Appeal No. UKEAT/0236/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 December 2019
Judgment handed down on
16 January 2020

Before

THE HONOURABLE MR JUSTICE KERR

MS SUSAN WILSON CBE

MR CLIFFORD EDWARDS

MS SOPHIA WALKER	APPELLANT
WALLEM SHIPMANAGEMENT LIMITED	FIRST RESPONDENT
MR BRIAN PHIPPS	SECOND RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

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For the Appellant	MR NIRAN DE SILVA MR EDWARD KEMP (of Counsel) Instructed through: Advocate (formerly the Bar Pro Bono Unit)
For the First Respondent	MR DAVID READE QC (Of Counsel) Instructed by: Mayer Brown International LLP, 201 Bishopsgate, London EC2M 3AF
For the Second Respondent	DEBARRED FROM TAKING PART IN THE APPEAL

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SUMMARY

JURISDICTIONAL POINTS – Working outside the jurisdiction

The employment tribunal had not erred in law by deciding that it had no power to entertain the claimant's claim for sex discrimination. The tribunal was correct to hold that the combined effect of section 81 of the Equality Act 2010 (the 2010 Act) and regulation 4 of the Equality Act (Work on Ships and Hovercraft) Regulations 2011 (the 2011 Regulations) was that Part 5 of the 2010 Act did not apply to protect the claimant against sex discrimination in respect of her recruitment in England to work on foreign registered vessels outside Great Britain.

The Hong Kong based respondent is an employment service provider within section 55 of the 2010 Act. It provides personnel to serve on foreign registered ships sailing outside United Kingdom waters. The female claimant qualified as a cadet deck officer and applied in this country through the respondent for work on a foreign registered ship. The respondent informed the claimant that it would not offer her work because of her sex; the respondent recruited only men, not women, to work on its clients' ships.

The first respondent admitted that this was an act of direct sex discrimination. The tribunal also found, subject to the jurisdiction point, that the claimant's claim for victimisation would have succeeded, though her claim for harassment would have failed. The tribunal would have awarded compensation for injury to feelings of £9,000. Her claim for loss of earnings would not have succeeded as she had since succeeded in obtaining employment with earnings sufficient to offset any such loss.

The appeal tribunal dismissed the claimant's appeal with regret. The respondent's conduct had been reprehensible, but the tribunal had been powerless to right the injustice done to the claimant. The 2011 Regulations, surprisingly, permit an offshore employment service provider to discriminate on United Kingdom soil on the ground of any of the protected characteristics in the 2010 Act when recruiting, in this country, personnel to serve on its clients' foreign flagged ships sailing outside United Kingdom waters.

No international law obligation of the United Kingdom requires UK domestic law to permit such discrimination. It is, at least, doubtful whether the 2011 Regulations conform to the provisions of Directive 2006/54/EC (the Equal Treatment Directive). The claimant has no remedy against the respondent because the latter is not an emanation of the state. The claimant's remedy, if any, lies against the United Kingdom itself.

The Secretary of State may well consider it wise to revisit the scope of the 2011 Regulations. A review and report on their impact is due to take place soon, in accordance with regulation 6.

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THE HONOURABLE MR JUSTICE KERR

Introduction

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1. This appeal raises a short point on the application of Part 5 of the Equality Act 2010 to those who work or are seeking work on a ship which is not registered in the United Kingdom and sails in foreign waters. The appellant (whom we will call the claimant) sought, in England, from the respondent, a service provider of employees to work on ships, work aboard a foreign registered cargo ship destined for foreign waters.

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2. She was in substance told by the second and first respondents that she would not be employed on a non-UK flagged ship because she is a woman. This was, plainly, an act of direct sex discrimination. When she complained, she was treated by the first respondent in a way that would amount to victimisation as well. However, the tribunal was persuaded that it lacked jurisdiction to determine her claim. The second respondent took no part below or in this appeal.

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3. The tribunal went on to decide that if had had jurisdiction over the claim, it would have succeeded on the basis of direct sex discrimination and, in part, of victimisation, but the harassment claim would have failed. The tribunal quantified the compensation it would have awarded at £9,000, for injury to feelings, and nil for financial loss since the claimant's actual earnings matched any earnings lost through unlawful acts over the relevant period.

