EMPLOYMENT TRIBUNALS

Claimant: **Ms K P K Puthenveettil**

Respondents: **(1) Mr S Alexander**
(2) Ms R George
(3) Secretary of State for Business, Energy and Industrial Strategy

Heard at: London South Employment Tribunal
On: 20, 21, 22 and 24 July 2020

Before: Regional Employment Judge Freer
Members Ms J Forecast
Ms C Brown

Representation
Claimant: Ms A Reindorf, Counsel
First and Second Respondents: In person
Third Respondent: No attendance

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that Regulation 2(2) of the National Minimum Wage Regulations 1999 is disapplied. The Claimant is entitled to payment of the National Minimum Wage of an amount to be determined.

REASONS

1. This is a matter remitted by the Employment Appeal Tribunal to determine the Claimant's challenge to the lawfulness of Regulation 2(2) of the National Minimum Wage Regulations 1999.

2. With the agreement of the parties this hearing was conducted by CVP video platform and was a fully digital hearing.

3. The Tribunal received evidence from Ms Jamila Duncan-Bosu, Solicitor at the Anti-Trafficking and Labour Exploitation Unit (ATLEU); Ms Rebecca Haworth-Wood, Chairperson of the British Au Pair Association ("BAPAA"); Ms Avril Sharp, Policy & Casework Officer at Kalayaan; and Professor Rosie Cox of Birkbeck University of London.

4. The First and Second Respondents did not give evidence because they could not sensibly provide any personal evidence that related to the issues to be determined.

5. The Tribunal was provided with a digital bundle comprising 2,700 pages and a costs application bundle comprising 61 pages.

The issues for determination

6. The list of issues was agreed in advance between the parties as follows:

    1. Is Reg. 2(2)(a) of the National Minimum Wage Regulations 1999 ("NMWR 1999") prima-facie indirectly discriminatory in that:

    1.1. it is or would be applied to all workers; and

    1.2. it has the effect of precluding workers who fall within the definition of "family worker" from entitlement to the National Minimum Wage; and

    1.3. the vast majority of workers who fall within the definition of "family worker" and who are thereby denied the national minimum wage are women; and

    1.4. it therefore puts women at a particular disadvantage when compared with men; and

    1.5. it put the Claimant at that disadvantage in relation to her work for the First and Second Respondents.

    2. If so, was Reg 2(2) NMWR 1999 enacted in pursuance of the following aims:

    2.1. to reflect the unusual working relationship which exists when a live-in worker is or is treated as a member of the family and his or her work is done in that context; and/ or

2.2. to encourage and/ or not discourage parents from seeking to return to work by imposing financial restrictions which may be unaffordable or might otherwise act as a deterrent?

3. If so, are the aforesaid aims legitimate aims?

4. If so, is Reg 2(2) NMWR 1999 a proportionate means of achieving the aims?

5. If Reg 2(2) NMWR 1999 is indirectly discriminatory, is it:

5.1. incompatible with Article 157 of the Treaty on the European Union; and/or

5.2. incompatible with Articles 21 and 23 of the EU Charter of Fundamental Rights; and/or

5.3. incapable of being read consistently with the Recast Directive 2006/54/2006?

6. If so, should the tribunal:

6.1. disapply Reg 2(2) NMWR 1999; and/ or

6.2. read Reg 2(2) NMWR 1999 consistently with the Recast Directive 2006/54/2006?

7. If so, should the Tribunal make a declaration under section 24(1) of the Employment Rights Act 1996 that the Claimant was entitled to be paid the national minimum wage during her employment by the First and Second Respondents, such amount to be determined at a subsequent hearing?

Background

7. The Claimant travelled to the UK from India in July 2005 with the First Respondent's father. She was employed by the First and Second Respondents as a domestic worker in their home in London from 14 November 2005 until her resignation on 23 April 2013.

8. By a claim form presented to the Tribunal on 22 July 2013 the Claimant commenced claims against the First and Second Respondents of unfair dismissal and unauthorised deductions from wages.

9. The Claimant pursued the unauthorised deduction from wages claim relying upon the level of pay of the national minimum wage. Her contractual rate of pay was £110 per week rising to £120 per week in 2008. The First and Second Respondents relied in defence upon the "family worker exemption" contained in Regulation 2(2) of the National Minimum Wage Regulations 1999 ("Reg 2(2)"). The Claimant argued that Reg 2(2) was unlawful and should be disapplied.

10. The Third Respondent was joined as a party to the action by an Order dated 01 June 2018 upon a request from the Government Legal Department dated 29 May 2018.

11. During proceedings it was agreed that the Tribunal should first decide whether Reg 2(2) applied to the Claimant's employment at all and if so, then to determine the Claimant's challenge to Reg 2(2) at a separate hearing.

12. From a hearing on the application of Reg 2(2) a judgment on liability was sent to the parties on 11 February 2017. The judgment concluded that Reg 2(2) did apply to the Claimant's employment and that she was therefore not entitled to payment of the national minimum wage.

13. The Claimant appealed against that decision and the Employment Appeal Tribunal remitted the matter back to a newly constituted Tribunal to consider three main issues of the lawfulness and disapplication of Reg 2(2); the number of hours of housework performed by the Claimant; and whether that was voluntary, or contractual as a matter of custom and practice or otherwise.

14. At a Preliminary Hearing on 7 June 2018 the Reg 2(2) matter was listed for a full merits hearing with a direction that the issue of the Claimant's hours of work would be decided at a later date, if appropriate.

