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EMPLOYMENT TRIBUNALS

Claimants: G Boohene, A Yeboah, H Benthum Brook, E Antwi, G Marro, J Masqoi, D Kofi, M Safoowa, D Antwi, J Marety, S Quadri, A Obadare, P Panford, F Behoe, R Tetteh & A Alarcon Castro

Respondent: The Royal Parks Ltd

Heard at: London Central

On: 19, 20, 23 & 24 August 2021 and 21 & 22 October 2021 (in chambers)

Before: Employment Judge H Grewal
Ms E Flanagan and Mr M Simons

Representation

Claimants: Mr C Khan, Counsel

Respondent: Mr D O'Dempsey, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1 The complaint of indirect race discrimination in respect of the minimum rate of pay in case numbers 2202211/2020 and 2204440/2020 is well-founded;

2 All other claims of indirect race discrimination in case numbers 2202211/2020 and 2204440/2020 are dismissed upon withdrawal;

3 Case number 2205570/2020 is dismissed upon withdrawal.

REASONS

1 In three claims (presented on 13 April 2020, 22 July 2020 and 22 August 2020 these sixteen Claimants made complaints of indirect race discrimination. Initially, they complained about three provisions, criteria or practices ("PCPs") applied by the Respondent. In closing submissions, the Claimants abandoned their complaints in respect of two of the PCPs. Fifteen of the Claimants commenced Early Conciliation ("EC") on 2 March 2020 and the EC certificate was granted on 13 March 2020. Mr Alarcon Castro commenced EC 15 June 2020 and the certificate was granted on 16 June 2020. He presented his claim (case number 2204440/2020) on 22 July 2020.

2 There was a dispute between the parties as to how the Claimants had formulated in their claim forms the one PCP that we had to determine. The Respondent's argument was that the PCP was as set out in paragraph 12a of the Grounds of Complaint in which the Claimants said that until 11 December 2019 the Respondent adopted a different minimum rate of pay depending on whether staff were direct employees (a minimum of not less than the London Living Wage ("LLW")) or outsourced workers (a minimum of the National Minimum Wage ("NMW"). The Respondent's argument was that the reference to "outsourced workers" was to all the workers who worked on all the Respondent's outsourced contracts.

3 The Claimants argued that in order to understand the PCP about which complaint was made it was necessary to look at the Grounds of Complaint as a whole and not at paragraph 12 in isolation. In particular, it had to be construed in the context of the factual matrix set out at paragraphs 4 – 12. Paragraph 6 refers to the tender for cleaning services in November 2014 and the bid put in by Vinci Construction UK Ltd ("Vinci"). It claims that Vinci presented a dual bid – one costed on the basis of paying park attendants (the cleaners) LLW and the other costed on paying them NMW. It presented the Royal Parks Agency ("RPA") with a choice. Paragraph 7 states,

> "*In November 2014 the RPA selected Vinci as its contractor and opted for the NMW bid over the LLW bid. It thereby made a calculated choice to put in place a contractual arrangement under which park attendants would receive less than the LLW. In furtherance of this arrangement, each of the Claimants has been employed by Vinci and supplied to the Respondent as a park attendant."*

Paragraph 9 states,

> "*At various points during the period November 2014 - 11th December 2019, the RPA and later the Respondent reviewed the rate of pay … on offer to park attendants. Whenever they were provided by Vinci with costings based on the LLW, they maintained and reaffirmed the existing practice of opting for NMW … for outsourced workers."*

Paragraph 10 states that following strike action on 12 December 2019 [by the workers on the Vinci contract] the Respondent made an executive decision to increase outsourced workers' rate of pay to bring it in line with the LLW. The Claimants argue that once paragraph 12a is read in conjunction with those facts, it is clear that the complaint is about how the Respondent treated the workers on the Vinci contract compared to staff employed by it.

4 The Claimants also argued that it was clear from the Respondent's response that that is how it understood the PCP. At paragraphs 46 and 47 of the amended grounds of response the Respondent deals with the PCP and says that it allows Vinci to pay its employees at such rate as it thinks fit, which may be at LLW or above it, and that the pleading of the PCP shows that the claim is an abuse of process because the Claimants are objecting to the Respondent's administrative decision to award the contract to Vinci on the terms on which it was awarded. It is clear from paragraph 48 that the Respondent understood the Claimants' case to be that the correct pool was people employed by Vinci to work on the cleaning contract and the employees of the Respondent. It argued that that was the wrong pool.

5 We agree with the Claimants. It is clear from the pleadings that the PCP related to the outsourced workers on the contract awarded to Vinci and that the Respondent understood that. Furthermore, the Claimant's trade union did not know what workers were paid on other contracts and whether RPA had been given the option on those contracts to accept a bid based on paying LLW. The only complaint that we had to determine was whether the Respondent indirectly discriminated against BME workers by applying a PCP from 1 November 2014 to 11 December 2019 whereby its employees were not paid less than the London Living Wage ("LWW") but outsourced workers on the toilets and building cleaning services contract awarded to Vinci were not paid LLW.

The Issues

6 It was agreed that the issues that we had to determine were as follows.

6.1 Whether section 41 of the Equality Act 2010 applies to the relationship between the Claimants and the Respondent.

6.2 Whether the Respondent applied a provision, criterion or practice ("PCP") to the Claimants in respect of the minimum level of their pay.

6.3 If it did, whether it did or would have applied that PCP to persons who were non-BME.

6.4 Whether the PCP put BME persons at a particular disadvantage compared to non-BME persons –

(a) What is the correct pool for comparison?

(b) Whether there is a material difference in the circumstances relating to BME and non-BME groups.

6.5 Whether the PCP put the Claimants at that disadvantage.

6.6 Whether the Respondent can show that the PCP was a proportionate means of achieving a legitimate aim.

6.7 Whether the claims were presented in time and, if not, whether it is just and equitable to consider them.

The Law

7 Section 41 of the Equality Act 2010 ("EA 2010") provides,

> "*(1) A principal must not discriminate against a contract worker –*
> *(a) as to the terms on which the principal allows the worker to do the work;*
> *(b) by not allowing the worker to do, or to continue to do, the work;*
> *(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*
> *(d) by subjecting the worker to any other detriment.*
>
> *…*
>
> *(5) A "principal" is a person who makes work available for an individual who is –*
> *(a) employed by another person, and*
> *(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).*
>
> *(6) "Contract work" is work such as is mentioned in subsection (5).*
>
> *(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b)."*

8 In **Harrods Ltd v Remick & Others [1998] ICR 156** the Court of Appeal considered section 7(1) of the Race Relations Act 1976, which was the precursor of section 41 of EA 2010. Section 7(1) provided,

> "*This section applies to any work for a person ("the principal") which is available for doing by individuals ('contract workers') who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal."*

The issue in that case was whether section 7 applied to complaints of race discrimination brought against Harrods by the employees of companies which had been granted licences by Harrods to sell their goods in Harrods. The Court of Appeal said that that involved the following two questions: (i) whether the work done by the employees of the licensees at Harrods was "work done for" Harrods, and (ii) whether they were persons whom their respective employers supplied under a contract made with Harrods.