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4. The appeal is against a decision of Employment Judge Warren, sitting with Mr D. Sutton and Mr R. Eyre in Cambridge. The hearing was from 9-11 May 2018. The reserved judgment and reasons were dated 12 June 2018 and sent to the parties on 14 June 2018. The appeal is brought on two grounds, which may be taken together. Both depend on whether the tribunal misinterpreted section 81 of the Equality Act 2010 (the 2010 Act), read with the Equality Act (Work on Ships and Hovercraft) Regulations 2011 (the 2011 Regulations).

The Relevant Statutory Provisions

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5. As is well known, the 2010 Act consolidated and codified the most important and fundamental provisions of discrimination law. Part 2 defined the protected characteristics and types of prohibited conduct. Part 5, entitled *Work*, enacted the scope of actionable discrimination in the context of work, in sections 39 to 83. Chapter 1 (sections 39-60) is headed *Employment, Etc*. It defines, among other things, the circumstances in which acts of discrimination may be committed in the work context.

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6. These include discrimination at the point of selection for work; discrimination during the course of the working relationship; and, in some cases, post-employment discrimination in the form of victimisation. As well as those who employ people directly, those who supply labour to clients are covered (with one exception not material here); see section 55 and 56 dealing with employment service providers. Employment service providers too must not discriminate in relation to selection for recruitment of persons to work for their clients.

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7. Section 81(1) of the 2010 Act, near the end of Part 5, provides that Part 5 applies in relation to work on ships, work on hovercraft and seafarers "only in such circumstances as are prescribed". By section 81(2), for the purposes of the section "it does not matter whether employment arises or work is carried out within or outside the United Kingdom." By section

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81(5) a "seafarer" means "a person employed or engaged in any capacity on board a ship or hovercraft."

8. Section 81 was brought fully into force on 1 August 2011, the same day the 2011 Regulations entered into force. Until those Regulations were ready, transitional provisions preserved the old law on application to seafarers and in respect of work on ships and hovercraft, found in the statutes (the Sex Discrimination Act 1975 and the Race Discrimination Act 1976) among those consolidated into the 2010 Act.

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9. The 2011 Regulations were made under section 81 (among other provisions). They prescribed the circumstances in which Part 5 of the 2010 Act applies in relation to work on ships, work on hovercraft and seafarers. Regulations 3, 4 and 5 are the most relevant to this appeal. They are detailed. We have set them out in full (ignoring Brexit-related amendments due to come into effect on a date to be appointed) in the appendix to this judgment.

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The Facts and the Proceedings Below

10. The tribunal found the following facts, so far as relevant to this appeal. The first respondent (Wallem) is a Hong Kong company which provides ship management services to cargo ship operators. Its business is based mainly in Hong Kong, Germany and Singapore. In 2016 Wallem sent a representative, the second respondent Mr Phipps, to interview graduates of the Blackpool & Fylde College including the son of the managing director Mr Price. Wallem proposed to interview ten graduates as potential ships' crew.

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11. The claimant was by then a qualified deck officer, recently graduated from the College. She was one of those interviewed. After some correspondence between Wallem and Mr Ward, a senior tutor at the College, Mr Phipps emailed Mr Ward saying that Wallem was "an equal opportunity company" but "will not offer places for the female cadets because we can't offer the appropriate on-board environment …". He went on to give his opinion that "girls have a place and a chance to succeed" but suggested the cruise industry would be better for them.

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12. Mr Ward forwarded that email to the male candidates and copied it to the claimant, who made a formal complaint to Wallem on 19 July 2016, saying she was outraged and disgusted. She pointed out that her maritime qualifications and experience matched those of the male applicants. She said she had "sustained deep humiliation", demanded a response and said she had contacted various news and media and other organisations.

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13. There was then a flurry of internal correspondence within Wallem, not so much about any wrong done to the claimant but about annoyance with Mr Phipps for having damaged Wallem's reputation and about how to limit the damage. Mr Phipps was suspended and subsequently dismissed by Wallem. Mr Price wrote to the claimant on 20 July 2016, apologising and offering a dialogue. The interviews and recruitment process at the College were cancelled. The claimant asked for any further response to be in writing, saying she hoped for a positive resolution through the ACAS early conciliation procedure.

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14. On 3 August 2016, an article appeared in the Fleetwood Weekly News quoting an unnamed Wallem source which turned out to be Mr Price who accepted that he had said what was attributed to him: that there was "no reason Ms Walker could not be employed by the company but in this instance there were concerns because she would have been the only woman

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taken on" and Wallem "wanted to ensure that it had a suitable environment in place before female staff are employed".

