Appeal No. UKEAT/0216/20/AT (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 December 2020
Judgment handed down on 21 December 2020

Before

THE HONOURABLE MR JUSTICE CAVANAGH

(SITTING ALONE)

MRS S STEER — APPELLANT

STORMSURE LIMITED — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Bindmans LLP 236 Grays Inn Road London WC1X 8HB
For the Respondent	MR JAMES McHUGH (of Counsel) Instructed by: Markel Law LLP Interchange 81-85 Station Road Croydon CR0 2AJ

SUMMARY

SEX DISCRIMINATION, HUMAN RIGHTS, JURISDICTIONAL/TIME POINTS AND VICTIMISATION.

The Appellant has presented a claim in the Employment Tribunal in which she alleges that she was dismissed by the Respondent and that the dismissal amounted to sex discrimination and/or victimisation on the ground that she had done a protected act, contrary to the Equality Act 2010. She appeals against the Employment Tribunal's refusal to permit her to apply for interim relief. The Appellant accepts that no such right appears on the face of the Equality Act 2010.

However, she says that the right to claim interim relief must be read into the Equality Act 2010, because this is required by European Law and/or by the European Convention on Human Rights ("ECHR"), and/or that such a right should be granted by giving horizontal direct effect to fundamental principles of EU law.

European Law

The Appellant relies on three grounds relating to European Law. The first two are that the failure of domestic law to provide interim relief in discrimination/victimisation cases relating to dismissal contravenes the EU law principles of effectiveness and equivalence. She says this should be remedied by the application of a conforming interpretation to the Equality Act 2010, by reading in words to the Act, granting a right to claim interim relief in dismissal cases. The Appellant's third contention is that the failure to provide interim relief in cases such as this is in breach of fundamental principles of EU law and, in particular, Articles 15 and 47 of the EU Charter, and that these principles should be given horizontal direct effect by reading appropriate wording into the Equality Act 2010 so as to provide a right to claim interim relief.

Effectiveness. The absence of a right to claim interim relief in discrimination/victimisation cases relating to dismissal does not infringe the EU law principle of effectiveness. Domestic

law provides for full compensation, plus interest, and this complies with the requirements of effectiveness. The delays in Employment Tribunal proceedings do not necessitate the provision of interim relief.

Equivalence. The principle of equivalence requires that the procedures and remedies for claims derived from EU law should be no less favourable than those that apply to similar actions of a domestic nature. For these purposes, a claim, under the Employment Rights Act 1996, section 103A, for "automatic" unfair dismissal where the principal reason for dismissal is the making of a protected disclosure, is a similar action of a domestic nature to a discrimination/victimisation claim resulting from dismissal. However, when the procedural rules and remedies are compared as a whole, the procedures and remedies for discrimination/victimisation claims resulting from dismissals are not less favourable than those that apply to claims under section 103A. Further and alternatively, the equivalence principle is complied with because the procedures and remedies that apply to discrimination/victimisation claims are no less favourable than those that apply to another similar action of a domestic nature, namely a claim for "ordinary" unfair dismissal, under the Employment Rights Act 1996, section 98.

Fundamental Principles of EU law. There is no breach of fundamental principles of EU law, because domestic law provides an effective remedy for discrimination/victimisation cases. Further and alternatively, fundamental principles of EU law, as they apply to procedural rules and remedies, do not go further than the principles of effectiveness and equivalence, which have been complied with by domestic law. The question of horizontal direct effect does not, therefore, arise.

Conforming interpretation. Even if the EAT had found that there was a breach of the principles of effectiveness or equivalence, it was not possible for a conforming interpretation to be applied to the ERA 2010, by reading in a right to apply for interim relief in discrimination/victimisation cases arising from dismissals, because that would cross the line between interpretation and quasi-legislation, and because to do so would require the EAT to take decisions for which it is not equipped and would give rise to important practical repercussions which the EAT is not equipped to evaluate.

The ECHR

The Appellant contends that the failure to grant a right to claim interim relief in discrimination/victimisation cases arising from dismissals infringes the ECHR, Article 14, when read with Articles 6, 8 and Article 1 of Protocol 1.

Article 14 is engaged, because the matter in question comes within the ambit of Article 6, as it relates to judicial remedies for the enforcement of civil rights. The Appellant has an "other status" for the purposes of Article 14, namely that of being an individual who wishes to bring a claim of dismissal/victimisation arising from dismissal.

It is appropriate to consider together the questions of whether those who wish to bring a claim under s103A are in an analogous situation, and whether the difference in treatment can be justified. The difference has not been justified. No legitimate aim has been advanced for the difference in treatment. The Respondent, being a private employer, is not in a position to say why the difference exists, and the Government did not respond to an invitation to intervene in this appeal. In these circumstances, it would be inappropriate for the EAT to speculate about whether, and, if so, why, the difference in treatment is a proportionate means of achieving a legitimate aim. The burden rests with the Respondent to justify the difference and, through no fault of its own, it has been unable to do so.

Accordingly, the Appellant has made out a breach of Article 14, ECHR.

However, the EAT has no power to make a declaration of incompatibility under the Human Rights Act 1998, section 3, and, for the same reasons as apply to the European Law part of the appeal, it would be wrong for the EAT to apply a conforming interpretation to the ERA 2010, in order to read in a right to apply for interim relief in discrimination/victimisation claims arising from dismissals. Therefore, the EAT cannot grant any relief for this breach.

For these reasons, the appeal is dismissed. Leave to appeal has been granted to appeal to the Court of Appeal, so that the Court of Appeal can consider whether to grant a declaration of incompatibility for the breach of Article 14.

THE HONOURABLE MR JUSTICE CAVANAGH

Introduction

1. This appeal is concerned with the scope of the remedies that are available to a claimant who brings a claim of unlawful discrimination or victimisation arising from his or her dismissal. The Appellant contends that the remedies include a right to seek interim relief. She accepts that no such right appears on the face of the Equality Act 2010. However, she says that the right to claim interim relief must be read into the law of England and Wales (and, it would follow, Scotland and Northern Ireland), because this is required by European Law and/or by the European Convention on Human Rights ("ECHR").

2. So far as European Law is concerned, the Appellant advances three alternative arguments. First, she submits that the EU law principle of effectiveness requires that interim relief be made available in these circumstances, because otherwise a claimant will not have access to an effective remedy. Second, she submits that the EU law principle of equivalence requires that interim relief be made available in discrimination and victimisation cases, because interim relief is available in relation to similar actions of a domestic nature, namely claims in which a claimant contends that s/he has been dismissed for making a protected disclosure (whistleblowing claims). Third, the Appellant submits that the absence of interim relief protection for discrimination and victimisation claims is in violation of fundamental principles of EU law, including those set out in Articles 15 and 47 of the EU Charter of Fundamental Rights. The Appellant says that if she is right in her first or second submission, then the right to claim interim relief in discrimination and victimisation claims must be read into the domestic legislative framework. If she is right in her third submission, she submits that the Appeal

Tribunal is obliged to give horizontal direct effect to her EU law rights, and that, in this context, this means that she must be afforded the right to claim interim relief.

3. In relation to the European Convention on Human Rights ("ECHR"), which is, of course, given effect in domestic law by the Human Rights Act 1998 ("HRA"), the Appellant submits that the failure of domestic law to make provision for interim relief in discrimination and victimisation cases amounts to discrimination against women, in breach of Article 14 of the ECHR, read together with Article 6, Article 8, and/or Article 1 of Protocol 1 ("A1/P1"). She submits that this problem must be remedied by reading a right to claim interim relief into domestic legislation.

4. This is, plainly, an important appeal. The Appellant is supported by the Equality and Human Rights Commission ("EHRC"). If the appeal succeeds, the legal landscape regarding the remedies that are available in discrimination and victimisation cases will change significantly. Claims relating to discrimination and victimisation are derived from statute, but the effect will be that an interim remedy will be available which is not set out in the statute, and which was not contemplated by Parliament. For that reason, when I gave permission at a Preliminary Hearing on 17 November 2020 for this appeal to proceed to a full appeal hearing, I directed that the Appellant was required to notify the Government Legal Department ("GLD") forthwith of the appeal, and to provide the GLD with copies of the Notice and Grounds of Appeal, the Appellant's skeleton argument for the Preliminary hearing, and a copy of my Order and Reasons. I also granted leave to the GLD and the Secretary of State to be represented by counsel at the full hearing or to put in written submissions if so advised. The Appellant duly notified the GLD, and both the Appellant and the Respondent have since been in contact with the GLD. The GLD acknowledged receipt and said that the papers had been passed to the

Government Equalities Office. However, the GLD and the Government Equalities Office have not availed themselves of the opportunity to intervene in these proceedings, either by attending by counsel, or by filing written submissions. No explanation has been provided as to why the Government has chosen not to intervene. This is not mentioned by way of criticism: it may be simply that there was insufficient time to do so, or that priority had to be given to other pressing matters. However, the effect has been that I have not had the benefit of the assistance of the Government in this appeal. This means that I have not been informed of the Government's position in relation to the issues raised in the appeal, and, in particular, I have not received direct evidence or clarification as regards (a) whether the Government took a positive decision not to extend interim relief to discrimination and victimisation cases involving dismissal, and (b) what justifications there may be for not doing so. Mr McHugh, counsel for the Respondent, fairly and frankly accepted that he was not in a position to put forward any such justifications.

5. One somewhat surprising feature of this legal challenge is that no similar challenge has previously been brought. The right to claim interim relief, in Trade Union Rights cases, was introduced by section 78 of the Employment Protection Act 1975, at roughly the same time as the enactment of the Sex Discrimination Act 1975. It has been apparent for some 45 years, therefore, that interim relief was available in relation to some types of domestic employment law claims but not in relation to claims concerning discrimination and victimisation. The right to claim interim relief in whistleblowing cases was introduced by section 9 of the Public Interest Disclosure Act 1998. The HRA came into force on 2 October 2000, just over 20 years ago. It is true, of course, that the legal principles that are relied upon by the Appellant did not arrive fully-formed, and some of them, like the principles of equivalence and effectiveness, have developed over time as they have been considered in successive cases by the Court of Justice of the European Union ("ECHR") and by appellate Courts in the United Kingdom.

Nonetheless, all of the arguments relied upon by the Appellant could have been advanced at any time over the last decade or so, if not longer ago. This does not mean, of course, that the Appellant's arguments do not have force, and they must be assessed on their own merits, but it is worth noting that no-one has previously seen fit to bring a challenge such as this.

6. In response to a query from me, Mr Milsom, Counsel for the Appellant, confirmed that the EHRC had not hitherto lobbied the Government to extend interim relief to discrimination and victimisation claims, though a specific suggestion had been made to extend interim relief to sexual harassment cases in an EHRC report called Turning the Tables, published in 2018.

The effect of withdrawal from the European Union

7. Another feature of this case is that, at least arguably, the claims relating to EU law have been brought at the last possible moment. The appeal hearing took place in mid-December 2020. The UK formally left the EU on 31 January 2020. Under the transitional arrangements, set out in the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020, EU law continues to apply in the UK, but only until 31 December 2020.

8. Two questions potentially arise. The first is whether the principles of EU law that are relied upon by the Appellant are in place at the date of the appeal. There is no doubt, in my view, that they are. As I have said, under the transitional arrangements, EU law currently applies in the UK. This is made clear by section 1A(2) of the 2020 Act.

9. The second, and potentially more difficult, question, is whether, if I were to rule in favour of the Appellant, this would have any value as a precedent once the transitional period comes to an end. Strictly, this question does not arise for determination on this appeal, as this

appeal is only concerned with the proceedings between the Appellant and the Respondent, but the very fact that the Appellant is supported by the EHRC shows that those advising her hope that the outcome of this appeal will stand as a precedent for the future. I will therefore briefly consider this question.

10. Section 4 of the European Union Withdrawal Act 2018 (as originally enacted) provided, in relevant part:

> **"4 Saving for rights etc. under section 2(1) of the ECA**
>
> **(1)Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—**
>
> **(a)are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and**
>
> **(b)are enforced, allowed and followed accordingly,**
>
> **continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).**
>
> **(2)Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they—**
>
> **(a)form part of domestic law by virtue of section 3 [this relates to direct EU legislation], or**
>
> **(b)arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case)."**

11. In the current appeal, the Appellant seeks judicial recognition for a right based on EU law, which has not previously been recognised, and for an interim remedy which does not exist in domestic legislation but which, she says, arises under an EU directive (or at least arises under general principles of EU law in light of the requirements of an EU directive). In those circumstances, it appears that, pursuant to sections 4(1) and section 4(2)(b) of the 2018 Act, the right will only continue to apply if the rights are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972 and are enforced, allowed and

followed accordingly, and/or are of a kind recognised by the European Court or a court or tribunal in the UK in a case decided before the deadline. (The rights will continue to apply unless and until repealed by legislation: see 2018 Act, section 7(4).) It is not a matter that arises for final determination on this appeal, but it is at least arguable that this means that even if the principles of EU law that are relied upon by the Appellant give rise to a right to interim relief in discrimination/victimisation cases, this will only continue to be the case if such a right has been recognised either by the Court of Justice of the European Union ("the CJEU") or by a domestic court or tribunal before the deadline. In other words, there has to be a judicial decision before the deadline which recognises the right in order to crystallise the right for the future. No such right has previously been recognised, either by the CJEU or by a domestic court or tribunal. This is the only chance for this to happen.

12. The next question, therefore, is whether the deadline has already passed. The deadline is referred to in section 4 of the 2018 Act, as originally enacted, as "exit day". This was defined in section 20 of the 2018 Act to mean 29 March 2019 at 11.00 pm. This was extended by statutory instrument, and, on the second occasion, was extended to 31 January 2020, at 11.00 pm: see The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations (SI 2019/1423). This deadline has, of course, also expired. However, section 25(3) of the European Union Withdrawal Act 2020 has replaced the reference to "exit day" in section 4 of the 2018 with "IP completion day". This is defined to mean 31 December 2020 at 11.00 pm (2020 Act, section 39(1)).

13. The effect of this is that the deadline for the purposes of section 4 expires on 31 December 2020. It follows that, as I understand it, if I were to rule in the Appellant's favour on the interim relief issue before 11.00 on 31 December 2020, this would represent the law that

would then continue to apply after the transitional period has expired (unless and until overturned on appeal or overturned by legislation). However, if I were to hand down judgment after that deadline then it would at least be strongly arguable that, whilst my ruling would have effect as between the Appellant and the Respondent, it would have no effect on the law of England and Wales for the future. It was for this reason that I granted expedition of this appeal and I indicated to the parties that I would hand down my judgment before the end of December 2020. In fact, because of administrative arrangements within the Employment Appeal Tribunal ("EAT"), the final date on which a judgment can be handed down before the end of the year is 21 December 2020.

14. The parties have indicated that they agree with this analysis.

15. As a result of all of this, I have had considerably less time than I would have liked – only a few days – to consider my decision and to draft my judgment. This is not ideal as this is an important case with, potentially, very significant implications for other litigants, and the arguments have ranged widely over several complex and difficult areas of law.