9 In respect of the first question, the Court of Appeal held that the Tribunal and the EAT had been correct to hold that it was work done for Harrods. Sir Richard Scott V-C (as he then was) said,

> "*The work would, of course, also be work for the licensee, the employer. But it is implicit in section 7 that the work to which subsection (1) is referring will not only be work done for the employer, in that it is work done pursuant to a contract of employment, but will also be work done for the principal. Under Harrods' contractual arrangements with its licensees the members of staff will be selling goods that at the moment of sale belong to Harrods. They will be receiving from the customers the price for the goods. The gross sums they receive will be paid over to Harrods, leaving Harrods to account to the licensee after deducting its commission. All of this work of selling Harrods' goods and of receiving the*

purchase money for the goods is work required by Harrods, under its contractual arrangements with the licensees, to be done by staff employed by the licensees. And the contractual arrangements entitle Harrods to impose rules and regulations governing the conduct of staff members in the course of carrying out this work. Against this background, the work done by the staff members can, in the ordinary use of language, properly be described as work for Harrods…

The statutory language … does not in terms limit the work to work in respect of which the principal has managerial powers

… in approaching the construction of section 7(1) we should, in my judgment, give a construction to the statutory language that is not only consistent with the actual words used but would also achieve the statutory purpose of providing a remedy to victims of discrimination who would otherwise be without one."

10 In respect of the second question, it was submitted on behalf of Harrods that the supply of workers should be the primary purpose, or the dominant purpose, of the contract made between the principal and the employer. Sir Richard Scott V-C said,

"*Here, too, I can see no justification for reading into the section restrictive words that are not there. If, under a contract, there is a contractual obligation to supply individuals to do work that can properly be described as "work for" the principal, the section, in my judgment, applies. I can see no justification for an exercise under which primary and secondary or dominant and subordinate obligations are sought to be identified. If the supply of the worker is pursuant to an obligation under a contract that. In my judgment, will do."*

11 In **Jones v Friends Provident Life Office [2004] IRLR 783** Carswell LCJ in the Northern Ireland Court of Appeal said,

"*The purpose of Article 12* [the equivalent of section 7(1) in Northern Ireland] *is to ensure that persons who are employed to perform work for someone other than their nominal employers receive the protection of the legislation forbidding discrimination by employers. It is implicit in the philosophy underlying the provision that the principal be in a position to discriminate against the contract worker. The principal must therefore be in a position to influence or control the conditions under which the employee works. It is also inherent in the concept of supplying workers under a contract that it is contemplated by the employer and the principal that the former will provide the services of the employees in the course of performance of the contract. It is in my view necessary for both these conditions to be fulfilled to bring a case within Article 12."*

12 In **Leeds City Council v Woodhouse [2010] IRLR 625** Lady Justice Smith, having reviewed the authorities, said,

"Each case is fact sensitive… The authorities suggest that where the principal and the employer of the applicant are in a relationship of contractor and subcontractor, the mere fact that the applicant does work under the subcontract from which the principal will derive some benefit is not enough to bring the application within s.7. It may well be that, if it can be shown that the principal can exercise an element of influence or control, that will be enough to bring the case within s.7. But that is not to say that influence or control must be demonstrated in all cases. The judge in the present case considered that, due to the extreme

closeness between the contracting parties, it could properly be said that Mr Woodhouse's work was being done for the council, regardless of the exercise of control or influence. In my view, control and influence are not necessary elements, and it matters not that they have not been demonstrated in the present case."

13 Council Directive 2000/43/EC (Racial Discrimination Directive) lays down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Members States the principle of equal treatment. Article 2 paragraph 1 provides that the principle of equal treatment means that there should be no direct or indirect discrimination based on racial or ethnic origin. Article 2 paragraph 2(b) provides,

"*indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."*

Within the limits of the powers conferred upon the European Community, the Directive applies to all persons, as regards both the public and the private sectors, in relation to employment and working conditions, including pay (Article 3, paragraph 1(c)). Article 7, paragraph 1 provides,

"*Member states shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation 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."*

14 We were referred by the Respondent to the decision of the ECJ in **Alemo-Herron & Others v Parkwood Leisure [2013] ICR 1116** That case concerned the interpretation of article 3 of Directive 2001/23 (which replaced Directive77/187/EEC). Article 3 safeguards an employee's rights when there is a change of employer (transfer of undertakings). The issue in that case was whether clauses in the contracts of the employees referring to collective agreements which were negotiated and adopted after the transfer were enforceable against the transferee. The ECJ held that article 3 of Directive 2001/23 must be interpreted in a manner that is consistent with Article 16 of the Charter of Fundamental Rights of the European Union, which laid down the freedom to conduct a business. The freedom to conduct a business means that the transferee must be able to assert its interests effectively in a contractual process to which it is a party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity. The ECJ's answer to the questions referred to it was,

"*article 3 of Directive2001/23 must be interpreted as precluding a member state from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of the transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer."*

15 **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."*

Race is a relevant protected characteristic under section 19. **Section 23(1) EA 2010** provides,

> "*On a comparison of cases for the purposes of sections 13, 14 or 19 there must be no material difference between the circumstances relating to each case."*

16 The Equality Act 2010 Statutory Code of Practice issued by the Equality and Human Rights Commission ("EHRC Code of Practice") provides,

> "*6.10 The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions … "*

17 In **Ishola v Transport for London [2020] EWCA Civ 122** Simler LJ said,

> "*The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited, in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely…*
>
> *In context and having regard to the function and the purpose of the PCP in The Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it would be done again in future if a hypothetical similar case arises… I consider that although a one-off decision or act can be a practice, it is not necessarily one."*

18 The EHRC Code of Practice advises,

"4.17 People used in the comparative exercise are usually referred to as the 'pool for comparison'.

4.18 In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively."

19 In **Allonby v Accrington and Rosendale College [2001] IRLR 364** Sedley LJ said,

"*once the condition or requirement* [the wording used instead of PCP in legislation that preceded the Equality Act 2010] *is identified the 'pool' within which its impact has to be gauged falls into place. So here … the pool was 'all persons who would qualify for continuous employment if the requirement or condition had not been taken into account*

… once the impugned requirement or condition has been defined, there is likely to be only one pool which serves to test its effect. I would prefer to characterise the identification of the pool as a matter neither of discretion nor of fact-finding but of logic."