15. After that, there was further correspondence and publicity given to the incident in this country and elsewhere, including Hong Kong. The concern of Wallem was to protect its reputation and limit the damage from the incident. The claimant, for her part, invoked the ACAS early conciliation process. But when ACAS contacted Wallem, Mr Price was reluctant to engage with the process because it did not want to appear to acknowledge the jurisdiction of the tribunal. Mr Price hoped that ACAS might "tell her not to be silly and let the matter drop".

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16. The claimant did not do so. She brought proceedings and was represented at the hearing by her sister, Ms H. Laurent, whose advocacy at the hearing was complimented by the tribunal. There were various procedural arguments which do not concern us in this appeal. At a late stage Mr David Reade QC, appearing below as well as before us, took the point that the tribunal had no jurisdiction to entertain and determine the claim for sex discrimination, victimisation and harassment because Wallem had no presence in this country and the planned interviews were for jobs on foreign registered ships destined to sail in foreign waters.

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17. Mr Reade accepted that the tribunal had power under its procedural rules to hear the case. He accepted also that Mr Phipps' initial email was an act of direct sex discrimination. He accepted that Wallem was, at least arguably, an employment service provider within section 55 of the 2010 Act. But, he said, Part 5 of the 2010 Act did not apply to the causes of action advanced by the claimant and therefore the tribunal could not determine her claims. He relied on section 81 of the 2010 Act as excluding the tribunal's jurisdiction over the claims and submitted that the 2011 Regulations did not reinstate the jurisdiction excluded by section 81.

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18. The tribunal accepted those submissions. They said that the claimant is a seafarer and was applying for selection to work aboard a ship not registered in the United Kingdom, sailing in non-UK waters. Regulation 4(2) of the 2011 Regulations did not reinstate the tribunal's jurisdiction because the work for which the claimant was applying was on board a foreign registered ship sailing in foreign waters. They considered whether the exclusion of jurisdiction in section 81 might not apply, on the basis that the claimant had not yet become a "seafarer"; and whether section 81 might not apply to cases of "pre-employment" discrimination at the point of selection for work. They considered but rejected that interpretation.

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19. The tribunal went on to say what its decision on the merits would have been if it had had jurisdiction. They decided that the claim for direct discrimination would succeed, as would the claim for victimisation; not offering the claimant an interview was a detriment caused by her complaint of 19 July 2016, which was a protected act. Three other detriments relied on by the claimant as acts of victimisation were rejected by the tribunal. Her claim for harassment would also have failed.

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20. The tribunal rejected her claim for loss of earnings; she was earning in other employment enough to eliminate any financial loss from Wallem's acts. They considered injury to feelings and, after considering the conventional bands, said their award would have been £9,000, within the middle band. To that figure, interest would have been added in the usual way. However, the absence of jurisdiction defeated the claim in its entirety.

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The Issues, Reasoning and Conclusions

21. Both parties developed the arguments beyond those advanced below. We agree with this approach, since the point arose at short notice below and the claimant was not then professionally represented. In the appeal, the claimant was represented by Mr de Silva and Mr Kemp, acting pro bono. We are, as ever, very grateful for this service to parties who would usually otherwise be unrepresented.

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22. The main submissions on behalf of the claimant made in oral and written argument can be paraphrased as follows:

(1) The exclusion, by section 81, of Part 5 from application in relation to work on ships and hovercraft and seafarers, is limited to cases where there is an actual employment relationship. This interpretation is supported by the language used and by references in the government's explanatory materials which are admissible to indicate the statutory purpose. The exclusion does not apply in this case and the subsequent question whether jurisdiction is reinstated by the 2011 Regulations therefore does not arise.

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(2) The use of the present tense and present participles in the verbs used in section 81 supports the claimant's interpretation: "it does not matter whether employment arises or work is carried out within or outside the United Kingdom" (section 81(2)); a "seafarer" is "a person employed or engaged in any capacity on board a ship or hovercraft (section 81(5)). Mr de Silva pointed to instances from *Bennion on Statutory Interpretation*, 7th edition, at pp. 527-530 where in other contexts the tense used was decisive of the meaning of a provision.

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(3) The explanatory notes to section 81 refer to the Act being generally silent on territorial application, which is not adequate for seafarers who "work on ships" (in the present tense) "that may be constantly moving between waters …". The notes therefore envisage a seafarer being in actual work on a ship rather than awaiting assignment to a ship during a pre-employment selection exercise.