16. I have been assisted in my task by the helpful submissions of Mr Christopher Milsom, on behalf of the Appellant, and by Mr James McHugh on behalf of the Respondent, for which I am grateful. The hearing took place remotely.

The structure of this judgment

17. In this judgment, I will first set out the procedural history of the case and the relevant domestic law statutory provisions. I will then address the issues in the following order:

EU law

(1) The relevant EU law provisions;

(2) The principles relating to remedies for infringement of rights derived from EU Directives;

(3) Does the lack of interim relief for discrimination/victimisation cases infringe the EU law principle of effectiveness?;

(4) Does the lack of interim relief for discrimination/victimisation cases infringe the EU law principle of equivalence?;

(5) If there is a breach of the principles of effectiveness and/or equivalence, can and should a right to seek interim relief in discrimination/victimisation cases be read into the domestic law statutory framework?;

(6) Is the absence of interim relief for discrimination/victimisation cases a violation of fundamental principles of EU law?;

(7) If there is a violation of fundamental principles of EU law, is there horizontal direct effect, resulting in a directly-effective right to seek interim relief in discrimination/victimisation cases?;

ECHR

(8) The relevant provisions of the Human Rights Act 1998 and the ECHR;

(9) Does the lack of interim relief for discrimination/victimisation cases amount to a breach of Article 14, when read with Article 6 or 8 or A1/P1?; and

(10) If so, what consequences follow?

The procedural history

18. The Appellant was employed by the Respondent from 12 March 2020 until 15 July 2020. She says that she was subjected to sexual harassment, consisting of inappropriate conduct related to her sex from a fellow employee. The Appellant says that the Respondent failed adequately to protect her from the harassment. In June 2020, she presented a grievance, and she claims that this was not adequately investigated. She also requested to work from home, which she says was to safeguard herself from unwanted harassment. She contends that the Respondent reacted unfavourably to this request because of unwarranted sex-based assumptions related to her ability to juggle work at home with her child-care responsibilities. She was eventually permitted to work at home, but was instructed to install screen shot monitoring software, which she says was an implicit attack on her integrity and an unjustified intrusion into her private life. The Appellant alleges that she was notified on 9 July 2020 that her working hours were to be reduced to 60%, with effect from 14 July 2020, because she also had child-care responsibilities. The Appellant contends that such a unilateral change amounted to an express dismissal, and, in the alternative, that she has been constructively dismissed. It is her contention that her dismissal amounted to sex discrimination and to victimisation for protected acts (namely the lodging of the grievance and the decision to work at home). Further or alternatively, she claims that she was dismissed for making a protected disclosure and that this is an automatically unfair dismissal, contrary to section 103A of the Employment Rights Act 1996 ("ERA").

19. The Appellant presented a claim to the Employment Tribunal ("ET") on 30 July 2020, and sought interim relief, both in relation to her whistleblowing claim and in relation to her sex discrimination/victimisation claims. On 30 July 2020, Employment Judge Lewis wrote to the

parties, listing an interim relief hearing for 11 August 2020, but only in relation to the whistleblowing claim.

20. The Appellant had an automatic right, under Rule 13 of the Employment Tribunals (Rules of Procedure) Regulations 2013 ("the ET Rules of Procedure"), to seek reconsideration of the ET's decision not to make provision for an interim relief hearing relating to the discrimination/victimisation claims. The Appellant's solicitors applied for reconsideration by email dated 30 July 2020. The ET replied by letter dated 6 August 2020. The letter made clear that EJ Lewis was only listing the interim relief application in relation to the whistleblowing claim and stated that the ET did not have jurisdiction to grant interim relief for the discrimination/victimisation claims. The letter also said that the Appellant's application for reconsideration would be dealt with after the hearing of the interim relief application relating to whistleblowing on 11 August 2020.

21. The Appellant filed an Appellant's Notice with the Employment Appeal Tribunal ("EAT") on 6 August 2020. This came before HHJ Auerbach on the paper sift. HHJ Auerbach directed that there should be a Preliminary Hearing. As I have said, this was heard by me on 17 November 2020. By this stage, the Appellant had withdrawn her reconsideration application and had also withdrawn her application for interim relief in relation to her whistleblowing claim. There can be no doubt that this was tactical. The Appellant and those advising her were keen for the point of law at the heart of this appeal to be heard by the EAT as soon as possible. The interim relief hearing on 11 August 2020 did not take place.

22. At the Preliminary Hearing in the EAT, the Appellant relied on three grounds of appeal. The first was that the ET had erred in law in deciding that it did not have the power to grant

interim relief in discrimination and victimisation claims, arising out of dismissals. This is a pure point of law. The other two grounds were procedural in nature, namely that the ET erred in law in concluding that it had no jurisdiction to order interim relief for contraventions of the Equality Act 2010 ("EA 2010") without first hearing from the Appellant, and that the ET decision was inadequately reasoned.

23. I granted permission to appeal on the first ground, the pure point of law, on the grounds that it was arguable and that it was a point of law of general public importance. I did not grant permission to appeal on the two procedural issues. The Employment Judge acted perfectly correctly in dealing with the jurisdictional issue by letter in the first instance, and without setting out full reasons in his letter. This was a decision under Rule 12 of the ET Rules of Procedure, and, as such, it triggered an automatic right of reconsideration, at which stage the Appellant could have made submissions and the Employment Judge would have given a fully-reasoned decision.

24. I also made clear that, were it not for the special features of this case, I would not have granted permission to appeal at all. I was, exceptionally, granting permission before the matter had been fully argued at the ET stage, and in circumstances in which there had been no examination of the underlying merits to determine whether the discrimination and victimisation claims reached the necessary threshold of having a "pretty good chance" of success which is required before interim relief will be granted (see, for example, **Taplin v C Shippam Ltd** [1978] ICR 1068 (EAT), **Ministry of Justice v Sarfraz** [2011] IRLR 562 (EAT), **His Highness Sheikh Bis Sadr al Qasimi v Robinson,** UKEAT/0383/17, and **Simply Smile Manor House Limited and ors v Ter-Berg** [2020] ICR 570 (EAT)). In normal circumstances, these would be reasons to decline to grant permission to appeal. However, I

considered it appropriate to grant permission to appeal because the appeal was concerned with a pure point of law, of public importance, in which the Appellant was supported by the EHRC, and, crucially, in which there was an argument that the EAT's ruling would not count for anything unless it was handed down before the end of December 2020 (when the transitional provision for the withdrawal from the European Union will come to an end).

25. In the meantime, at a case management hearing on 7 September 2020, EJ Lewis stayed the proceedings in the ET, pending the outcome of this appeal.

26. It is important to emphasise that, as I have already said, this appeal is concerned with a pure point of law. The Respondent denies that it has treated the Appellant unlawfully, whether as alleged or at all, and in particular denies that it was unsympathetic to the Appellant because of her child-care responsibilities, or that it did not respond adequately to her grievance. It is clear that there are major disputes of fact between the parties. No findings of fact have been made in this case, and no assessment of the pleaded claims of discrimination and victimisation has been made to determine whether they satisfy the "pretty good chance of success" test. No findings adverse to the Respondent have been made in these proceedings and the allegations of the Appellant remain just that, allegations.

The legislative framework

Interim relief: overview

27. Interim relief is available for certain types of claim. It applies where the claimant is complaining about being dismissed. The claim for interim relief must be made within seven days of the effective date of termination. The mechanism for interim relief applies in the same way in relation to all types of claim for which interim relief is available. The ET sets up an

urgent hearing, as soon as is practicable. At the hearing, the ET will only provide interim relief if it appears to the ET that it is likely that on determining the complaint the Tribunal will find in the claimant's favour. As I have said, this means that the ET must satisfy itself that the claimant has a pretty good chance of success at the final hearing.

28. Rule 95 of the Rules of Procedure Regulations states that the Tribunal shall not hear oral evidence at the interim relief hearing, unless the ET directs otherwise. The default position, therefore, is that there will be no oral evidence. The issue of interim relief will be decided by reference to the pleadings, submissions, written statements, and the review of a relatively small number of documents.

29. If the ET decides that interim relief should be granted, the employer is asked whether it is prepared to re-instate the claimant or, if not, to re-engage the claimant in another job on terms and conditions which are not less favourable than those which would have applied if the claimant had not been dismissed. If the employer indicates that it is prepared to re-instate the claimant, the ET makes an order to this effect. If the employer indicates that it is prepared to re-engage the claimant, and the claimant agrees, the ET makes an order for re-engagement. If the claimant does not agree to re-engagement, and the ET considers the refusal to be reasonable, the ET will make an order for the continuation of the claimant's contract of employment. If the ET considers that the refusal is unreasonable, the ET will not make any order. If the employer refuses to agree to re-instatement or re-engagement, or the employer does not attend the interim relief hearing, the ET will make an order for the continuation of the claimant's contract of employment.

30. An order for the continuation of the claimant's contract of employment means that the contract of employment will continue in force for the purpose of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and for the purpose of determining for any purpose the period for which the employee has been continuously employed, until the final determination or settlement of the claim. The ET specifies an amount which must be paid by the employer during each normal pay period. Such payments are taken into account for the purposes of calculation of damages for breach of contract or compensation for the breach of the relevant statutory right. The employer is not required to permit the claimant to carry on working.

31. The net effect of these provisions, therefore, is that a claim for interim relief, if successful, does not mean in practice that the ET will require the employer to permit the claimant to carry on working pending the determination or settlement of his or her claim. It is not the equivalent of a mandatory injunction or specific performance of the obligation to provide work. Rather, it means that the claimant will continue to receive his/her salary and other benefits in the period up to determination of claim or settlement. This is a valuable benefit, because it can take a number of months before a claim is finally determined (or even longer in complex cases, especially when there is a backlog of claims before the ET). It means that the claimant has a financial cushion whilst s/he is waiting for his/her claim to be heard. It is particularly valuable, because the employee will not have to repay the monies received, even if his or her claim ultimately fails. It also means that the employer has an ongoing financial commitment, which may mean that the employer is more amenable to settlement.

32. Interim relief was originally introduced by the Employment Protection Act 1975, and was limited to claims in which the alleged reason for dismissal was actual or proposed trade

union membership or authorised union activities. It was introduced as a way of deterring lightning strikes which used to be a feature of the industrial relations landscape when a trade union official or activist was dismissed for trade union activities. In **Bombardier Aerospace/Short Brother v McConnell and others** [2008] IRLR 51 (NICA), Girvan LJ said, at paragraph 7, that the purpose of interim relief was to "preserve the status quo until the full hearing" and that:

> **"The interim relief provisions were a response to the problem of dismissals of trade unionists which have the potential to generate suspicion of victimisation which on occasions can result in industrial unrest and industrial action. As pointed out in Harvey on Industrial Relations and Employment Law at paragraph 593 an application for interim relief is intended to head off industrial trouble before it begins or at least before it becomes too serious by allowing an employment tribunal to give a preliminary ruling at an emergency hearing."**

33. Provision is made for interim relief in sections 128-132 of the ERA 1996, and in the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), sections 161-167. There is also provision for interim relief in the Employment Relations Act 1999, section 12, and in the Employee Study and Training (Procedural Requirements) Regulations 2010 (SI 2010/155) ("the 2010 Regulations").

34. Pursuant to ERA section 128, an interim relief claim can be brought if the reason for dismissal is:

(1) Carrying out specified health and safety activities (such dismissal is automatically unfair under ERA 1996, sections 101(1)(a) and (b));

(2) Acting as a representative of members of the workforce for the purposes of Schedule 1 to the Working Time Regulations 1998 (ERA 1996, section 101A(d));

(3) Acting as a trustee of an occupational pension scheme (ERA 1996, section 102(1));

(4) Acting as an employee representative for redundancy or TUPE purposes (ERA 1996, section 103);

(5) Making a protected disclosure (ERA 1996, section 103A);

(6) Being made redundant, when the selection was made on the basis that the claimant was seeking trade union recognition (TULR(C)A, Schedule A1, paragraph 162); and

(7) The claimant was on a blacklist (ERA 1996, section 104F).

35. Pursuant to TURL(C)A, section 162, interim relief is available if the claimant was dismissed on grounds relating to union membership or activities (which is automatically unfair pursuant to TULR(C)A, section 152).

36. The Employment Relations Act 1999, section 12(6), extends the right to claim interim relief to those who claim that they have been dismissed because they sought to be accompanied to a disciplinary or grievance hearing, or because they tried to accompany a worker to such a hearing.

37. The 2010 Regulations, regulation 17, extend the right to claim interim relief to those who claim to have been dismissed because they attended a meeting to discuss their application for time off for education or training, or because they accompanied a colleague to such a meeting.

Interim relief: the legislative provisions

38. Section 167(2) of TULR(C)A provides that the interim relief provisions set out in that Act shall be construed as one with the equivalent provisions in the ERA. It is not necessary to

set out both sets of provisions, or the provisions of the Employment Relations Act 1999 or the 2010 Regulations (which simply incorporate by reference the relevant provisions of the ERA). I will confine myself to setting out the provisions relating to interim relief in the ERA 1996, sections 128-130, though I mention below an additional hurdle that a claimant must surmount in trade union cases. Sections 128-130 provide:

> **"128.—Interim relief pending determination of complaint.**
>
> **(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—**
>
> **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
>
> **(i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or**
>
> **(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or**
>
> **(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met,**
>
> **may apply to the tribunal for interim relief.**
>
> **(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).**
>
> **(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.**
>
> **(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.**
>
> **(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.**
>
> **129.— Procedure on hearing of application and making of order.**
>
> **(1) this section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—**
>
> **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
>
> **(i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or**

(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and

(b) in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) fails to attend before the tribunal, or

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),

the tribunal shall make an order for the continuation of the employee's contract of employment.

130.— Order for continuation of contract of employment.

(1) An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force—

(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and

(b) for the purposes of determining for any purpose the period for which the employee has been continuously employed,

from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.

(2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.

(3) Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—

(a) in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and

(b) in the case of a payment for any past period, within such time as may be specified in the order.

(4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.

(5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, goes towards discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.

(6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.

(7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed."

39. Section 129(1) states that interim relief is only available where, on hearing the employee's application for interim relief, it appears to the tribunal that it is likely that on "determining the complaint to which the application relates" the tribunal will find that the

reason or if more than one the principal reason for dismissal is one of the proscribed reasons. However, in **Simply Smile,** Choudhury J made clear that this did not mean that the only issue that a ET could address at the interim relief stage was the reason for dismissal. Rather, the tribunal needs to consider the likely outcome of the eventual determination of the complaint, and so section 129(1) does not preclude a tribunal from having regard to the merits of other elements of the claim aside from the reason for dismissal. The same "likely to succeed" test has to be applied to all of the matters that the claimant has to prove. In **Simply Smile**, this meant that the ET had been right to consider the chances that the claimant would be able to establish that he was an employee rather than a self-employed worker, at the interim relief stage.