20 In **Essop & Others v Home Office (UK Border Agency) [2017] UKSC 27** Lady Hale said,

"*all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact on the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"- ie the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."*

21 The wording of section 19(2) EA 2010 is different from the wording used in earlier legislation to define indirect discrimination. The earlier legislation required a claimant to establish that the proportion of persons who shared his protected characteristic who could comply with the PCP was considerably smaller than the proportion of persons who did not share the protected characteristic who could comply with it. In **Chief Constable of West Yorkshire Police v Homer [2012] ICR 704** Baroness Hale said that the new formulation,

"*was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not comply and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages."*

Although there is no requirement to adduce statistical evidence, the requirement to show that those who share the protected characteristic in question are placed at a disadvantage still remains. Evidence given by the claimant and by others who belong

to the group sharing the protected characteristic can be important evidence for the tribunal to consider, and it might provide compelling evidence of disadvantage even in the absence of statistics – **Games v University of Kent [2015] IRLR 202**.

22 Paragraph 4.15 of the EHRC Code of Practice provides,

> "*Once it is clear that there is a* [PCP] *which puts (or would put) people sharing a protected characteristic at a particular disadvantage, then the next stage is to consider a comparison between workers with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances."*

Paragraph 4.20 provides,

> "*The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned. It may in some circumstances be necessary to carry out a formal comparative exercise using statistical evidence."*

23 **Greenland v Secretary of State for Justice [EAT/0323/14]** was a case of indirect race discrimination concerning the different rates of remuneration paid to different categories of members of the Parole Board during a certain period. The two categories were retired judges and non-judicial members. At the material time only the former chaired oral hearings relating to the release of prisoners sentenced to life imprisonment. Both categories chaired hearings relating to the release of prisoners who had been sentenced to indeterminate terms for public protection. During the period in question the retired judges were paid a higher daily rate for chairing oral hearings. The EAT held,

> "*on the evidence before the tribunal, the retired judges were paid a daily fee for their work as a member of the Parole Board. The evidence does not support the assertion that they were paid a fee for a specific task. In those circumstances, given the remuneration was paid for the work done by the retired judges, the tribunal was entitled to consider the entirety of the work in respect of which they received remuneration. They were entitled to conclude that there were material differences in the cases of the retired judicial members as compared with the cases of the non-judicial members. The retired judges did undertake a broader range of work and had legal skills and experience relevant to their work which was not possessed by the non-judicial members. In those circumstances, the tribunal were entitled to find that there were material differences for the purpose of section 23 of the 2010 Act and to conclude, therefore, that it was not appropriate to compare those two groups for the purposes of section 19 of the 2010 Act."*

24 It was emphasised in **Essop** (cited above) at paragraph 32 that there has to be a causal link between the PCP and the disadvantage suffered by the claimant in order for the claimant to establish indirect discrimination.

25 In **Homer** (cited above) Baroness Hale set out the test for establishing justification under section 19 of the 2010 Act. She said,

"*19 The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground … is not limited to the social policy or other objectives derived from articles 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business…*

20 As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, para 151,

> *"the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

He went on, at para 165, to commend the three-stage test for determining proportionality derived from …

> *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*
> *… it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."*

The Evidence

26 All the Claimants, Nigel Green (Branch Secretary, Public and Commercial Services Union) and Richard O'Keefe (caseworker in the legal department of United Voices of the World) gave evidence in support of the claims. Tom Jarvis, Director of Parks, gave evidence on behalf of the Respondent. The documentary evidence in the case comprised a little over 1,000 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of fact

27 The Respondent was created in March 2017 to manage eight of London's Royal Parks and other open spaces. Since 2017 it has managed the estate under a contract with the Department for Digital, Culture, Media and Sport ("DCMS"). While statutory responsibility for managing the parks rests with the Government, the Respondent has day to day operational responsibility.

28 The Respondent is a company limited by guarantee without share capital established for charitable purposes. The Secretary of State for DCMS is its sole shareholder. The Respondent is also registered as a charity with the Charity Commission and is led by a Board of Trustees who must ensure that it meets its charitable objectives. The senior management team oversees the day to day running of the parks and advises the Board on a range of operational matters as well as managing a committed workforce of staff and volunteers,

29 The predecessors of the Respondent, the public bodies previously responsible for the management of the parks, decided in the early 1990s that all functions which largely involved manual work should be outsourced to the private sector. The service functions that have been outsourced since then include the cleaning and maintenance of toilets, landscape maintenance and horticulture, gate locking and building and maintenance repairs. When outsourcing those functions, the Respondent and its predecessors have to ensure that they comply with UK Government and European Union policy in respect of public procurement.

30 The Respondent employs around 160 employees in administrative and professional roles. They are mainly office based jobs. They are employed on two different sets of terms:

(i) the contractual terms relating to those who transferred under TUPE from the Civil Service when the Respondent was created in 2017; and

(ii) the terms of those recruited since 2017 or those who were previously employed by the Respondent's predecessor and have chosen to transfer to the new terms.

About 40% of the Respondent's employees are employed on the first set of terms and about 60% on the second set of terms.

31 The employees who transferred from the Civil Service are paid according to the rates of pay determined for their grades by the Civil Service. There is a range of pay for each grade. All the rates of pay are over the London Living Wage. The rates of pay for staff recruited by the Respondent are based on the market rate at the time but are never less than the rates of pay paid for that particular role under the Civil Service rates of pay. With the exception of three or four people, all the employees have an annual salary and are paid monthly. Three or four individuals are on hourly rates. They are zero hour workers engaged on a temporary or ad hoc basis to undertake specific pieces work. All directly employed employees are paid above the London Living Wage. The Respondent and its predecessors have at all times been committed to ensuring that its employees are not paid less than the LLW. It has accepted the LLW as a benchmark for its employees. 12.6% of the staff employed by the Respondent are black or minority ethnic ("BME").