15. By letter dated 24 January 2019, the Secretary of State informed the Tribunal and the parties that they no longer wished to participate in the proceedings.

A summary of the relevant law

National Minimum Wage Regulations 1999

16. Regulation 2(2) of the National Minimum Wage Regulations 1999 provides:-

> "In these Regulations 'work' does not include work (of whatever description) relating to the employer's family household done by a worker where the conditions in sub-paragraphs (a) or (b) are satisfied.
>
> (a) The conditions to be satisfied under this sub-paragraph are
>
> (i) that the worker resides in the family home of the employer for whom he works,
>
> (ii) that the worker is not a member of that family, but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities,
>
> (iii) that the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, in respect of the provision of the living accommodation or meals, and

(iv) that, had the work been done by a member of the employer's family, it would not be treated as being performed under a worker's contract or as being work because the conditions in sub-paragraph (b) would be satisfied.

(b) The conditions to be satisfied under this sub-paragraph are

(i) that the worker is a member of the employer's family,

(ii) that the worker resides in the family home of the employer,

(iii) that the worker shares in the tasks and activities of the family, and that the work is done in that context".

Indirect sex discrimination

17. Section 19 of the Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic;
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
(c) it puts, or would put, B at that disadvantage; and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim".

18. The burden is on the Claimant to prove facts from which the tribunal could conclude that they have been unlawfully discriminated against in the absence of an adequate explanation from the Respondent. The Claimant must produce some evidence that the provision, criterion or practice ("pcp") has had a disproportionate adverse impact upon their protected characteristic.

19. The whole or a part of a legislative provision may amount to a pcp for the purposes of indirect discrimination.

20. The Tribunal should consider whether the pcp is "intrinsically liable" to affect the protected group more than others. It is not necessary to show why the disadvantage has arisen (see generally **Homer –v- Chief Constable of West Yorkshire Police** [2012] UKSC 15 and **Essop -v- Home Office (UK Border Agency)** and **Naeem -v- Secretary of State for Justice** [2017] UKSC 27).

21. The Tribunal is entitled to take into account its knowledge and expertise in the industrial field generally (**London Underground -v- Edwards** (No 2) [1999] ICR 494 CA).

22. The Respondent has the burden of proving justification. It is the pcp itself that requires to be justified, rather than its discriminatory effect. The Respondent must show that both its aim is legitimate and the means chosen to achieve it are proportionate.

23. A legitimate aim must correspond to "a real need" that is, in fact, pursued by the measure in question.

24. In order to show that a measure is proportionate to the aim pursued, it must be demonstrated that it is both appropriate and necessary to achieve the aim. It should allow attainment of the aim without unduly prejudicing the legitimate interests of the affected individuals.

25. The employer does not have to show that no other proposal is possible, but that the means is objectively justified notwithstanding its discriminatory effect.

26. The more serious the disparate adverse impact, the more cogent the justification must be.

27. The Tribunal has to take account the reasonable needs of the business and to make its own judgment whether the proposal is reasonably necessary based upon a fair and detailed analysis of the working practices and the business considerations. However, budgetary considerations do not in themselves constitute social policy aims (**O'Brien -v- Ministry of Justice** (Case C-393/10) [2012] 2 CMLR 25 CJEU), although they can "underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt" **(Fuchs -v- Land Hessen** (Case C-159/10) [2012] ICR 93 CJEU).

<u>The non-discrimination principle in EU law</u>

28. The non-discrimination principle in EU law is stated in Article 21(1) of the Charter of Fundamental Rights of the European Union (2000/C 364/01): "Any discrimination based on any ground such as sex . . . shall be prohibited". Also Article 23 states: "Equality between women and men must be ensured in all areas, including employment, work and pay".

29. Article 157 of the Treaty on the Functioning of the European Union (2012/C 326/01) provides:

> "1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
> 2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
> Equal pay without discrimination based on sex means:
> (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
> (b) that pay for work at time rates shall be the same for the same job".

30. The meaning of 'discrimination' in Art 157 encompasses indirect discrimination.

31. Article 4 of the Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (2006/54/EC) enshrines the right to equal treatment between men and women in all areas, including employment, work and pay.

32. The Tribunal has been referred to a considerable amount of authorities, including 66 cases by the Claimant. The Tribunal has taken those authorities into account and also refers to them specifically below where appropriate.

Facts and associated conclusions

33. The Tribunal accepts the submission on behalf of the Claimant that when it was first enacted Reg 2(2) was primarily intended to apply to au pairs.

34. This is demonstrated by Parliamentary debates (see pages 2316–2325 of the bundle). For example when addressing Parliament, Ms Margaret Hodge, the Parliamentary Under-Secretary of State for Education and Employment, stated:

> "I am replying to the debate on behalf of three Departments, which have responsibilities for and an interest in the important issues that have been raised. The Home Office has responsibility for the immigration rules, which govern au pairs. The Department of Trade and Industry regulates the employment agencies, and therefore the au pair agencies, and has responsibility for the national minimum wage and employment rights. My own Department is responsible for the regulation of child care and for the national child care strategy".

35. Ms Hodge continues: "This group of young people are not as defined by the 1998 Act because they work as if they were members of the employer's family. Foreign nationals in the United Kingdom under the au pair scheme who undertake light household duties or child care and are treated as members of the host family clearly fall within this category. We have provided in regulation 2(2) of the national minimum wage regulations a limited exemption from the provisions of the 1998 Act for such work, provided that the worker is treated as a member of the employer's family, particularly for the provision of accommodation and meals, and the sharing of tasks and leisure activities. Our approach will enable au pairs living as a member of the family to continue to undertake work for their host family, and it will also prevent exploitation through low pay for those who do not enjoy the benefits of family life".