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(4) The explanatory note to the 2011 Regulations likewise refers, at paragraph 2.1, to "seafarers working on … ships and hovercraft…". Other explanatory notes to the 2011 Regulations describe their purpose as "to apply Part 5 … to work on ships (including hovercraft) and seafarers". The Regulations "specify to which seafarers, working on which ships, working in which waters, Part 5 of the Act applies".

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(5) The 2011 Regulations may be prayed in aid to help interpret the relevant provision in the parent statute, here section 81, especially since they form a package and are roughly contemporaneous. The common law principle of the right to work, famously expounded by Lord Denning MR in *Nagle v. Fielden* [1966] 2 QB 633, at 644G, and the presumption against statutory destruction of fundamental rights without clear words, point strongly in favour of the claimant's interpretation.

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(6) Wallem's construction, on the other hand, would violate the right not to be discriminated against found in the Equal Treatment Directive (Directive 2006/54/EC), articles 14 and 17; the Charter of Fundamental Rights of the European Union (2012/C 326/02), articles 21, 23 and 47; the common law principle that where there is a wrong there should be a remedy (see e.g. Lord Dyson JSC in *Jones v. Kaney* [2011] 2 WLR 823, at [113]); and the principles of equivalence and effectiveness.

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(7) Wallem's construction leads to absurdity: a person may be recruited in the territory of the United Kingdom (which is within the territory of the EU and the European Economic Area (EEA)) using overtly and unrepentantly discriminatory criteria; for example, Wallem could have used openly racist or otherwise discriminatory recruitment criteria (e.g. "no Jews or Muslims", "no gays", etc). That would be unjust and abhorrent. This unfortunate result is avoided by confining section 81 narrowly so that it only applies to actual work on a non-UK ship sailing in foreign waters.

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(8) The phrase "employment arises" within the words in section 81(2) "… it does not matter whether employment arises or work is carried out within or outside the United Kingdom" should therefore not, as the tribunal found, be held to embrace what the tribunal called the "pre-employment scenario". A purposive construction should be adopted to preserve compatibility of the provision with the European law obligations of the United Kingdom (*Marleasing SA v. LA Comercial de Alimentación SA* (Case C-106/89) [1990] ECR I-4135).

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23. For Wallem, Mr Reade defended the reasoning and conclusion of the tribunal and made further submissions in support of the tribunal's interpretation of section 81. We paraphrase his principal arguments in the following way:

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(1) section 81 operates to exclude the application of Part 5 of the 2010 Act in all cases except where regulations prescribe otherwise. The starting point in section 81 is that Part 5 is excluded in relation to work on ships, work on hovercraft and seafarers. Regulation 3 of the 2011 Regulations then reinstates Part 5 but only in the cases covered by that regulation. For regulation 3 to apply, the work must be at least partly in Great Britain (including British territorial waters) and on a ship registered in either the UK or an EEA state.

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(2) It is common ground that regulation 3 does not apply to the claimant's case because she was not intending to work in Great Britain at all. The claimant's case falls not within regulation 3 but within regulation 4, in that her intention was to work wholly outside Great Britain and its adjacent waters; but regulation 4 does not apply Part 5 of the 2010 Act in her case because the condition in regulation 4(1)(a) is not met: the work must be on a UK registered ship; the claimant's intended work was not.

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(3) Whether or not the claimant, a qualified deck officer though without work experience as such, was a "seafarer" within section 81(1), the exclusion of Part 5 by section 81 is not limited to persons who are actually working on board a ship (or hovercraft). A definition of seafarer would be unnecessary if it embraced only those actually working on a ship; such persons would be caught by section 81(1) anyway.

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(4) Neither section 81 (in particular section 81(2)), nor the 2011 Regulations, are confined to current employment rather than also including applications for employment. The use of the present tense does not lead to that conclusion; if it did, only those parts of Part 5 prohibiting discrimination against current employees would have been included within the scope of section 81. Instead section 81, where it applies, excludes the whole of Part 5.

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(5) Section 81(2) makes clear that the section applies regardless of whether the work is carried on inside or outside Great Britain. This removes an argument that could otherwise arise about the territorial reach of the 2010 Act, where a person works within the United

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Kingdom. Subsection (2) is there to ensure it is clear that the exclusion of Part 5 applies even where the work is carried out or is to be carried out in Great Britain.