32 In 2014 the Respondent's predecessor, the Royal Parks Agency, invited tenders for public toilets and buildings cleaning services in its parks. The Specification of Requirements for the contract provided, inter alia,

- the contractor should appoint a Contract Manager as their principal point of contact for all contract liaison, whose job it would be to oversee the delivery of the specification, including cleaning toilets to defined standards, operating, maintaining and charging for toilets, providing all management information to TRP's Contract Manager and dealing with customer care matters. The Contract Manager would be required to meet with the TRP Contact Manager monthly or at an interval to be agreed (Clause 2.1);

- the contractor should ensure that TRP could contact either the contractor's Contract Manager or Local Supervisor by telephone at all times of the day when cleaning staff were working in the Royal Parks. The contractor should ensure that their staff could contact a Contract Manager or Local Supervisor by telephone, or other means as agreed by TRP, at all times when they were on duty (clause 2.12(a));

- the contactor would be responsible for the provision of all plant, equipment and materials for the proper execution of the contract but all materials should be of a quality agreed with TRP (clause 3.1);

- TUPE would apply and a list of staff who would transfer to the contractor was attached (clause 4.1.1);

- the contractor would be expected to employ staff of a good calibre with, where necessary, the qualifications, language ability and experience required to perform their duties efficiently and effectively (clause 4.1.2);

- as part of the completed pricing schedule contractors had to provide pay rates for each role proposed within the staff structure. The rates would be those required to attract, retain and motivate high calibre individuals in the current employment market (clause 4.1.4);

- the contractor should establish a management structure which clearly defined the lines of authority, responsibility and accountability. A member of the management team had to be on duty on site during all hours of operation (clause 4.1.5);

- all contractor employees must at all times behave in a manner befitting The Royal Parks when dealing with members of the general public (clause 4.1.6(iii));

- uniforms should be provided by the contractor but all uniform designs were subject to TRP's approval, which would not be unreasonably withheld (clause 4.1.8);

33 The Specification Requirements contained job descriptions for the various roles covered by the contract. The job description for Toilet Attendants (toilet cleaners) and Playground Attendants (toilet cleaners in playgrounds) included the following:

> "*Attendants shall ensure that three sets of colour coded cleaning materials shall be maintained to ensure that cloths, brushes, mops, etc, used for WCs and urinals are not used for cleaning any other equipment, and that separate materials are used solely for any appliances connected with drinking water."*
>
> *"They shall supervise the premises to deter abuse or damage, liaising with their supervisors, TRP and Metropolitan Police as necessary."*
>
> *"They shall switch toilet lights on and off as required."*
>
> *"Attendants' offices must be kept clean and tidy. Radios may be provided at the Contractor's expense and TRP Park Manager's approval but the volume must be kept to a minimum."*
>
> *"Attendants are not permitted to leave the premises during working hours unless prior permission is given by their supervisor or TRP Park Manager and adequate cover is provided."*
>
> *"Daily Duties*

> *On arrival, Toilet Attendants shall carry out a full inspection of the premises and equipment and report any deficiency, fault, damage or vandalism to their supervisor or TRP Park Manager"*

The Diana Princess of Wales memorial Playground had a Playground Manager directly employed by TRP whose role was to coordinate the tasks of all the staff employed by the contractor to ensure that the standards of TRP were met. Office Cleaners and Window Cleaners were only allowed to use cleaning materials approved by TRP.

34 Vinci Construction UK Ltd ("Vinci") put in a bid for the tender. The annual cost to the Respondent of a 5 year contract was just under £6,000,000 (just under £1,200,000 per annum). The cost of the payroll for the operatives was just under £2,800,000 (£558.343 per annum). The bid set out what the cost to the Respondent would be if the operatives were paid the London Living Wage. It added £144,781 to the annual cost (and a total of £718,906 over the 5 year period). It would have increased the overall price of the contact by about 12%. LLW in 2014 was £9.15 per hour.

35 In its Tender Response, in response to the question how it would motivate its staff and ensure that it avoided excessive staff turnover, Vinci responded that it had reviewed the TUPE information provided by the incumbent and had decided to increase the basic hourly rate as they felt that the rate paid did not reflect the true value of the employees.

36 The Royal Parks asked Vinci to clarify by how much they intended to increase the hourly rate for staff. Vinci responded,

> "*After careful examination of the TUPE information we established that many of the current staff members are on the minimum wage of £6.31 per hour. We have taken the view that this level of payment will not attract and retain staff so have increased it to £7 per hour. We believe this will assist with staff retention and form part of the package to motivate staff."*

TRP's Senior Procurement Officer said that they could not see how with that hourly rate the daily costs could be kept to £60 a day and asked Vinci to explain how that was possible. Vinci explained how it was possible.

37 On 4 September 2014 TRP wrote to Vinci that the option for paying staff the London Living Wage would not be taken up at that stage but that it reserved the right to revisit it at any point during the contract period. It was not in dispute that TRP was given the option of accepting a bid that would have resulted in the staff working on the contract being paid a London Living Wage and that it decided not to take up that option. We did not hear evidence from any of the individuals involved in making that decision. We did not have any documents before us that explained why TRP rejected the option that involved paying LLW. Mr Jarvis, who commenced employment with the Respondent in October 2018, said in his witness statement that TRP had not taken up the LLW option in November 2014 because "*it was simply not affordable at the time."* He accepted in cross-examination that there was an element of speculation on his part. His evidence was not based on any documents that we had not seen. It was based on the documents that we had before us. None of those showed that the option had not been affordable at the time. All that the documents showed was what it would have added to the cost of the contract (see paragraph 34 above).

38 The Royal Parks awarded the Public Toilets Maintenance and Cleaning Services contract to Vinci and the parties signed a contract on 1 November 2014. It provided that the contract would automatically expire on 31 October 2019 unless it was terminated earlier under the provisions of the contract or extended. The contract contained the following provisions –

"*A.2.1 At all times during the Contract Period the Contractor shall be an independent contractor and nothing in the Contract shall create a contract of employment, a relationship of agency or partnership or a joint venture between the Parties and accordingly neither Party shall be authorised to act in the name of, or on behalf of, or otherwise bind the other Party save as expressly permitted under the terms of the Contract.*

A.2.2 In consideration of the payment of the Contract Price the Contractor shall perform its obligations in accordance with the terms of the Contract."

"B Supply of Services

B.1 The Services

B.1.1 The Contractor shall supply the Services during the Contract Period in accordance with The Royal Parks' requirements as set out in the Specification and the provisions of the Contract in consideration of the payment of the Contract Price."

"B.3.2 The Contractor shall ensure that all Staff supplying the Services shall do so with all due skill, care and diligence and shall possess such qualifications, skills and experience as are necessary for the supply of the Services.
…

B.3.4 The Contractor shall maintain a record for each member of staff of their qualifications, training records and training schedules, and shall make available all such records to The Royal Parks on request.

B.3.5 The Contractor shall, if requested by The Royal Parks, supply a copy of any certificate of qualification or any certificate of competence issued by a recognised authority.

B.3.6 The Contractor shall be required to train all Staff to respond in an intelligent and informative way to questions from members of the public. The Royal Parks will provide background information to support this."

