Neutral Citation Number: [2023] EAT 47

Case No: EA-2021-000243-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 5 April 2023

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

(1) MR SANTOSH ALEXANDER THUKALIL
(2) MRS RIYA GEORGE THUKALIL

Appellants

- and –

(1) MS KAMALAMMAL POONNAMAMNAL KATTUVILA PUTHENVEETTIL
(2) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Respondents

- -
- -

The **Appellants** appeared in person
Ms Akua Reindorf KC (instructed by the Anti Trafficking and Labour Exploitation Unit) appeared for the **First Respondent**
The **Second Respondent** did not appear and was not represented

Hearing date: 28 February 2023

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JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 5 April 2023 at 10.30am. The version released for publication may be treated as authentic.

SUMMARY

Indirect sex discrimination; directly effective EU law rights

The tribunal had correctly held that the claimant was entitled to the national minimum wage. The tribunal had rightly disapplied regulation 2(2) of the National Minimum Wage Regulations 1999 (**the 1999 Regulations**). The tribunal was entitled to find that the family and domestic worker exception in regulation 2(2) was indirectly discriminatory against women and was not a proportionate means of achieving legitimate aims.

The tribunal had correctly decided that regulation 2(2) was contrary to the claimant's directly effective EU law right under article 157 of the Treaty on the Functioning of the European Union (**TFEU**). It had correctly held that article 157 applies to unjustified indirect discrimination. The tribunal was bound by the former section 2(1) of the European Communities Act 1972 ("**the 1972 Act**") to disapply regulation 2(2).

The appellants were not correct in their contentions that (i) article 157 did not apply to the claimant's case because she had not brought an equal pay claim using a male comparator (ii) she could not do so because there was no "single source" body responsible for the pay and conditions of both claimant and comparator; and (iii) article 157 is only concerned with eliminating disparities in pay between the sexes and not, as **the 1999 Regulations** are, with ensuring fair wages.

An enactment to ensure fair wages such as **the 1999 Regulations** is not immune from disapplication under the former section 2(1) of **the 1972 Act** merely because the kind of discrimination the enactment produces is unequal pay and pay equality is not the purpose of **the 1999 Regulations**. The contention that the inequality can only be remedied by an equality clause in an equal pay or equal value claim is wrong. If the discriminatory effect is lower pay for a pool of overwhelmingly female workers without justification, the measure is not exempt from disapplication.

It was not necessary to decide whether the tribunal was right to disapply regulation 2(2) of **the 1999 Regulations** on the further ground that it was incompatible with the EU law general principle of non-discrimination. While there was force in the contention that the tribunal was right to do so, the issue was not decisive of the appeal; the scope of direct effect of general principles of EU law had not been established in the Luxembourg case law; and the EU Charter of Fundamental Rights had (albeit subject to a saving provision) already ceased to be part of English law when the hearing took place.

The hearing and decision occurred during the Brexit transition period from 31 January 2020 (exit day) to 31 December 2020 (IP [*implementation period*] completion day). Since 31 December 2020, a tribunal has had no power to disapply domestic legislation on the ground that it is incompatible with directly effective EU law rights. The failure of the appeal does not mean that a person in the claimant's position would now be entitled to the national minimum wage under regulation 57 of the National Minimum Wage Regulations 2015.

The Honourable Mr Justice Kerr:

Introduction

1. This appeal has a long procedural history. The first respondent was the claimant below. I shall refer to her as the claimant. The two appellants were the first and second respondents below. I will refer to them as the respondents. The second respondent to this appeal was the third respondent below, joined because the claimant was asserting that a legislative provision should be disapplied. I shall refer to him as the Secretary of State. He has taken no part in the present appeal.

2. The decision appealed against is that regulation 2(2) of the National Minimum Wage Regulations 1999 ("**the 1999 Regulations**") must be disapplied and that the claimant was entitled to be paid the minimum wage under **the 1999 Regulations**. She was a domestic worker in the respondents' home from 2005 to 2013. As such, regulation 2(2), unless disapplied, removed her entitlement to the minimum wage.

3. The claimant challenged that provision on the ground that it indirectly discriminated against women, contrary to directly effective EU law rights. The tribunal, at London South, agreed and found in her favour. It comprised Regional Employment Judge Andrew Freer, sitting with Ms J. Forecast and Ms C. Brown. The hearing was in July 2020. The decision was dated 14 December 2020 and sent to the parties the next day.