(6) It is the claimant's construction that leads to absurdity. If it were correct, an employer could be liable for discriminatory practices in recruitment in this country but escape liability for discrimination against the same employee from the moment a contract of employment is entered into, either aboard ship or even before the employee goes aboard. Similarly, an employer who victimised an ex-employee by, say, refusing to write a reference because the ex-employee had done a protected act, would be liable while the same employer would escape liability for earlier discrimination during employment aboard ship.

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(7) Wallem's construction does not entail breaches of European law obligations by the United Kingdom. The explanatory memorandum to the 2011 Regulations made clear (see paragraphs 7.4 and 7.5) that the Regulations were being enacted within the constraints of the UK's obligations under the United Nations Convention on the Law of the Sea (10 December 1982) ("UNCLOS") which restricts the ability of states to apply their legislation to ships flying a different flag (see articles 92 and 94, within the *General Provisions* section (section 1) of Part VII, entitled *High Seas*.

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(8) The European Union is itself a party to the UNCLOS: see Council Decision 98/392/EC, 1998 OJ L179; and Professor Esa Paasivirta's article *The European Union and the United Nations Convention on the Law of the Sea*, (2015) (vol. 38, article 5, *Fordham International Law Journal*) at page 1050, footnote 10, citing Decision 98/392/EC. The text of that Decision was not available at the hearing, but reads as follows, at article 1(1): "[t]he United Nations Convention on the Law of the Sea and the Agreement relating to the implementation of Part XI thereof are hereby approved on behalf of the European Community." (Part XI deals with enclosed or semi-enclosed seas).

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(9) Under the old law (section 10 of the Sex Discrimination Act 1975 and section 9 of the Race Relations Act 1976) the exemptions from discrimination law were broader than under section 81 of the 2010 Act and the 2011 Regulations. For example, under the 1975 Act it was lawful to have a "men only" policy for recruitment to work aboard a UK flagged ship, provided the work was to be done wholly outside Great Britain. It was also lawful under the 1976 Act to recruit foreign ships' crew abroad on a basis that discriminated on the ground of race or nationality.

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(10) The government consulted on the draft Regulations, specifically regarding the practice of nationality-based pay differentials. The consultation exercise, as shown in the explanatory memorandum accompanying the 2011 Regulations (paragraphs 7.8, 8.1-8.3) led to the inclusion of regulation 5, providing that it is not unlawful to offer to pay or to pay different rates to seafarers (applicants for work or employees or contract workers) from non-EEA states or non-designated states (whose citizens are entitled to rights equivalent to those from EEA states), where a seafarer is recruited outside Great Britain.

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(11) Regulation 5 would make no sense unless the exclusion of Part 5 protection wrought by section 81 of the 2010 Act bites on applicants for work as well as on those already employed. Regulation 5 is crafted on the basis that it applies to nationality-based differentials in offers of work as well as to nationality-based differentials in payments to those already in work. It is unreal to suppose that the application of regulation 5 to offers of work could only have effect where the offer is made to a person already employed.

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24. We come to our reasoning and conclusions, having carefully considered the rival contentions of the parties. We start, as usual, with the words of the statute, section 81 of the 2010 Act. It is true that the drafter has used the present tense and participle in the phrases "employment arises", "work is carried out" and "a person employed or engaged". Similarly, in regulation 4 of the 2011 Regulations the present tense is used in the phrase "a seafarer who works wholly outside Great Britain." The language used does connote current employment.

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25. On the other hand, regulations 3 and 4 of the 2011 Regulations apply or disapply the whole of Part 5, not only parts of it. They do not carve up Part 5 into applied parts and disapplied parts. Part 5 is entitled *Work*, while Chapter 1 (headed *Employment, Etc*) includes provisions that plainly apply to the pre-employment recruitment process and not just the employment (or worker) relationship.

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26. It is not until we get to regulation 5 that the application or non-application of Part 5 is carved up, i.e. it is modified rather than applied or disapplied wholesale. Under regulation 5 (but not regulations 3 and 4), Part 5 is applied differentially, so that some parts apply and others do not. And regulation 5 is dealing expressly with circumstances in which (by virtue of regulation 3 or 4) the whole of Part 5 would otherwise apply.