"B.5.1 The Royal Parks may, by written notice to the Contractor, refuse to admit onto, or withdraw permission to remain on, the Premises:
(a) any member of the Staff; or
(b) any person employed or engaged by any member of the Staff,
whose admission or continued presence would, in the reasonable opinion of the Royal Parks, be undesirable."

"B.5.3 The Contractor's Staff, engaged within the boundaries of the Premises, shall comply with such rules, regulations, including The Royal Parks Regulations as amended form time to time, and requirements (including those relating to

security arrangements) as may be in force from time to time for the conduct of personnel when at or outside the Premises."

"D.3 The Parties acknowledge and agree that this Contract constitutes a contract for the provision of Services and not a contract of employment."

39 The Claimants were all employed by Vinci and worked on the toilet cleaning services contract. More than half of them transferred under TUPE to Vinci when it was awarded the contract. The others were engaged by Vinci. None of them was ever sent by the company employing them to work at any site outside the Royal Parks. They all worked as toilet cleaners. They were all paid less than LLW. We set out in the table below the names, racial groups, start dates and locations of work of each of the Claimants.

Name	Race/country of origin	Start date	Location of work
Ms G Boohene	Black - Ghanaian	April 1995	Playgrounds in Regent's Park, Kensington Gardens
Ms J Martey	Black - Ghanaian	1997	Various toilets and playgrounds, mainly Primrose Hill
Mr A Alarcon Castro	Latino - Colombian	2007	Various toilets and playgrounds, mainly Regent's Park
Ms E Antwi	Black - Ghanaian	2009	Various toilets and playgrounds, mainly Hyde Park
Mr S Qadri	Black - Nigerian	Nov 2009	Various toilets and playgrounds, mainly Greenwich Park
Mr D Kofi	Black - Ghanaian	May 2010	Various toilets and playgrounds, mainly Regent's Park
Mr G Marro	White - Italian	April 2012	Various toilets and playgrounds, mainly Regent's Park
Ms J Masqoi	Black – Sierra Leone	2012	Various toilets and playgrounds, mainly Hyde Park
Mr A Obadare	Black - Nigerian	Aug 2014	Various toilets and playgrounds, mainly Greenwich Park
Ms R Tetteh	Black - Ghanaian	Sept 2014	Various toilets and playgrounds, mainly Kensington Gardens
Mr D Antwi	Black - Ghanaian	April 2015	Various toilets and playgrounds, mainly St James' Park
Mr F Bekoe	Black – Ghanaian	Late 2016	Various toilets and playgrounds, mainly Regent's Park, Hyde Park
Ms H Benthum-	Black - Ghanaian	July 2017	Various toilets and

Brook			playgrounds
Ms P Panford	Black - Ghanaian	Feb 2018	Various toilets and playgrounds, mainly Greenwich Park
Ms A Yeboah	Black - Ghanaian	Mar 2018	Various toilets and playgrounds, mainly Regent's Park
Ms M Safoowa	Black - Ghanaian	May 2019 – 20 Jan 2021	Various toilets and playgrounds, mainly Kensington Gardens

40 In the summer of 2019 there were about 50 employees working on the toilet maintenance and cleaning services contract (a document dated 9 July 2019 refers to 48 people working on the contract and a document dated 20 August refers to 52 people working on the contract). It is clear from the evidence before us that at least 40 of them, and possibly a little more, were black or ethnic minority ("BME") employees. The overwhelming majority of those 40 were black African.

41 The Respondent recognised the Public and Commercial Services Union ("PCS") and Prospect for collective bargaining. Each year both unions submitted a joint pay claim which was followed by joint collective bargaining. In June 2017 Nigel Green, Branch Secretary for PCS, submitted a pay claim on behalf of the unions. In that submission, he stated,

> "*the Royal Parks as employer must give consideration to extending payment of the Living Wage, currently £9.75 in London, to all employees of contractors by incorporating a clause to this effect as part of the procurement process."*

At a pay negotiation meeting on 18 July 2017 Caroline Rolfe, the Respondent's Director of Resources at the time, said that that did not form part of the pay negotiations for its employees and that she would raise the issues separately.

42 Around October 2017 the Respondent's Board asked for advice on the impact of introducing LLW for all contractors and concessionaires working within the Parks. Mr A Scattergood, Chief Executive of the Respondent, prepared a paper to deal with the issue. Mr Scattergood circulated drafts of his paper among his colleagues. Some colleagues saw the benefits and advantages of recommending the introduction of LLW for contractors. Others, such as Ms Rolfe, were opposed to it. She set out her arguments as to why she was opposed to it and said, "*The TRP budgetary position is not of relevance here."*

43 Mr Scattergood presented his paper to the Board on 8 November 2017. His recommendations were:

> "*TRP should make a commitment to continue to pay the LLW for all of its staff.*
>
> *TRP should encourage its concessionaires and contractors to pay LLW as contracts came up for renewal, but should not make this a mandatory requirement as this time given the estimated additional cost of a minimum of £2m per annum is an unaffordable burden on the charity.*
> *TRP should aspire to the LLW being paid to all of its contractors and concessionaires within ten years."*

The paper contained a breakdown of how the estimated cost of £2million had been arrived at. £1.5 million of that related to implementing LLW on catering contracts. The estimated costs of implementing it on the toilet cleaning services contact was £150-170,000. In the paper Mr Scattergood said that the Respondent could say as part of the tender process that they were supportive of LLW and ask companies to set out the price of delivering the LLW. Vinci had done that in 2014 but the Respondent's predecessor had decided not to pursue that option.

44 In the June 2018 pay negotiations the trade union side raised concerns about the fact that it appeared that an employee of the Respondent was being paid less than LLW. The minutes of the meeting have recorded that Ms Rolfe emphasised that the Respondent's intention was "*not to pay below the LLW for its directly employed staff*" and it was agreed that the matter would be investigated. It was investigated and it was found that the employee in question was in fact not being paid below the LLW.

45 On 27 June 2019 United Voices of the World ("UVW") wrote to Vinci on behalf of their members, the toilet cleaners who worked in the Royal Parks. They asked Vinci to recognise UVW for collective bargaining. They said that the vast majority of their members were paid below the LLW and asked Vinci to respond with a proposal for implementation of the LLW as a minimum rate for all its employees working as toilet cleaners in the parks. They threatened industrial action if they did not hear from Vinci within the timeframe they imposed. The letter was copied to the Respondent.