40. As Choudhury J also pointed out in **Simply Smile**, at paragraph 38, section 161 of TULR(C)A provides a further reason for not entertaining an application in trade union cases, and that is that in such cases the employee must present a certificate from an authorised official of a relevant trade union, confirming that on the date of dismissal the employee was or proposed to become a member of the union, and that there appeared to be reasonable grounds for supposing that the reason for dismissal or the principal reason was one alleged in the complaint, i.e. one that related to trade union membership or activities.

Remedies for claims for discrimination and victimisation

41. Dismissal amounting to discrimination or victimisation in relation to sex or any other protected characteristic is rendered unlawful in domestic law by EA 2010, sections 39(2)(c) and 39(4)(c), respectively.

42. Section 120(1) provides that the ET has jurisdiction to determine a complaint relating, inter alia, to breaches of section 39.

43. The remedies for discrimination and victimisation are set out in section 124. This provides:

> **"124 Remedies: general**
>
> **(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
>
> **(2) The tribunal may—**
>
> **(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;**
>
> **(b) order the respondent to pay compensation to the complainant;**
>
> **(c) make an appropriate recommendation.**
>
> **(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.**
>
> **(4) Subsection (5) applies if the tribunal—**
>
> **(a) finds that a contravention is established by virtue of section 19, but**
>
> **(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.**
>
> **(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).**
>
> **(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.**
>
> **(7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation , the tribunal may—**
>
> **(a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;**
>
> **(b) if no such order was made, make one."**

44. Section 124(6) states that the amount of compensation that can be awarded corresponds to the amount that can be awarded by the county court under section 119. Section 119(2)(a) provides that a county court shall award the damages on the same basis as they would be awarded in a claim in tort, and section 119(4) provides that an award of damages may include compensation for injury to feelings.

45. It is clear, therefore, and is undisputed, that the domestic statutory framework does not expressly permit the grant of interim financial relief in discrimination and victimisation cases concerning dismissal. If interim relief were available in such cases, the overall compensation that would be awarded to a successful claimant would be the same, but claimants would receive an income to tide them over pending the determination of their claim or settlement.

EU law

(1) The relevant EU law provisions

The Recast Directive

46. Article 14(1)(b) of the Recast Equal Treatment Directive (Directive 2006/54/EC, "the Recast Directive") provides that there shall be no direct or indirect discrimination on grounds of sex in the public or private sectors in relation to employment and working conditions, including dismissals.

47. The Appellant relies, in particular, upon the parts of the Recast Directive which emphasise that a member state must provide an effective remedy for the rights that are protected by the Directive. In particular, she relies upon the following Recitals and Articles:

> **"Recital 29**
>
> **The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment.**
>
> **….**
>
> **Recital 35**
>
> **Member states should provide for effective, proportionate and dissuasive penalties for breaches of obligations under this Directive.**

Article 17

1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended

….

Article 18: Compensation or reparation

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration."

The other anti-discrimination Directives

48. The Appellant's claim is concerned with sex discrimination and so the relevant directive is the Recast Directive. However, Mr Milsom pointed out that a similar requirement for member states to provide effective remedies is set out in the Racial Discrimination Directive, Directive 2000/43/EC, and the Equality Directive, Directive 2000/78/EC, which is concerned with discrimination in relation to other types of protected characteristics, namely religion and belief, disability, age and sexual orientation.

The EU Charter of Fundamental Rights

49. The following Articles are relevant:

"Article 15: Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and pursue a freely chosen or accepted occupation.

….

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

….

Article 25: Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

Article 47: Right to an effective remedy and a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time….

Article 52: Scope and interpretation of rights and principles

…. 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as laid down in the said Convention….."

(2) The principles relating to remedies for infringement of rights derived from EU Directives

50. EU law leaves it to member states to decide upon procedural rules and remedies for the enforcement of rights that are derived from EU directives, but this is subject to two important limitations, namely that the domestic law procedures and remedies must comply with the principles of effectiveness and equivalence. The principle of effectiveness requires that the member state's domestic law provides an effective remedy, and the principle of equivalence requires that the procedures and remedies are no less favourable than those which apply to similar actions of a domestic nature. Provided that the requirements of effectiveness and equivalence are satisfied, the member state has autonomy to choose the procedures and remedies that are to apply.

51. This has been spelt out innumerable times in the judgments of the European Court of Justice ("ECJ") and the CJEU. So, for example, in **Preston and others v Wolverhampton Healthcare NHS Trust and others (C-78/98)** [2001] 2 AC 415, the CJEU said:

> **"31. First, it should be borne in mind that, according to settled case law, in the absence of relevant Community rules, it is for the national legal order of each member state to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness): see, to that effect, Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland (Case 33/76) [1976] ECR 1989 , 1997-1998, paras 5 and 6; Comet BV v Produktschaap voor Siergewassen (Case 45/76) [1976] ECR 2043 , 2053, para 13; Fisscher v Voorhuis Hengelo BV (Case C-128/93) [1995] ICR 635 , 669-670, para 39; Johnson v Chief Adjudication Officer (No 2) (Case C-410/92) [1995] ICR 375 , 404, para 21 and Magorrian v Eastern Health and Social Services Board (Case C-246/96) [1998] ICR 979 , 1003, para 37."**

(3) <u>Does the lack of interim relief for discrimination/victimisation cases infringe the EU law principle of effectiveness?</u>

<u>The benefits of interim relief</u>

52. Mr Milsom submits that interim relief provides a litigant with four immediate and significant benefits. These are:

(1) Restoration of employment. He says that interim relief can be equated to an interim injunction but with no requirement for undertakings or the payment of compensation in the event that the claim is ultimately successful. There is the additional benefit that the decision is taken by ETs, the specialist body that is charged with dealing with employment disputes;

(2) Swift redress. The claimant does not have to wait for a remedy until judgment is handed down after the final hearing which may be many months, and in some cases years, after the claim is presented;

(3) The avoidance of cost, as the costs of trial and extensive witness statements are considerably reduced in an interim relief application; and

(4) Speedy access to an effective financial remedy.

53. In my judgment, the most important benefits of interim relief are the ones referred to in Mr Milsom's sub-paragraphs (2) and (4), which perhaps amount to the same thing. It is of great value to a litigant to receive a regular salary and other benefits whilst s/he is awaiting a full hearing of her/his claim. As Mr Milsom says, the wait can last months or, in complex cases, more than a year. In the meantime, as the claimant will have lost her or his job, and may not have found another one, the claimant may well be facing financial hardship. Interim relief provides a very welcome financial cushion.

54. There are two other major benefits of interim relief for a claimant, in my view, which are related to each other. First, if the claim for interim relief is successful, the claimant will receive a financial remedy from the employer which may be substantial, and, crucially, which is not repayable even if it turns out in the end that the claimant's claim is not well-founded. In other words, interim relief provides a way for a claimant to obtain a financial remedy without succeeding in establishing her or his claim on the evidence at a full hearing. Although the interim remedy is time-limited, it may well equate to many months' salary or even more. Second, if a claimant succeeds in obtaining interim relief, this will place pressure on the employer to settle. Whilst interim relief is in place, the employer will be paying sums to the claimant which will never be recovered, regardless of the underlying merits of the claim. In such circumstances, there is an obvious incentive for an employer to cut its losses and settle. The very fact that an interim relief hearing is listed may also encourage an employer to settle, so as to avoid legal costs that would be incurred at an early stage of the litigation.

55. It is partly because the consequences of a grant of interim relief are so significant, both for claimants and respondents, that the evidential threshold for interim relief is so high (the other reason is that the ET is having to form a judgment on the basis of limited evidence and without hearing oral evidence).

56. I do not think that benefits (1) and (3), as enumerated by Mr Milsom, are so important. In reality, the claimant's employment will not be restored, in the sense that s/he will be allowed back to work, unless the employer consents to this. There is not much incentive for the employer to do so, because the employer will have to pay salary and other benefits whether the claimant comes back to work or not. Given that relations between the claimant and the employer are likely to be strained, in any case in which interim relief is available, I think that it will be rare for an employer to offer the claimant her or his old job back, or to offer re-engagement. In any event, the employer cannot be compelled to do so. The interim remedy is, in reality, a financial one. It is true, however, that the claimant does not have to offer a cross-undertaking as to damages, and is not liable to repay the sums paid by way of interim relief, regardless of the outcome of the final hearing. I do not think that the interim relief regime reduces legal costs for a claimant. In fact, it means that, if legally-represented, s/he will have to pay for two hearings instead of one. Nevertheless, there may be a saving of legal costs if the interim relief application has the effect of bringing the employer to a settlement at an earlier stage than would otherwise have been the case.

57. The central point that Mr Milsom makes in relation to the advantages of access to a right to claim interim relief is, nonetheless, a good one: in my judgment there can be no doubt that the right to claim interim relief is of very real benefit to a claimant.

The parties' submissions

58. Mr Milsom submissions as to why the absence of interim relief in discrimination/victimisation cases means that UK law does not provide an effective remedy focus on the problem of delay. He submits that there is a derogation from the effectiveness principle in the absence of a measure which suspends the effects of discriminatory dismissal, particularly in view of delay in substantive proceedings. The remedy of compensation, only paid many months later, without the option of preserving the status quo, fails to afford remedies which are "effective and dissuasive".

59. Mr Milsom acknowledges that there is no judgment of the CJEU which has considered whether reinstatement or interim relief is required in order to achieve effectiveness. However, he points that the CJEU and the Supreme Court have made clear that a right need not be impossible to enforce in order to be deprived of its effectiveness: enforcement must not be "excessively difficult" (see, for example **Preston**, CJEU, at judgment, paragraph 34). Furthermore, courts and tribunals should apply a practical, rather than theoretical, approach to determining whether the remedies that are provided by domestic law are effective (see **R (Unison) v Lord Chancellor** [2017] UKSC 51; [2020] AC 869, at paragraphs 109-116).

60. Mr Milsom also points out that many member states provide the remedy of reinstatement/declaration of nullity as a remedy for a discriminatory dismissal. These include Austria, Belgium, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Portugal and Spain. Mr Milsom further submits that in some circumstances, the availability of a post-hoc remedy may not be enough.

61. For the Respondent, Mr McHugh submits that, in the discrimination field, the ECJ has specifically stated that the grant of financial compensation for loss and damage sustained, together with interest, amounts to an effective financial remedy. He relies, in particular, upon **Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (No 2) (C-271/91)** [1993] ICR 893, and **Arjona Camacho v. Securitas Seguridad Espana SA (C-407/14)** [2016] ICR 389.

Discussion

62. In my judgment, the principle of effectiveness does not require the extension of interim relief to discrimination/victimisation cases. UK law provides an effective remedy in that it provides, if a claimant is successful at a full hearing, for the remedies of declaration, compensation and, in appropriate cases, a recommendation, An award of compensation is not capped (as it used to be, before **Marshall**) and interest can be awarded to make up for delays in payment (see the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803). The question is not whether interim relief would improve the suite of remedies available to to claimants in discrimination/victimisation cases – it plainly would – but whether the current set of remedies satisfies the requirement of effectiveness.

63. The fundamental problem with the Claimant's submission, in my view, is that the delays before a final hearing and final remedy in discrimination cases are not such as to mean that the award of compensation, when it finally arrives, does not provide an effective remedy. Mr Milsom referred me to Government statistics for the period April to June 2020 which showed that the caseload outstanding was 37,000 cases. The mean age of single (rather than multiple) claims at disposal was 32 weeks. These statistics refer to all claims, not just to discrimination/victimisation claims. As the commentary to the Government's figures pointed,

the delays have been exacerbated by the Covid-19 Pandemic, both because this has reduced the number of ET hearings and has increased the number of job losses. However, there have been other periods in the past when there have been long delays before cases were finally determined, for example because of a shortage of Employment Judges. The current delays are not unique.

64. I accept, therefore, that there are frequently substantial delays before a deserving claimant in a discrimination/victimisation claim will receive an award of compensation. However, I do not think that the length of the delays is such as to mean that claimants are being deprived of an effective remedy. In most cases, they will obtain a final judgment within a year of the claim being presented, and in the vast majority of cases, they will obtain a final judgment within a year and a half at most. This compares favourably with the time-scales for other types of civil litigation in the UK, and, I believe, compares favourably, and in some cases very favourably, with the types of delays that might be expected for similar claims in other member states. Some delay between the infringement taking place and the remedy being granted is unavoidable. The litigation process requires that pleading be exchanged, evidence gathered, disclosure be given, witness statements be prepared, and evidence be presented to the tribunal and legal arguments be advanced. The litigant must take her or his place in the queue with other litigants, and the resources that can be allocated to the tribunal system are not limitless, unfortunately.

65. Mr Milsom also pointed out that it is, sadly, often the case that respondents do not pay the compensation that has been found to be due to a claimant, either at all, or for a considerable period after the award has been made by the ET. This is a separate issue, in my view, and is not one that would be solved by the provision of interim relief.

66. Given that the delays are not grossly excessive, a remedy which provides full compensation for loss, including interest, but which is only available after a final hearing at which full evidence and argument have been heard, does not infringe the effectiveness principle. Put another way, the EU law principle of effectiveness does not require member states to make provision for interim relief. In my judgment, this is especially clear in circumstances in which the interim relief is available after only a brief consideration of the issues in the case by an ET, without full examination of the evidence, and in which the sums payable by way of interim relief are non-refundable.

67. In addition, there are many other forms of discrimination or victimisation which do not involve dismissal, but it is not being suggested on behalf of the Claimant that the principle of effectiveness requires interim financial relief to be provided in those cases. It is hard to see why the principle of effectiveness should require interim relief in dismissal cases but not, for example, in cases in which a Claimant contends that she has been discriminated against by being turned down for a job, and has suffered financial loss as a result.

68. There is nothing in any of the ECJ/CJEU authorities to suggest that the requirements of the principle of effectiveness go as far as Mr Milsom suggests. Indeed, in my view, Mr McHugh is right to submit that the ECJ/CJEU has made clear that a remedy of full compensation after a final hearing, coupled with interest, satisfies the requirement of effectiveness, albeit that the question of interim relief has not specifically been an issue in any of the cases.

69. In **Sabine Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen (C-14/83)** [1986] 2 CMLR 430, a case about the original sex discrimination directive, 76/207, the ECJ said, at paragraph 18:

> **"[18] Article 6 requires member-States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'. It follows from the provision that member-States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves member-States free to choose between the different solutions suitable for achieving its objective."**

70. This passage makes clear that the provision of "adequate financial compensation" satisfies the requirement of effectiveness.