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27. Regulation 5 creates a limited exception in the case of payment, or offered payment, of nationality-based differential rates. The part of regulation 5 dealing with offers to pay would be redundant if discrimination in relation to pre-employment offers of work, or offers of work on particular terms, were already excluded (other than in prescribed cases) from the general disapplication of Part 5 by section 81. We agree with Mr Reade that this feature of the regime points against the uses of the present tense being decisive in favour of the claimant.

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28. Aside from questions of policy and justice, therefore, we would prefer Wallem's construction of the 2010 Act and the 2011 Regulations. Nor do we consider the claimant is assisted by the explanatory notes to the 2010 Act and the 2011 Regulations. The language in the notes includes the same use of the present tense as found in the provisions themselves. The statutory purpose is clearly to delineate cases where rights under Part 5 of the 2010 Act may be enjoyed and those in which they may not be, in the context of work connected to seafaring. To find out where that line is drawn, one is driven back to the language of the provisions.

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29. We therefore consider whether there are reasons of policy or justice which impel us to prefer the claimant's construction and, if so, whether we can apply the *Marleasing* principle and adopt a construction that confines the injustice as narrowly as possible by applying the exclusion of Part 5 only to cases of actual employment, not recruitment. The claimant says that Wallem's construction is unjust on several counts: it infringes the principle that where a wrong is done, there should be a remedy; it denies the claimant rights not to suffer discrimination, conferred by the Equal Treatment Directive and the Charter of Fundamental Rights; and it undermines the common law "right to work" articulated in *Nagle v. Fielden*.

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30. We accept the force of Mr de Silva's point that Wallem's interpretation enables a foreign based recruiter of seafarers in this country, such as Wallem itself, with complete immunity to commit what would ordinarily be flagrant tortious conduct on UK soil, including harassment and other overtly discriminatory acts of a kind that society regards with abhorrence. We agree that this a matter of serious concern. We doubt whether the Secretary of State intended, when enacting the 2011 Regulations, to confer such immunity.

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31. If we were to accept the claimant's interpretation of the provisions, we would be mitigating the injustice but not eliminating it. It would still be lawful for the likes of Wallem, recruiting workers to work on foreign registered ships in foreign waters, to discriminate on UK soil once an employment relationship had begun. We would not need to decide the position once the relationship had ended, for example in the case posited by Mr Reade of a refusal to write a reference for the prohibited reason that an ex-employee had done a protected act.

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32. We accept Mr Reade's point that the 2011 Regulations were enacted with the UNCLOS in mind and that the EU may be taken to be a member, or at least a supporter, of the obligations of EU and EEA states (and other designated states) under that Convention. We accept also his further point that the solution envisaged in the 2011 Regulations does pay heed to the rights of nationals of EEA and designated states, by extending to them the protection of Part 5 where the relevant non-UK registered ship flies the flag of an EEA or designated state.

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33. We doubt, however, whether the 2011 Regulations fully address the rights to equal treatment guaranteed by articles 14 and 17 of the Equal Treatment Directive and by the equivalent provisions in the Charter of Fundamental Rights. The discrimination practised by Wallem in this case occurred on British soil, i.e. on the physical territory of an EU and EEA state. Mr Reade does not dispute that the rights asserted by the claimant in this case are underpinned by EU law.

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34. It does not follow that because (i) the 2011 Regulations were enacted with the UK's obligations under the UNCLOS in mind and (ii) the EU is a member or supporter of the UNCOS, the 2011 Regulations are compliant with the UK's obligations under EU law. The UNCLOS has nothing to say about recruitment that takes place on dry land. The restrictions on states applying their laws to ships registered in a different state only apply where the ship is on the high seas. The UNCLOS imposes no obligation on the United Kingdom to exempt nationals of other states from liability under UK law for discrimination committed in England.

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35. We have therefore had to consider carefully whether we should accede to Mr de Silva's invitation to reject what would otherwise be the linguistically indicated construction of provisions that can work injustice, if applied in accordance with the natural meaning of the words, read in their context. We have concluded in the end that we cannot do so.

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36. Parliament chose, in section 81, to empower the Secretary of State to decide whether and to what extent Part 5 should apply in relation to work on ships, work on hovercraft and seafarers. In our judgment, the Secretary of State then decided to apply or disapply the whole of Part 5 of the 2010 Act as provided for in regulations 3 and 4 of the 2011 Regulations and to disapply part, but not all, of Part 5, in the circumstances provided for in regulation 5.