46 On 28 June 2019 in their pay claim PCS and Prospect said,

> "*The Royal Parks as employer should extend payment of the Living Wage to the employees of its contractors, by incorporating a clause to this effect as part of the procurement process. This pay level is determined by the Living Wage Foundation to reflect the real cost of living in the UK and London and is currently £10.55 per hour for London."*

The Respondent's position at the pay negotiation meeting on 5 July 2019 was the same as it had been in 2017, that that was not a matter for that negotiating forum. Clare Wadd, the new Director of Resources, said that TRP was not saying that the issue would not be considered but that meeting was not the forum in which to discuss it. The trade union side said that the more pressure that could be placed on companies through the tendering process to pay the LLW the better.

47 On 9 July 2019 the account manager on the Vinci cleaning contract contacted Tom Jarvis (Director of Parks since October 2018) to arrange a meeting to discuss the pricing of the cleaning contract which was coming up for renewal at the end of October 2019. They had discussions about LLW, and Mr Jarvis asked Vinci for the details of the number of its staff on the contract and their various pay rates, identifying those who fell below LLW. The account manager provided the figures – 46 out of the 48 staff on the contract fell below the LLW. 39 were paid £8.21 per hour, 1 was paid £8.41, 6 were paid £8.66, 1 was paid £11.96 and 1 was paid £13.59. He asked Mr Jarvis whether he wanted him to provide at their meeting a cost of the option of paying LLW. Mr Jarvis responded in the affirmative.

48 On 10 July Mr Jarvis wrote to UVW,

> "*although the payment of the London Living Wage is not currently a mandatory requirement on Royal Parks contracts, it remains an aspiration of the Charity as*

we recognise the real challenges faced by those who live and work in London. We do consider London Living Wage when contracts are re-tendered."

49 On 23 July Vinci's Commercial Manager informed Mr Jarvis that adopting the LLW would cost an additional £225,000 per annum. He continued,

"*Many public sector organisations are now realising the benefits of paying a real living wage and I would urge TRP to seriously consider adopting it."*

On 2 September Mr Jarvis informed Vinci that the Respondent would extend the contract with Vinci on the basis of the recent proposal put to them. He said that once they had the approval of the Board on LLW that week they would issue the extension letter.

50 In a paper presented to the Board on 5 September 2019 Claire Wadd recommended,

"*For expenditure contracts, for tenders and extensions from now on, TRP should require all contractors to pay LLW effective from award/extension of contract. This will start with the toilets contract due for extension effective 1 October 2019.*

Certain current large contractors – landscape maintenance and gate-locking – should be required to pay LLW during the life of existing contracts, effective 1 April 2020.

For income generating contracts, concessionaires and contractors should be expected to pay LLW from the outset of new and extended contracts wherever possible (with phasing permitted in some cases if necessary, but LLW to be paid from 1 April 2023 at the latest."

She said that the Respondent's operating costs would increase by approximately £1.2 million in 2020-2021 if the recommendations were accepted. She continued,

"*This is a significant amount, representing approximately 3% of operating costs. However, we are facing union pressure and bad publicity as a result of contractors not paying LLW, contractors are finding it hard to recruit and retain staff, and morally we believe it is the right thing to do."*

Her conclusion was,

"*Whilst TRP's operating costs will increase by approximately £1.2m in 2020/21 should it decide to pay LLW on its toilets, landscape maintenance and gate-locking contracts from October 2019/April 2020, this can be offset by increases in events income, as demonstrated in the 3-year projections.*

Excluding catering, these contracts represent the largest number of contractors' staff who are not currently paid LLW. Unlike in catering, they are, in many cases, very long-serving staff who have dedicated many years of their lives to TRP. Taking both this and the potential for strike action and reputational damage into account, we believe that bringing forward the date at LLW is paid to these staff is the right thing to do."

51 The Board agreed at the meeting on 5 September 2019 that the Respondent and all of its contractors should pay the LLW to all staff as soon as possible after the contracts came up for renewal, and by April 2023 at the very latest. The Board noted that there would be a financial cost to the charity in adopting that approach.

52 A Change Control Notice was issued on18 September 2019 in respect of the toilet cleaning contact with Vinci. It recorded that it had been agreed that with effect from 1 November 2019 the contract would be extended to 31 October 2021 and that TRP would fund future increases to the LLW. The estimated cost of the change was said to be £120,000. It was subsequently decided (email of 29/10/19) that they would extend the contract under its existing terms for 12 months with the Respondent meeting the costs of LLW (which were said to amount to £287,000) and that they would retender for a new contract in November 2020.

53 On 6 November 2019 the Respondent replied to questions that had been asked by UVW. The Respondent confirmed that at the time of the tender exercise on 2014 and subsequently Vinci had presented Royal Parks with costing for paying the LLW to the workers who would be employed on the contract. It stated that all of the Respondent's employees were paid more than LLW. The Respondent said,

> *"At the time the cleaning contract was let in 2014, prior to the formation of this charity, the Royal Parks Agency considered the costs of requiring contractors to pay the London Living Wage but decided that this option would not be taken forward but could be revisited during the period of the contract."*

54 On 13 December 2019 the Respondent announced that Vinci staff employed on TRP contracts would be paid LLW.

55 On 23 December 2019 Vinci wrote to its employees to inform them of the increase in their pay. The wording of the letter which had been agreed with the Respondent was,

> "*We are writing to inform you that The Royal Parks have opted to fund London Living Wage on its office and toilet cleaning staff with Vinci Facilities.*
>
> *Your hourly pay will increase to £10.75, effective 1st November 2019. This means that you will receive a back payment in January 2020."*

56 The back-payment was made in the middle of January 2020. Since then the Claimants have been paid the LLW.

57 On 1 November 2020 the Respondent entered into a new contract with Vinci for public toilet and building cleaning services. The contract provided,

> "*D.4 London Living Wage*
>
> *D.4.1 … the Contractor shall:*
>
> *D.4.1.1 ensure that none of:*
>
> *(i) its employees, nor*
> *(ii) the employees of its London Sub-contractors,*

engaged in the provision of the Services be paid less than the London Living Wage as appropriate to the location of their workplace."

58 On 1 May 2021 the contract was awarded to Just Ask Estate Services Ltd and the Claimants' employment transferred to that company.

59 In the Bundle of Authorities produced by the Claimants on the last day of the hearing was a research report published by the Equality and Human Rights Commission entitled "Coming clean: contractual and procurement practices". The report contained some statistics about BME representation in the cleaning workforce in England and in London. The Respondent submitted that that was evidence that the Claimants were trying to introduce very late in the day (in the course of closing submissions) and that it should not be admitted. It was submitted on behalf of the Claimants that it was information in the public domain and was admissible. We agreed that it was not an "authority" but new evidence that the Claimants were trying to adduce. Even if the information was publicly available, if the Claimants wished to rely on it they should have introduced it as evidence. We decided that it would not be in accordance with the overriding objective to admit that evidence at this very late stage. It would lead to a delay in the proceedings and to additional costs being incurred by the Respondent.