36. It could be observed that this debate was solely to address the work of au pairs and that simply because the responses from Ms Hodge addressed such circumstances it does not necessarily mean that the exemption was mainly to address that type of work above others.

37. However a 'policy note' disclosed by the Secretary of State (see below) records:

"Regulation 2(2) was not included in the original draft Regulations which were subject to a consultation in September 1998 but was added following the consultation. The Secretary of State's Report on the NMW Regulations states: "The LPC [Low Pay Commission] did not make any recommendation on the position of workers who live with a family and are treated as one of the family (such as nannies, au pairs and companions). On further consideration, the Government has decided that this group of workers deserves different treatment because of the degree of integration within the family context. Regulation 2 provides that work done on such a basis will not count for the purposes of the national minimum wage"."

38. In that document there is a footnote reference that states: "Regulations Implementing the National Minimum Wage: a Report by the Secretary of State for Trade and Industry. We have not been able to locate a copy of this report- the extract was quoted in House of Commons Research Paper 99/18 on the National Minimum Wage (19 February 1999)".

39. However, the extensive research undertaken on behalf of the Claimant was able to locate this reference and the preceding paragraph to the above quote reads: "Regulation 2 makes it clear that work done by a member of the family, either in the form of domestic chores in the family household, or as a contribution to the family business, does not count for the purposes of the NMW. This exemption is extended to people (such as au pairs) who are not family members but, nevertheless, live as part of the family".

40. The 'policy note' also states: "In the House of Commons debate on the 1999 Regulations on 3 March1999, the then Minister (Ian McCartney) said: "I should clarify, for the avoidance of doubt, the position of work that is done in a family context. The regulations provide an exemption for work undertaken by people who work and live as one of a family in their employer's home. That could include, for example, many au pairs".

41. This material is not relied upon by the Claimant or used by the Tribunal in any **Pepper -v- Hart** sense to interpret the actual meaning of the Regulations, but to provide some context for any justification arguments and also by way of explanation for the reference below to the Claimant's evidence and research on au pairs and domestic work.

42. The Secretary Of State as the Third Respondent in these proceedings is clearly in the primary position to respond to the Reg 2(2) challenge. However, although having confirmed on a number of occasions during the course of these proceedings that he would address the issue, in January 2019 the Secretary of State confirmed that he no longer wished to participate in the proceedings and that "he does not intend to provide any witness evidence or appear at the hearing". This has left the First and Second Respondents in the unenviable position of having to defend this legally complex and long running issue by themselves, which the Tribunal understands has placed them under a good deal of financial and mental stress. They acquitted themselves well at this hearing.

43. With regard to the list of issues, the first matters are relatively easy to determine. Reg 2(2) applies, or would apply, to all workers, men and women. That is self-evident from the terms of the legislation, as is the fact that it has the effect of precluding workers who fall within the definition of "family worker" from entitlement to the National Minimum Wage.

44. The Tribunal accepts that a majority of women are more likely to fall within the meaning of "family worker" when compared to men. This conclusion can be reached by simply exercising judicial notice.

45. However, if supporting evidence is needed, the Tribunal received a substantial amount of material supplied on behalf of the Claimant. The Tribunal refers to some of the main elements.

46. The grant of overseas domestic worker visas for January 2015 to December 2018 (at pages 916 to 918 Vol B of the Bundle) shows that, of around 17,000 visas made each year, female applicants outweigh male applicants by around 75% to 25%.

47. National Census statistics for the period 2013 to 2018 (pages 918a to 918d Vol E of the bundle) and 'Section T: Activities of Households as Employers: and differentiated goods and services producing activities of households for own use only'. This includes the activities of households as employers of domestic personnel such as maids, cooks, waiters, valets, butlers, gardeners, gatekeepers, stable lads, chauffeurs, caretakers, governesses, babysitters, tutors and secretaries. The figures suggest a greater number of female to male workers carrying out work within private households.

48. Labour Force Surveys for the period 2014 to 2017 (pages 919 - 1039 Vol E of the bundle), show that for the category '9233 Cleaners and Domestics' more women than men are engaged, supporting the contention that live-in domestic workers tend to be female.

49. An analysis of adverts by Professor Cox as part of research carried out by Birkbeck College, suggests that live in domestic workers are more likely to be female than male.

50. National Referral Mechanism statistics for years 2011 to 2018 (pages 206 to 860 Vol A of the bundle), demonstrate that more women than men are trafficked for the purpose of domestic servitude.

51. The First and Second Respondents refer to these figures and argue that if the figures from the National Referral Mechanism statistics are applied to the figures of overseas domestic worker visas, it means that only 2.1% of women per annum are victims of domestic servitude and overall around 98% of female and male workers must be happy with Reg 2(2), were in good relationships with their employers and never had any issues.

52. The First and Second Respondents also rely upon the Independent Review of the Overseas Domestic Workers Visas (December 2015) ("The Ewins Report"),

which states at paragraphs 30 and 31: "Therefore, the logical and practical conclusion is this: it is current UK policy to allow employees with a special vulnerability to enter and work in the UK through the overseas domestic workers visa scheme. It must be emphasised that special vulnerability does not mean that exploitation of migrant domestic workers is endemic. There are likely to be many examples of healthy employer-employee relationships. And it follows that, in the absence of a failsafe filtering process of the 17,000 or so migrant domestic workers (and their employers) entering the UK each year, some will be in healthy relationships and some will not, a fact conceded by the Government".