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37. We consider that we cannot escape from that conclusion by invocation of a beneficent policy-driven construction, whether by applying the *Marleasing* principle or by invoking other general principles of interpretation such as the need for there to be a remedy where a wrong needs righting, or preservation of the a right to work. It would strain the language of section 81, read with the 2011 Regulations, too far to do so.

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38. For those reasons, we have come to the conclusion that the tribunal was correct to accept Wallem's interpretation of the provisions and to reject its own jurisdiction to entertain the claims and determine them on their merits. We must therefore dismiss the claimant's appeal.

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We do so with some misgivings. The respondent's conduct has been reprehensible, but the tribunal below and this appeal tribunal are powerless to right the injustice done to the claimant.

39. It is, in our judgment, an uncomfortable but inescapable proposition that the 2011 Regulations permit an offshore employment service provider to discriminate, on United Kingdom soil, on the ground of any of the protected characteristics in the 2010 Act, when recruiting in this country personnel to serve on its clients' foreign flagged ships sailing outside United Kingdom waters.

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40. No international law obligation of the United Kingdom requires UK domestic law to permit such discrimination. It is, at least, doubtful whether the 2011 Regulations conform to the provisions of Directive 2006/54/EC (the Equal Treatment Directive). The claimant has no remedy against the respondent because the latter is not an emanation of the state. The claimant's remedy, if any, lies against the United Kingdom itself.

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41. The three members of this appeal tribunal consider that the Secretary of State would be wise to revisit the scope of the 2011 Regulations. We note that he or she is obliged by regulation 6 of the 2011 Regulations to review the impact of regulations 3 to 5 every five years. The next quinquennial review must be done by 31 July 2021. The conclusions must be published in a report. The scope of the review includes reference to three directives on equal treatment, including Directive 2006/54/EC. We would not be surprised if the present case and the injustice suffered by the claimant were to feature in that review.

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APPENDIX: REGULATIONS 3, 4 AND 5 OF THE 2011 REGULATIONS

3.— Application of Part 5 of the Act to seafarers working wholly or partly in Great Britain and adjacent waters

(1) Part 5 of the Act applies to a seafarer who works wholly or partly within Great Britain (including United Kingdom waters adjacent to Great Britain) if the seafarer is on—

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(a) a United Kingdom ship and the ship's entry in the register maintained under section 8 of the Merchant Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice, or

(b) a hovercraft registered in the United Kingdom and operated by a person whose principal place of business, or ordinary residence, is in Great Britain.

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(2) Part 5 of the Act, except in relation to the protected characteristic of marriage and civil partnership, also applies to a seafarer who works wholly or partly within Great Britain (including United Kingdom waters adjacent to Great Britain) and who is on—

(a) a ship registered in or entitled to fly the flag of an EEA State other than the United Kingdom, or

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(b) a hovercraft registered in an EEA State other than the United Kingdom,
if paragraph (3) applies.

(3) This paragraph applies if—

(a) the ship or hovercraft is in United Kingdom waters adjacent to Great Britain,

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(b) the seafarer is a British citizen, or a national of an EEA State other than the United Kingdom or of a designated state, and

(c) the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain.

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4.— Application of Part 5 of the Act to seafarers working wholly outside Great Britain and adjacent waters

(1) Part 5 of the Act applies to a seafarer who works wholly outside Great Britain and United Kingdom waters adjacent to Great Britain if the seafarer is on—

(a) a United Kingdom ship and the ship's entry in the register maintained under section 8 of the Merchant Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice, or

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(b) a hovercraft registered in the United Kingdom and operated by a person whose principal place of business, or ordinary residence, is in Great Britain,
and paragraph (2) applies.

(2) This paragraph applies if—

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(a) the seafarer is a British citizen, or a national of an EEA State other than the United Kingdom or of a designated state, and

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(b) the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain.

5. Differentiation in relation to pay

It is not a contravention of section 39(1)(b) or (2)(a) or 41(1)(a) of the Act, as applied by regulations 3 and 4, for an employer or principal to offer to pay or to pay a person (A) at a lower rate than that at which the employer or principal offers to pay or pays another person (B) because A is of a different nationality from B, if—

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(a) A—

(i) applied for work as a seafarer, or

(ii) was recruited as a seafarer,

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outside Great Britain, and

(b) A is not—

(i) a British Citizen,

(ii) a national of another EEA State, or

D

(iii) a national of a designated state.

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