Appeal No. UKEAT/0210/18/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 1 July 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR G BADARA — APPELLANT

PULSE HEALTHCARE LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BAYO RANDLE (of Counsel) Advocate
For the Respondent	MR JACK MITCHELL (of Counsel) Instructed by: Longmores Solicitors 24 Castle Street Hertford SG14 1HP

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

RACE DISCRIMINATION

The Claimant was a Nigerian national who was a family member of an EAA national residing in the UK; and had the right to work in the UK pursuant to the Free Movement European Directive 2004/38/EC and the related provisions of the **Immigration (European Economic Area) Regulations 2006** (the EEA Regulations). He was employed by the Respondent as healthcare support worker. His UK Residence card confirmed his status under the 2006 Regulations but expired on 20 January 2015. The Respondent refused to provide him work from that date until 17 November 2015, on the basis that he had not supplied evidence of his right to work. Home Office ECS (Employer Checking Services) checks during this period were negative. The Respondent relied on (i) the penalty provisions against employers of those without eligibility to work (**Immigration, Asylum and Nationality Act 2006** (the **2006 Act**); Immigration (Restrictions on Employment) Order 2007) and (ii) a contractual term in his contract (clause 8.1) concerning the production of evidence of eligibility to work. By two ET1s presented in 2015 the Claimant complained of unlawful deduction of wages and direct and indirect discrimination on the grounds of race and/or nationality.

The claims in the first ET1 were dismissed by an ET; but that decision was set aside by the EAT (HHJ Hand QC) and remitted to a fresh ET, which heard both sets of claims. The ET held that, whilst the Claimant admittedly had the right to work under the EEA Regulations, in the light of the penalty provisions in the **2006 Act** (s.15), the requirements of the 2007 Order and clause 8.1 of the contract, it had been reasonable to require proof of eligibility in the form of positive ECS checks. For similar reasons, the discrimination claims were dismissed.

The Claimant appealed, contending in particular that the ET had been wrong to distinguish the EAT decision in **Okuoimose v City Facilities Management Ltd** (UKEAT/0192/11/DA), which made clear that the provisions of the **2006 Act** and 2007 Order were irrelevant in circumstances where the employee had a right to work pursuant to the Directive and the EEA Regulations; and that the ET had failed to take account of Home Office guidance to similar effect. This undermined the decisions in each claim. The Respondent contended that **Okuoimose** was correctly distinguished; and that in any event the ET's decision on the claim for unlawful deduction of wages was based on the Claimant's obligations under clause 8.1.

The EAT held that the decision in **Okuoimose** and the Home Office guidance were relevant to the clause 8.1 issue and to the justification defence in the claim of indirect discrimination. Those claims were remitted to the same ET for reconsideration. The appeal in respect of direct discrimination was dismissed, as there was no basis to conclude that there might have been a different conclusion.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimant against the decision of the Employment Tribunal London Central (Employment Judge Henderson and members) sent to the parties on 11 May 2018. Following a four-day hearing in April 2018, the Tribunal upheld the Claimant's contention that he was an employee of the Respondent and allowed his claim for unlawful deduction of wages in 2015 but only to the extent of the period from 16 October 2015 to 17 November 2015. His claims of unfair dismissal, direct and indirect discrimination on the grounds of his race and/or nationality, victimisation, breach of contract and holiday pay were dismissed.

2. Following the Rule 3(10) Hearing, the Claimant was permitted to pursue two grounds of his appeal which relate to the claims for unlawful deduction of wages and of direct and indirect discrimination. The Claimant is a Nigerian national. The central question in the appeal on each of these claims is whether, notwithstanding that he had a right to work in the UK as a family member i.e. spouse of an EEA national resident in the UK, the Respondent reasonably required him to produce evidence of his right to work in the form of positive ECS (Employer Checking Services) checks from the Home Office. Neither Counsel in this appeal appeared below.

3. The case has a long history and concerns two distinct ET1 claims presented respectively on 29 April 2015 and 28 January 2016, i.e., 01109/2015 and 3322403/2016. The first claim was dismissed by a tribunal in October 2015, but this was overturned by the Employment Appeal Tribunal (HHJ Hand QC) on 27 April 2017. The second claim had been stayed pending that decision. The decisions under appeal are in respect of both claims.

4. The Claimant came to the UK in 2003 and was the spouse of an EEA national resident in the UK. He and his wife were estranged and divorce proceedings had been commenced but the marriage had not been dissolved. It was common ground at the April 2018 hearing that the Claimant therefore had a right to work in the UK pursuant to the provisions of the Free Movement European Directive 2004/38/EC ("the Directive") and the consequent domestic provisions contained in the **Immigration (European Economic Area) Regulations 2006** ("the EEA Regulations"). As the Judgment records, in paragraph 26, "This was the strict legal position, irrespective of any documentary evidence provided by the Claimant".

