SA** [1990] ECR 4135, [1992] 1 CMLR 305).

C 34. A number of authorities expound on the far-reaching nature of this obligation, including that it is not constrained by conventional rules of construction, permits a departure from the strict and literal application of the words Parliament has used, and permits the implication of additional words. Nevertheless, it is not the case that there are no limits at all on how this obligation may be deployed. In particular, the authorities establish that the interpretation of the domestic legislation that it is used to achieve, must “go with the grain of the legislation” and should not be one which is inconsistent with a fundamental or cardinal feature of the domestic legislation.

D 35. The concept of direct effect postulates a distinct doctrine, namely that a party to domestic litigation may be able, in some cases, to rely on a provision of EU law not merely as an aid to interpretation of the domestic statute, but directly. But EU law places limits on this doctrine. In particular, the instrument relied upon must be sufficiently clear and precise, unconditional and unqualified, so as to be capable of being directly invoked and enforced. See: **Van Gend en Loos v Nederlandse Administratie der Belastingen** [1963] ECR 1, [1963] CMLR 105.⁴

⁴ We are not concerned in this case with the distinction between what is called horizontal and vertical direct effect, bearing in mind that the Respondent is a local authority.

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36. Does the concept of direct effect enable a party to rely upon an EU instrument as providing an independent *cause of action* in the ET, regardless of, or in addition to, whatever rights may be conferred by domestic legislation? That, if it existed, might be called a “free-standing” right. In **Biggs v Somerset County Council** [1995] ICR 811 (referring to ETs under their then title of Industrial Tribunals) the EAT said this⁵:

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“As we understand the interaction between Community Law, domestic law and the jurisdiction of Industrial Tribunals the position is in summary as follows:

(a) The Industrial Tribunal has no inherent jurisdiction. Its statutory jurisdiction is confined to complaints that may be made to it under specific statutes, such as the Employment Protection (Consolidation) Act 1978, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Equal Pay Act 1970 and any other relevant statute. We are not able to identify the legal source of any jurisdiction in the Tribunal to hear and determine disputes about Community law generally.

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(b) In the exercise of its jurisdiction the Tribunal may apply Community Law. The application of Community law may have the effect of displacing provisions in domestic law statutes which preclude a remedy claimed by the applicant. In the present case the remedy claimed by Ms Biggs is unfair dismissal. That is a right conferred on an employee by the 1978 Act and earlier legislation. If a particular applicant finds that the Act contains a barrier which prevents the claim from succeeding but that barrier is incompatible with Community Law, it is displaced in consequence of superior and directly effective Community rights.

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(c) In applying Community Law the Tribunal is not assuming or exercising jurisdiction in relation to a “free-standing” Community right separate from rights under domestic law. In our view, some confusion is inherent in or caused by the mesmeric metaphor, “free-standing”. “Free-standing” means not supported by a structural framework, not attached or connected to another structure. This is not a correct description of the claim asserted by Ms Biggs. She is not complaining of an infringement of a “free-standing” right in the sense of an independent right of action created by Community Law, unsupported by any legal framework or not attached or connected to any other legal structure. Her claim is within the structural framework of the Employment Protection legislation, subject to the disapplication of the threshold qualifying provisions in accordance with the EOC case. So far as her right is subject to domestic law time limits, she can only have those removed by the application of Community Law if, as explained above, time limits are themselves incompatible with Community Law. For the reasons we have stated they are not.”

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37. The EAT’s approach was upheld by the Court of Appeal in **Biggs** and this passage was also approved by the Court of Appeal in **Barber v Staffordshire County Council** [1996] IRLR 209 at paragraph 22. However, some have argued that more recent authority calls the **Biggs** approach into question. Some have, in particular, interpreted the Decision in **Unison and GMB v Brennan and Sunderland City Council** [2008] ICR 955 in that way.

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⁵ Mummery J and members; [1995] ICR 811 at 830B-G.

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Discussion and Analysis

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38. The arguments presented to me were wide-ranging and extensive. I have considered them all; but it would be neither proportionate nor necessary for me to seek to reproduce and address them all here, to the last detail. I shall address, in turn, a number of discrete questions or topics, referring to the arguments that seem to me to have been most significant and pertinent. I will then return to the specific grounds of appeal to see how they stand in the light of my conclusions on these topics, and hence will arrive at the overall outcome of this appeal.

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*The status of the **CRPD** as a Treaty*

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39. As Article 2 of the **2009 Order** records, the **CRPD** has been signed by both the European Union and the United Kingdom. The EU's adherence to it is confirmed by the Council Decision of 26 November 2009 (2010/48/EC).