4. The appeal proceeds on the sole ground permitted by Eady J(P) at an appellants only preliminary hearing on 17 May 2022. The essence of that ground is that the tribunal should have accepted the respondents' arguments and held that article 157 of the Treaty on the Functioning of the European Union ("**TFEU**") does not apply here because it only applies (to quote from the grounds of appeal) "where there is a disparity of pay between a male and a female who does equal work or work of equal value" and where the disparity in pay and conditions can be "attributed to a single source".

5. The respondents further contend, as part of the permitted ground of appeal, that in the present case there is no such single source; that therefore "there is no body which is responsible for the inequality and which could restore equal treatment"; and that unlike the Regulations, the purpose of article 157 "is not for ensuring fair wages, but to eliminate disparity of wages between different sexes". Therefore, the respondents say, the tribunal was wrong to disapply regulation 2(2).

6. The respondents' arguments were ably presented (as they were below) by the first respondent, Mr Thukalil, on behalf of himself and his wife. They are not lawyers; they work in information technology, though they were represented by counsel at earlier stages of the litigation. He presented the arguments with exemplary courtesy and clarity. The claimant too was ably represented by the more legally experienced Ms Akua Reindorf KC, who appeared successfully for the claimant below.

Background Facts

7. The background facts may conveniently be taken from paragraphs 7-15 of the tribunal's decision and reasons, as follows:

> **"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."

Relevant Provisions in Regulations

8. The domestic and family worker exception from entitlement to the national minimum wage was, at the time of the claimant's period of service from 2005 to 2013, enacted in regulation 2(2) of **the 1999 Regulations**. It provided until 5 April 2015:

"2.- General interpretative provisions

…

(2) 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."**

9. As the tribunal noted, by the time of its decision on 15 December 2020, that provision had (from 6 April 2015) been revoked and replaced by the similarly worded regulation 57 of the National Minimum Wage Regulations 2015 ("**the 2015 Regulations**"). It is still in force and provides:

> **"57. — Work does not include work relating to family household**
>
> **(1) In these Regulations, "work" does not include any work done by a worker in relation to an employer's family household if the requirements in paragraphs (2) or (3) are met.**
>
> **(2) The requirements are all of the following—**
>
> **(a) the worker is a member of the employer's family;**
>
> **(b) the worker resides in the family home of the employer;**
>
> **(c) the worker shares in the tasks and activities of the family.**
>
> **(3) The requirements are all of the following—**
>
> **(a) the worker resides in the family home of the worker's employer;**
>
> **(b) the worker is not a member of that family, but is treated as such, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities;**
>
> **(c) the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals;**
>
> **(d) if the work had been done by a member of the employer's family, it would**

> **not be treated as work or as performed under a worker's contract because the requirements in paragraph (2) would be met."**

The Tribunal's Decision

10. At the hearing in July 2020, there was an agreed list of issues. The first set of issues focussed on whether regulation 2(2) had a prima facie indirectly discriminatory adverse impact on women because the vast majority of family and domestic workers disentitled by the provision are women; and whether the measure put women in general, and this specific claimant in her work for the respondents in particular, at a disadvantage when compared to men.

11. The second set of issues focussed on whether regulation 2(2) was enacted in pursuance of the aims which the Secretary of State had advanced, namely (i) reflecting the unusual working relationship when a living in worker is or is treated as a family member and their work is done in that context; and (ii) to encourage parents to return to work by not imposing unaffordable or deterrent financial burdens on them; whether those aims were legitimate; and whether regulation 2(2) was a proportionate means of achieving them.

12. The third set of issues focussed on whether, if regulation 2(2) is indirectly discriminatory, it is incompatible with article 157 of the **TFEU**; and with articles 21 and 23 of the EU Charter of Fundamental Rights ("**the EU Charter**"); and whether it is incapable of being read consistently with the Recast Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ("**the Recast Equal Treatment Directive**" or "**the Directive**").

13. The fourth and final set of issues related to remedy: whether the tribunal should disapply regulation 2(2); whether it could be read consistently with **the Directive**; and whether the tribunal should 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 in respect of her period of employment with the respondents.

14. The tribunal referred without controversy to the text of regulation 2(2); to the meaning of indirect discrimination stated in section 19 of the **Equality Act 2010** ("**EqA**") and to the burden of proof provision in section 136 of the **EqA**. The tribunal accepted the proposition that a legislative provision can be a "provision, criterion or practice" within section 19(1) of the **EqA**. It was for the respondents to prove justification. The tribunal summarised the usual body of law determining when an aim is legitimate and what constitutes justification.