5. The Respondent is a provider of healthcare services to individuals in their home and the community. The Claimant was employed by the Respondent as a healthcare support worker from 15 February 2013 until 17 November 2015 when the Respondent terminated his employment. The employment practice of the Respondent included the use of contractual documents which, on their face, were made between itself and a limited company as "Contractor" providing the services of an "Employee". The Claimant had signed a number of such documents and in particular one dated 1 July 2013.

6. By the Decision under appeal, the Tribunal held that he was at all material times employed by reference to that document. However upon its analysis of the reality of the relationship, and consideration of the Supreme Court judgment in **Autoclenz Ltd v Belcher & Ors** [2011] UKSC 41, the Tribunal held that contrary to the apparent terms of the 1 July 2013 document, the employment relationship was of that of employer and employee. It thus rejected the Respondent's case that the Claimant was self-employed.

7. It was agreed at the hearing that at the commencement of his relationship with the Respondent the Claimant had presented a UK Residence card which confirmed his status as a family member of an EEA national and had an expiry dated of 20 January 2015: see Judgment at paragraph 27. The Respondent did not provide work for the Claimant between 20 January 2015 and the termination of his employment. Its stated reason was that the Claimant had not provided the necessary evidence of his right to work in the UK during that period. The Claimant therefore made claims for unlawful deduction from wages for the whole period 20 January 2015 until 17 November 2015, pursuant to s. 13 **Employment Rights Act 1996** (ERA). It was not in dispute that the Claimant was throughout ready and willing to carry out the intended daily work as a Healthcare Support Worker.

8. As revised at the Tribunal hearing, the issues in the ET claim were:

> **"Employment Status**
>
> **7. Was the Claimant an employee or worker of the Respondent or was he a self-employed contractor? If the Claimant is an employee/worker, when did that employment commence?**
>
> **Unlawful Deduction of Wages - section 13 Employment Rights Act 1996 (ERA)**
>
> **8. Were wages properly payable to the Claimant for the period 20 January to 29 April 2015 (Claim 1) and/or from 28 September 2015 to 17 November 2015 (Claim 2)?**
>
> **9. Did the Respondent make unlawful deduction of wages in respect of payments due to the Claimant? If so, if there were a series of deductions does the Tribunal have jurisdiction to hear the claims in respect of all parts of the series or was there a break in excess of three months from 30 April to 27 September 2015?"**

9. The end dates for each of the two periods identified in paragraph 8 reflect the dates on which the Claimant presented his first and second claims. The issue in paragraph 9 reflects the provisions of s. 23(3) ERA. In the light of its conclusion that no wages were properly payable before 15 October 2015, the Tribunal did not determine that issue.

10. The Tribunal upheld the Respondent's case before 16 October 2015, but held that the Claimant had provided the necessary evidence with effect from that date; and that thereafter

until termination of the contract on 17 November it had provided no explanation for its failure to provide work for, or therefore pay wages to, the Claimant. The Respondent's proposed cross appeal on perversity grounds was rejected on the **Rule 3(7)** sift and not renewed.

Legal framework

11. The relevant European law and domestic legislation were identified in **Okuoimose v City Facilities Management (UK) Limited** UKEAT/0192/11/DA, a decision which is at the heart of the grounds of appeal. Thus the Directive provides:

> **"Article 23**
>
> **Related Rights**
>
> **Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.**
>
> **Article 25**
>
> **General provisions concerning residence documents**
>
> **1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.**
>
> **2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents."**

12. The EEA Regulations seek to transpose the Directive and provide:

> **"13. Initial right of residence**
>
> **(1) […]**
>
> **(2) A family member of an EEA national residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport.**
>
> **[…]**
>
> **14- Extended right of residence**
>
> **(1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.**
>
> **(2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.**

[…]

15- Permanent right of residence

(1) The following persons shall acquire the right to reside in the United Kingdom permanently-

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national butt who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

[…]"

13. Separate from these provisions is the **Immigration Asylum and Nationality Act 2006** ("the 2006 Act") which is directed at the consequences of immigration control for employers. This provides:

"15. Penalty

(1) It is contrary to this section to employ an adult subject to immigration control if-

(a) he has not been granted leave to enter or remain in the United Kingdom, or

(b) his leave to enter or remain in the United Kingdom-

(i). is invalid,

(ii). has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or

(iii) is subject to a condition preventing him from accepting the employment.

(2) The Secretary of State may give an employer who acts contrary to this section a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum.

(3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment.

(4) But the excuse in subsection (3) shall not apply to an employer who knew, at any time during the period of the employment, that it was contrary to this section.

(5) The Secretary of State may give a penalty notice without having established whether subsection (3) applies.

….."

14. The Immigration (Restrictions on Employment) Order 2007 implements the **2006 Act** and in particular, by Regulation s.4 and 4A, makes provision for excuse from paying a civil

penalty under s.15, if the employee provides the employer with certain documents identified in lists A and/or B in the Schedule to the Order.