53. However the Tribunal notes the preceding section that reflects upon the Report's reasons for the special vulnerability of overseas domestic workers at that time: "their predominant motivation, and consequently their mentality, is often one of relative desperation: being unable to find adequate (or any) work in their own community/country, they have left that country to find other work abroad in order to make remittances back home - sometimes as little as £25 per week - for the general living, health and education costs of their relatives; they are, by definition, not working in their home community and do not have the safety net of their friends and family and other social support networks; they are often working in locations where culture and language are, at best, unfamiliar, and more often represent a significant barrier to wider social interaction and a cause of social exclusion or marginalisation; they often work long hours, limiting the opportunities to develop social or other connections or interactions in their local community and they often lack knowledge of wider networks of support; they often do not have knowledge of their legal rights; they predominantly work in private homes, not a public workspace, in which public oversight and regulation is difficult; the work they undertake is often part of an informal economy, in which pay is not made through bank accounts and income is not declared to tax authorities; their permission to enter the UK rests solely on their employer's professed want/need of them, and they therefore have a consequent dependency on that employer, which extends to their legal status in the UK; and they have no recourse to public funds".

54. The Tribunal concludes that the National Referral Mechanism statistics are clearly not representative of the whole picture of those in domestic servitude, simply those that have managed to find their way into the referral mechanism and on balance it is not reasonable to conclude that the remaining workers are content with their arrangements. It also does nothing to address the issue of whether the majority of workers fall within the family worker exemption are female.

55. It follows that the Reg 2(2) pcp applies to all workers, the majority of workers falling within the family worker exemption are women and they are placed at the particular disadvantage compared to men of not receiving the national minimum wage.

56. The Tribunal has given careful attention to whether there can be a disadvantage where it is anticipated that there is to be in place an offset by way of providing benefits in kind, expressly in the Claimant's instance with regard to the provision of living accommodation and meals.

57. When assessing 'disadvantage' the Tribunal adopts the 'objective reasonable worker' test.

58. The Tribunal was taken by the Claimant to an Article by the International Labour Organization ("the ILO") entitled "Domestic workers across the world: Global and regional statistics and the extent of legal protection". Whilst the Tribunal would not normally refer to articles on any particular legal subject matter, it does so on this occasion as it is an authoritative source of information that neatly identifies situations of potential abuse relating to provisions such as the family worker exemption, such as: "When the value attributed to the in-kind payments is excessive, or when the in-kind payments are unilaterally imposed by the employer. In particular, residence in the household might be an employer-required term of employment that primarily serves the employer's desire to receive round-the-clock services. Excessive deductions can also greatly reduce the already low amount of wages that is paid in money, and hence undermine domestic workers' economic independence and their freedom to decide how to spend their earnings".

59. For example, Article 12(2) of the ILO Domestic Workers Convention, 2011 (No. 189) addresses these concerns and sets out how it aims to secure fair financial worth for domestic workers in a way that is similar to other workers: "National laws, regulations, collective agreements or arbitration awards may provide for the payment of a limited proportion of the remuneration of domestic workers in the form of payments in kind that are not less favourable than those generally applicable to other categories of workers, provided that measures are taken to ensure that such payments in kind are agreed to by the worker, are for the personal use and benefit of the worker, and that the monetary value attributed to them is fair and reasonable".

60. The Tribunal also has referred itself to established principles derived from relevant authorities. The initial burden of proof is on the Claimant to produce some evidence that the pcp has had a disproportionate adverse impact upon women (**Nelson -v- Carillion Services Ltd** [2003] ICR 1256 CA).

61. The pcp need not amount to an absolute bar and permits exceptions (**British Airways -v- Starmer** [2005] IRLR 862 EAT).

62. It is not necessary for the Claimant to produce statistical proof, nor to identify a pool for comparison (**Homer** above) but where statistics are produced to demonstrate particular disadvantage, a "persistent and constant disparity" between the proportions of women and men adversely affected by the pcp may be sufficient, even where the difference is small (**R -v- Secretary of State for Employment ex p Seymour-Smith and Perez (No 2)** [2000] ICR 244 HL).

63. The Tribunal should consider whether the pcp is "intrinsically liable" to affect the protected group more than others (**O'Flynn -v- Adjudication Officer** C-237/94 [1996] 3 CMLR 103 CJEU).

64. The evidence produced by the Claimant from Professor Cox focussed on the au pair sector. Professor Cox explained that before 2008 the UK adopted an 'au pair visa scheme' where certain stipulations were attached in respect of which the au pair received pocket money (not pay) and lived with a host family rather than an employer.

65. Professor Cox stated that upon the closing of the au pair scheme in 2008 there was a race to the bottom in terms of pay and conditions as there were no longer clear regulations applicable to the host or au pair. In reality the host family usually held the balance of power.

66. Research by Professor Cox and her colleagues, as set out in evidence, found that: "many au pairs are carrying out long hours of work for very low pay, there was no correlation between the hours to be worked and the amount offered; and it was common for adverts to set out duties that went beyond help or light household tasks". The research led to a conclusion that there was "exploitation within the au pair 'industry', so even those who are EU nationals and are au pairing through traditional routes are vulnerable".

67. The evidence of Ms Duncan-Bosu was that the victims of domestic servitude she has acted for report a spectrum of treatment, from restriction of movements, onerous working hours to verbal, physical and sexual assault. However, her experience is that a feature in almost each and every case is the failure to pay a salary in line with the national minimum wage.