15. The tribunal then referred to the principle of non-discrimination in **the EU Charter**, in chapter III headed "Equality". Article 21 headed "Non-discrimination" prohibits at (1) "[a]ny discrimination based on any ground such as sex …" Article 23 headed "Equality between men and women" requires that "[e]quality between men and women must be ensured in all areas, including employment, work and pay".

16. The tribunal set out the text of article 157 of the **TFEU** (formerly article 141 of the Treaty establishing the European Communities and before that the differently worded article 119 of the Treaty of Rome):

> **"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.**
>
> **3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social**

> **Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.**
>
> **4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."**

17. The tribunal said "[t]he meaning of 'discrimination' in Art 157 encompasses indirect discrimination" (paragraph 30). Ms Reindorf had cited in support of that proposition **Bilka-Kaufhaus GmbH v Weber von Hartz** (Case 170/84) [1987] ICR 110, at [29]–[31], where the Court of Justice held that excluding part time workers from an occupational pension scheme, if the large majority of part time workers are women, is contrary to article 119 unless the employer can explain its pay practice by objectively justified factors unrelated to any discrimination on the ground of sex.

18. The tribunal then referred to **the Directive**. Article 1 records that:

> **"[t]he purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation."**

19. Article 1 goes on to explain that the Directive contains provisions to implement the principle of equal treatment in relation to, among other things, working conditions, including pay. The tribunal referred to article 4 which requires that:

> **"[f]or the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated".**

20. The tribunal then proceeded to examine in detail the evidence – and some further case law – relevant to its determination of the issues. That exercise occupied paragraphs 33-119 of the decision. The tribunal had before it much evidence about the intent and purpose of the domestic and family

worker exception from entitlement to the minimum wage, the impact of the measure on women compared to its impact on men, the government's legislative aims and whether regulation 2(2) was a proportionate means of achieving those aims.

21. I do not need to go through the detail of that evidence and the tribunal's consideration of those issues. Having considered and assessed the evidence, it concluded in summary that regulation 2(2) had a strong adverse disparate impact on women. It put them at a disadvantage compared to men. The claimant too was placed at that disadvantage with regard to her work for the respondents. The measure was indirectly discriminatory on the ground of sex.

22. In considering the defence of justification, the tribunal rejected the first of the two aims contended for by the respondents - reflecting the unusual working relationship where a living in worker is or is treated as a member of the family. The tribunal accepted the legitimacy of the second aim - to encourage parents to return to work by not imposing unaffordable or deterrent financial burdens on them - but noted an absence of evidence that this aim was actually adopted by government or the Secretary of State.

23. The tribunal went on to consider, on the basis that both the aims advanced by the Secretary of State were considered to be present and legitimate, evidence bearing on whether the measure was a proportionate means of achieving those aims; and concluded that it was not. The evidence from the Secretary of State, put before the tribunal before the Secretary of State ceased participating in the proceedings, did not meet the test of proportionality and did not provide justification for the domestic and family worker exception.

24. The tribunal went on to consider whether to disapply regulation 2(2) of **the 1999 Regulations**. The tribunal accepted that **the Directive** is not directly effective. However, they went on to state (at paragraphs 108-109):

> **"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."**

25. The tribunal went on to consider the legislative changes arising from Brexit, including repeal of **the 1972 Act**. I need not set those out because the claimant's service with the respondents pre-dated the Brexit referendum and consequent later changes in the law. It was not argued below that those changes meant the tribunal could no longer disapply regulation 2(2). Indeed, the Secretary of State (the tribunal noted at paragraph 115) "does not oppose disapplication once i[t] has been established that regulation 2(2) has given rise to unjustified indirect discrimination."

26. The tribunal concluded that there was no alternative to outright disapplication. There was no available purposive reading of regulation 2(2) compatible with EU rights. The tribunal was duty bound to disapply regulation 2(2) and would do so. It followed that the claimant was entitled to the national minimum wage in respect of her period of service with the respondents. The tribunal made a declaration to that effect.

27. On 28 December 2020, the respondents sought reconsideration of the tribunal's decision. They pointed out that the tribunal had, at paragraph 114, stated that it was "under a duty to disapply Reg 2(2) as incompatible with national legislation ….". They complained that the tribunal had not engaged with their argument that the purpose of article 157 is not to achieve fair wages, but to eliminate discrimination on the ground of sex.