15. List A includes "A permanent residence card issued by the Home Office to the family member of a national of a European Economic Area country or Switzerland". List B, Part 1, includes "A current residence card…issued by the Home Office to a non-European Economic Area national who is a family member of a national of a European Economic Area country or Switzerland or who has a derivative right of residence". List B, Part 2 includes "A Certificate of Application issued by the Home Office…to a family member of a national of a European Economic Area country or Switzerland stating that the holder is permitted to take employment which is less than six months old."

16. Home Office guidance dated 16 May 2014 and headed "An employer's guide to right to work checks" includes advice headed "When do you conduct checks." This includes in the opening paragraph:

> **"6. You are required to carry out an initial right to work check on all people you intend to employ before you employ them. Once you have completed this check, you will be required to carry out follow up right to work checks on this person if they are from outside a European Economic Area and Switzerland and have time-limited permission to do the work in question."**

17. It then provides advice in respect of acceptable documents as identified in Lists A and B of the 2007 Order, including reference to a Certificate of Application for a residence card made by a non-EEA national. Under the heading "Additional Information" it provides:

> **"Non - EEA nationals who claim to have a right to work in the UK as a family member of an EEA national, or by virtue of a derivative right, but who do not hold documentation issued by the Home Office.**
>
> **There is no mandatory requirement for non- EEA nationals who are resident in the UK as a family members of an EEA national, or who have a derivative right of residence in the UK, to register with the Home Office or to obtain documentation issued by the Home Office.**
>
> **Consequently, it is open to any non-EEA national who has an enforceable European Union law right to work in the UK – as a family member of an EEA national or by**

> **virtue of a derivative right of residence – to demonstrate the existence of that right through means other than those documents in Lists A and B of the Immigration (Restrictions on Employment) Order 2007 (as amended by the Immigration (Restrictions on Employment) (Codes of practice and Amendment) Order 2014) which are explained in the preceding sections.**
>
> **In such cases, an employer may choose to accept such alternative evidence or seek further advice from the Home Office. However, in the event that a non-EEA national is found not to qualify to work in the UK, the employer would be liable to payment of a civil penalty unless they checked the documents prescribed in the 2007 Order (as amended by the 2014 Amendment Order) above.**
>
> **Further guidance on EEA and non-EEA family members of EEA nationals can be found via this link."**

18. In **Okuoimose** the Claimant was a member of the family of an EEA national residing in the UK. Her passport had a Home Office stamp stating that she had a right of residence in the UK as a family member of an EEA national resident in the UK, until 8 July 2010. The Claimant had initiated an application to renew the permit on her passport, but this had not been concluded by that date. She was dismissed on the grounds of illegality. The tribunal in that case dismissed her claim against the employer for unlawful deductions, accepting the argument that the contract had become illegal. The EAT (HHJ McMullen QC) allowed the appeal. He accepted the Claimant's primary case that the Claimant's right to work, and therefore entitlement to full pay, did not depend upon the documents from the Home Office. Her right derived from her status as a family member of an EEA national.

19. Having set out the relevant legislation to which I have referred, the judge stated:

> **"19. Persuasively Mr Aughey contends that the language of a person being *granted leave* to enter or leave to remain is different from the language of rights. Three categories of person have rights. They are UK nationals; nationals of an EEA state; and nationals of a non-EEA state who are family members of a person who is. That status does not depend upon marks made in the passport. Further, the entry in the Claimant's passport is consistent with what I hold to be the correct approach, which is in the language of rights and not of permissions, grants, and discretion.**
>
> **20. The central issue, therefore, is did the Claimant, at any time, cease to be a person who was entitled to work under Article 23 of Directive 2004/38? In my judgment, Mr Aughey is right that she had that status at all times and the application for a residence card or permanent residence card did not affect that right. After all, the Secretary of State *must* issue a residence card in respect of such an application. Further, that requirement on the Secretary of State is the implementation in the United Kingdom of Article 25. This precludes the possession of a residence card as a precondition for the exercise of an administrative formality."**

20. He continued that the tribunal had wrongly taken account of the irrelevant consideration that there were penalties to be incurred if the employer got it wrong. Thus:

> **"23.…As I have indicated by the citation from the 2006 Act, penalties are there incurred where leave to remain in the United Kingdom has ceased to have effect by reason of the passage of time. That was cited specifically by the Judge in paragraph 21 and simply has no application here. For, as I have indicated, the Claimant was entitled to be here as of right and did not have leave to enter, nor did the leave to enter, even if she had it, expire with time. She had a right for as long as she met the condition of being a family member of Mr Okuoimose to be here and, therefore, any reference to s.15 is misplaced.**
>
> **24. The Judge accepted the Respondent's argument that it is necessary for the Claimant to produce evidence. That is not the law. The Claimant may apply for residence or permanent residence after five years and she will be granted a residence card - it is a stamp in the passport. That is sufficient evidence of her entitlement for all purposes. It is simply evidence; it is not the creation of such a right which exists independently of the stamp in her passport. The Judge was wrong, in my opinion, to have been influenced by evidential matters when discussing the statutory and treaty rights."**

21. HHJ McMullen accepted the force of the concern expressed by the employers that they may be placed in difficulties if they do not have ready access to the paperwork. However he stated "That is a different sort of regime and it does not affect the legality or otherwise of a contract of employment." [26].