68. Although it might be observed that given the nature of the organisation for whom Ms Duncan-Bosu works, the Anti-Trafficking and Labour Exploitation Unit, it is ever likely that she will witness the extremes of those who may be caught by the family worker exemption and that the numbers are relatively low, the Tribunal concludes that it is evidence that corroborates the research and evidence of Professor Cox and demonstrates the substantial detriment experienced by significant sections of those covered by the exemption.

69. The Tribunal has received no material and corresponding evidence of the value, or typical value, of benefits in kind that may be received by those who fall within the exemption.

70. Although some of the evidential material from the Claimant does not cover the period of her work for the First and Second Respondent, which was principally due to its unavailability, when considering the evidence as a whole, the Tribunal concludes that it is extremely unlikely that there was any time from when the Regulations were introduced where the number of women live-in domestic workers was less than the numbers of men.

71. Having considered all the relevant evidence put before it, the Tribunal concludes that the Reg 2(2) pcp puts women at the particular disadvantage when compared to men of being denied the national minimum wage. If further analysis is required at this stage of the effect of the potential receipt of benefits in kind, that disadvantage compared to men can be further described as 'not having an

entitlement to receive the national minimum wage, which without adequate safeguards is inconsistent with the wage/work bargain and dignity at work'.

72. The Tribunal concludes that the Claimant was clearly placed at that disadvantage with regard to her work with the First and Second Respondents as she was denied an entitlement to be paid the national minimum wage.

73. The Claimant has discharged her burden of proof that the Reg 2(2) family worker exemption is on the face of it indirectly discriminatory.

74. Further analysis of the impact of other associated benefits received in relation to those to whom the family worker exemption applies is more properly considered as part of proportionality arguments under justification, to which we now turn.

75. With the Claimant having established her case so far, it now turns to the Respondents to establish that the family worker exemption is a proportionate means of achieving a legitimate aim. We have noted above the significant difficulty that the Secretary of State's decision to no longer participate in the proceedings has placed on the First and Second Respondents.

76. The suggested aims are set out in the Third Respondent's Response:

"1) reflecting the unusual working relationship which exists when a live-in worker is or is treated as a member of the family and his or her work is done in that context (including, for example, the social, material and other non-monetary benefits which such workers enjoy from being in such a relationship and the more intimate nature of the relationship); and/or

2) encouraging and/or not discouraging parents from seeking to return or from returning to work by imposing financial restrictions which may be unaffordable or might otherwise act as a deterrent".

77. The aim relied upon should corresponded to a 'real need' pursued by Reg 2(2). The burden is on the Secretary of State to show that the aim existed at the time the Claimant was subjected to the pcp, which is from 14 November 2005 to 23 April 2013. However, evidence of fact that the aim existed after the relevant period can infer that the aim had previously existed.

78. In this respect the Tribunal has been referred to little or no evidence in support.

79. The First and Second Respondent have, in their written submissions, set out the challenges to them of what they refer to as a nanny arrangement (which is not the same as an au pair: a nanny typically provides professional child care for a salary and an au pair is typically a young person who provides child care as part of a cultural exchange). They argue that they followed the guidance and documentation that the Home Office provided when the Claimant worked for them and that paying the national minimum wage would have been unaffordable. However, these matters cannot go to the aim and/or means adopted by the Secretary of State.

80. The Tribunal refers to the letter from the Government Legal Department of 24 January 2019, where it states: "For the avoidance of doubt, the Secretary of State makes no concessions, save as set out in paragraph 4 of his Response to the Amendment to the ET1 (namely that, if the family workers exemption is found to be indirectly discriminatory, it should be read consistently with EU law or disapplied in the Claimant's case). However, subject to the position taken by the First and Second Respondents, the Secretary of State accepts that the consequence of his position is that, if the Claimant establishes that the family workers exemption 'prima facie' indirectly discriminated against her (that is to say, she proves all of the points set out in paragraph 1 of the List of Issues), the Tribunal should so find because the Claimant will have discharged the burden placed upon her by section 19 of the Equality Act 2010, and the Secretary of State will not have attempted to discharge the burden placed on him by section 19(2)(d) of the Act".

81. The Tribunal considers that it is, in principle, possible for the First and Second Respondents, as parties to this action, to discharge that burden from any available and relevant material provided by the Third Respondent.

82. The Claimant, exercising a duty to the Tribunal, has referred it to what appears to be the only mention of the aims contained in the Secretary of State's disclosure: (i) Research Paper 99/18 of 19 February 1999, mentioned above, (at pages 2326-2370 of the bundle) which states that workers who live with a family and are treated as one of the family (such as nannies, au pairs and companions): "deserve different treatment because of the degree of integration within the family context. Regulation 2 provides that work done on such a basis will not count for the purposes of the national minimum wage". (ii) a five and a half page document that purports to be a "policy rationale" (at page 2416A to F). In these proceedings it has adopted the title "policy note", but that may be putting it a little high. It is an undated and unattributed document. The content places the date of creation after January 2009. There is no clue as to the author, or their status.

83. As to the aim of Reg 2(2) the 'policy note' states: "The aim of the exemption is to address the complexities that are involved where people are working in the family context - a situation which can be legitimate and beneficial to both parties. This exemption was developed with the idea of working parents in mind. It was considered that if working parents had to pay live-in au pairs the NMW this could become unaffordable and the Government did not want to create a deterrent for parents - particularly working mothers - wanting to work. We believe that it was also consistent with one of the objectives of the Department for Education and Employment, that more of those with young children should be able to find at least part-time work and afford child care in the home. At the same time, the exemption was drafted to prevent abuse as it only applies in those situations where a worker is being treated as a member of the employer's family. It is consistent with the treatment of members of the employer's family".