28. They cited the familiar case law on the need for a "single source" of pay inequality where in an equal pay or equal value claim a comparison is sought to be made with a comparator working at a different workplace. A male comparator was an essential element of the claim, they submitted. Here, there could not be one because the respondents did not employ any male domestic or family member workers; nor was there any other "single source" of the pay of both claimant and any comparator. Without a comparator article 157, concerned with equal pay and not fair wages, did not apply.

29. On 9 March 2021, the tribunal responded, acknowledging that "national legislation" in paragraph 114 was (as was obvious from reading the decision as a whole) an error and that the words should have been "EU rights". The tribunal had intended to say that it was "under a duty to disapply Reg 2(2) as incompatible with EU rights …" That apart, the respondents' arguments were rejected. The respondents' submissions had not been overlooked and there was "no error in the Tribunal's approach to the compatibility of unjustified indirect discrimination with directly effective EU law".

The Parties' Submissions

30. For the respondents, Mr Thukalil submitted as follows, in support of the appeal. Regulation 2(2) of **the 1999 Regulations** is not, he submitted, incompatible with article 157 of the **TFEU**. Article 157 requires EU member states to ensure the principle of equal pay for equal work or for work of equal value is applied. That flows from article 3(3) of the Treaty on European Union of 1992, which provides among other things that the EU shall promote equality between women and men.

31. Article 23 of **the EU Charter**, he submitted, likewise required equality to be ensured in all areas, including employment, work and pay. Only where the court is able to establish all the facts enabling it to decide whether a woman receives less pay than a male comparator engaged in the same work or work of equal value, does article 157 apply. Where no discrimination in the matter of wages between men and women could be established, article 157 cannot apply.

32. Mr Thukalil relied on the analysis of Elias J (as he then was) in **Walton Centre for Neurology & Neurosurgery NHS Trust v Bewley** [2008] ICR 1047, at [33] and [43]. At [43], Elias J said that "indirect" or disguised discrimination cases, where hypothetical comparisons are made, are excluded from the scope of article 157. The identification of the indirect or disguised discrimination implies comparative studies of entire branches of industry, as the Court of Justice had noted in **Macarthys Ltd v Smith** [1980] ICR 672, at [15], cited in **Walton**, at [24].

33. Mr Thukalil submitted that article 157, therefore, did not apply to cases of such "indirect" discrimination. Even if it did, he went on to submit, regulation 2(2) is not indirectly discriminatory against women. The "reason why" issue, i.e. the reason why the worker is treated in the way she is where regulation 2(2) applies, is not her sex; it is because she (or he) is a domestic or family worker. Disparity of treatment with a male comparator cannot be established at the threshold and the application of article 157 is excluded.

34. It was not enough, he submitted, for a claimant to show that regulation 2(2) impacted adversely on a pool of family and domestic workers most of whom were women. He reminded me of the definition of indirect discrimination in **the Directive**, article 2(1)(b):

> **"where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary".**

35. Mr Thukalil submitted that the Directive did not have horizontal direct effect, but the tribunal effectively treated it, wrongly, as having that effect. Further, the tribunal had not been entitled on the evidence to conclude that regulation 2(2) had the necessary adverse disparate impact on women. He criticised the evidential basis on which the tribunal had reached that conclusion.

36. He then referred to the case law on the need for a "single source" of pay inequality, which an

individual entity must have the power to remedy; citing in particular **Lawrence v Regent Office Care Ltd** [2003] ICR 1092 (ECJ), at [17]-[18]; and **Dumfries and Galloway Council v North** [2013] UKSC 45, [2013] ICR 993, *per* Baroness Hale JSC at [37] ff. Unless there is such a single source, with the ability to remedy any pay inequality, article 157 cannot apply. Since domestic and family workers affected by regulation 2(2) work for different employers, there is no such single source. That is the position here; the respondents did not employ any other domestic worker except the claimant.

37. Ms Reindorf KC, for the claimant, made the following main submissions in defence of the decision below. The argument that for article 157 to apply an equal pay or equal value claim had to be brought, was misconceived. That argument had not been advanced below. The respondents had been represented by counsel when the list of issues was prepared and agreed. In any case, the **Bilka-Kaufhaus** case is authority that article 157 (then article 119) applies to indirect discrimination claims.

38. The submission that the tribunal was not justified in finding that regulation 2(2) is indirectly discriminatory is not open to the respondents, Ms Reindorf argued: it does not form any part of the first ground of appeal which is the only ground permitted to proceed to a full hearing. In any case, the tribunal's conclusion on the evidence that the measure operated in a manner that was indirectly discriminatory in English and EU law, was unimpeachable and unassailable.