The contractual terms

22. As to the terms of the contract of employment between the Claimant and the Respondent, the document of 1 July 2013 between the Respondent and a limited company included in clause 8 headed "Information We Require":

> **"8.1. The Contractor is required to produce evidence of its Employee's eligibility to work within the United Kingdom forthwith upon Our request. In the event that the circumstances of such Employee changes in any manner that might affect their continued eligibility to work in this country, the Contractor shall immediately inform us of the details."**

The ET Judgment: Findings of fact and conclusions

23. As already noted, the Tribunal's Judgment recorded the agreement of the parties that at the commencement of his relationship with the Respondent he had presented a Residence Card which confirmed his status as a family member of an EEA national, with an expiry date of 20

January 2015. The appeal bundle includes a receipt of that document albeit with a date stamp of 12 February 2014, not 2013. In advance of that expiry date, the Respondent had reminded the Claimant of the need to renew it. The Tribunal concluded that the Respondent "genuinely believed that the Claimant's right to work expired on this date." In the light of the provisions of the EEA Regulations, it had since conceded that this was an erroneous belief. However the Respondent had relied on the Home Office guidance. The Judgment summarised that guidance as it related to employers carrying out checks and obtaining appropriate documents in order to avoid facing a penalty for employing an individual who did not have lawful immigration status. He noted that a List B Part 1 document would include a current Residence Card, issued by the Home Office to a family member of an EEA national; and that List B Part 2 stated that another appropriate document would be a Certificate of Application issued pursuant to the EEA Regulations.

24. The Judgment pointed to the guidance which stated:

> **"A person's application must be made before their leave expires for it to be deemed in time. If you receive a Negative Verification Notice in response to your request you will no longer have a statutory excuse and you should not continue to employ that person."**

As a result of this wording, the Respondent believed that it needed to have clear ECS checks in order to protect itself against any penalties or fines before providing work to the Claimant. The Judgment did not make any reference to the section in the Home Office guidance headed "Additional Information" and relating to family members of EEA nationals. However it noted that the Claimant was "strictly correct" in maintaining that he had the right to work in that capacity and that the Residence Card was not evidence of that right.

25. The Claimant had not applied to the Home Office for an extension of his Residence Card until the afternoon of its expiry, on 20 January 2015. He had, the same afternoon, brought

to the Respondent evidence of the posting of his application to the Home Office. That was not the same as a Certificate of Application listed in List B Part 2. The Tribunal concluded: "The Tribunal finds that it was reasonable for the Respondent not to regard this information as complying with the relevant 2007 Order, namely a document within List B Part 2." [56]. The Certificate of Application was eventually provided and is dated 9 March 2015.

26. The Respondent had before then begun to carry out a series of ECS checks as recommended by the Home Office guidance. All these checks, between 21 January and 15 July 2015, were negative. The Judgment observed that it was not clear why checks provided by the Home Office after the date of the Certificate of Application continued to be negative. The example negative check in the appeal bundle, dated 15 July 2015, includes the following: "This person does not have the right to work in the UK; "You should not employ this person, or continue to employ them, if they are an existing employee as they do not have the right to work in the UK" and "If you are found employing this person illegally, you could be prosecuted for knowingly employing an illegal worker which means you may face an unlimited fine and/or imprisonment."

27. Whilst acknowledging that the Claimant did in fact have the right to work, the Tribunal concluded that it was not unreasonable in the circumstances for the Respondent to rely on the ECS checks provided by the Home Office: [61]. In October 2015 the Claimant received a card confirming a permanent right of residence in the UK from 16 October 2015. This document was provided to the Respondent on 14 October 2015.

28. Following an adverse judgment against the Claimant in respect of the first claim from the first tribunal on 29 October 2015, the Respondent on 17 November 2015 terminated the

A Claimant's employment with immediate effect. The contractual clauses which it relied on (9.2 and 9.3) provide for termination without notice and thus do not relate to the question of eligibility to work in the UK.

B

29. The Tribunal held that the provision of the documentation on 14 October 2015:

> **"… was the documentary evidence of his right to work, which the Respondent needed; although it was accepted that the Claimant always had right to work prior to that date. The Tribunal has found that although the Claimant had the legal status of an employee when he was carrying out his work; he was doing so on the basis of the terms expressed in the limited company contract of July 2013. Under this contract there were no guaranteed minimum hours and the contractor did have to show that the worker providing the service could do so lawfully in terms of immigration status in the UK." [71].**

C

The Respondent submits that the final words of that paragraph can only be a reference to clause 8.1 of the document of 1 July 2013.