84. The Tribunal notes the view that the primary intention of Reg 2(2) was for it to apply to au pairs. The document also states: "It should be noted that there has been little discussion about Regulation 2(2) since it was implemented in 1999.

Due to the passage of time, there are extremely limited records available relating to the original decision and no internal BIS files remaining on this issue".

85. With regard to the first purported aim, the Tribunal agrees with the submissions made on behalf of the Claimant that "*Reflecting the unusual working relationship* which exists when a live-in worker is, or is treated as, a member of the family and his or her work is done in that context" does not on the face of it amount to a social policy aim of the State. No further supporting argument or evidence has been provided by the Secretary of State. The Tribunal concludes that this statement does not demonstrate a real need, or that it was an aim pursued by the family worker exemption, or that it was in existence at the relevant times in respect of the Claimant.

86. The Tribunal concludes that the second aim, on the face of it, can be objectively legitimate. It falls into the category of "legitimate employment policy, labour market and vocational training objectives" (see **Seldon -v- Clarkson Wright and Jakes** [2012] ICR 716 SC). It is not a matter that only relates to budgetary issues as it underpins a social policy of enabling mothers to return to the workplace and fulfil their career ambitions. It corresponds to a real need. It is also consistent with Government policy, such as those relating to child care, maternity/parental leave and rights for working mothers.

87. The decision in **Seldon** confirmed that: "There is in fact no hint in the Luxembourg cases that the objective pursued has to be that which was in the minds of those who adopted the measure in the first place. . . it was for the national court "to seek out the reason for *maintaining* the measure in question and thus to identify the objective which it pursues" So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation".

88. However, what is missing is any evidence from the Third Respondent to demonstrate that this was actually an aim adopted by the Government and/or the Secretary of State. There has been no material evidence provided in support. The only evidence that goes to the point is the policy note which the Tribunal concludes carries little or no weight for the reasons mentioned earlier: it is undated and in particular, it is unattributed. For example, there is no explanation of the level of involvement with the Secretary of State, or the materials or advice used to substantiate the general comments made. Those matters could have been addressed, for example, by a short witness statement. As it stands, without the Secretary of State's further involvement in these proceedings, the document raises more questions than it answers.

89. The First and Second Respondents also rely upon the 'policy document' produced by the Third Respondent. But of course they cannot shed any further light on its provenance. However they do cite the remaining part of the address to Parliament by Ian McCartney as set out in the policy note (above): "I should make it clear, however, that the exemption applies only if the worker is treated as a member of the employer's family, especially in the provision of accommodation and meals, and the sharing of tasks and leisure activities. If au pairs, or any other workers, live in their employer's household but do not enjoy the benefits of being treated as part of the family, the national minimum wage will

apply. I believe that that approach is balanced and family friendly and encourages fair treatment of workers in the home". However, in so far as the aim is to encourage fair treatment of workers in the home, this does not (and cannot) add further to the aims as pleaded by the Secretary of State.

90. Therefore, although the Tribunal concludes that the second aim on the face of it can amount to a legitimate aim, the Tribunal has received no reliable evidence to demonstrate that it was actually an aim adopted by the Secretary of State at the introduction of Reg 2(2), during the course of the Claimant's employment, or even retrospectively.

91. The Secretary of State has not provided any material evidence to demonstrate that the second aim (or indeed the first, if it can be established to be an aim) amounts to a social policy aim that corresponds to a real need which was in fact pursued by the Regulation at the relevant time, or at all.

92. The Tribunal accepts the Claimant's submission that the disparate impact of Reg 2(2) is serious because the statutory right to be paid the national minimum wage is removed from more women than men.

93. Therefore to demonstrate that the attainment of the aim/s weighs more heavily in the balance than the discriminatory effect of the provision, the Tribunal would expect to see substantive cogent evidence relating to proportionality.

94. The First and Second Respondent further cite the 'policy note' with specific regard to proportionality. It states: "As noted above, Regulation 2(2) is not a blanket exemption. Protections are built into it as it only applies where four conditions are met. These aim to ensure that the exemption only applies where the reality of the situation is that someone is being treated as a member of the family. It should also be noted that section 28 of the NMW Act 1998 provides for a reversal of the burden of proof. In the event of a dispute, the assumption is that the worker qualifies for the NMW and that they have been paid less than the NMW".

95. As stated above, the Tribunal attaches little weight to the policy note and has received no argument on proportionality from the Third Respondent. The Tribunal can only reach a decision on the material and representations made to it and the content of the policy note does not address proportionality in any meaningful way. The statement of matters in the policy document alone with no evidence or analysis of their efficacy is substantially insufficient for the purposes of any justification defence.

96. As submitted on behalf of the Claimant, no explanation is provided, for example, of why Reg 2(2) is a proportionate mechanism by which to "reflect the unusual relationship" in a consistent and systematic manner, or that it is a reasonably necessary mechanism by which to do so.

97. The second aim seeks to facilitate the return to employment of one category of workers by denying to another category of workers the statutory right to be paid. Therefore where one would expect, or indeed require, some degree of cogent

evidence on proportionality and the balance of competing interests, the Tribunal has received next to nothing.

98. In comparison the Claimant has provided detailed evidence and supporting legal argument to demonstrate that the four statutory conditions required to achieve family worker status and the reversal of the burden of proof provision have been ineffective to restrict the discriminatory effect of Reg 2(2). The Tribunal refers to the evidence in particular of Professor Cox and Ms Duncan-Bosu.