Conclusions

[In this part the references to "TRP" and "the Respondent" are to the Respondent and its predecessors who were previously responsible for the management of the parks.]

Jurisdiction

60 We considered first whether the claims had been presented in time. The claim by all the Claimants other than Mr Alarcon Castro was presented on 13 April 2020. The effect of section 140B of the Equality Act 2010 is that a complaint about any act that occurred on or after 3 December 2019 was presented in time. Although the payment of LLW to the workers on the Vinci contract was effective from 1 November 2019, they were first told that they would be paid it on 23 December 2019 and they were paid it in the middle of January 2020. We concluded that the act of discrimination continued until the date when the payment was made, i.e. the middle of January 2020, and that the claim had been presented in time. In case we are wrong in that conclusion and the act of discrimination ended on 1 November 2019, we would nevertheless have considered it just and equitable to consider the claim in circumstances where the Claimant were first told that they would receive LLW on 23 December 2019. Mr Alarcon Castro's claim was not presented in time. His evidence was that his trade union representative had asked him in November 2019 whether he wished to join the group claim and he had said that he would. We could only surmise that his claim was presented later because his name had accidentally been omitted from the list of names attached to the original ACAS conciliation. As his claim was identical to the claims of the others, we concluded that it would be just and equitable in all the circumstances to consider it.

Are the Claimants contract workers under section 41?

61 We then considered whether the Claimants were contract workers under section 41 of the 2010 Act. That entailed answering the following two questions – (i) Whether TRP made work available for them or, put in another way, whether the work done by

them was work done for TRP; and (ii) whether Vinci supplied them in furtherance of a contract. The answering of the first question involves considering whether TRP exercised an element of influence or control over the conditions under which the Claimants worked (although influence and control does not have to be demonstrated in every case). The fact that they were employed by Vinci and did their work pursuant to a contract of employment with Vinci does not preclude it from also being work done for TRP. Equally, the mere fact that they did work under a subcontract from which the Respondent would derive some benefit is not in itself enough to bring them within section 41.

62 We considered the following matters to be relevant in answering the first of the two questions. Throughout their periods of employment with Vinci and its predecessors all the Claimants worked in the Royal Parks cleaning toilets and buildings that belonged to the Royal Parks and were used by those visiting the Royal Parks. TRP could exclude any of Vinci's employees working on the contract from the Royal Parks if in its reasonable opinion that person's presence would be undesirable. It could effectively stop any of Claimants working on the contract, which could possibly lead to them being dismissed if Vinci had no other cleaning work available for them. Vinci's employees working on the contract had to comply with TRP's rules and regulations relating to the conduct of personnel when on or off the premises. TRP had the right to inspect records relating to the qualifications and training of the staff and copies of their certificates of qualifications and competence. The implication of that is that if TRP was not satisfied of the suitability of any of Vinci's employees, it could ask for that employee to be removed from the contract. The Claimants had to be trained on dealing with members of the public in a manner befitting TRP and TRP provided the material for such training. Although Vinci provided the materials and equipment used for the cleaning, they had to be of a quality agreed with TRP. Uniforms were provided by Vinci but the designs had to be approved by TRP.

63 Although Vinci employed and managed the staff, TRP had considerable control over how they did their work and behaved in the workplace. TRP set out how they should use their cleaning materials and their daily duties on arrival. TRP dictated the circumstances in which they could leave the premises during the working hours. TRP dictated what their offices should be like and the use of radios in their offices. In certain respects Vinci's employees liaised directly with TRP's managers; Vinci's employees at the playground in Kensington Gardens (at the Diana memorial playground) were managed directly by a TRP Playground Manager. Staff could get permission from TRP Park Manager to leave the premises during working hours and, if necessary, had to liaise with TRP in respect of deterrence of abuse or damage.

64 Vinci decided the rates of pay for the various roles on the contract subject to TRP's stipulation that the rates had to be those required to attract, retain and motivate high calibre individuals in the current employment market. More importantly, the minimum level of pay for the employees on the contract was determined by TRP (this is dealt with in more detail below). At the very outset of the contract, Vinci gave TRP the option of accepting a bid whereby it would pay all the employees on the contract LLW. TRP rejected that option. They reconsidered it during the term of the contract but did not accept the option which would have resulted in the Claimants receiving LLW.

65 Having considered all the evidence, we concluded that TRP exercised a considerable degree of influence or control over the work done by the Claimants and that the work done by the Claimants could properly be described as work done for

TRP. TRP made work available for Vinci's employee working on the toilet and building cleaning contract.

66 We then considered the second question, namely, whether Vinci supplied the Claimants to TRP in furtherance of a contract between it and TRP. The issue here was simply whether there was an obligation under the contract to supply individuals to do the work, which we have decided could properly be described as work done for TRP. The supply of workers does not have to be the primary or dominant purpose of the contract. We accept that the contract between Vinci and TRP was for the supply of services from the former to the latter. The Specification of Requirements for the contract stated expressly that the contractor would be expected to employ staff with the qualifications and experience required to perform effectively the duties required under the contract. TRP provided the job descriptions for the various roles covered by the contract. As we have set out above TRP exercised a level of control and influence over the individuals who worked on the contract. Having considered all the provisions of the Specification of Requirements and the terms of the contract between TRP and the Vinci, we concluded that under the contract there was an obligation for Vinci to supply individuals to do the work that was required to be done under the contract.

67 We, therefore, concluded that the relationship between the Claimants and the Respondent was one that fell within section 41 of the 2010 Act. That conclusion is consistent with the wording of section 41 and gives effect to Council Directive 2000/43/EC. Nor is such an interpretation in any way inconsistent with Article 16 of Charter of Fundamental Rights of the European Union. There is nothing in the wording of section 41 that restricts its application to cases where the PCP in question is applied only to the contract workers.

Did the Respondent apply a PCP to the Claimants?

68 The decision as to whether or not the Claimants were paid the LLW was made by TRP/the Respondent. The Vinci bid contained two costings – one based on a minimum wage of £7 and the other on LLW. What Vinci paid as a minimum wage depended on which option TRP chose. If TRP had chosen the latter Vinci would have paid that. It would have been financed by TRP. The acceptance of that option would not have interfered with Vinci's freedom to conduct a business. Vinci put in a bid based on LLW being paid. It chose to do that. If TRP had accepted it both parties would have agreed that LLW would have been paid. The decision as to whether the Claimants were paid LLW as a minimum was made by TRP. As Mr Khan said on behalf of the Claimants, the decision might have been executed by Vinci but it was made by TRP. It was clear to us that TRP/the Respondent applied a provision, criterion or practice to the Claimants that its employees would be paid the LLW as a minimum wage but those working on the cleaning contract with Vinci would not be paid LLW as a minimum wage.