D

30. The Tribunal concluded, in respect of the claim of unlawful deduction of wages:

> **"72. The Tribunal finds that from 20 January to 15 October 2015, it was reasonable for the Respondent not to provide work to the Claimant based on the question of his immigration status. The Certificate of Application provided in mid-March 2015 would only have provided "the statutory excuse" for 28 days after the expiry of the original Residence Card — i.e. until 17 February 2015. The ECS checks up to July 2015 had been negative and the Tribunal have found it was reasonable for the Respondent to rely on those checks. It was only in October 2015 that the Claimant had clear documentation which allowed the Respondent to provide him with work, without risk of incurring liability and fines. The Tribunal finds that from 20 January to 15 October 2015 there were no wages properly payable to the Claimant. After 15 October 2015, there was no explanation provided by the Respondent for not assigning work to the Claimant. Therefore, the Claimant's claim for unlawful deduction of wages succeeds for the period of 16 October 2015 to 17 November 2015, when his relationship with the Respondent was terminated.**
>
> **73. The Tribunal was referred by the Claimant's Counsel to the case of Okuoimose v City Facilities Management Ltd UK EAT 2011. This case is about the suspension without pay for an employee whose employer thought she did not have the right to work and that her contract of employment was illegal. The Tribunal notes the content of that case but also notes that the application of that case can be distinguished in this case because there was no question raised that the contract of employment was illegal. The issue is this case, having established that the Claimant had employee status was whether wages were "properly payable" to him, which the Tribunal has concluded was only from 16 October 2015 to 17 November 2015."**

E

F

G

31. As to the claim for direct discrimination, it held:

H

> **79. The Respondent has accepted as unfavourable treatment, the fact that no work was offered to the Claimant from January 2015 to 17 November 2015 and has also conceded that technically it was lawful for the Claimant to work in the UK during that period. The issue before this Tribunal is the reason for that less favourable treatment. The**

> **Tribunal has made detailed findings of fact (set out above) as to the Home Office Guidance and the documentation which the Respondent needed in order to avoid legal liability and fines. The Tribunal has found that it was reasonable for the Respondent to rely on the ECS checks, even though these may not have been correct.**
>
> **80. The Tribunal finds that the Claimant has not shown primary facts for the Tribunal to draw the inference that the unfavourable treatment was on the grounds of his race and/or nationality. The Tribunal accept the Respondent's explanation that the reason was the Home Office's requirements with regards to the various ECS checks which had to be available to the Respondent in the circumstances. The Claimant's claim for direct discrimination is not successful."**

32. As to indirect discrimination, it held:

> **81. The Respondent accepts that it applied to everyone to whom it offered work, who was not an EU national, the PCP that a positive ECS check was required from the Home Office before such work could be offered and undertaken. The Respondent also accepts that such requirement placed the Claimant at a substantial disadvantage when compared with someone who was an EU national. However, the Tribunal accept the Respondent's arguments with regards to objective justification. It must be a legitimate aim of all employers that they comply with the appropriate immigration control and statutory requirements as set down by the Home Office — especially where failure to do so would render them liable to legal and financial penalties. The Tribunal finds that in the circumstances the Respondent's practice of relying on the Home Office ECS checks was a proportionate means of achieving that legitimate aim. The Tribunal notes and has some sympathy with the Claimant in that the ECS checks do not always appear to have been correct: however, that does not mean it was unreasonable for the Respondent to rely on them."**

Grounds of Appeal

33. At the Rule 3(10) Hearing, HHJ Barklem did not require an amended Notice of Appeal, but I accept that the grounds which he allowed to proceed are fairly summarised in the Claimant's skeleton argument as:

> **"a. That the Tribunal erred in law in attempting to distinguish this claim from *Okuoimose v City Facilities Limited* UKEAT/0192/11/DA at [73] (Ground 1); and**
>
> **b. That the Tribunal erred in law at [60] and [79] in holding that it was reasonable for the Respondent (R) to have relied upon the ECS checks for the purposes of the unlawful deduction from wages claims, and the direct and indirect discrimination claims (Ground 2)."**

34. The two grounds of appeal are interwoven. It is convenient to deal with the combined argument as it relates in turn to the decisions on: (1) unlawful deduction of wages (2) indirect discrimination (3) direct discrimination.

Unlawful deduction of wages: submissions

35. On behalf of the Claimant, Mr Bayo Randle submits that the Tribunal wrongly distinguished the decision of the EAT in **Okuoimose** and in consequence wrongly concluded that it was reasonable for the Respondent to rely on the ECS negative checks provided by the Home Office as a reason not to provide work to, nor therefore pay, the Claimant. The decision in **Okuoimose** in particular made clear that (1) a person with the rights derived from Article 23 of the Directive and the EEA Regulations had the same right to work in the UK as a UK or EEA nationals (2) the fact of an application for a Residence Card did not affect that right; and (3) the provisions of s.15 of the **2006 Act** (and by inference the provisions of the 2007 Order), concerning penalties for employers in the context of employees who needed leave to enter or remain in the UK, were irrelevant in the case of an employee who had a right to work in the UK. That this was not in issue was made clear by the Respondent's concession, recorded in the EAT decision of HHJ Hand QC, which was in these terms:

> **"(1) the Respondent concedes that the Tribunal erred in law at paragraph 34 of the Judgment, dated 24 October 2015, in stating that "It would have been unlawful for the [Appellant] to work without a permit";**
>
> **(2) consequent to the Appellant's status as the husband of an EEA national, and as clarified in Okuoimose…the Appellant did have a right to work in the United Kingdom as at 20 January 2015"**

36. The Home Office guidance likewise reflected this distinction between those non-EEA nationals who needed leave to enter or remain (and therefore to work) in the UK and those who had a right to work in the UK as a family member of an EEA national. This was made clear in the section of the guidance headed "Additional Information". Mr Randle pointed in particular to the passages which stated that there was no mandatory requirement for such people to register with the Home Office or to obtain documentation issued by the Home Office; and that it was open to them to demonstrate the existence of that right through means other than those documents referred to in Lists A and B of the 2007 Order. The Respondent had received a copy of the relevant part of the Claimant's Nigerian passport, containing the Home Office residence

documentation expiring on 20 January 2015. There was no dispute he was a family member of an EEA national residing in the UK. Furthermore by letter dated 27 March 2015 the Claimant had sent the Respondent a grievance letter which emphasised the right to work which he enjoyed pursuant to his status and the EEA Regulations and expressly referred to the decision in **Okuoimose**.

37. The Tribunal had wrongly distinguished that decision on the basis that the present case did not involve an attempt to defend the claim on the grounds that the contract of employment was illegal. That was an immaterial distinction. The significance of **Okuoimose** was that it established that the employer's reliance on the provisions of the **2006 Act** and 2007 Order was irrelevant if the employee had a right to work pursuant to the Directive and the EEA Regulations. It followed that the Tribunal had erred in law in concluding (1) that it was not unreasonable for the Respondent to rely on the ECS checks provided by the Home Office in order to avoid incurring any penalty or fine pursuant to the 2007 Order; and (2) that accordingly the Respondent had a valid defence to the claim for unlawful deductions.

38. In reply Mr Jack Mitchell, appearing with Ms Rachel Owusu-Agyei, submitted that the appeal in respect of unlawful deductions missed the central point that the Tribunal's decision was based on the provisions of clause 8.1 of the contract document of 1 July 2013. At paragraph 52 of the Judgment the Tribunal referred to that clause, albeit with the evident typographical slip that it was "clause 8.21". At paragraph 71, it expressly distinguished the Claimant's right to work as a family member of an EEA national from his contractual obligation. Thus it found that, albeit as an employee and not self-employed, he was working on the basis of the terms expressed in the contract document of 1 July 2013 and that under its terms

"…the contractor did have to show that the worker providing the service could do so lawfully in terms of immigration status in the UK."

39. The provisions of clause 8.1 required the contractor "…to produce evidence of its Employee's eligibility to work within the United Kingdom forthwith upon Our request." The Tribunal in effect had found that the Respondent reasonably required the Claimant to provide evidence of his eligibility to work in the form of a positive ECS check; and therefore had been contractually entitled to rely on the negative results from the Home Office as a reason to refuse work or pay between 20 January and 15 October 2015.

40. In **Okuoimose**, by contrast, there was no such bar in the claimant's terms of contract. The only defence advanced was that of illegality; and that was wrong in law. Accordingly the Tribunal was right to distinguish **Okuoimose**, which was irrelevant to the present case. Furthermore, to the extent that there was an appeal against the Tribunal's conclusions in respect of the document dated 1 July 2013, this had been dismissed at the Rule 3(10) Hearing. Leaving aside the contractual position, it was wrong to treat the right to work under the Directive and the EEA Regulations as if it were unqualified. He pointed to the various conditions identified in the Directive and the EEA Regulations.

41. The Claimant had come to the UK in 2003. His Residence Card had been issued on 20 January 2010 for a five-year period. He was at all times "subject to immigration control" within the meaning of s.15 because he was not an EEA national. Mr Mitchell acknowledged that, since the Claimant did have the right to remain and work pursuant to the Directive and the EEA Regulations, the penalty provisions in s.15 of the **2006 Act** were not in fact engaged in his case. However, in the face of the negative ECS checks which warned that to employ the

Claimant would risk criminal prosecution, it was obviously reasonable for the Respondent to have acted as it did. The Claimant's letter of 27 March 2015 was of no assistance, for on either side of that letter were those negative ECS checks.

42. In any event, even if the necessary information were confined to a valid passport and proof that he was a family member, the Claimant's passport had in fact expired on 3 November 2014. At the appeal hearing, Mr Mitchell handed up a copy of the relevant page which was also date stamped as received on 12 February 2014.