71. In **Marshall (No 2)**, the ECJ said:

> **"21. As the court held in Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching) (Case 152/84) [1986] Q.B. 401 , since article 5(1) prohibits generally and unequivocally all discrimination on grounds of sex, in particular with regard to dismissal, it may be relied upon as against a state authority acting in its capacity as an employer, in order to avoid the application of any national provision which does not conform to that article.**
>
> **22. Article 6 of the Directive puts member states under a duty to take the necessary measures to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. Such obligation implies that the measures in question should be sufficiently effective to achieve the objective of the Directive and should be capable of being effectively relied upon by the persons concerned before national courts.**
>
> **23. As the court held in Von Colson v. Land Nordrhein-Westfalen (Case 14/83) [1984] E.C.R. 1891 , 1907, para. 18, article 6 does not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but leaves member states free to choose between the different solutions suitable for achieving the objective of the Directive, depending on the different situations which may arise.**
>
> **24. However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. As the court stated in the Von Colson case, at p. 1908, para. 23, those measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.**
>
> **25. Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal contrary to *165 article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained.**

> **26. Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules."**

72. In my judgment, paragraphs 25 and 26 of the above extract from the **Marshall (No 2)** judgment make clear that financial compensation passes the test of effectiveness, providing it means that the loss and damage is made good in full.

73. Moreover, the ECJ in **Marshall (No 2)** specifically addressed the impact of delay on the effectiveness of the remedy and held that the effects of delay could be addressed by the provision of interest:

> **"31. With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.**
>
> **32. Accordingly, the reply to be given to the first and second questions is that the interpretation of article 6 of the Directive must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid."**

74. The ECJ did not say that the delays that are inherent in the judicial process meant that an effective remedy could only be provided if there was interim relief. **Marshall (No 2)** was concerned with Directive 76/207, but it is clear that the guidance given in **Marshall (No 2)** is equally applicable to the current Recast Directive: see **Arjona**, judgment, paragraph 29.

75. In the **Arjona** case, the CJEU reiterated that a remedy that provided full compensation for sex discrimination claims satisfied the requirement for an effective remedy. In that case, the question that was referred to the Court was whether it was necessary, in addition, for the

member state to make provision for punitive damages: the answer was "no", see judgment, paragraphs 32-36.

76. The fact that other member states provide a remedy of reinstatement or a declaration that the dismissal is a nullity is nothing to the point. **Marshall (No 2)** and **Arjona** make clear that a member state is free to decide either to provide for reinstatement/declaration of nullity, or full financial compensation. In any event, a remedy of reinstatement/declaration of nullity, granted at the end of a full hearing, is not the same thing as interim relief.

77. In my judgment, the other authorities that Mr Milsom relied upon, as examples of circumstances in which the principle of effectiveness could only be satisfied by interim relief, have no relevance to the present case. He referred to the human rights case of **Baczkwoski v Poland (1543/06)** (2009) 38 E.H.R.R. 19, in which the European Court of Human Rights ("ECtHR") had held that the Convention requirement of effectiveness had not been met when the Polish courts did not rule on the constitutionality of a march and demonstrations until after the date for them had come and gone. This was a case in which there was an obvious urgent reason, connected with freedom of assembly, why a final (not interim) judicial determination had to take place before a particular event took place. The reasons relied upon by the ECtHR in that case have no relevance to discrimination/victimisation cases. Similarly, the case of **R v Secretary of State for Transport, ex parte Factortame and others** [1990] ECR-I 2433, in which the ECJ held that it was necessary for member states to make available interim remedies to enable a court to disapply domestic legislation that is inconsistent with directly effective EU law in order to enforce a judgment that had already been handed down, is of no application to the present case. That was not interim relief in the same sense as it is being used in the present appeal, and, in any case, the subject-matter of the case was completely different.

Conclusion on effectiveness

78. For these reasons, I do not accept that the absence of a right to claim interim relief in discrimination/victimisation cases violates the EU law principle of effectiveness.

(4) Does the lack of interim relief for discrimination/victimisation cases infringe the EU law principle of equivalence?

The relevant comparison

79. The similar action of a domestic nature that Mr Milsom relies upon for his argument based upon the principle of equivalence is a claim for automatic unfair dismissal for making a protected disclosure, made under ERA, section 103A. He does not contend that the other causes of action for which interim relief is available, concerned with dismissals relating to trade union rights and employee representation matters, are similar actions of a domestic nature.

80. As regards the types of Directive-based claims that are equivalent to s103A claims, for this purpose, Mr Milsom submits that this applies to all types of discrimination and victimisation claims which involve dismissal (including harassment claims, if such claims can arise from dismissals). Moreover, he submits that the principle of equivalence means that interim relief must be extended to all forms of discrimination, not just sex discrimination as in the present case, but also to discrimination relating to all other types of protected characteristics that are covered by the EA 2010. He does not limit his comparison to victimisation cases. It follows that, if Mr Milsom's argument succeeds, interim relief will be extended to apply to all types of discrimination claims arising from dismissal, in relation to all forms of protected characteristics. In my judgment, Mr Milsom was right to put his case in this way. It would have been artificial to single out victimisation claims as being similar actions to s103A claims, when in reality victimisation is simply one of several forms of discrimination that is rendered

unlawful by the Directives and by the EA 2010, and the legislative framework treats victimisation cases in the same way it treats cases concerning other types of discrimination.

81. In a charmingly descriptive metaphor, Mr McHugh submits that this means that, rather than comparing apples with apples, Mr Milsom is comparing apples with a whole basket of fruits, and that this serves to emphasise that a s103A claim is not a similar action of a domestic nature so far as the entirety of discrimination claims arising from dismissals are concerned. I will deal with this submission later in this part of this judgment.

The issues

82. Three questions arise, which need to be considered separately. The first is whether claims for automatically unfair dismissal, under ERA, s103A, are similar actions of a domestic nature when compared with the generality of discrimination/victimisation claims. The second question is whether, if so, the procedural/remedies rules for discrimination/victimisation claims are less favourable than those from automatically unfair dismissal claims under s103A. The answer to the latter question may be affected whether the court or tribunal is required to look solely at the procedure or remedy about which complaint is made, i.e., in this case, interim relief, or whether the court or tribunal should look in the round at all of the procedural and remedy rules that apply to the two sets of actions. The third question is whether the "no most favourable treatment Proviso" ("the Proviso") applies, namely whether there is no breach of the equivalence requirement if the procedural and remedy rules applying to the EU-based claim are no less favourable than those which apply to a similar action of a domestic nature, even if there are other similar domestic law claims which have more favourable rules relating to procedures and remedies.

83. I will deal with these three questions in turn.

Are claims for automatically unfair dismissal, in whistleblowing cases, under ERA, section 103A similar actions of a domestic nature when compared with the generality of discrimination cases?

The test

84. Guidance in relation to the test to be applied has been provided by the Supreme Court in **Totel Ltd v Revenue and Customs Commissioners** [2018] UKSC 44; [2018] 1 WLR 4053. In **Totel,** the issue was whether a challenge to a determination of liability for VAT, derived from EU law, was similar to challenges to assessments for taxes of domestic origin, namely Income Tax, Capital Gains Tax ("CGT"), and Stamp Duty Land Tax ("SDLT"). The procedural rules were different, in that a taxpayer could only challenge an assessment to VAT if it paid the tax claimed first, whereas this did not apply to challenges in relation to the other types of tax.

85. The Supreme Court made clear that it is for the domestic court or tribunal to decide whether something is a similar action of a domestic nature (and also whether the procedures are less favourable). At paragraph 6 of the judgment, Lord Briggs JSC (who gave the judgment of the Court) said that, "This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis."

86. In **Totel**, a key question was whether claims arising out of the assessment of liability to direct and indirect taxes, respectively, were true comparators for this purpose. At paragraph 8, Lord Briggs said that a national court's analysis will depend critically upon the level of generality at which the process of comparison is conducted. As to that, he summarised the guidance from the CJEU as follows:

(1) There may be cases in which there is no similar action of a domestic nature (paragraph 7);

(2) The question whether any proposed domestic claim is a true comparator with an EU law claim is context-specific (paragraph 9);

(3) The domestic court must focus on the purpose and essential characteristics of allegedly similar claims (paragraph 10);

(4) Counsel for **Totel** was wrong to submit that the CJEU authorities justified addressing the similarity question at a very high level of generality (para 12); and

(5) The CJEU case law shows that alternative types of claim for exactly the same loss are a common example of true comparators see e g **Preston v Wolverhampton Healthcare NHS Trust (No 2)** [2001] 2 AC 455.

87. Lord Briggs also said that, in some cases, differences in procedure could be an indication that the two causes of action were not comparable. For example:

> **"Of particular importance within the relevant context is the specific procedural provision which is alleged to constitute less favourable treatment of the EU law claim. This is really a matter of common sense. Differences in the procedural rules applicable to different types of civil claim are legion, and are frequently attributable to, or at least connected with, differences in the underlying claim. A common example is to be found in different limitation periods. Thus, in England and Wales, the primary limitation period for personal injury claims is three years, whereas the primary limitation period for most other claims is six years. There is a 20-year prescription period for property claims in Scotland. To treat personal injury and, for example, property claims as true comparators for the purpose of deciding whether the shorter limitation period for personal injury claims constituted less favourable treatment would make no sense. This is because it is no part of the purpose of the principle of equivalence to prevent member states from applying different procedural requirements to different types of claim, where the differences in those procedural requirements are attributable to, or connected with, differences in the underlying claims."** (paragraph 11)

88. In **Totel**, the Supreme Court held that proceedings to challenge assessments to direct taxes was not a similar action of a domestic nature to VAT assessment. This was because VAT is a tax of which the economic burden falls upon the ultimate consumer, but which is collected by the trader from the consumer, and accounted for by the trader to HMRC. By contrast, taxpayers seeking to appeal an assessment to income tax, CGT, and SDLT are being required to pay, from their own resources, something of which the economic burden falls on them, and

which they have not collected, for the benefit of the revenue, from anyone else (judgment, paragraph 23).

89. In **Preston (No 2)**, at paragraph 21, Lord Slynn said that that one should be careful not to accept superficial similarity as being sufficient. It is not enough to say that both sets of claims arise in the field of employment law. In **Preston (No 2),** the House of Lords held that a claim for breach of contract was a similar action of a domestic nature to a claim for equal pay under the Equal Pay Act 1970.

90. The test was helpfully summarised by the Northern Ireland Court of Appeal in **Chief Constable of the Police Service of Northern Ireland v Agnew and others** [2019] NICA 32; [2019] IRLR 782, at paragraph 62, as follows (this case is currently under appeal to the Supreme Court):

> **"62. The essential first step for the operation of the principle of equivalence is to identify a true comparator. The judgment in Totel includes guidance as to identification of a comparator. "First, the question whether any proposed domestic claim is a true comparator with an EU law claim is context-specific." In that respect the domestic court must focus on the purpose and essential characteristics of allegedly similar claims. In Levez it was stated by the Advocate General that although "in some cases there is no difficulty in identifying "similar" forms of domestic action, in other cases it is clearly necessary to determine the ground of comparison, which in practice involves a policy decision." The Advocate General went on to state that "in principle, it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law … comply with the principle of equivalence: …." However, the Advocate General stated that there were a number of guidelines so that domestic actions pursuing the same "objective" … as actions to enforce a Community right, or whose purpose was similar, must be regarded as similar domestic actions." Also that "in order to establish the comparability of the two systems in question, the essential characteristics of the domestic system of reference must be examined" and that task was for the national court. The CJEU in its judgment at paragraph [43] stated that in "order to determine whether the principle of equivalence has been complied with in the present case, the national court — which alone has direct knowledge of the procedural rules governing actions in the field of employment law — must consider both the purpose and the essential characteristics of allegedly similar domestic actions." It also stated at paragraph [44] that "…, whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as**

the operation and any special features of that procedure before the different national courts: …"

The parties' submissions

91. Mr Milsom, on behalf of the Claimant, submits that if the test for "similar actions of a domestic nature", as summarised in **Totel** and **Agnew,** is applied, then a claim for automatic unfair dismissal for making a protected disclosure under ERA, s103A is a similar action of a domestic nature to all types of discrimination and victimisation claims relating to dismissal. Mr McHugh submits that this is not the case.

Discussion

92. In my judgment, Mr Milsom's submission on this point is correct. The two sets of claims are comparable for the purposes of the equivalence principle. In both cases they are claims that arise because the employer has treated the claimant less favourably in a particular way, by dismissing them. In both cases, the claim is based on the contention that the reason for dismissal was an impermissible one. It is true that, in a whistleblowing case, the alleged reason for dismissal is that the employer is victimising the claimant because it believes the claimant has done a particular thing, namely, make a protected disclosure, whereas claims for dismissals in breach of the EA 2010 encompass dismissals because the employer believes that the claimant has done a particular thing (a protected act) but also encompass dismissals because of one or more of the claimant's particular personal characteristics. Furthermore, claims for discriminatory dismissal will include claims for dismissal involving indirect discrimination, such as a provision, criterion or practice applied to selection for redundancy dismissal, for example, whether an employee is full-time or not, which is more difficult for women than for

men to satisfy. They will also encompass claims for dismissals arising from disability, under section 15 of the EA 2010. It might be said that there is a considerable difference between such claims and a whistleblowing dismissal claim. This is the point that was being made by Mr McHugh in his "basket of fruit" metaphor. Nonetheless, in my view, taken in the round, and applying the guidance in **Totel,** the similarity is sufficiently close to pass the comparability test.

93. A further potential argument against comparability is that there is no separate cause of action for "dismissal" in the discrimination/victimisation field. Claims for discriminatory dismissal or for victimisation consisting of dismissal are part of the wider cause of action which renders any detriment for these reasons unlawful. However, discriminatory dismissal has a sub-section to itself in the EA 2010, section 39(2)(c), as does dismissal by way of victimisation, section 39(4)(c), and so I do not think that this is an insurmountable impediment to comparability.

94. It is also true that, as I will go on to examine, there are numerous significant differences between the procedures and remedies for discrimination/victimisation cases, on the one hand, and s103A cases, on the other, quite apart from the non-availability of interim relief. However, in my judgment these differences do not mean that, as a matter of common sense, the two types of claims cannot be comparable. Unlike the example given at paragraph 11 of **Totel**, the procedural differences are not attributable to, or connected with, differences in the underlying claims.

95. There is one further important difference between the two sets of claims, however. This is that a claim under s103A can only be brought by an employee, that is, someone employed under a contract of service, whereas a discrimination/victimisation claim can be brought by a worker, which encompasses a much broader category of persons. This is a major point of

distinction, but, nevertheless, it does not affect my conclusion that these are similar actions of a domestic nature, for equivalence purposes, particularly in light of the two lines of authority to which I now turn.

96. The first line of authority consists of cases in which the appellate courts have emphasised the similarities between whistleblowing claims and discrimination claims, albeit not in the context of a consideration of the equivalence principle.

97. In **Woodward v Abbey National (No 1)** [2006] EWCA Civ 822; [2006] ICR 1436, at paragraph 59, Maurice Kay LJ said at paragraph 59 that:

> **"Although the language and the framework might be slightly different, it seems to me that the four Acts [the Public Interest Disclosure Act 1998, which introduced remedies in whistleblowing cases and the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995] are dealing with the same concept, namely, protecting the employee from detriment being done to him in retaliation for his or her sex, race, disability or whistle-blowing. This is made explicit by the long title to the Public Interest Disclosure Act 1998 , which is, as I have already set out: "An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation ." (Emphasis added.) All four Acts are, therefore, dealing with victimisation in one form or another. If the common theme is victimisation, it would be odd indeed if the same sort of act could be victimisation for one purpose, but not for the other."**

98. In my judgment, it is clear that Maurice Kay LJ was using the word "victimisation" in that passage in the broader sense of "targeted less favourable treatment", and so he was comparing whistleblowing claims with all types of discrimination claims.