99. If the aims relate to an attempted *quid pro quo* between the interests of family employers and au pairs, although the Claimant does not have to show that the aim could have been achieved in a different way, a less discriminatory method of achieving that aim could be to adopt a framework similar to that developed by the British Au Pair Association, as set out in evidence by Ms Haworth-Wood.

100. There have been some opportunities for the Government to revisit and record the rationale for the Regulation, such as the discontinuance of the au pair visa scheme in 2008, when there is likely to have been some sort of review; Employment Tribunal decisions that highlighted a lack of clarity in the Regulations; and ATLEU sending the Secretary of State the pleadings in every migrant domestic worker case in which they acted after 2011 where Reg2(2) was relied upon by the Respondent. There have been further opportunities after the Claimant's employment ended, such as: the Low Pay Commission report of March 2014 (pages 1190-1501 of the bundle); a Government announcement by Vince Cable in March 2014, in response to the Low Pay Commission report, of an intention to "take the next available opportunity to legislate and clarify the entitlement of migrant domestic workers to the National Minimum Wage" (page 1501B of the bundle); the consultation on draft Consolidated National Minimum Wage Regulations in 2014 (pages 2371-2404 of the bundle), where three trade unions recommended the abolition of the family worker exemption; the Low Pay Commission report of March 2015, which expressly stated: "we continue to believe that the difficulties faced by [migrant domestic workers] can only be satisfactorily resolved through a review of the application of the family worker exemption"; the introduction of the new Regulation 57 in the 2015 Regulations which, after a consultation process, substantially re-enacted Reg 2(2); and more court and tribunal decisions.

101. The Tribunal considers that these are matters that have not suddenly arisen, they are factors that impact on the issue of proportionate means and make it increasingly difficult to demonstrate proportionality between the aims (even if they are both accepted as being legitimate aims) and the means of achieving them.

102. In assessing appropriateness, the Tribunal should consider whether the measure "genuinely reflects a concern to attain [the aim] in a consistent and systematic manner" (see **Petersen -v- Berufungsausschuss für Zahnärtzte für den Bezirk Westfalenlippe** (Case C-341/08) [2010] 2 CMLR 31 CJEU). The Respondent may not rely upon "mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives" as those do not "constitute evidence on the basis

of which it could reasonably be considered that the means chosen are suitable for achieving that aim" (see **R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform** (Case C-388/07) [2009] ICR 1080 CJEU). The Secretary of State must show that there has been a balance of the discriminatory effect of the measure against the social aims sought to be pursued (whether at the time that the measure was adopted or subsequently).

103. Having considered all those matters, the Tribunal concludes on the evidence as presented there was no proportionate means of achieving a legitimate aim.

104. Once the Tribunal reaches the decision that the effect of Reg 2(2) is that that it is indirectly discriminatory, the Claimant argues that Reg 2(2) should be disapplied because in proceedings between private individuals, such as the present case, the Tribunal is not only empowered but bound to disapply legislation which is in conflict with directly effective EU law and cannot be read consistently with it.

105. As set out above under in the summary of the law, the non-discrimination principle is repeated in EU law and is done so expressly with regard to pay.

106. The First and Second Respondent argue that the Recast Directive does not have horizontal direct effect against private individuals, and therefore cannot be used to disapply Reg 2(2) in a claim against them and relies in support upon **R -v- Secretary of State for Employment ex p Seymour-Smith and Perez (No 2)** [2000] ICR 244 HL and **Faccini Dori -v- RecrebSrl** (case C 91/92) [1994] ECR I-3355.

107. This is partly correct because, in general, only Treaty provisions and EU Regulations have horizontal direct effect, such that they can be relied upon in litigation between private parties in domestic courts. Horizontal effect is not ordinarily extended to Directives.

108. However, as set out above, the principle of non-discrimination is a general principle of European Community law and therefore has horizontal direct effect in all cases that fall within the scope of EU law. The Charter of Fundamental Rights of the European Union, Article 157 of the Treaty on the Functioning of the European Union, and the Recast Directive are simply different expressions of the same non-discrimination principle - plus Article 157 is directly effective.

109. The Tribunal concludes that in the exercise of its statutory jurisdiction, it is bound by 2(1) of the European Communities Act 1972 to apply directly effective Community law and must override any rule of national law which is found to be in conflict with directly effective EU law. Therefore, the Tribunal must interpret national law in accordance with the wording and purpose of Community law and in particular in this case, the principle of non-discrimination.

110. Post-Brexit and the repeal of the European Communities Act 1972, under the provisions of section 3(1) of the European Union (Withdrawal) Act 2018, as amended, direct EU legislation that was operative immediately before exit day

still forms part of domestic law for the duration of the implementation period and CJEU case law therefore also continues to bind domestic courts and tribunals.

111. Although section 5(1) of the European Union (Withdrawal) Act 2018 provides that: "the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day" (at the end of the implementation period), section 5(2) confirms that: "Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule passed or made before exit day".

112. Similarly, although section 5(4) states that The Charter of Fundamental Rights will no longer be part of domestic law on or after exit day, section 5(5) provides that this "does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)".

113. The Tribunal concludes that there is no purposive reading that can be made, or words that can be implied, necessary to make Reg 2(2) compatible with EU rights. It would require the Tribunal to redesign an alternative legislative scheme.

114. As a consequence the Tribunal is under a duty to disapply Reg 2(2) as incompatible with national legislation and it is thereby ineffective.