43. In response to the contractual argument, Mr Randle did not accept that the Tribunal had in fact made its decision on the basis of clause 8.1 of the contract document of 1 July 2013. That was not clear from the its Judgment. If it had, and in the context of an employee who enjoyed the right to work under the Directive and the EEA Regulations, the clause on its proper construction did not entitle the Respondent to require the production of evidence on the basis of the irrelevant provisions of s.15 of the **2006 Act** and the 2007 Order. This construction also reflected the Home Office guidance in the section headed "Additional Information." This made clear that those in the Claimant's position did not need to register with the Home Office or to obtain documentation issued by the Home Office. In circumstances where there was no need to register, it was unsurprising that an ECS check might produce a negative result. Had the Tribunal taken account of that section of the guidance, it would have had to conclude that in circumstances where the Claimant had supplied evidence of his passport and there was no dispute that he was a family member, he had supplied all the information which could properly be requested under clause 8.1.

44. As to the expiry of the passport in November 2014, this had not previously been raised as an issue and there had been no requests for evidence of a successor passport. Furthermore, since it was common ground before the Tribunal that the Claimant had a right to work throughout the period January to October 2015 by virtue of the EEA Regulations, it was implicit that at all material times he held a valid passport.

Unlawful deductions - conclusions

45. The first question is whether the Tribunal in fact rejected the s.13 claim on the basis that (1) the contract of employment was subject to clause 8.1 of the 1 July 2013 document and (2) that this entitled the Respondent to require the Claimant to produce evidence of his eligibility to work in the form of a positive ECS check.

46. Although its reasoning is, with respect, expressed somewhat elliptically, I am satisfied that the Tribunal did reach its conclusion on that basis. As I read the Judgment, the Tribunal regarded the primary source of the contractual relationship as being the document dated 1 July 2013. Insofar as this purported to treat the contracting party as a limited company, it held this not to be the reality of the relationship and concluded that the Claimant was the contracting party required to carry out the daily care work as an employee of the Respondent: see paragraphs 68 to 71. However, in the same paragraphs, it also found that the Claimant was carrying out the works on the basis of the terms set out in that same document.

47. In the final sentence of paragraph 71 the Tribunal referred to a contractual provision in terms that "the contract did have to show that the worker providing the service could do so lawfully in terms of immigration status in the UK." That was evidently intended to be a reference to clause 8.1 which had previously been noted, albeit with an obvious typographical

A error, in paragraph 52. Although the Tribunal did not spell this out, the terms contained in the 1 July 2013 document evidently had to be read in a way which removed the distinction between "the Contractor" and "the Employee". Thus the first sentence of clause 8.1 would have to be read as "The Employee is required to produce evidence of his eligibility to work within the United Kingdom forthwith upon our request."

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C 48. On a fair reading of the Judgment, and in particular paragraphs 60 and 71-72, the Tribunal held that the Respondent had pursuant to clause 8.1 reasonably requested production of evidence, namely positive ECS checks, which the Claimant had not provided. Accordingly the Claimant had not satisfied the condition of the contract which entitled him to work and to payment for that work.

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E 49. However in my Judgment, that is not the end of the appeal on the s.13 claim. This is because the decision and reasoning in **Okuoimose** were potentially relevant to the question of whether the Claimant had failed to satisfy clause 8.1. True it is that the employer's defence in **Okuoimose** was illegality; and there was no dispute that if, that defence failed, the Claimant was entitled to her pay. However in rejecting the defence of illegality HHJ McMullen QC made clear that the provisions of the penalty scheme under the **2006 Act** and 2007 Order were irrelevant to Mrs Okuoimose's established right to work under the Directive and the EEA Regulations.

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G 50. Furthermore, the Home Office guidance expressly distinguished those circumstances. In doing so it made clear that those with a right to work did not have to register with the Home Office or to obtain documentation issued by the Home Office.

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51. In my judgment, the distinction which **Okuoimose** and the Home Office guidance clearly identified was potentially relevant to the Tribunal's necessary analysis of the evidential requirement which could be imposed on the Claimant pursuant to clause 8.1. In this respect it is to be noted that, when summarising the effect of that clause in paragraph 71, the Tribunal did so in the terms that I have just identified. I consider it properly arguable that, in circumstances where the employee did in fact have a right to work under the EEA Regulations, on a proper construction of clause 8.1 it would be sufficient for the employee to produce evidence that he was a family member of an EEA national and held a valid passport. In other words, that in such circumstances the employer was not entitled to request documentary evidence relevant only to those who required leave to enter or remain in the UK within the meaning of s.15 of the **2006 Act** and/or the 2007 Order.

52. In reaching its Judgment on the contractual issue, the Tribunal disregarded **Okuoimose** and the distinction which it highlighted and took no account of the related "Additional Information" section in the Home Office guidance. In fairness, it is not clear whether any submissions were addressed by either Counsel in respect of that section. However, as the pagination makes clear, the relevant page was in the trial bundle. The original grounds of appeal did not contain a direct challenge to the Tribunal's implicit conclusion that clause 8.1 entitled the Respondent to require the Claimant to produce positive ECS checks; and hence there was no dismissal of any such challenge at the Rule 3(10) Hearing. However, I consider that the grounds of appeal which were allowed to go forward are sufficiently wide to embrace the argument that, by treating the decision in **Okuoimose** as irrelevant and by extension taking no account of the related section of the Home Office guidance, the Tribunal erred in its interpretation of clause 8.1 and its consequential conclusion that it was reasonable for the Respondent to refuse the Claimant work or pay in the absence of positive ECS checks.