99. Again, in **Eszias v North Glamorgan NHS Trust** [2007] EWCA Civ 330, albeit not in the context of an equivalence issue, Maurice Kay LJ said:

> **"30. There is another aspect of this type of case that calls for comment. Whistleblowing cases have much in common with discrimination cases, involving as they do an investigation into why an employer took a particular step, in this case dismissal.**

> **31. The claimant will often run up against the same or similar difficulties to those facing a discrimination claimant. There is a similar but not the same public interest consideration."**

100. In **Timis v Osipov (Protect Intervening)** [2018] EWCA Civ 3281; 2019] ICR 655, the Court of Appeal held that a claimant could obtain damages against individual respondents for detriment or vicarious liability arising from making a protected disclosure, under ERA s47B, in parallel to obtaining compensation against the employer for unfair dismissal under section 103A. At paragraph 69, Underhill LJ said:

> **"69. I would add that if Mr Stilitz [counsel for the employer] were right the scheme of protection for whistleblowers will be less effective than for victims of other kinds of discrimination and victimisation at work. As noted at para 33 above, under the 2010 Act dismissal is simply another form of detriment for which both the employer and any responsible co-workers are potentially liable: claims are commonly brought against individuals as well as employers, and occasionally it is the individual who ends up having to pay, either because the employer is insolvent or because it has established a reasonable steps defence 9 . That point is not in itself decisive because (again, as noted above) there is a limit to the extent to which it is right to try to assimilate the two schemes; but the two situations are nevertheless essentially similar and, other things being equal, one would expect Parliament to have intended to follow the same substantive approach in each."**

101. The second line of authorities consist of cases in which it has been held that the test of comparability between causes of action for the purposes of the principle of equivalence has been passed. These serve to emphasise that, whilst each comparison is context-specific, it is possible for the test to be satisfied even if the causes of action are not exactly similar. So, for example:

(1) In **Preston (No 2),** claims for equal pay and claim for breach of contract for other reasons were held by the House of Lords to be comparable;

(2) In **Revenue and Customs Commissioners v Stringer** [2009] UKHL 31; [2009] ICR 985, the House of Lords expressed the view that actions for breach of the right to holiday pay under the Working Time Regulations and common law claims for failure to provide holiday with pay were comparable (see Lord Walker, at paragraph 62);

(3) In **Pontin v T-Comalux SA (C-63/08)** [2009] ECR-I 10467, a Luxembourg law provided that a woman who was dismissed on grounds of pregnancy only had 15 days to bring her claim, whereas an action for damages for wrongful dismissal had a 3-month time limit. The CJEU made clear that it took the view that this breached the principle of equivalence (see judgment, paragraphs 58-59); and

(4) In **Agnew,** claims under the Working Time Regulations (Northern Ireland) were held to be comparable to claims for unlawful deductions from wages.

Are the procedural/remedies rules for discrimination/victimisation claims less favourable than those for automatically unfair dismissal claims under s103A?

102. Having concluded that discrimination/victimisation claims are comparable, for equivalence purposes, with claims under ERA s103A, the next question is whether the procedural/remedies rules for such claims are less favourable than they are for whistleblowing unfair dismissal claims.

103. In one respect, they plainly are, because interim relief is not available for discrimination/victimisation claims, whereas it is available for s103A claims. However, that is not the end of the question. The authorities make clear that when considering whether procedural/remedies rules are no less favourable for similar actions of a domestic nature, the court or tribunal must look at the entirety of the procedures and remedies.

104. This was made clear by Lord Briggs in **Totel,** at paragraph 31:

> **"31. Less favourable treatment is not, of course, established merely because the procedure for one type of claim contains a restriction or condition which is absent from the procedure for another type of claim. It is common to find that different claims are subjected to a package of procedural requirements, such that some of those affecting claim A are less favourable, but others more favourable, than those affecting claim B. A good example is to be found**

in Preston v Wolverhampton Healthcare NHS Trust (No 2) [2001] 2 AC 455 , illustrated in paras 29–31 in the speech of Lord Slynn."

105. In **Preston (No 2)**, in the passage referred to by Lord Briggs, Lord Slynn said:

> **"29. There is still a six-year period for contract claims rather than a six-month claim for infringement of article 119 . This, however, is not the end of the inquiry. Merely to look at the limitation periods is not sufficient. It is necessary to have regard to "the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts" [2001] 2 AC 415 , 452a-b, para 61. In Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521 , 546, the Court of Justice said:**
>
> **"51. On that point, it is appropriate to consider whether, in order fully to assert rights conferred by Community law before the county court, an employee in circumstances such as those of the applicant will incur additional costs and delay by comparison with a claimant who, because he is relying on what may be regarded as a similar right under domestic law, may bring an action before the industrial tribunal, which is simpler and, in principle, less costly."**
>
> **30. There are thus factors to be set against the difference in limitation periods. As has already been seen the claim under a contract can only go back six years from the date of the claim whereas a claim brought within six months of the termination of employment can go back to the beginning of employment or 8 April 1976 (the date of the judgment in Defrenne v Sabena (Case 43/75) [1976] ICR 547), whichever is the later. Moreover the claimant can wait until the employment is over, thus avoiding the possibility of friction with the employer if proceedings to protect her position are brought during the period of employment, as will be necessary since the six-year limitation runs from the accrual of a completed cause of action. It is in my view also relevant to have regard to the lower costs involved in the claim before an employment tribunal and if proceedings finish there the shorter time-scale involved. The period of six months itself is not an unreasonably short period for a claim to be referred to an employment tribunal. The informality of the proceedings is also a relevant factor.**
>
> **31. I am not satisfied that in these cases it can be said that the rules of procedure for a claim under section 2(4) of the 1970 Act are less favourable than those applying to a claim in contract. I therefore hold that section 2(4) does not breach the principle of equivalence."**

106. In **Agnew**, at paragraph 63, the NICA said:

> **"63. In relation to the more favourable character of a similar domestic action the test was stated by the Advocate General in Levez at paragraph [70] as being "whether the procedural rules governing (a similar domestic action) are more favourable than those laid down by domestic law … to govern the exercise of rights derived from Community law." The CJEU identified procedural rules in Levez when it stated that the "exercise of a Community right before the national courts must not be subject to conditions which are more strict (for example, in terms of limitation periods, conditions for recovering undue payment, rules of evidence) than those governing the exercise of similar rights derived wholly from domestic law." Also in Levez the CJEU identified at**

paragraph [51] that if the Community procedures involve additional costs and delay and are more complicated that can amount to less favourable conditions."

107. Accordingly, it is necessary to consider all of the procedural/remedial rules relating to discrimination/victimisation to determine if the availability of interim relief means that the domestic cause of action is less favourable than the cause of action derived from EU law. It is necessary to consider whether there are factors to be set against the factor relied upon by the Appellant (see **Preston (No 2)**).

108. I should mention in passing that it is clear, in my view, that it does not matter whether something is to be regarded as a procedural matter, or as an aspect of remedies. Either way, it forms part of the package which must be considered for the purposes of the equivalence comparison. In **Marshall,** the equivalence test was applied to the provision of interest on damages, which might be regarded as more a matter relating to remedies than to procedures. Again, in **Stringer** and then in **Agnew,** the matter under consideration was how far back a claim for lost holiday pay could go. Once again, this might be regarded as a matter that related more to remedies than to procedures, in the narrow sense.

109. The bulk of procedural and remedies rules are the same for discrimination/victimisation claims and s103A claims. Both sets of claims are brought in the ET, and the same procedural rules in the Rules of Procedure Regulations apply to both. In both cases, the main remedies are declaration and compensation. So far as compensation is concerned, there is no statutory cap. Interest is available in both cases.

110. There are a number of respects in which the procedural/remedial requirements for discrimination/victimisation claims are more favourable to claimants than in s103A claims. These are (this is not an exhaustive list and there may be others):

(1) Time limits. Though the primary time limit is the same, three months from dismissal, the secondary time limit for discrimination/victimisation is considerably more favourable to claimants (the "just and equitable" test rather than the "reasonably practicable" test): see EA 2010 s123(1)(b) and ERA, s111(2)(b);

(2) Burden of proof. In a discrimination/victimisation case, the shifting burden of proof in EA s136 applies. In **Kuzel v Roche Products Ltd** [2008] EWCA Civ 380; [2008] ICR 799, at paragraph 48, this was regarded as a more favourable burden for claimants than the burden that applies in unfair dismissal cases;

(3) The reason for dismissal. In a s103A case, the claimant must show that the protected disclosure is the reason or, if more than one, the principal reason for the dismissal. In a discrimination case, in contrast, the question is whether the protected characteristic or the protected act was an 'effective cause', see **O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1997] ICR 33, EAT and **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615, CA;

(4) Third party liability. In a discrimination case, a claim can be brought against an individual who may be jointly and severally liable with the employer. In a claim brought under section 103A, this is not possible (such a claim can be brought as part of a detriment claim under section 47B, see **Osipov,** but the present comparison is not concerned with section 47B claims);

(5) Injury to feelings. A payment for injury to feelings will be made in a discrimination/victimisation case, but no such payment is available in an unfair dismissal claim, including one under s103A. See **Dunnachie v Kingston Upon Hull City Council** [2004] UKHL 36, [2004] IRLR 727. The fact that injury to feelings compensation may be available in a whistleblowing detriment claim under ERA, section

47B (see **Virgo Fidelis School v Boyle** [2004] ICR 1210) is nothing to the point, as the comparison is not with section 47B claims; and

(6) Contributory fault. A deduction for contributory fault may be made in a s103A case (see ERA, s123(6)), but it is not clear whether a deduction for contributory fault may be made in a discrimination/victimisation claim, or at least whether the circumstances in which such a deduction may be made are as broad as they are in unfair dismissal cases. See **First Great Western Ltd v Waiyego** UKEAT/0056/18 (Kerr J).

111. Taking into account all of the various procedural/remedies features of discrimination/victimisation claims and of s103A claims, including interim relief, in my judgment it is not the case that the procedural/remedies requirements of discrimination/victimisation cases are less favourable than those that apply to s103A claims. Whilst the right to claim interim relief is a real benefit, it does not, in my view, outweigh the procedural and remedies advantages of discrimination/victimisation claims, as described above. It is necessary to take a practical and realistic approach to this comparison. If this is done, then, in my opinion, the features of discrimination/victimisation claims which are more favourable to claimants are considerably more valuable in practice than the countervailing features of s103A claims.

112. As for discrimination/victimisation claims, the more generous time limits are a real and important benefit. The frequency in practice in which claimants rely upon the "just and equitable" extension is testament to this. So is the scope to recover compensation for injury to feelings and the (relative) insulation from deductions for contributory fault. On the other hand, the different approach to reasons for dismissal may well be of limited significance. Moreover, I do not consider the differences in burden of proof to be significant. The differences in the

burden of proof are unlikely to make much, if any, difference in practice. In **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] IRLR 870, the Supreme Court agreed with a warning given by Underhill J in **Martin v Devonshires Solicitors** [2011] ICR 352 (EAT), paragraph 39, that it is 'important not to make too much of the role of the burden of proof provisions'. However, the ability to claim against individual respondents is potentially very beneficial to claimants in discrimination/victimisation cases. I can see, however, that it might be arguable that this latter benefit is may not be procedural/remedial at all, but could be characterised as a separate substantial cause of action. Even if this last feature is left out of account, I would remain of the view that, on balance, the procedural/remedies rules relating to discrimination/victimisation claims are the more favourable, even when interim relief is taken into account.

113. Mr Milsom did not seek to rely upon any other procedural or remedial advantages of s103A claims over discrimination/victimisation claims. There are some. These are that successful claimants in section 103A claims are entitled to be considered for reinstatement/re-engagement under ERA, s114-115, and to a basic award as well as the compensatory award, under section 116.

114. Even if these other advantages of s103A claims are taken into account, my conclusion remains the same. In practice, the number of cases in which an ET will order reinstatement or re-engagement for someone who has been dismissed for making a protected disclosure will be tiny, if not non-existent. The reality will be that working relationships will have been irredeemably damaged, so that such remedies will not be practicable. This leaves the advantage of the basic award. Mr Milsom has not relied on the basic award as being a more favourable procedural/remedies feature than is available in discrimination cases and I do not

think that, even when considered along with interim relief, it outweighs the procedural/remedies benefits of discrimination/victimisation claims.

115. Looking at the matter in the round, therefore, I do not accept Mr Milsom's submission that, even taking account of interim relief, the procedural/remedies features of discrimination/victimisation cases are less favourable than the features of s103A automatically unfair dismissal claims relating to protected disclosures.

116. If I am right about this, then it means that the Claimant's case based upon equivalence must fall, but in case I am wrong, I will go on to deal with the Proviso.

Does the Proviso apply?

117. The Proviso was considered by the Supreme Court in **Totel.** In light of its finding on 'similar actions of a domestic nature', it was strictly unnecessary for the Supreme Court to deal with the Proviso. Lord Briggs said that if it had been necessary to decide the issue, he might have regarded it as deserving a reference to the CJEU. In the circumstances, as the point had been fully argued, the Supreme Court made some obiter observations about it (para 29). Although these observations are obiter, in my judgment I should follow them since, albeit obiter dicta, they emanate from the Supreme Court, and also since I agree with them.

118. Lord Briggs referred to the Proviso as follows at paragraph 36 of his judgment:

> **"36. This issue arises if the search for true comparators with the EU claim discloses more than one comparable domestic claim with, viewed in the round, different levels of favourableness in procedural treatment. On almost every occasion when it has referred to the principle of equivalence the CJEU has added the proviso that the principle does not require the EU claim to be treated as favourably as the most favourably treated comparable domestic claim. In the earliest of the cases cited to this court, the EDIS case, the proviso is explained thus, at para 36:**

> **"That principle [the principle of equivalence] cannot, however, be interpreted as obliging a member state to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law."**
>
> **Similar statements appear in the Levez case at para 45, in Pontin v T-Comalux SA (Case C-63/08) [2009] ECR I-10467 , at para 45, in the Transportes Urbanos case, at para 34 and in the Littlewoods case, at para 31. But none of these cases provide any more comprehensive explanation of how the Proviso is to be applied in practice. This may be because its detailed operation is a matter for national courts, and the CJEU considers that the Proviso as described above is sufficiently self-explanatory for that purpose."**

119. Lord Briggs described the "no most favourable treatment Proviso" as meaning that the equivalence principle does not require the EU claim to be treated as favourably as the most favourably treated comparable domestic claim (para 36). The detailed operation of the Proviso is a matter for domestic courts (para 36).