39. Ms Reindorf submitted that section 2(1) of **the 1972 Act**, in force at the relevant times, required the tribunal to disapply national law that was incompatible with directly effective EU rights. Article 157 was, being a treaty provision, directly effective. It expresses the non-discrimination principle, which also finds expression in the (not directly effective) provisions of articles 21 and 23 of **the EU Charter** and in the (not directly effective) **the Directive**.

40. Furthermore, Ms Reindorf submitted, the general principle of non-discrimination is directly

effective in its own right in cases which fall within the scope of EU law, regardless of the specific means by which it is given expression in the EU legal instruments. As authority for that proposition, she cited (as she did below) **Mangold v Helm** (Case C-144/04) [2006] 1 CMLR 43 CJEU and **Kücükdeveci v Swedex GMbH & Co KG** [2011] 2 CMLR 27 CJEU, at [21]ff.

41. She further submitted that a provision of domestic law governing workers' pay such as regulation 2(2) could be a provision, criterion or practice for the purposes of testing whether there is indirect discrimination within the meaning of article 2(1)(b) of the Directive: **R (UNISON) v Lord Chancellor (Nos 1 and 2)** [2017] ICR 1037 SC *per* Lord Reed JSC at [4]; *per* Baroness Hale DPSC at [124]-[134].

42. It followed that if, as the tribunal properly found, regulation 2(2) had an adverse disparate impact on a pool of largely female domestic and family workers by entitling them to less pay than non-domestic or family workers, the tribunal was bound either to interpret regulation 2(2), if it could, in a manner consistent with the claimant's directly effective EU right to equality of pay and the benefit of the non-discrimination principle; or, if it could not, to disapply the provision as the tribunal did.

43. Ms Reindorf submitted that the tribunal's decision and its correctness at the time it was given is unaffected by Brexit-related legislation. There was a statutory Brexit transition period from 31 January 2020 (exit day) up to 31 December 2020 (IP or implementation period completion day). The hearing before the tribunal took place (in July 2020) and the tribunal's decision was made (sent to the parties on 15 December 2020) during that transition period.

44. She explained that while section 2(1) of **the 1972 Act** was repealed with effect from 31 January 2020, transitional provisions in the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) (as amended, "**the 2018 Act**") kept alive the effect of section 2(1) of **the 1972 Act** as retained EU law until the transition period ended on 31

December 2020.

45. By section 5(4) of the **2018 Act**, as Ms Reindorf pointed out, **the EU Charter** ceased to have effect in the UK from 31 January 2020. But it was not directly effective anyway; and by section 5(5) of the **2018 Act**, section 5(4) which provides that **the EU Charter** ceases to have effect in the UK:

> **"does not affect the retention in domestic law on or after IP completion 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)."**

46. Ms Reindorf submitted that "fundamental rights or principles" include "the general non-discrimination principle" in the various instruments whether or not those instruments conferred horizontal and directly effective EU rights on individuals. Further, by section 2(1) of the **2018 Act**, "EU-derived domestic legislation", i.e. retained EU law continues after the end of the transition period to form part of domestic law, subject (see sections 2(3), 4(3) and 5(6)) to exceptions in Schedule 1.

47. For completeness, it is common ground that there is no longer any power to disapply domestic legislation as incompatible with a general principle of EU law: see paragraph 3 of Schedule 1 to the **2018 Act**. That does not mean, Ms Reindorf submitted, that the tribunal's decision to do so in its decision below is retrospectively invalidated.

Reasoning and Conclusions

48. I start with the content and effect of regulation 2(2). It is, as Mr Thukalil submitted, part of an enactment, **the 1999 Regulations**, whose purpose is to ensure a fair wage is paid to the general body of workers, by ensuring that their pay does not fall below a specified minimum level. Regulation 2(2) then creates an exception by removing the right to be paid that minimum in the case of a particular class of workers, namely family and domestic workers as defined in regulation 2(2).

49. Regulation 2(2) is, to state the obvious, neutral as to the sex of the worker concerned. It is not directly discriminatory. It applies whether the family or domestic worker concerned is male or female. However, it has an adverse disparate impact on women. The pool of workers deprived by regulation 2(2) of the right to the minimum wage are, for the most part, women. The tribunal properly so found on the evidence and that finding cannot be challenged or reversed in this appeal. It does not form part of the first ground of appeal which, alone, may be advanced.