115. It should also be noted that the Third Respondent, in both its Response at paragraph 4 and its letter of 24 January 2019, does not oppose disapplication once is has been established that regulation 2(2) has given rise to unjustified indirect discrimination.

116. Therefore the Tribunal's judgment is that Reg 2(2) of the Minimum Wage Regulations 1999 is disapplied.

117. The disapplication of Reg 2(2) is necessarily with regard these proceedings on the evidence produced to this Tribunal. As for any wider disapplication, this is a Tribunal of first instance and its decision is not binding on other courts or tribunals, although persuasive to some. It is therefore possible that a different conclusion could be produced in another tribunal, particularly on a case with different facts.

118. However, this Tribunal would observe that the family worker exemption almost inescapably applies to more women than men and places women at a particular disadvantage when compared to men. The issue appears to turn on justification. Here the Secretary of State ultimately chose a strategy of limited engagement with the matter. The future wider implications are therefore essentially a matter for the Secretary of State. However, as the discriminatory effect of Reg 2(2) is significant and therefore also potentially Reg 57 of the 2015 Regulations, if there is any future case one might reasonably expect to see cogent and substantial evidence of the balancing exercise undertaken between the discriminatory effect

and the proportionate means of achieving the legitimate aim. This would likely include consideration of the special vulnerability of overseas domestic workers highlighted in the Ewins Report above and perhaps a less discriminatory approach as identified in the ILO Domestic Workers Convention of the payment to persons that would have fallen under the family worker exemption of limited remuneration in the form of payments in kind, in respect of which the monetary value attributed to them is fair and reasonable, which also could avoid any inaccurate implication that domestic work is of limited or little value.

119. The provisions of the National Minimum Wage Regulations 1999 apply to the Claimant and the matter will be listed for consideration of the hours worked by the Claimant so a calculation of the sums owed can be made.

The Claimant's application for Costs against the Third Respondent

120. The Claimant presented her claim to the Tribunal on 22 July 2013.

121. It had been agreed in another matter that if the lawfulness of the family worker exemption was to be challenged the Secretary of State would be notified and would seek to be joined to proceedings once a finding had been made that the exemption applied.

122. On 8 October 2013 the Third Respondent was notified of the Claimant's claim. On 17 November 2013 the Third Respondent confirmed that it did not wish to take part in the proceedings until a finding had been made as to whether the exemption applied.

123. The Claimant's claim was dismissed before the lawfulness of the family worker exemption was determined. An application was made to the Employment Appeal Tribunal in order that the claim could be reinstated. The Third Respondent took part in those proceedings and argued that the issue of the lawfulness of the exemption should be remitted back to the Tribunal at which stage they would seek to be formally joined to proceedings.

124. The Third Respondent was joined to the proceedings at its own request on 01 June 2018 and case management directions were made to bring the matter to a full hearing that was listed for 4-6 February 2019.

125. On 24 January 2019, the Government Legal Department advised that they had decided not to adduce witness evidence or attend the hearing (as set out above). This caused the hearing to be postponed to 28-30 April 2020, which was subsequently relisted to this hearing.

126. The Respondent had been placed on notice by the Tribunal that the Claimant's costs application would be considered at the end of this hearing. The Third Respondent wrote to the Tribunal and confirmed that, in the interests of saving further costs, it would not be appearing at the hearing but instead made brief submissions regarding the Claimant's application (page 21 of the costs application bundle). The Tribunal has taken these into account.

127. The letter from the Government Legal Department in part sets out reasons for the decision to withdraw, but the question is not whether the decision itself to withdraw from proceedings was unreasonable, it is whether the Third Respondent acted unreasonably in the conduct of the proceedings.

128. The Tribunal concludes that the Third Respondent had ample opportunity prior to January 2019 to consider both its approach to this litigation and the level of involvement it wished to take, most particularly from the time it asked to be notified of proceedings, become involved in the EAT application and apply to be joined as a party to the action specifically for the purposes of having an opportunity to address the Reg 2(2) issue.

129. The effective withdrawal from proceedings so close to the hearing caused its postponement, resulted in some of the preparatory directions being taken over by the Claimant's representatives, increased correspondence and required an additional preliminary hearing. Had the Third Respondent considered its position in good time, the incurring of these costs could have been avoided. The Tribunal further accepts the Claimant's submission that the Claimant's case could have been considered in one go had the Secretary of State not intervened. The case was approached in a different manner because of the Secretary of State's involvement.

130. Following **Barnsley Metropolitan Borough Council -v- Yerrakalva** [2011] EWCACiv 1255, the Tribunal has considered the whole picture of what happened in the case and concludes that the Third Respondent acted unreasonably in the conduct of the proceedings and chooses to exercise its discretion and to make an order for costs.

131. When making a costs order on the ground of unreasonable conduct, there is no requirement to link the award causally to particular costs which have been incurred as a result of the unreasonable conduct (**McPherson -v- BNP Paribas (London Branch)** [2004] EWCA Civ 569: "The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred".

132. The Tribunal has been taken to the Claimant's schedule of costs and is satisfied that these costs have been reasonably incurred and are reasonable in amount. The Claimant has restricted its claim for costs to work arising from the Third Respondent's intervention in proceedings and has excluded costs arising from evidence gathering that would have been incurred in any event. The case has been conducted under a legal aid certificate that covers the work done in respect of which the costs are claimed. In all the circumstances the Tribunal concludes that the Third Respondent shall pay to the Claimant the sum of £5,582.38.

_____
Regional Employment Judge Freer
Date: 14 December 2020