120. The Supreme Court considered the argument advanced by the taxpayer, based upon an obiter comment by Lord Neuberger in **Stringer**, to the effect that the Proviso only applies where the most favourable rules are exceptional or unusually beneficial rules (paras 38-40).

121. Lord Briggs said that Lord Neuberger's comment in **Stringer** was not intended to be a fully reasoned or comprehensive explanation of the Proviso's full purpose and effect (para 44). He did not approve or adopt it. He put forward the following (obiter) analysis:

(1) The Proviso is not a free-standing rule, but is an integral part of the equivalence principle (paragraph 45);

(2) "What is required is that the procedure should be broadly as favourable as that available for truly comparable domestic claims, rather than the very best available" (paragraph 45);

(3) The conclusion of the Court of Appeal in **Totel** on this issue was broadly correct (paragraph 47). The Court of Appeal's conclusion was set out in the extract from the Court of Appeal judgment at paragraph 42 of the Supreme Court's judgment, and was to the effect that it was open to the member state to apply 'any available set of rules, which are already applied to similar claims, to an EU-derived claim, provided that an EU-derived claim is not selected for the worst treatment."

122. Applying this approach to the present case, interim relief is not available in "ordinary" unfair dismissal cases. Therefore, if such "ordinary" unfair dismissal cases are also similar actions of a domestic nature to discrimination/victimisation cases, the Proviso would operate so as to mean that there has been no breach of the equivalence principle: the rules for discrimination/victimisation cases would be no less favourable than for one of the similar actions of a domestic nature.

123. However, this analysis will only work if claims for "ordinary" unfair dismissal are similar actions of a domestic nature. This is another difficult question. In my judgment, the answer is that they, too, are similar actions of a domestic nature.

124. It is true that there have been no statements in the case-law authorities which compare unfair dismissal claims under section 98 where the dismissal was for an impermissible reason with discrimination/victimisation claims, as there have been in relation to dismissals under s103A. However, "ordinary" unfair dismissal claims are similar to claims for discrimination/victimisation relating to dismissal in that they are both concerned with dismissal, and they are both concerned with improper action on the part of the employer. In my judgment, these similarities are sufficient.

125. It is true also that, whilst a claim for "ordinary" unfair dismissal may consist of a claim that the dismissal was for an impermissible reason, i.e a reason that was not for any of the potentially fair reasons set out in ERA, sections 98(1)(a) and 98(2), it may (and more usually will) be concerned with a claim in which the claimant is contending that, whilst the reason for dismissal was not itself impermissible, the employer acted unreasonably in deciding to dismiss, or did not operate a fair procedure. Unlike discrimination/victimisation cases, therefore, the main focus may not be upon what the reason for dismissal is, but upon whether the employer should have dismissed for that reason, or whether the dismissal procedures were unfair. Nevertheless, in my view, an "ordinary" unfair dismissal claim is a similar action of a domestic nature. The similarity does not have to be exact. This is demonstrated by **Preston (No 2),** in which the House of Lords held that "ordinary" breach of contract claims were similar to equal pay claims. In any event, there is a particularly close parallel, when the comparison is made with "ordinary" unfair dismissal cases in which the contention is that the reason for dismissal is not for a permitted reason.

126. There is also, of course, a close parallel between "ordinary" unfair dismissal claims and "automatic" unfair dismissal claims, such as s103A claims, which I have already found to be comparable, in their turn, with discrimination/victimisation claims.

127. For these reasons, in my view, even if (contrary to the conclusion I have reached) the rules for discrimination/victimisation claims are less favourable than one similar action of a domestic nature, a s103A claim, because of interim relief, the Proviso will apply, because there is another similar action, a claim for unfair dismissal, which does not make provision for

interim relief. This is an alternative reason why the equivalence principle has not been breached.

Conclusion and summary on equivalence

128. I have not found this issue to be an easy one. There were times during my consideration of this matter when I was swayed by Mr Milsom's attractive submissions on equivalence. However, though I have found that discrimination/victimisation claims are comparable for equivalence purposes, I have concluded that there has been no breach of the equivalence principle. This is for two cumulative reasons. The first is that, in my view, taken in the round, the procedural/remedies features of discrimination/victimisation cases are no less favourable than the relevant features of s103A claims. The second is, that even if I am wrong on the first point, the Proviso applies, namely that the equivalence principle is not infringed because, even if the procedures/remedies for discrimination/victimisation claims are less favourable than for s103A claims, they are not less favourable than for another similar action of a domestic nature, namely a claim for "ordinary" unfair dismissal, which does not have provision for interim relief.

(5) If there is a breach of the principles of effectiveness and/or equivalence, can and should a right to seek interim relief in discrimination/victimisation cases be read into the domestic law statutory framework?

129. In light of the conclusions that I have set out in the preceding parts of this judgment, this issue does not arise, at least in the EU law context. I have found that there has been no breach of the effectiveness or equivalence principles. However, I will go on to consider whether, if there had been a breach of the equivalence principle, it would be possible to read a right to interim relief for discrimination/victimisation cases into domestic law. I do so (a) in case I am wrong in relation to equivalence, and (b) because the question whether a right to interim relief

A can be read into domestic law arises in relation to the claim made under the ECHR, and the test is the same.

The test

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130. The test for whether it is possible to read words into domestic legislation to bring it into line with Community law obligations is now well-established, although it is not always easy to apply it to borderline cases. The test in EU law cases is exactly the same as is to be applied C when seeking to bring domestic legislation into line with the ECHR, in accordance with the HRA, section 3. In the EU law field, it is sometimes known as the **Marleasing** principle, after **Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89)** [1990] D ECR I-4135.

131. The scope and limits of the interpretative obligation have been set out by Underhill LJ E in **Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust** [2016] EWCA Civ 607; [2016] ICR 903, at paragraph 48:

> **"48. I do not, therefore, think that the claimant can get home by applying ordinary principles of construction. I turn to Mr Milsom's alternative case based on the Marleasing principle. The limits of that principle, and the cognate approach under section 3 of the Human Rights Act 1998 , have been the subject of a good deal of exposition in the case law, most authoritatively in the decisions of the House of Lords in Pickstone v Freemans plc [1988] ICR 697; [1989] AC 66 , Litster v Forth Dry Dock & Engineering Co Ltd [1989] ICR 341; [1990] 1 AC 546 5 and Ghaidan v Godin-Mendoza [2004] 2 AC 557 . For working purposes, it is sufficient to adopt the summary in the judgment of Sir Andrew Morritt C in Vodafone 2 v Revenue and Customs Comrs [2010] Ch 77, para 37:**
>
> **"In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far reaching. In particular: (a) It is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in Pickstone , at p 725E). (b) It does not require ambiguity in the legislative language (per Lord Oliver in Pickstone , at p 725E; per Lord Nicholls of Birkenhead in Ghaidan , at para 32). (c) It is not an exercise in semantics or linguistics (see per Lord Nicholls Ghaidan , at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115). (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in Litster , at p 371D; per Lord Nicholls in Ghaidan , at para 31). (e) It permits the implication of words necessary to comply with Community**

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law obligations (per Lord Templeman in Pickstone , at 720F; per Lord Oliver in Litster , at p 371D); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in Pickstone , at p 712C; per Lord Rodger in Ghaidan , at para 122; per Arden LJ in R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs [2006] STC 1252 , para 114)."

Sir Andrew continued, at para 38:

"The only constraints on the broad and far reaching nature of the interpretative obligation are that: (a) the meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in Ghaidan [2004] 2 AC 557 , para 33; per Dyson LJ in Revenue and Customs Comrs v EB Central Services Ltd [2008] STC 2209 , para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls in Ghaidan's case, at para 33 and Lord Rodger at paras 110–113; per Arden LJ in IDT Card Services at paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the Ghaidan case, per Lord Nicholls at para 33; per Lord Rodger, at para 115; per Arden LJ in the IDT Card Services case, at para 113."

132. Applying the **Marleasing** approach, or its cognate approach in relation to the ECHR, the Courts have, on a number of occasions, added words to statutes to bring them into line with EU law or the ECHR. So, for example:

(1) In **Litster v Forth Dry Dock and Engineering Co Ltd** [1989] ICR 341, the House of Lords read words into the automatically unfair dismissal provisions of the Transfer of Undertaking (Protection of Employment) Regulations so that they applied to those who were dismissed immediately before the transfer, for a reason connected with the transfer, as well as to those who were still in employment at the time of the transfer;

(2) In **Ghaidan,** the House of Lords was concerned with a provision in the Rent Act 1977 which provided a partner of a deceased statutory tenant could succeed to the tenancy if they were the tenant's spouse or lived together as husband and wife. At the time, applying the normal rules of statutory interpretation, this excluded same sex-partners of the tenant from the succession rights. The House of Lords held that the relevant

provision should be read, and given effect to, as though the survivor of a homosexual couple living together was the surviving spouse of the original tenant;

(3) In **EBR Attridge LLP v Coleman** [2010] ICR 242, the EAT read words into section 3A(5) of the Disability Discrimination Act 1995 so that the protection against disability discrimination not only to the disabled person themselves, but also someone who suffered from associative discrimination, that is, discrimination on the ground of another's disability. In **Coleman,** the Claimant contended that she was discriminated against because she was the primary carer of her disabled son;

(4) In **Rowstock Ltd and another v Jessemey** [2014] EWCA Civ 185; [2014] 1 WLR 3615, the Court of Appeal read words into the EA to render unlawful victimisation occurring after the termination of employment. The Court held that the failure to include this within the EA had been an unintended drafting error;

(5) In **Blackwood,** the Court of Appeal read words into the EA 2010 so as to enable a work placement student to bring proceedings for sex discrimination against the work provider which she said was responsible for the discrimination, rather than against the educational institution which had arranged the placement;

(6) In **British Gas Trading Ltd v Lock** [2016] EWCA Civ 983; [2017] ICR 1, the Court of Appeal read words into the Working Time Regulations 1998 so that commission could be taken into account when holiday pay was calculated;

(7) In **P v Commissioner of Police for the Metropolis (EHRC Intervening)** [2017] UKSC 65; [2018] ICR 560, the Supreme Court read words into the EA 2010 to extend its scope to complaints about disciplinary proceedings against police officers; and

(8) In **Gilham v Ministry of Justice (Protect Intervening)** [2019] UKSC 44, [2019] 1 WLR 5905, the Supreme Court read words into the ERA, section 47B so as to extend its scope to judicial office-holders, in order to bring the statute into line with the ECHR.

133. These examples illustrate the breadth of the courts' power to apply a conforming interpretation to domestic legislation.

134. The Court has, however, on some occasions declined to apply a conforming interpretation to domestic legislation. For example, in **R (Anderson) v Secretary of State for the Home Department** [2002] UKHL 46; [2003] 1 AC 837, the House of Lords declined to read words into the Crime (Sentences) Act 1997, so as to remove the Home Secretary's Power to set the tariff for prisoners serving a mandatory life sentence, even though it was in violation of ECHR, Article 6, because the statutory provision expressed the deliberate legislative intent of entrusting decisions relating to the length of imprisonment and the release of prisoners serving mandatory life sentences to the Secretary of State. Therefore, that provision could not be read and given effect, under section 3(1) of the Human Rights Act 1998, in a way which was compatible with the Convention. Again, in **Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs Intervening)** the Court of Appeal, [2015] EWCA Civ 33; [2016] QB 347, held that it was not possible to read the State Immunity Act 1978 in such a way as to withhold state immunity from an embassy which was facing claims for unfair dismissal and other employment-related claims from service staff, even though the immunity was contrary to Article 6 of the ECHR. The Supreme Court [2017] UKSC 62; [2019] AC 777, did not demur and made a declaration of incompatibility instead. In **Office of Gas and Electricity Markets v Pytel** [2019] ICR 715, the EAT declined to read words into section 105(1) of the Utilities Act 2000 so as to require an employer to disclose certain documents relating to the claimant's protected disclosure claim.

Application of the test to the present case

Textual amendment

135. There would be no difficulty finding a form of words that would extend interim relief to discrimination/victimisation cases concerning dismissals. The case law authorities have stressed, time and again, that the precise form of words to be used does not matter. Mr Milsom has helpfully suggested a form of words that would achieve his objective. This would involve the addition of a new sub-paragraph to section 39 of the EA 2010, section 39(9), in the following terms:

> **"(9) Sections 128 to 132 of the Employment Rights Act 1996 (interim relief) apply in relation to dismissal for the reason specified by subsections (2)(c) or (4)(c) as they apply in relation to a dismissal for a reason specified in section 128(1)(b) of the 1996 Act."**

136. This would be a neat and elegant solution to the drafting issue, and so this does not form any obstacle to a conforming interpretation.

Would a conforming interpretation be possible in this case?

137. Mr Milsom submits that there would be no difficulty in applying a conforming interpretation in order to read an obligation to make interim relief available in discrimination cases, if he is right on either of his contentions to the effect that the failure to offer interim relief in such cases contravenes EU law and the ECHR. He submits that it would not go against the grain of the EA 2010 to do so. A key purpose of the EA 2010 is provide effective remedies in cases of discrimination. The effect of adding a right to seek interim relief would be to improve the effectiveness of the available remedies. This would go with the grain of the legislation, not against the grain. Further, he submitted that the EA 2010 was drafted and enacted to implement the UK's obligations under the EU anti-discrimination Directives and other EU legislation, and

so that it could not be going against the grain of the legislation to do something that would remedy a breach of the UK's EU obligations.

138. These are persuasive arguments. The strongest, in my view, is that it would not go against the grain of the EA 2010 to enhance the remedies that are available to litigants, because the legislation is designed to provide an effective remedy. Nonetheless, in my view, applying the principles relating to the conforming interpretation as they have been laid down in the higher appellate authorities, it would not be possible to apply a conforming interpretation in this case, even if the absence of interim relief for discrimination/victimisation cases related to dismissal infringes the EU principle of equivalence and/or the ECHR.

139. The principles that were summarised by Sir Andrew Morritt V-C in **Vodafone 2** include that an interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment, and that the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate.

140. In my judgment, the introduction, via an appellate ruling, of the remedy of interim relief for discrimination/victimisation cases resulting from dismissals would cross the boundary between interpretation and amendment, and would require this EAT to make decisions on matters that the Appeal Tribunal is not equipped to evaluate.

141. The extension of interim relief to discrimination/victimisation cases would be a very significant change indeed. In UK domestic law, the law relating to unfair dismissal, on the one

hand, and relating to discrimination/victimisation, on the other, have always pursued separate and parallel paths. The causes of action are different and the remedies are different. Though I have not had the benefit of assistance from counsel from the Government in this appeal, it is clear that there was a deliberate legislative choice to have separate schemes for unfair dismissal and for discrimination/victimisation.

142. In **Kuzel v Roche** [2008] ICR 799, Mummery LJ said, at paragraph 48:

> **'The thinking behind the association of protected disclosure and discrimination is that both causes of action involve acts or omissions for a prohibited reason. Unfair dismissal and discrimination on prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts.'**

143. In my judgment, it is also clear that the scope of the current suite of remedies that are available in discrimination/victimisation cases is the result of careful consideration by Government and Parliament. A positive choice must have been made not to add interim relief to that suite of remedies.