50. Regulation 2(2), therefore, puts women generally at a particular disadvantage compared to men. Unless it were objectively justified by a legitimate aim, the means of achieving which are appropriate and necessary, it would fall within the definition of indirect discrimination found in **the Directive**, article 2(1)(b). Unless justified, it also falls within the definition of indirect discrimination in section 19 of the **EqA** because the claimant too was placed at that disadvantage with regard to her work for the respondents.

51. Next, I accept Ms Reindorf's submission founded on Baroness Hale DPSC's judgment in the **UNISON** case that a domestic legislative provision may amount to a provision, criterion or practice for the purposes of the indirect discrimination test. The other justices agreed with her reasoning; see *per* Lord Reed JSC at [4]. Lady Hale clearly indicated at [125] and [126] that a requirement in regulations to pay a particular fee for bringing a particular kind of employment tribunal claim could be a provision, criterion or practice.

52. In the present case, the defence of justification failed on the facts below and that finding cannot be overturned. There is no permitted challenge to that finding in this appeal. The question is then whether the tribunal was right, in the exercise of its duty under section 2(1) of **the 1972 Act**, to disapply regulation 2(2) and declare the claimant entitled to the minimum wage under **the 1999 Regulations**.

53. Ms Reindorf's contention that the tribunal correctly disapplied regulation 2(2) rests on two pillars. The first is article 157 of the **TFEU** which has horizontal direct effect in domestic law where it applies. The second is the "general principle of non-discrimination" embodied not only in article 157 but in the other instruments that are not themselves directly effective, namely articles 21 and 23 of **the EU Charter** and **the Directive**.

54. I consider article 157 of the **TFEU** first. The question is whether, contrary to Mr Thukalil's contention, it applies in respect of regulation 2(2) of **the 1999 Regulations**. The tribunal found that it did. If it did, it is not disputed that it is directly effective.

55. The reach of what is now article 157 (formerly article 119 of the Treaty of Rome) has been considered in a series of cases in the Court of Justice. In **Defrenne v SABENA** Case 43/75 (judgment of 8 April 1976), a straightforward case of direct and overt discrimination, the Court commented at [12] that "the principle of equal pay forms part of the foundations of the Community" and decided at [40] that the principle of equal pay in article 119:

> **"may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public."**

56. The Court of Justice went on to consider in subsequent cases the limits of direct effect under article 119. **Macarthys Ltd** established that comparison with a predecessor colleague was permissible. **Jenkins v Kingsgate (Clothing Productions) Ltd** [1981] ICR 592 demonstrated that article 141 could cover cases of indirect discrimination, i.e. paying less to predominantly female part timers.

57. In **Worringham v Lloyds Bank** [1981] ICR 558 the Court determined (at [23]) that article 119 extended to cases where discrimination may be "judicially identified", where "the court is in a

position to establish all the facts enabling it to decide whether a woman receives less pay than a man engaged in the same work or work of equal value".

58. I think it is clear that article 157 and its predecessors apply to cases of unequal pay caused by indirectly discriminatory measures. The decisions in **Jenkins** and **Bilka-Kaufhaus** directly support that proposition. In **Bilka-Kaufhaus** the Court followed **Jenkins** in which, as the Court in **Bilka-Kaufhaus** observed at [26], the question had been considered "whether the payment of a lower hourly rate for part-time work than for full-time work was compatible with article 119".

59. These decisions were carefully analysed by Elias J (as he then was) in **Walton**, at [18]-[37], in the course of considering whether comparison with a successor was permissible. He decided that it was not. He described **Jenkins** as "this seminal indirect discrimination case", acknowledging that the Court had held that article 141 could apply to cases of indirect discrimination.

60. I should explain that at [43], Elias J was referring to the exclusion of hypothetical comparators from the application of article 157. This is referred to in the Luxembourg case law as "indirect or disguised" discrimination implying "comparative studies of entire branches of industry", (**Macarthys Ltd** cited in **Walton**, at [24]). That is not the same concept as indirect discrimination in the sense of **the Directive** and section 19 of the **EqA**.

61. Here, the tribunal was not dealing with a case involving a hypothetical comparator, requiring a comparison across sectors of industry. The comparison was between one pool of workers and another. The first pool comprised domestic and family workers not entitled to the minimum wage unless regulation 2(2) were disapplied. The second pool was workers not within the regulation 2(2) exclusion who are entitled to the minimum wage. Indirect discrimination was established by the tribunal's finding that the first pool is at a considerable disadvantage compared to the second pool.