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40. Article 2 of the **2009 Order** adds the **CRPD** to the list of Treaties or EU Treaties, so that it is included within the grasp of those defined terms, for the purposes of the **1972 Act**. But, it may be observed, in terms of its express provisions, Article 2 does no more nor less than that.

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*Does the **CRPD** Have Indirect Effect?*

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41. It has been clearly held by the CJEU that the **CRPD** may be relied upon for the purposes of interpreting the Framework Directive which must, so far as possible, be interpreted in a manner consistent with it. See, for example, **Daouidi v Boots Plus SL and others** [2017] IRLR 151 at paragraph 41 and earlier authorities cited there.

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42. Accordingly, it will be open to the Claimant (and indeed the Respondent), at the hearing of his claims in the ET, to seek to rely upon any relevant provision of the **CRPD** as having a bearing, by any of the techniques which may be deployed, in accordance with the *Marleasing* jurisprudence, on the interpretation of any relevant provision of the **2010 Act**.

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*Does the **CRPD** have direct effect?*

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43. By this question I must make clear, for reasons that will become apparent later, that I mean, at this point, “direct effect” in the sense of the doctrine which I have already described, of which the fount is the **Van Geld** Decision.

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44. During the course of oral submissions, the Claimant indicated that he agreed with Mr Meichen that the answer to this question is “no”. However, it appeared to be controversial before EJ Woffenden, was considered by her, and, this question having been thoroughly explored in argument on appeal, I should record that my answer is the same, and explain why.

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45. First, if no existing authority directed me to the answer, I should have concluded that the provisions of the **CRPD** are not sufficiently clear and precise, unconditional and unqualified to be amenable to the doctrine of direct effect. That is an unsurprising conclusion. The provisions of international Treaties, or other such high-level international instruments, tend, in their very nature, to be cast in generalised, principled, aspirational or exhortative language directed at the adhering States themselves. There is no such iron rule, but the exceptions are notorious as such. In the field of equality, the notorious exception is what is now Article 157 of the **Treaty on the Functioning of the European Union** (concerning equal pay).

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46. In my judgment, the language of the **CRPD**, in particular of the Articles I have cited earlier in this decision, does not meet the test of being sufficiently clear and precise, unconditional and unqualified so as to be amenable to the doctrine of direct effect. The only provision which might, potentially, be a candidate, is Article 27(1)(a), given its prohibitive nature, and identification of particular kinds of employment-related activity; but even it is parasitic on the definition of “discrimination” in Article 2, the language of which does not meet this test.

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47. But, in any event, there *is* prior authority on the subject.

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48. First, and most importantly, the CJEU has said, in **Z v A Government Department** C-363/12 [2014] IRLR 563, at paragraph 90:

“In those circumstances, without there being any need to examine the nature and broad logic of the UN Convention, it must be held that the provisions of that Convention are not, as regards their content, provisions that are unconditional and sufficiently precise within the meaning of the case law cited in paragraphs 85 and 86 of the present judgment, and that they therefore do not have direct effect in European Union law. It follows from this that the validity of **Directive 2000/78** cannot be assessed in the light of the UN Convention.”

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49. That dictum, in and of itself, I think, settles the point.

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50. Secondly, I was referred to the Decision of the Court of Appeal in **R (Davey) v Oxfordshire County Council**, and that of the High Court, which it upheld ([2017] EWCA Civ 1308; [2017] EWHC Admin 354). That litigation was concerned with the setting of a personal care budget pursuant to the **Care Act 2014**. The Decision considered, in particular, Article 19 of the **CRPD**, which is concerned with “living independently and being included in the community.” Citing from the Decision of the Court below, the Court of Appeal (Bean LJ, Thirlwall and McFarlane LJJ concurring) said this:

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“62. The judge held that the UNCRPD is an unincorporated international treaty which, absent incorporation, creates no direct obligations in UK domestic law. But by ratifying a convention a State undertakes that wherever possible its laws will conform to the laws and values that the convention enshrines. A domestic UK statute must be interpreted in a way that is consistent with the obligations undertaken by the UK under any relevant international conventions. Words of a UK statute passed after the date of the treaty and dealing with the same subject matter are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it: see *A v SSHD* [2005] UKHL 71. There is a strong presumption in favour of interpreting an English statute in a way that does not place the UK in breach of its international obligations, and accordingly the UNCRPD could be resorted to as a construction of a particular provision of the 2014 Act in case of ambiguity or uncertainty. However, great care must be taken in deploying provisions of a convention or treaty which set out broad and basic principles as determinative tools for the interpretation of a concrete measure such as a particular provision of a UK statute. Provisions which are aspirational cannot qualify the clear language of primary legislation.