144. It is clear that, prior to the enactment of the EA 2010, Parliament and the Government carefully considered the state of the law of discrimination/victimisation, and considered whether improvements and alterations should be made to it. The Explanatory Notes to the EA 2010 record that in June 2007 the Department for Communities and Local Government published a consultation paper, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain. This was followed in June and July 2008 by two Command Papers published by the Government Equalities Office: Framework for a Fairer Future – the Equality Bill (Cm 7431); and The Equality Bill – Government Response to the Consultation (Cm 7454). In January 2009, the Government published the New Opportunities White Paper (Cm 7533)

which, amongst other things, committed the Government to considering legislation to address disadvantage associated with socio-economic inequality. All of this shows that the Government and Parliament carefully took stock of equality law before enacting the EA 2010, and gave consideration to the ways in which protections could be improved. The Explanatory Notes state that the EA 2010 has two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality.

145. The EA 2010 harmonised the law that was previously set out in a different statutes and statutory instruments, but it also introduced a number of changes and improvements to equality law. These are summarised in paragraph 12 of the Explanatory Notes, as follows:

> The EA 2010:
>
> - places a new duty on certain public bodies to consider socio-economic disadvantage when making strategic decisions about how to exercise their functions;
> - extends the circumstances in which a person is protected against discrimination, harassment or victimisation because of a protected characteristic;
> - extends the circumstances in which a person is protected against discrimination by allowing people to make a claim if they are directly discriminated against because of a combination of two relevant protected characteristics;
> - creates a duty on listed public bodies when carrying out their functions and on other persons when carrying out public functions to have due regard when carrying out their functions to: the need to eliminate conduct which the Act prohibits; the need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and the need to foster good relations between people who share a relevant protected characteristic and people who do not. The practical effect is that listed public bodies will

have to consider how their policies, programmes and service delivery will affect people with the protected characteristics;

- allows an employer or service provider or other organisation to take positive action so as to enable existing or potential employees or customers to overcome or minimise a disadvantage arising from a protected characteristic;
- extends the permission for political parties to use women-only shortlists for election candidates to 2030;
- enables an employment tribunal to make a recommendation to a respondent who has lost a discrimination claim to take certain steps to remedy matters not just for the benefit of the individual claimant (who may have already left the organisation concerned) but also the wider workforce;
- amends family property law to remove discriminatory provisions and provides additional statutory property rights for civil partners in England and Wales; and
- amends the Civil Partnership Act 2004 to remove the prohibition on civil partnerships being registered in religious premises.

146. It follows that the Government and Parliament conducted a wholesale review of the law relating to discrimination/victimisation, including the available remedies. Some strengthening of the remedies was introduced. If it had been considered appropriate to introduce interim relief for discrimination/victimisation cases relating to victimisation, then this would have been done as part of the reforms introduced by the EA 2010. In these circumstances, in my view, it is safe to infer that consideration was given to remedies for discrimination/victimisation in the period leading up to enactment of the EA 2010, and a decision was made not to add interim relief to the suite of available remedies.

147. In **Benkharbouche,** at paragraph 67, the Court of Appeal expressly approved the reasoning of the then President of the EAT, Langstaff J, as regards why he did not think that a conforming interpretation was permissible in that case. As I have said, the Supreme Court did not demur, though it did not consider the issue in any detail. In the EAT judgment, at paragraph 38, Langstaff J said that:

> **"using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."**

148. In my judgment, to add interim relief to the suite of remedies available for discrimination/victimisation cases would be inconsistent with the scheme of the EA 2010, and would fall on the wrong side of the boundary referred to by Langstaff J.

149. Moreover, to use the words of the Court of Appeal at paragraph 68 of **Benkarbouche** (echoing Langstaff J at paragraph 40 of the EAT judgment), there would be a "danger of its affecting the overall balance struck by the legislature whilst lacking Parliament's panoramic vision across the whole of the landscape".

150. This is another way of saying that (to paraphrase **Ghaidan**) the extension of interim relief to discrimination/victimisation cases relating to discrimination would have major policy and practical consequences, the effects of which the EAT is not equipped to evaluate. There are a large number of policy and practical considerations.

151. First, the extension of interim relief would mean that there would be an interim remedy for a particular subset of discrimination/victimisation cases (dismissal cases) which is not

available for other types of cases. This would run counter to the scheme of the EA 2010, which is to make the same remedies available for all forms of discrimination and victimisation.

152. Second, it would mean that interim relief would be available not just to employees, as it currently is in s103A claims, but also to the much wider class of workers. This would be a very significant change. There will be policy and practical consequences resulting from this which the EAT is not equipped to evaluate.

153. Third, it would open up the possibility of a much larger number of interim relief claims being brought in ETs in future. There are, I think, are many more discrimination and victimisation claims relating to dismissals, than there are s103A claims. Mr Milsom says that this may not make much difference in practice, because in reality few discrimination/victimisation claimants will seek interim relief and even fewer will be successful. I am simply not in a position to evaluate this. I do not have Parliament's "panoramic vision" to assist me in predicting whether the extension of interim relief in this manner would lead to a flood of new claims. I am not able to evaluate whether this would place intolerable burdens and delays on ETs, perhaps leading to delays for the main body of discrimination and victimisation claimants who do not seek interim relief, or for whom it would still not be available, but whose cases will be delayed by interim relief hearings in other cases. Put bluntly, I am not in a position to evaluate whether the extension of interim relief in discrimination and victimisation cases will be of overall benefit for the enforcement of equality law, or whether it will impede the early resolution of more cases than it will benefit.

154. Fourth, the extension of interim relief to discrimination/victimisation cases relating to dismissal would have obvious disadvantages for employers. It would mean that, potentially,

some claimants would have received an interim financial remedy when they were unsuccessful in the final hearing. This would expose the employer to a substantial and irrecoverable cost. It is not possible or appropriate for the EAT to balance the advantages to workers against the disadvantages to employers of the extension of interim relief in this way.

155. Fifth, the complexity of the policy and practical considerations surrounding the extension of interim relief is compounded by the fact that, if interim relief is extended to discrimination/victimisation claims, it may well be that, for the first time, interim relief will be sought in multiple claims. As things stand, under s103A, a whistleblowing unfair dismissal claim is likely to be brought by a single individual, or at most by one or two whistleblowers. In contrast, a discrimination claim relating to dismissal may be concerned with very many claimants. An example would be claims arising from a large-scale redundancy exercise in which it is claimed that the selection criteria are indirectly discriminatory on the grounds of sex. This may mean that the interim relief hearing becomes lengthy and unwieldy. Yet again, there may be policy and practical questions as to whether this would be a beneficial change.

156. Sixth, if interim relief is extended to dismissal/victimisation cases, then the range of issues which the ET will potentially have to address at the interim relief hearing will be much wider. The ET has to consider the "pretty good chance" question in relation to all aspects of the claim (see **Simply Smile**). In a disability discrimination case, for example, the question may arise as to whether the claimant has a pretty good chance of establishing that s/he is disabled. In an indirect discrimination claim, very nuanced questions may arise for determination at the interim relief stage. All of this means that interim relief claims relating to discrimination, in particular, may be very much more complex than the standard type of interim relief claim in a s103A case. There is no simple answer to this by saying that if a case is

complex, the claimant(s) will not seek interim relief. They may choose to do so for tactical reasons, in order to put pressure on the employer. There is no procedure by which an ET may refuse to grant a hearing on interim relief because the claimant's prospects of obtaining such relief are poor.

157. This brings me on to the seventh reason why, in my view, the EAT is not equipped to evaluate the policy and practical considerations surrounding the extension of interim relief to discrimination/victimisation claims concerning dismissals. Even if few claimants are actually successful in their interim relief claims, the ability to bring such claims will affect the balance of power, so to speak, between claimant and respondent. It may make employers more willing to contemplate settlements than they might otherwise have been, even in potentially unmeritorious cases. This may or may not be a good thing, but, once again, this gives rise to policy considerations which the EAT is not equipped to evaluate.

158. The eighth, and final, policy or practical consideration is that if interim relief is extended to some discrimination/victimisation cases it will mean that, for the first time, an employer in such a case may have to pay significant sums to a claimant without the claimant having established the employer's liability at a hearing at which an ET has considered all of the relevant evidence and the parties arguments in full detail.

159. In my judgment, in light of the above, the policy and practical consequences that would arise if the EAT were to extend interim relief to discrimination/victimisation claims concerning dismissal are much more wide-ranging than those which have arisen in cases in which courts have applied a conforming interpretation. In most of those cases, the effect of the conforming interpretation has been to introduce a narrow extension to the coverage of the law, or to correct

an obvious error or illogical lacuna in the legislative framework. The proposed conforming interpretation in the present case goes much further.

160. I accept that the reasons why a conforming interpretation in this case is not possible are not as stark as they were in **Benkharbouche** or **Anderson.** In **Benkharbouche,** the Court was being ask to read an exception into a statute that was intended to provide for state immunity, by removing state immunity from one of the classes of cases that was specifically covered by the statute. In **Anderson**, the Court was being asked to delete a statutory power that had expressly been conferred on the Home Secretary by the legislation in question. Nevertheless, the step that I am being asked to take by the Claimant goes beyond the interpretative function into a quasi-legislative function. It would require me to make decisions for which I am not equipped and would give rise to important practical repercussions which the EAT is not equipped to evaluate. To use the phrase used by Lord Nicholls at paragraph 33 of **Ghaidan** (when referring to the limits of the conforming interpretation in ECHR cases), it would be "to cross the constitutional boundary".

161. The present case is closer to the **Pytel** case. I think that this is "an area in which the court is not equipped to understand the effect of a piecemeal amendment of one provision in an intricate scheme." (**Pytel**, at paragraph 91, per Elisabeth Laing J).

162. For these reasons, in my judgment, even if the Claimant is right that there is a breach of the EU law principle of equivalence, or of the ECHR, it is not possible to apply a conforming interpretation to the EA 2010, by reading in words which would extend interim relief to discrimination/victimisation claims relating to dismissal.

(6) <u>Is the absence of interim relief for discrimination/victimisation cases a violation of fundamental principles of EU law?</u>

163. This issue can be dealt with very much more briefly than the question of equivalence.

164. The provisions of the Charter that are relied upon by the Appellant require that there be no discrimination on the ground of sex and that (by Article 47) member states provide an effective remedy. The CJEU has held that, in addition to the Charter, there is a general principle of non-discrimination in EU law which has to be given effect: see **Mangold v Helm (Case C-144/04)** [2005] ECR I-9981, **Kucukdevici v Swedex GmbH & Co KG (C-555/07)** [2010] ECR I-365 and **Benkharbouche** in the Court of Appeal, at paragraph 78.

165. The advantage of a successful claim for breach of fundamental principles of EU law over a claim for breach of the principles of equivalence or effectiveness (or a claim for breach of the ECHR) is that there is no need to show that a conforming interpretation is possible. The fundamental principles of non-discrimination and effective remedy under Article 47 have horizontal direct effect, i.e. they can be relied upon by an individual against a private sector employer: see, for example, **Mangold v Helm**, **Kucukdevici**, and **Benkharbouche** in the Court of Appeal, at paragraphs 77 and 80.

166. In my view, however, fundamental principles of EU law do not assist the Appellant in the present case. The principle of non-discrimination is recognised in domestic law by the EA 2010, which transposes the relevant EU anti-discrimination directives. Domestic law provides a remedy for sex discrimination of the sort about which the Appellant complains. For the reasons given in an earlier section of this judgment, that remedy satisfies the requirement of effectiveness. Therefore, there is no scope for bringing a claim instead in reliance upon fundamental principles of EU law relating to non-discrimination and the requirement to provide an effective remedy. These arise only in the absence of any effective protection in domestic law (as there was in **Mangold v Helm).**

167. Mr Milsom submitted, in the alternative, that there was a breach of fundamental principles of EU law because the remedies for discrimination/victimisation claims relating to discrimination do not include interim relief, whereas such a remedy is available for section 103A claims. In other words, he relies upon discrimination as between types of claims. He said that those who would want to bring a discrimination/victimisation claim were more likely to be woman or from a protected group, whereas the same does not apply to those who bring whistleblowing claims. It follows, he submits, that the less favourable treatment of discrimination/victimisation claims is a breach of the fundamental EU law principle of non-discrimination.

168. I do not accept this submission. I do not think that there is any basis for expanding the scope of fundamental principles of EU law so as to prohibit a member state from having different procedural rules and different remedies for discrimination cases as compared to similar claims that are not discrimination cases. The requirements of the fundamental principles are met if there is an effective remedy for discrimination/victimisation in domestic law. Mr Milsom relied on the **Pontin** case, but that case was concerned with a straightforward application of the principles of effectiveness and equivalence. The CJEU did not rely upon fundamental principles of EU law in that case.

169. In any event, even if I am wrong about that, I have concluded, earlier in this judgment, that the procedural and remedies rules for discrimination/victimisation claims are no less favourable than the rules that apply to s103A cases, and so, there is no discrimination between causes of action amounting to a breach of fundamental principles of EU law in the present case.

I do not think that the fundamental principles of EU law can go any further than the EU principles of effectiveness and equivalence.

170. It follows that I do not need to address in any detail the complex and difficult question of whether, in any event, less favourable treatment (in terms of procedures and remedies) of discrimination/victimisation claims, as compared to a different cause of action, results in less favourable treatment of those with any particular protected characteristic, such that it can be capable of amounting to a breach of the EU fundamental principle of non-discrimination. Even if it is, there is no such breach in the present case. I should record, however, that Mr McHugh on behalf of the Respondent took issue with Mr Milsom's submission. He said that the non-availability of interim relief in discrimination/victimisation cases is not based directly or indirectly on any specific protected characteristic, and therefore does not engage any fundamental EU law rights.

(7) <u>If there is a violation of fundamental principles of EU law, is there horizontal direct effect, resulting in a directly-effective right to seek interim relief in discrimination/victimisation cases?</u>

171. In light of my conclusion on the preceding issue, this question does not arise.

<u>ECHR</u>

172. There is a short answer to the Appellant's challenge in reliance upon the HRA and the ECHR. This is that the only remedy which I would be able to grant is a confirming interpretation. The EAT does not have the power to make a declaration of incompatibility under the HRA, section 4 (see **Benkharbouche,** Court of Appeal, paragraph 5, and EAT, paragraph 7). I have already dealt extensively in this judgment with the question whether a conforming interpretation is possible. Exactly the same approach applies to ECHR issues as to

claims based on EU law. I have concluded that a conforming interpretation is not possible. This means that, whatever is my view on whether there has been a breach of the ECHR, I cannot grant any relief. I will nevertheless go on to consider the arguments based on the ECHR, but in somewhat less detail than would otherwise be the case. I am also hesitant to deal with the ECHR issues in great detail because the Government has not provided any evidence or made any submissions in this appeal. This means that I have not received any assistance from the Government on the question whether there is any justification for the procedural and remedies differences between discrimination/victimisation claims relating to dismissal and claims for unfair dismissal resulting from a protected disclosure, and, if so what that justification is.