62. I can see no reason to disagree with the tribunal and Ms Reindorf that article 157 can apply

where unequal pay as between men and women is caused by an indirectly discriminatory legislative provision, as in this case. I reject the submission of Mr Thukalil that in such a case the only right that can be asserted is the right to benefit from an equality clause in a claim for equal pay for equal work, or for work of equal value.

63. It is true that a claim for equal pay would necessarily fail for want of a qualifying male comparator. As Mr Thukalil rightly pointed out, he and his wife do not employ any other domestic workers, do not operate any other establishment than their own home and are not able to eliminate any inequality in pay as between the claimant and workers who are entitled to the minimum wage.

64. But the source of the pay inequality is statutory, not contractual. There is no good reason why an equal pay claim should be the only and necessary remedy against the discrimination. The fact that **the 1999 Regulations** are not concerned to achieve pay parity between men and women is not a good reason. The claimant may assert her right under article 157 even though she could not succeed in an equal pay claim. The "single source" jurisprudence is, therefore, beside the point. It could be said that the "single source" body with power to eliminate the pay inequality is the legislature itself.

65. The respondents' argument amounts to the contention that you cannot attack a fair wages measure as indirectly discriminatory if the discrimination the measure produces is inequality of pay. If that is the form of the indirect discrimination, it must be attacked by means of an equal pay claim and not by requiring disapplication of the discriminatory measure that produces the inequality in pay. The fallacy in that reasoning is that the purpose of the measure (fair wages) does not mean it is free from any discriminatory effect. Article 157 applies because regulation 2(2) produces unequal pay.

66. I come next to the claimant's reliance on the general principle of non-discrimination as a source of directly effective EU rights. The tribunal accepted this line of argument. The claimant submits that the non-discrimination principle is a general principle of EU law; it has horizontal direct

effect in cases which fall within the scope of EU law, regardless of the means by which it is given expression in the EU legal instruments; and domestic provisions governing workers' pay fall within the scope of EU law.

67. Consequently, Ms Reindorf says the tribunal was right to disapply regulation 2(2) of **the 1999 Regulations**, exercising its duty under section 2(1) of **the 1972 Act**, even if (contrary to the claimant's primary contention) article 157 does not apply to this form of legislative indirect discrimination. As noted above, the authorities relied on are **Mangold** and **Kücükdeveci**.

68. The impact of **Mangold** and **Kücükdeveci** was discussed in the judgment of the court in **Benkharbouche v Embassy of Sudan** [2016] QB 347, (Lord Dyson MR, Arden and Lloyd-Jones LJJ (as they then were)). The issue was the compatibility of domestic legislation restricting employment claims against embassies with the Convention right of access to a court under article 6 of the ECHR. The court gave horizontal direct effect to article 47 of **the EU Charter**, which was in the same terms as article 6 of the ECHR.

69. A declaration of incompatibility was made and the offending provisions of the State Immunity Act 1978 disapplied. At paragraphs 76 to 80, the court said this:

> **'76. In our judgment, for the reasons given below, an EU Charter right can be relied on "horizontally" in certain circumstances.**
>
> **77. The Court of Justice gave general principles of EU law horizontal direct effect before the Charter came into effect. In *Mangold v Helm* (Case C-144/04) [2005] ECR I-9981 there was a dispute between a private employer and an employee who claimed that a provision of his employment contract discriminated against him on the grounds of age. He argued that national law was incompatible with Council Directive 2000/78/EC (OJ 2000 L303, p 16) but that Directive had not been transposed into national law and the time for doing so had not expired. The conventional route for enforcing non-implemented Directive rights is through the EU law doctrine of direct effect, but that is not applicable where the time for transposition has not expired. The Court of Justice agreed that the national law was contrary to Directive 2000/78. It went on to hold that the provisions of the Directive were applicable even though it had not been transposed into national law and the time for transposition had not expired. Its reasoning was that the Directive implemented the principle of non-discrimination, and that was a general principle**

of EU law which had to be applied anyway. National law had to be set aside in order to give effect to the general principle.