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63. *Morris J* held that no specific ambiguity in the 2014 Act had been identified in respect of which Article 19 might serve as an interpretative tool. He added:

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“...The importance of the wishes of the service user is fully addressed in the provisions of the Act itself. The relative balance between those wishes and the assessment of the local authority is struck in the provisions of the Act themselves. In my judgment, and in the light of the principles set out above, there is no warrant for a conclusion that, by dint of the application or consideration of Article 19 itself and the concept of independent living therein, that balance is weighted more in favour of the service user, than it would otherwise be under the Act, to the extent that the service user can have the final say on his own needs and personal budget or dislodge the principle that, under the Act, the decisions are ultimately to be taken by the local authority. The wishes of the disabled person may be a primary influence, but they do not amount to an overriding consideration.”

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64. On appeal to this court, Mr Burton did not argue that there was any error in the judge’s conclusion that Article 19 of the UNCRPD did not assist the Claimant’s case. I have set out the judge’s conclusions on this topic only because the EHRC, in their written submissions lodged as interveners in this court, argued that “the decision of the Respondent in this case, and the judgment of Mr Justice Morris upholding that decision, goes against the principles of Article 19 of the UNCRPD”. I need say no more in the present case than that, with respect to the EHRC, the judge’s analysis seems to me entirely correct. But this should not prevent the argument being advanced in a future case where it is the subject of adversarial argument by the parties.”

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51. Mr Meichen submitted that this is further authority for the proposition that the **CRPD** *does* have indirect effect, but does *not* have direct effect. However, I was told that it was in part because of the very last sentence of paragraph 64, that HHJ Tucker considered that this point merited further consideration at a Full Hearing, on the footing that it might be read as having left the door open to further consideration of the question of direct effect in a future case. However, that may be, with the benefit of argument at the Full Hearing of this appeal, I conclude that that is not, in fact, a correct reading of this passage in Davey.

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52. So far as indirect effect, or the interpretative obligation, is concerned, this passage in Bean LJ’s speech discusses (drawing on *Morris J*’s Decision) two aspects: the general and the specific.

A As to the general, it confirms that, in principle, because it has been ratified by the UK, the
interpretative obligation applies to relevant provisions of the **CRPD**. The *specific* question in
B Article 19. It was in relation to that *specific* question that Bean LJ respectfully agreed with Morris
J that there was no ambiguity in the domestic legislation in respect of which Article 19 could be
brought to bear as an interpretative tool; and it was on that *specific* question (the point having
C been raised in that case only by the intervener) that he did not rule out the argument being
advanced again, and the Court hearing adversarial argument in a future case.

53. This sentence at the end of paragraph 64 does not, therefore, in any way qualify Bean LJ's
D general statement, in paragraph 62, that the **CRPD** does not have direct effect, though it is capable
of being drawn upon for indirect effect. All of that said, I am conscious that it might be said that,
in any event, the Court in Davey was only specifically concerned with Article 19. It did not need
E to consider whether, for example, specifically Article 27, or any part of it, might have direct
effect. Nevertheless, the discussion in Davey reinforces my view, that the general nature and
character of the **CRPD**, is such that it is intended to lay down general principles, and is not apt,
F in any of its provisions, to have direct effect. But ultimately, as I have explained that would still
be my conclusion, without the reinforcement of Davey.

Can Direct Effect be Achieved Through Another Legal Route?

G 54. As I have said, the Claimant indicated in oral argument, that he did not seek to argue that
the **CRPD**, or any part of it, had direct effect in what I have called the *Van Gelder* sense. But,
he argued, direct effect is, by virtue of the **2009 Order**, achieved through a different route.
H Though he sometimes put it in slightly different ways, or using different terminology, the gist of
his argument is that, because the **2009 Order** designates the **CRPD** as a Treaty for the purposes

A of the **1972 Act**, that then means that section 2(1) of that Act applies to it; and *that* then means that it is directly enforceable in domestic Courts and Tribunals.

B 55. The crucial – and disputed – proposition in that chain of reasoning, concerns the meaning and effect of section 2(1). The authority on which the Claimant sought, principally, to rely in support of his case on that proposition, is **R (Miller) v Secretary of State for Exiting the European Union** [2018] AC 61.

C 56. In particular the passages the Claimant cited included the passage in which the majority Justices discussed the “status and character of the 1972 Act”, in which they said that it “authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation) EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes” (paragraph 61); that “so long as that Act remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law” (paragraph 61); that “the EU Treaties themselves are directly applicable by virtue of section 2(1)” (paragraph 63). He also referred, in particular, to a passage in the dissenting speech of Lord Reed, referring to the relevant or ultimate rule of recognition having been unaltered by the UK’s entry into the EU.