53. Contrary to Mr Randle's submission, I am not persuaded that I am in as good a position as the Tribunal to resolve these questions; whether as to the proper construction of clause 8.1 or as to whether in the light of that construction it was satisfied. These have to be resolved within their factual context which extends beyond the ambit of the particular issues raised in this appeal. The s.13 claim must therefore be remitted for reconsideration afresh. The parties agreed that, should I reach this conclusion, the remission should be to the same Tribunal.

Indirect discrimination

54. Mr Randle submits that the Tribunal's disregard of **Okuoimose** and the related "Additional Information" in the Home Office guidance fatally undermined its conclusion on the claim of indirect discrimination. The Respondent accepted that the PCP, which required of non-EU nationals a positive ECS check, placed the Claimant at a substantial disadvantage when compared with someone who was an EU national. However the Tribunal accepted the Respondent's justification defence, holding that it was a legitimate aim of all employers to comply with the appropriate immigration control and statutory requirements as set down by the Home Office; and that in the circumstances its practice of relying on the Home Office ECS checks was a proportionate means of achieving that legitimate aim.

55. If the Tribunal had recognised that the provisions of s.15 of the **2006 Act** and the related 2007 Order had no relevance to the Claimant's established right to work, and had taken account of the related Home Office guidance, it must inevitably have concluded that its practice of reliance on the ECS checks was not a proportionate means of achieving the legitimate aim of compliance with the immigration control and statutory requirements of the Home Office. This required no further factual consideration but was the necessary consequence of the Tribunal's failure to take account of **Okuoimose** and the guidance.

56. Mr Mitchell's essential response was that the issue of proportionality was a question of fact for the Tribunal. There was no error of law in its treatment of **Okuoimose.** Bearing particularly in mind the penalties which employers could face if they did not require and receive the appropriate documents from prespective or actual employees pursuant to the **2006 Act** and 2007 Order, and the strictures contained in the terms of negative ECS checks, the Tribunal's conclusion of fact was unimpeachable.

57. I recognise, of course the difficult position in which employers may be placed in these circumstances. However the Claimant had a right to work; and as the Home Office guidance made clear, was under no obligation to register with or obtain documentation from the Home Office. In consequence of the Respondent's requirements of positive ECS checks, and Home Office responses which for some reason were negative, his ability to exercise that right was prevented.

58. In my judgment, when considering this claim the Tribunal should have taken account of the decision in **Okuoimose** and the Home Office 'Additional Information'. This was relevant both to the legitimate aim, i.e., to the extent of identifying what were the relevant immigration control and statutory requirements, and to the proportionality of the means used to achieve that aim. I am again not persuaded that the question necessarily admits of only one answer. In consequence this claim must also be remitted to the Tribunal for reconsideration.

Direct discrimination

59. Mr Randle submits that the Tribunal's disregard of **Okuoimose** and the Home Office 'Additional Information' also undermines its rejection of the claim of direct discrimination. Having concluded that it was reasonable for the Respondent to rely on the ECS checks, it held

that the Claimant had not shown primary facts from which it could draw an inference that the admittedly unfavourable treatment in offering him no work between January and November 2015 was on the grounds of his race and/or nationality. It also accepted the Respondent's application that the reason for offering no work was the negative ECS checks. If the Tribunal had taken account of **Okuoimose** and the guidance, and in consequence also the Claimant's letter of 27 March 2015 which identified the basis of his right to work and expressly referred to **Okuoimose**, it might have (1) concluded that the Claimant had overcome the first hurdle of establishing primary facts from which an inference of discrimination could be drawn, and (2) not accepted the Respondent's explanation for its unfavourable treatment of the Claimant. Mr Randle accepted that this would be a matter for determination by the Tribunal.

60. For the reasons advanced by Mr Mitchell, I do not accept this part of the appeal. In particular, I can see no reason why the Tribunal might reach any other conclusion as to the truth of the explanation given by the Respondent, i.e. as to the 'reason why'. There was no suggestion of any substantive problem in the employment relationship before 20 January 2015, in the sense of any dissatisfaction of the Respondent with any aspect of the Claimant's work or personality. There was a natural concern to avoid the penalties identified in the **2006 Act** and 2007 Order, only magnified by the severe warnings contained in the negative ECS checks. The Claimant's letter of 27 March 2015 must be seen in the context of the negative ECS checks which the Respondent received before and after that letter. In all the circumstances, I can see no basis on which the Tribunal could have upheld this claim.

61. Accordingly the appeal in respect of the claim of direct discrimination must be dismissed. The appeal in respect of the claims for unlawful deductions and for indirect

A discrimination is allowed. Those two claims will therefore be remitted to the same Tribunal for reconsideration in the light of this Judgment.

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