The pool for comparison

69 It is clear from the authorities that the pool for comparison should comprise all the workers affected by the PCP. Having regard to the PCP in this case, the pool comprises all the Respondent's employees and all of Vinci's employees who worked on the toilet and building cleaning services contract.

Comparison/material difference

70 We then had to consider whether the Respondent's PCP of paying LLW as a minimum wage to its employees but not to those working on the toilet cleaning contract put BME persons at a particular disadvantage when compared with persons who were not BME. We considered whether there was any material difference between the circumstances of the BME persons and the non-BME/white persons in the pool. Some of the BME persons in the pool were employed by the Respondent, others worked on the Vinci contract. The same applied in the case on the non-BME/white persons in the pool. Some of them were employed by the Respondent and others worked on the Vinci contract. We concluded that there was no material difference between the circumstances relating to the two groups. We did not have to consider for the purpose of sections 19(2)(b) and 23(1) of the 2010 Act whether there was any material difference between the circumstances of those employed by the Respondent and those employed by Vinci. If we are wrong and such a comparison had to be made, we would have concluded that for the purpose of determining whether LLW should be paid as a minimum wage to the two groups, there was no material difference between them. LLW is the amount that the Living Wage Foundation considers the minimum that a person working in London needs to meet his or basic living costs. That figure applies to all persons working in London, regardless of the identity of the worker's employer or the nature of the work that he or she does. The LLW applies equally to office based workers and manual labourers and to private and public sector employees.

71 We then considered whether the PCP put BME workers at a particular disadvantage when compared with white/non-BME workers. Of the Respondent's 160 employees 12.3% were BME and 87.7% white/non-BME. That means that about 20 of its employees were BME and 140 non-BME. In 2019 there were about 50 Vinci employees working on the toilet cleaning contract. At least 40 of them were BME. The pool consists of 210 employees, of whom 150 were non-BME and 60 were BME. The PCP applied by the Respondent resulted in 20 BME workers receiving LLW as a minimum wage and 40 BME employees not receiving it. 66.66% of the BME workers in the pool did not receive LLW as a minimum wage. Out of the 150 white/non-BME workers, 140 received LLW as a minimum and 10 did not. 6.66% of the white/non/BME employees did not receive LLW as a minimum wage. It is clear from the above figures that the PCP applied by the Respondent put BME workers at a particular disadvantage when compared with non-BME/white workers. It comes as no surprise to the Tribunal, which deals with many cases involving cleaners in London, that a large proportion of them are BME.

Whether the PCP put the Claimants at that disadvantage

72 All the Claimants were paid less than the LLW. They were paid less because TRP/the Respondent made the decision not to accept the option for the staff on the Vinci contract to be paid LLW. Had TRP accepted that option, the Claimants would have been paid LLW. We were satisfied that there was a direct causal link between the PCP applied by the Respondent and the fact that the Claimants were paid less than LLW.

Justification

73 The onus is on the Respondent to establish that the PCP it applied, which put BME workers and the Claimants at a particular disadvantage, was a proportionate

means of achieving a legitimate aim. The Respondent purported to set out at paragraph 53 of its amended grounds of resistance the legitimate aim on which it relied. However, it does not deal at paragraph 53 with the PCP of which the Claimants complained and does not state what the legitimate aim of rejecting the option afforded by Vinci to pay LLW to the workers on that contact is. What it sets out at paragraph 53 is the aim of outsourcing, i.e. the private or voluntary sector delivering services to the government or the public after a process of competitive tendering. None of the matters set out at paragraph 53 explain what aim the Respondent sought to achieve by not accepting the option to pay the workers on the Vinci contract the LLW. There is nothing in outsourcing that prevented TRP accepting the LLW option or from requiring contractors to pay it, as can be seen from the fact that in September 2019 its Board agreed that all of its contractors should pay LLW to all staff as soon as possible after contract came up for renewal.

74 In its closing submissions, the Respondent submitted that although it had not used the word "affordability" in its grounds of resistance, it was plain in the context of what it had said at paragraph 53 and in subsequent paragraphs that its aims had included "profitability". It also relied on Mr Jarvis' evidence in his witness statement that it had not been affordable (see paragraph 37 above). We do not accept that the Respondent relied on affordability as a legitimate aim in its grounds of resistance, but it has relied on that at the hearing before us. It has, however, not presented any evidence to support its case that it could not accept the LLW option in November 2014 and at any time before November 2019 because it was not affordable.

75 It is not in dispute that if the Respondent/TRP had accepted the option for the workers on the Vinci contract to be paid LLW, it would have increased the overall cost of the contract by about £145,000 (or 12%). The mere fact that it would have cost more does not mean that it was not affordable. There was no evidence before us from a witness involved in the making of that decision or any contemporaneous documents that showed that the Respondent had not accepted that option because it was not affordable. The Respondent did not provide any contemporaneous company accounts, financial plans or budgetary costs to show that it was not affordable in November 2014 or at any time before November 2019. When the Respondent refused the option in September 2014, it did not say that it was not affordable. In its letter of 6 November 2019 the Respondent said that at the time of the original tender in 2014, it had considered the costs of requiring the contractor to pay LLW but had decided not to take up that option at that time. It did not say that it had rejected that option because it had not been affordable. There was evidence that in November 2017 the Respondent's Chief Executive advised that the cost of making LLW mandatory on all its contracts and concessions (£2 million) would be an unaffordable burden on the charity. There was no evidence that the cost of implementing it on the Vinci contract, which was estimated as being £150,000 – 170,000, was unaffordable. In September 2019 it was decided to implement the LLW on the Vinci contract. It was estimated at that time that it would cost between £225,000 and £287,000. There was no suggestion at that stage that it was not affordable. There was no evidence before us about how the position had changed from 2014 to 2019.Having considered all the evidence, it appeared to us that what had changed was the Respondent's attitude towards incurring that extra cost rather than its ability to pay that extra cost. There was a recognition in September 2019 that it was "*the right thing to do."* If the Respondent's case was that it could not afford to pay the workers on the Vinci contract LLW between November 2014 and November 2019, it failed to establish that. If, as appears to be the case, the Respondent's aim was solely to reduce costs, that cannot be relied upon as a legitimate aim in an indirect discrimination case.

76 We concluded that the Respondent had failed to establish that the PCP which it applied which put BME workers at a particular disadvantage was a proportionate means of achieving a legitimate aim.

_____

Employment Judge - Grewal

_____

Date: 16th Nov 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

17/11/2021

.....

FOR THE TRIBUNAL OFFICE