(8) The relevant provisions of the Human Rights Act 1998 and the ECHR

The Human Rights Act 1998 ("HRA")

173. Section 3 of the HRA provides:

> **"Interpretation of legislation.**
>
> **(1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.**
>
> **(2)This section—**
>
> **(a)applies to primary legislation and subordinate legislation whenever enacted;**
>
> **(b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and**
>
> **(c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."**

174. This is, of course, the power to apply a conforming interpretation. As I have said, section 4 grants the power to certain courts to make declarations of incompatibility, but this does not include the EAT.

The ECHR

175. The provisions of the ECHR, set out in Schedule 1 to the HRA, provide in relevant part:

> **Article 6 Right to a fair trial**
>
> **1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…..**
>
> **Article 8 Right to respect for private and family life**
>
> **1. Everyone has the right to respect for his private and family life, his home and his correspondence.**
>
> **Article 14 Prohibition of discrimination**
>
> **The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.**
>
> **Article 1 of Protocol 1 (A1/P1) Protection of property**
>
> **Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law…."**

(9) Does the lack of interim relief for discrimination/victimisation cases amount to a breach of Article 14, when read with Article 6 or 8, or A1/P1?

The Appellant's argument

176. Mr Milsom does not submit that the non-availability of interim relief for discrimination/victimisation claims involving dismissal is a breach of Article 6, Article 8, or A1/P1. However, he says that this amounts to unlawful discrimination on "other status" in breach of Article 14, when read with Article 6, Article 8, or A1/P1. He relies on two

alternative statuses, sex, and the "other status" of being an individual who was dismissed on discriminatory grounds (or, perhaps more accurately, an individual who wishes to bring a claim of dismissal/victimisation arising from dismissal). He submits that there is a difference in treatment for this class of persons, as compared with those who were dismissed for making a protected disclosure (or who wish to bring a claim on that basis), and that there is no justification for the difference. In these circumstances, he submits, there is a contravention of the Appellant's ECHR rights, and the EAT should read words into the EA 2010 in order to grant her a right to claim interim relief.

The questions that need to be considered

177. The proper approach for considering whether there has been a violation of Article 14 was described by Lady Black in **R (Stott) v Secretary of State for Justice** [2018] UKSC 59, [2020] AC 51, at paragraph 8:

> **"In order to establish that different treatment amounts to a violation of article 14 , it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173 . He observed that once the first two elements are satisfied:**
>
> **'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact'."**

178. The issues as regards whether the Appellant is right that there has been a breach of her ECHR rights break down into the following questions:

(a) Is the matter in question within the ambit of substantive ECHR rights, so that Article 14 can be relied upon?;

(b) Does the Appellant have a status for the purposes of Article 14?;

(c) Is Appellant in an analogous situation with those who are entitled to interim relief for a section 103A claim and, if so, can that treatment be justified? This involves consideration of the level of scrutiny which the EAT must apply.

(a) <u>Does the matter in question come within the ambit of substantive ECHR rights?</u>

179. It was common ground between the parties that the answer to this question is "Yes", and so I will deal with it only very briefly.

180. In my judgment, this case comes within the ambit of Article 6, because it relates to access to judicial remedies for the enforcement of civil rights (see **R (on the application of Leighton) v Lord Chancellor** [2020] EWHC 336 (Admin), at paragraph 165). It is not necessary, of course, that the claimant can show a breach of one of the other Articles.

181. In these circumstances, it is not necessary for me to address the somewhat more complicated questions of whether the matter in question also comes within the ambit of Article 8 and/or A1/P1.

(b) <u>Does the Appellant have a status for the purpose of Article 14?</u>

182. Again, this was not in dispute between the parties. It was common ground that the Appellant had a relevant status for the purpose of Article 14.

183. It is, however, worth identifying the particular status in question. The meaning of "status" for the purposes of Article 14 has been considered in a number of recent cases. I attempted to summarise the current state of the law relating to "other status" in **Leighton** at paragraphs 177-182, as follows:

> **"178. The question as to the scope of the words "other status" in Article 14 is a vexed and difficult one. The case law shows that it extends to matters such as sexual orientation, marital status, transsexual status, trade union membership and illegitimacy. In Gilham v Ministry of Justice , the Supreme Court held that being a judge was a "status" for this purpose (see judgment at paragraph 32). All of these examples are relatively straightforward, however. It is much more difficult to discern a rule or set of principles which enable one to work out whether a more transient or inchoate "status" counts for this purpose. The issue was considered, thoroughly and in great detail, by Lady Black in R (Stott) v Secretary of State for Justice [2018] 3 WLR 1831 (SC) at paragraphs 13-81. This case was not cited by either party in the present case. I will not attempt to summarise the review of the case law that is set out in Lady Black's judgment, but she noted that, whilst the grounds within Article 14 are to be given a generous meaning, not everything is a "status" for these purposes. A "status" could include a personal characteristic, but was not limited to personal characteristics. It is not necessary that the treatment of which the applicant complains must exist independently of the other status. The fact that a person is affected by new legislation which would not previously have applied to others in the same position does not give them a "status" for these purposes. When, as in the present case, a court is considering an as yet unconsidered characteristic, the court will have in mind the nature of the grounds it was thought right to list specifically in Article 14 , but a strict ejusdem generis interpretation would be unduly restrictive. In Clift v United Kingdom CE:ECHR:2010:0713JUD000720507; The Times, 21 July 2010 , the Strasbourg Court held that the length of a prisoner's sentence was a status for Article 14 purposes. In R (RJM) v Secretary of State for Work and Pensions [2009] AC 311 , homelessness was held to be a "status". In Mathieson v Secretary of State for Work and Pensions [2015] 1 WLR 3250 , the Supreme Court held that the claimant had a "status" for Article 14 which consisted of being a severely disabled child in need of lengthy in-patient hospital treatment, or by virtue of being a child hospitalised free of charge in a NHS hospital for a period longer than 84 days. In the Stott case itself, the Supreme Court held that being a prisoner serving an extended determinate sentence, as compared to be a prisoner serving indeterminate or other determinate sentences, was a "status".**
>
> **179. In Stott , at paragraph 209, Lady Hale said that "status" for the purposes of Article 14 is not limited to personal qualities, whether innate (such as sex, race, colour, birth or sexual orientation) or acquired (religion, political opinion, marital/non-marital status or habitual residence), but extends to non-personal qualities such as property rights**
>
> **180. The issue of "status" has also recently been considered by the Court of Appeal in R(SC) v Secretary of State for Work and Pensions [2019] EWCA Civ 615 , paragraphs 60-77, and in R (SHU) v Secretary of State for Health and Social Care [2019] EWHC 3569 (Admin) , per Foster J, at paragraphs 78-89. In SC , at paragraph 62, Leggatt LJ said that no clear or coherent test of what constitutes a "status" for the purpose of article 14 has emerged in the case law of the European Court of Human Rights. In SHU , at paragraph 85, Foster J said that "It is beyond contention …. that, according to the case law, the**

> **concept of "other status" must be given a broad interpretation. The claimed status does not have to be innate or acquired, it may be imposed or (as described in paragraph 71 of SC) it may be "the upshot of circumstance, as with homelessness."" Even more recently, the issue of "other status" was considered in Carter and another v Chief Constable of Essex Police and another [2020] EWHC 77 QB , at paragraphs 50-57. In Carter , Pepperall J held that being a post-retirement widow of a police officer with pre-1978 service (who did not have the same survivors' pension rights as a pre-retirement spouse) was an "other status" for the purposes of Article 14 .**
>
> **181. Also in Carter , at paragraph 56, Pepperall J referred to Stevenson v. Secretary of State for Work & Pensions [2017] EWCA Civ 2123 , in which Henderson LJ, commenting on the clear direction of travel in the Strasbourg jurisprudence, observed at paragraph 41:**
>
> **"In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point."**
>
> **182. I hope that it is not an oversimplification to express the view that, in practice, it will be rare that the "status" issue will be the decisive issue in an Article 14 case. If a court regards treatment as amounting to unjustified discrimination for the purposes of Article 14 , the court will be likely to regard the class of persons which has suffered from this treatment as having the necessary "other status". In SHU [2019] EWHC 3569 (Admin), at paragraph 84, Foster J observed that "there may be an element of circularity in seeking to identify status separately from the notion of discrimination, although the courts have accepted certain self-defining cases."**

184. In my judgment, the relevant status is the "other status" of being an individual who wishes to bring a claim of dismissal/victimisation arising from dismissal, rather than the core status of gender. Applying the law as I summarised it **Leighton,** the status of being a litigant in such a claim, or someone who wishes to bring such a claim, is capable of being an "other status". It is similar to the category of "persons who have brought a claim for discrimination in the County Court" which I held in **Leighton** to be a valid "other status" (see **Leighton** at paragraph 183). On the other hand, I do not think that the core status of gender is a relevant status for the purposes of these proceedings. The problem about which the Appellant claims – not being able to claim interim relief – is not specific to women, as it applies to anyone with any protected characteristic who wishes to bring a claim for discrimination/victimisation arising from dismissal. As I have said, every person has at least a few protected characteristics and so is potentially a person who might wish to bring a claim for discrimination/victimisation relating to dismissal. Mr Milsom submitted that being female was a core status because women are

more likely to need to bring a discrimination complaint. He submitted that there is a passage in Baroness Hale's judgment in the **Unison** case, at paragraphs 125-130, which shows that if women bring the majority of discrimination claims, then anything that is detrimental to such claims is indirectly discriminatory against women. I am not sure that the passage relied upon, which was obiter, goes that far, but in any event, I do not need to resolve the matter because I have found that the Appellant has a status for the purpose of Article 14.

185. Mr Milsom suggested that the difference between a core status and an "other status" may matter, because the test for justification is stricter where a core status is concerned. This is because of what Lord Walker described as the "concentric circles" of statuses warranting protection under Article 14, in **R (RJM) v SSWP** [2008] UKHL 63, [2009] 1 AC 311: the rigour of the test for justification varies from status to status. However, in my judgment the standard of scrutiny would be essentially the same, whether the relevant status is gender or whether consists of claimants in discrimination/victimisation cases. Although it is not a core status, such claimants have an important status, since they are seeking to enforce fundamental rights.

(c) <u>Is the Appellant in an analogous situation with those who are entitled to interim relief for a section 103A claim and, if so, can that treatment be justified?</u>

186. In my judgment, this is the paradigm type of case of the sort identified by Lady Black in **Stott** and **Lord Nicholls** in **Carson,** in which it would be artificial to look at the question of whether claimants in discrimination/victimisation claims are in an analogous situation with those who have s103A claims separately from the question of justification. In other words, the real question is whether there are differences between the two categories of claims which justify the availability of interim relief for one but not the other.

187. As Mr Milsom submits, what needs to be justified is the difference in treatment: see **AL (Serbia) v Secretary of State for the Home Department** [2008] UKHL 42; [2008] 1 WLR 1434, at paragraph 38.

188. As for the standard of scrutiny, this is a matter on which submissions from counsel for the Government would have been welcome. This is not an issue which is concerned with public expenditure. It is to some extent concerned with the allocation of public resources, in that the extension of interim relief to some discrimination/victimisation cases will have an impact upon the Employment Tribunal system, in that it will increase the case-load. It involves a matter of political judgment. There has been much debate in recent case-law about whether the appropriate test is the conventional proportionality test (is it a proportionate means of achieving a legitimate aim?) or the stricter test pursuant to which the court will not interfere unless the treatment is manifestly without reasonable proportion. However, in my judgment, this is a case in which there is no material difference between application of the conventional proportionality test, giving appropriate weight to and respect to the judgment of the executive or legislature, and the "manifestly without reasonable foundation" test (see **R (Drexler v Leicestershire CC** [2020] EWCA Civ 502, at paragraph 76, and **R (On the application of Adiatu) v HM Treasury** [2020] EWHC 1554, at paragraph 62).

189. In any event, the question of what standard of justification is applicable in this case is moot, because, whatever it is, no justification is established, or even put forward. The burden is on the respondent, or the Government if it has intervened, to put forward the aim that the difference in treatment is directed towards, and then to show that the means adopted is proportionate. The Government has not intervened and so has not put forward any justification. Frankly, and entirely properly, Mr McHugh on behalf of the Respondent has said that he is not in a position to advance any particular justification. His client is a private sector business

which has no reason to be privy to the reasons why interim relief is available for some employment claims but not for others.

190. In these circumstances, I do not think that it is appropriate for me to speculate about what potential justifications there might be. I have set out a number of considerations at paragraphs 151-158 of this judgment which may or may not be the reasons for the availability of interim relief for s103A cases, but not discrimination/victimisation cases, and which may or may not mean that the difference in treatment is proportionate. It may be relevant, when evaluating any potential justifications, that the procedures and remedies for discrimination/victimisation claims arising from dismissal provide an effective remedy, even without interim relief. But, as I said in that section of this judgment, I am not in a position to evaluate the potential justifications, at least not without assistance from submissions and perhaps evidence on behalf of the Government.

191. It follows that I am not saying that the difference in treatment is incapable of justification. Rather, the position is that, through not fault of its own, the Respondent has been unable to satisfy the burden of justifying the difference in treatment for Article 14 purposes. In the absence of a justification being put forward, the breach is established: see **Gilham,** at paragraphs 36 and 37.

192. It follows that the Appellant has succeeded in establishing that the difference in treatment relating to interim relief as it affects those who bring a claim, or who wish to bring a claim, in relation to discrimination/victimisation arising from dismissal, and those who bring a claim or who wish to bring a claim for automatic unfair dismissal under ERA s103A, is a breach of ECHR Article 14, when read with Article 6.

(10) <u>What consequences follow?</u>

193. I have already addressed this question. The only potential remedy that the EAT could grant would be to read words into the EA 2010 in a way which reversed the effect of the breach of Article 14, in order to give the domestic legislation a conforming interpretation in accordance with the HRA, section 3. However, as section 3 states, a conforming interpretation can only be adopted "so far as it is possible to do so". For the reasons given earlier in this judgment, I have taken the view that it is not possible for a conforming interpretation to be applied to the ERA 2010, because that would cross the line between interpretation and quasi-legislation, and because to do so would require the EAT to take decisions for which it is not equipped and would give rise to important practical repercussions which the EAT is not equipped to evaluate.

194. It follows that I must dismiss the Appellant's appeal relating to Article 14 of the ECHR.

Conclusion

195. For the reasons that are set out in this judgment, the Appellant's appeal is dismissed. The Claimant has sought permission to appeal to the Court of Appeal on the ECHR point. Since I have held that there has been a breach of Article 14, it is appropriate to grant permission to appeal so that the Court of Appeal may have the opportunity to consider this issue and, if considered appropriate, grant the declaration of incompatibility which the EAT does not have jurisdiction to grant. Accordingly, I have granted permission to appeal.