78. It is therefore perhaps not surprising to find that the Court of Justice has applied the Mangold case to the equivalent Charter provision after the Lisbon Treaty came into effect. *Kücükdeveci v Swedex GmbH & Co KG* (Case C-555/07) [2010] All ER (EC) 867; [2010] ECR I-365 was another dispute between private parties about age discrimination where again national law had not properly transposed Council Directive 2000/78. (The time for transposition had in this case just expired.) The Court of Justice again held that there was a general principle of non-discrimination in EU law which had to be given effect. It noted that article 21 of the Charter now contained the principle of non-discrimination. The court also stated, without apparent qualification or elaboration, that the Lisbon Treaty (specifically article 6FEU) provided that the Charter had the same status as the treaties. This was significant because, as Lord Kerr of Tonaghmore JSC pointed out *in Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd)* [2012] 1 WLR 3333, para 26:

> **"In its initial incarnation the Charter had persuasive value: the CJEU referred to and was guided by it: see, for instance, *Productores de Música de España (Promusicae) v Telefónica de España SAU* (Case C-275/06) [2008] All ER (EC) 809; [2008] ECR I-271 , paras 61-70."**

79. A question which remained after the Kücükdeveci case was whether the Court of Justice's statement about the status of the Charter means that the Lisbon Treaty had elevated all the rights, freedoms and principles in the Charter to a level equivalent to the Mangold general principles. The Court of Justice to an extent addressed this question in *Association de médiation sociale v Union locale des syndicats CGT (Union départementale CGT des Bouches-du-Rhône intervening)* (Case C-176/12) [2014] ICR 411 ("the AMS case"), which was decided after Langstaff J gave his judgment. In that case, a trade union representative sought to rely on article 27 of the Charter (workers' right to information and consultation) against a private employer. The relevant Directive had again not been duly implemented by national law and it did not have direct effect. The Court of Justice held that article 27 could not be invoked horizontally because it required specific expression in Union or national law, but expressly distinguished the Kücükdeveci case. The same objection does not apply to article 47, which does not depend on its definition in national legislation to take effect.

80. The Court of Justice did not, however, go on to make it clear which rights and principles contained in the Charter might be capable of having horizontal direct effect, and which would not. In our judgment, however, article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect. It follows from the approach in the Kücükdeveci and AMS cases that EU Charter provisions which reflect general principles of EU law will do so. …..'

70. In my judgment, there are strong arguments for supporting the tribunal's and Ms Reindorf's proposition that regulation 2(2) should be disapplied on the additional basis that the principle of equal

treatment between men and women is a general principle of non-discrimination and must be given horizontal direct effect irrespective of whether article 157 of the **TFEU** applies. However, I prefer not to base my decision in this appeal on that ground, for the following reasons.

71. The first reason is that article 157 clearly does apply to this case, as the tribunal found, as I have said, correctly. It is therefore unnecessary to consider the scope of directly effective general principles of EU law. Secondly, the case law of the Court of Justice has not fully determined its scope, as the Court of Appeal made clear in the discussion of **the EU Charter** article 47 in the **Benkharmouche** case. Thirdly, while the Court of Appeal gave horizontal direct effect to article 47, Ms Reindorf did not seek as much for articles 21 and 23 in this case, either below or in this appeal.

72. Finally, I am conscious that when the hearing took place and the tribunal's decision was made and sent to the parties, **the EU Charter** had already ceased to be part of English law (section 5(4) of the **2018 Act**), albeit subject to the saving in section 5(5) that section 5(4) does not affect retention in domestic law of fundamental rights or principles which exist irrespective of the Charter.

73. As I have said, Ms Reindorf's general principle of non-discrimination may well be such a fundamental right or principle that it should be given direct effect in accordance with the Luxembourg case law and section 5(5) of the **2018 Act**. But as the point is not decisive of this appeal, I do not embark on a detailed analysis of that case law or second guess what the Court of Justice would have said about the scope of the fundamental rights or principles to be given direct effect in national courts.

74. That issue aside, I accept Ms Reindorf's submissions on the effect of the Brexit transition legislation found in the **2018 Act**. The correctness of the tribunal's decision is not altered by those provisions. However, if the facts were to recur now, the repeal of section 2(1) of **the 1972 Act** means the tribunal would no longer have power to disapply the successor to regulation 2(2) of **the 1999 Regulations**, namely regulation 57 of **the 2015 Regulations**. The claimant's period of service

predated the Brexit referendum and consequent provisions in the **2018 Act**.

75. The Secretary of State has played no part in this appeal and withdrew part way through the proceedings below. Before doing so, he indicated that he did not oppose disapplication of regulation 2(2) if it were found to be indirectly discriminatory. That concession was rightly made, although it made life difficult for the respondents who by then were no longer represented and were left with the unenviable task of defending the compatibility of regulation 2(2) with directly effective EU rights.

76. I agree with the decision of the tribunal to disapply regulation 2(2) and to grant a declaration that the claimant was entitled to the minimum wage in respect of her period of service with the respondents, from 2005 to 2013. For the reasons I have given, the appeal does not succeed and is dismissed.