D **E** **F** **G** **H** 57. As is well known, **Miller** concerned whether a withdrawal notice under Article 50 of the **Treaty of European Union** could, under the UK’s constitutional arrangements, be given by Government ministers exercising prerogative powers, without prior authorisation by an Act of Parliament. That was a question of domestic law, resolution of which depended upon the proper interpretation of the **1972 Act**, as well as other statutes. The majority eight Justices concluded that section 2 authorises a process by which EU law becomes an independent source of domestic

A law, overriding other sources, including other domestic legislation, unless or until Parliament decides otherwise. Withdrawal from the EU would mark a fundamental change to the UK's constitutional arrangements by cutting off the source of EU law. The UK constitution required such changes to be effected by UK Parliamentary legislation. The minority three Justices considered that the effect which the **1972 Act** had given to EU law was inherently conditional on the UK's continued membership of the EU. It did not manifest any intention to affect the Crown's exercise of prerogative powers in respect of such membership.

58. Within the context of the arguments on that issue, the passages relied upon by the Claimant can be seen as high level statements (crucially important though they were to the outcome in **Miller** itself) as to the significance which the **1972 Act** has for the (proposed) withdrawal of the UK from the foundational Treaties as a whole, having regard to the mechanism by which the **1972 Act**, and in particular section 2(1), causes EU Treaties to become a source of domestic law, which has primacy over other sources, until Parliament decides otherwise. They are not authority for the proposition that all such Treaties, or all provisions of all such Treaties, have, and must be given, direct effect by domestic Courts and Tribunals, without more.

59. There is nothing in **Miller** to suggest a revisiting of the long-established understanding of the doctrines of direct and indirect effect, nor indeed the so-called *Francovich* principle by which a citizen who has lost out because of the State's failure, for example, properly to implement a Directive, may sue the State itself. This is reflected in paragraph 64 of **Miller**:

"Thus, EU law in EU Treaties and EU legislation will pass into UK law through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act, so long as the United Kingdom is party to the EU Treaties. Similarly, so long as the United Kingdom is party to the EU Treaties, UK courts are obliged (i) to interpret EU Treaties, Regulations and Directives in accordance with decisions of the Court of Justice, (ii) to refer unclear points of EU law to the Court of Justice, and (iii) to interpret all domestic legislation, if at all possible, so as to comply with EU law (see *Marleasing v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135). And, so long as the United Kingdom is party to the EU Treaties, UK citizens are able to recover damages from the UK government in cases where a decision of one of the organs of the state based on a serious error of EU law has caused them loss".

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60. **H. P. Bulmer v Bollinger** [1974] Ch 401 (CA), specifically cited in the grounds of appeal in this case, offered an early, and memorable, domestic-law assessment of the impact of the **1972 Act**, but does not add any other nuance to the jurisprudence.

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61. The Claimant's argument depends, I think, on a fundamental misreading of section 2(1). It does not, as he seems to contend, in and of itself, give all provisions of all EU Treaties, direct effect in UK law; rather, it requires the rights, etc., created by or arising under them (whatever they, in the given case, may be), to be *given* effect by the appropriate mechanisms. Section 2(2) goes on to elaborate on the enabling mechanisms which may be adopted, including orders, rules, regulations or other subordinate instruments.

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62. The Claimant argued that, were it not the case that the designation of the **CRPD** as a Treaty by the **2009 Order**, and then the application of section 2(1) to it, gave the **CRPD's** provisions direct effect, then the **2009 Order** would be pointless and futile, as it would be wholly ineffective. But that is not so. Its relevant provisions, are, to repeat, certainly capable of being drawn upon in an appropriate context as having indirect effect. But section 2(1) does not give it direct effect in any sense. Nor does the **2009 Order** indeed make any provision enabling any provision of the **CRPD** to be independently invoked as providing a cause of action, justiciable in any UK Court or Tribunal. Further, for completeness, I note that no order, rules, regulation or scheme has been made pursuant to section 1(2) of the **1972 Act** with respect to the **CRPD**.

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63. The Claimant cited passages from **EN (Serbia) v The Secretary of State for the Home Department** [2009] EWCA Civ 630; but these do no more than expound the recognised doctrines of direct and indirect effect. He also cited a statement by Stanley Burnton LJ, that a Tribunal

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A cannot quash delegated legislation, which is true; but the Claimant’s contention that, not to give
the **2009 Order** direct effect would amount to purporting to quash it is, with respect, not. He
cited **Ghaidan v Godin-Mendoza** [2004] 2 AC 557 at paragraph 60 where Lord Nicholls of
Birkenhead said: “Ordinary principles of statutory construction include a presumption that
B Parliament does not intend to legislate in a way which would put the United Kingdom in breach
of its international obligations.” But this Decision expounded *Marleasing* type principles of
C interpretation in relation to the **European Convention on Human Rights**, and the impact of
section 3 of the **Human Rights Act 1998**. It does not advance the Claimant’s particular case.

64. The Claimant also argued that his own Convention rights would be infringed, were the
D **CRPD** not given direct effect, in particular, his Article 6 right to a fair trial, and equivalent rights
conferred by common law and Article 47 of the **Charter of Fundamental Rights of the
European Union**. He referred in this regard to **Benkharbouche v Secretary of State for
E Foreign and Commonwealth Affairs** [2017] UKSC 62. But that case concerned the
disapplication of a statute that would otherwise have deprived the complainants of rights to bring
statutory complaints over which the Employment Tribunal has jurisdiction, enjoyed by others.
The Claimant in this case has not been deprived of any such rights.

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65. The Claimant referred to **P v Commissioner of Police of the Metropolis** [2018] ICR
560. That was a case in which, read literally, the **Equality Act 2010** did not enable a police
G officer to enjoy the same right as others, to bring a claim in the ET challenging her dismissal as
discriminatory. The Supreme Court held that the **2010 Act** must be construed in such a way as
to repair that gap. Again, the Claimant, by contrast, has not been deprived of any right to pursue
H his statutory claims in the ET.

A 66. As I have concluded that the **CPRD** does not have direct effect, whether as conventionally understood, or in the novel sense argued for by the Claimant, I do not need to explore further, whether the **Biggs** line of authorities are the last word on whether a provision of an EU instrument
B which did have *Van Gelder* direct effect could ever give rise to a free-standing cause of action in the ET.

Conclusions on the Grounds of Appeal

C 67. I return, then, to the specific grounds of appeal. As to ground 1, paragraph 1, the Judge did not fail to take proper account of the fact that the **2009 Order** provides that the **CRPD** is to
D be treated as one of the EU Treaties. At paragraph 13 of her decision she expressly adverted to that fact, but noted, correctly, that it does no more than that.

E 68. As to ground 1, paragraph 2, for reasons I have explained, section 2(1) does not mean that, because it is to be regarded as a Treaty, therefore, without more, the **CRPD** has direct effect; nor do the discussion, or observations, in **Davey** advance that case. The Judge was right to regard
F **Davey** as illustrating the approach to be taken to the effect of the **CRPD** in domestic Courts, and confirming that relevant provisions of the **CRPD** could potentially have interpretative effect, but not as authority for it having direct effect.

G 69. Ground 1, paragraph 3 is a statement of the interpretative principle, as applied to the Framework Directive, and/or the **CRPD**; but EJ Woffenden, to repeat, recognised that. See paragraph 16 of her Decision. It has in fact never been in dispute in this case.

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A 70. Ground 1 paragraph 4 appears to be an assertion of the alternative theory of direct effect expounded by the Claimant. But as I have concluded it is not sound, nor do I conclude that EJ Woffenden failed to take proper account of it.

B 71. Turning to Ground 2, EJ Woffenden's discussion of the interpretative obligation is relatively brief, but it was not incumbent upon her, to analyse or expound upon its far-reaching nature, or the particular radical techniques which may be deployed in its service. Nor did she
C need to consider how it might or might not be relevant to any particular issues in this case. That is first, because, to repeat once again, the general principle that, in the context of a claim of disability discrimination under the **2010 Act**, the interpretative obligation may be invoked by
D reference to relevant provisions of the **CRPD**, has never been at issue; and how that might or might not apply in any particular way in this case did not need to be explored in order to determine the specific question which EJ Woffenden was called upon to answer.

E 72. Further, any such issues will fall to be considered by the ET when it considers the substantive claims under the **2010 Act** themselves. It is worth restating that the Claimant's status as a disabled person in law has already been conceded by the Respondent. In so far as he wishes
F to argue that the application of the interpretative obligation by reference to some specific provision of the **CRPD** may be significant to the outcome of some other particular relevant issue in this case, it will be open to him to raise those arguments at the Full Hearing of his claims before
G the ET.

Outcome

H 73. For all of the foregoing reasons none of the Grounds of Appeal is well founded. There was no error of law in EJ Woffenden's decision and this appeal is dismissed.