Neutral Citation Number: [2023] EAT 69

Case No: EA-2021-001282-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 May 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT
MR DESMOND SMITH
DR GILLIAN SMITH MBE

- -

Between :

THE ROYAL PARKS LTD **Appellant**

- and –

G BOOHENE AND 15 OTHERS **Respondents**

- -
- -

Julian Milford KC (instructed by DAC Beachcroft LLP) for the **Appellant**
Changez Khan and **Richard O'Keeffe** (instructed by United Voices of the World) for the **Respondents**

Hearing date: 18 April 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 5 May 2023

SUMMARY

Race Discrimination – Indirect Discrimination – Section 19 ***Equality Act 2010*** *– Contract Workers – Section 41* ***Equality Act 2010***

The claimants were contract workers employed by a third party to work on its toilet and cleaning services contract with the respondent in London. Their minimum rates of pay were set below London Living Wage ("LLW"); this contrasted with the respondent's direct employees, who were office-based and had a level of pay higher than LLW; the ET found that the respondent had committed to ensuring that the minimum pay of its direct employees would not fall below LLW but had decided not to accept the option of LLW as the minimum pay rate on the toilet and cleaning contract. The claimants brought claims of indirect race discrimination in respect of their treatment as contract workers as compared to the respondent's direct employees. The ET upheld these complaints as falling within the definition of indirect discrimination under section 19 **Equality Act 2010**, ("the EqA"), rendered unlawful by reason of section 41. The respondent appealed.

Held: *allowing the appeal*

On its findings of fact in this case, the ET had been entitled to conclude that these claims fell within section 41(1) **EqA**, the respondent having exercised sufficient control as to minimum level of pay that was to be paid to workers on the toilet and cleaning contract. Although ostensibly set by the contractual term agreed between the claimants and the contractor, the ET permissibly found that the decision not to pay LLW was made by the respondent, the contractor had merely executed that decision; in this respect, it was the respondent that had determined the relevant term on which the claimants were to be allowed to do their work. For the purposes of section 19 **EqA**, the ET was similarly entitled to find that it was the respondent that had applied the relevant provision criterion or practice ("PCP").

The ET had, however, fallen into error in defining the PCP in this case and this had led it to adopt an indefensible pool for comparison. Although the claimants' pleaded case had identified a PCP that distinguished between the respondent's direct employees and its outsourced workers, the case at trial was put on the more limited comparison between the respondent's direct employees and the workers on the toilets and cleaning contract. In accepting the latter case, the ET had improperly excluded from the pool for comparison all other outsourced workers undertaking work for the respondent. That was an error that fundamentally

undermined the ET's approach to the comparative exercise it was required to undertake in this case. The appeal was allowed on this basis.

The respondent would not, however, have succeeded in its further challenge to the ET's approach to comparability. In considering whether there were any material differences between the advantaged and disadvantaged groups, on the facts of this case, the ET had been entitled to find that the nature of the work and the identity of the employer were not relevant to the question whether the respondent had drawn a distinction between its directly employed staff and outsourced workers when committing to LLW as a minimum rate of pay.

A further valid point of challenge had been raised in relation to the ET's failure to address the case of the claimant, Mr Marro, who did not share the relevant protected characteristic. Had this point not been rendered academic by the EAT's earlier conclusion, this final ground of appeal would also have been allowed and this question remitted to the ET for determination.

The Honourable Mrs Justice Eady, President:

Introduction

1. This appeal raises the question whether, under section 41 **Equality Act 2010** ("EqA"), workers employed by third-party contractors could rely on the principal's own employees as comparators for the purposes of their claims of indirect race discrimination in relation to minimum rates of pay.

2. Save where necessary to distinguish between particular claimants, we refer to the parties as the claimants and the respondent, as below. This is our unanimous judgment on the respondent's appeal against the decision of the London Central Employment Tribunal (Employment Judge Grewal, sitting with lay members Ms Flanagan and Mr Simons, on 19, 20, 23 and 24 August 2021, with two further days of deliberations in chambers on 21-22 October 2021; "the ET"), sent to the parties on 17 November 2021. By its judgment, the ET upheld the claimants' complaints of indirect race discrimination in respect of their minimum rates of pay. The respondent appeals against that ruling.

3. The claimants were represented before the ET by Mr Khan of counsel, who is assisted on this appeal by Mr O'Keeffe of counsel. The respondent also appeared by counsel before the ET but not by Mr Milford KC, who now represents its interests.

The Factual Background

4. The respondent, a company limited by guarantee established for charitable purposes, was created in March 2017, merging the Royal Parks Agency and the Royal Parks Foundation. It manages eight of London's Royal Parks and other open spaces under a contract with the Department for Digital, Culture, Media and Sport ("DCMS"); the Secretary of State for the DCMS is the respondent's sole shareholder. Statutory responsibility for managing the parks rests with the Government, but the respondent has day-to-day operational responsibility. In contemporaneous correspondence, the respondent and its predecessors are often referred to simply as "the Royal Parks" or "TRP".

5. The claimants are (or were) all employees of Vinci Construction UK Ltd ("Vinci") and worked on its public toilets maintenance and cleaning services contract with the respondent ("the toilets and cleaning contract"). More than half the claimants transferred to Vinci under the **Transfer of Undertakings (Protection**

of Employment) Regulations 2006 ("TUPE") when it was awarded that contract; the others were directly engaged by Vinci. In the 1990s, the respondent's predecessors had determined that all functions largely involving manual work should be outsourced to the private sector. This led to the outsourcing of various service functions, including the cleaning and maintenance of toilets, landscape maintenance and horticulture, gate locking, and building and maintenance repairs.

6. The respondent directly employs around 160 employees in mainly office-based, administrative and professional roles. These direct employees 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 who 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.

7. 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 but all the rates of pay are over the London Living Wage ("LLW"). 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. 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 of work. As the ET found:

> "31 … 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."

8. In 2014, the respondent's predecessor invited tenders for public toilets and buildings cleaning services in its parks. The specification of requirements for the contract included, *inter alia*, the following:

> "- TUPE would apply and a list of staff who would transfer to the contractor was attached (clause 4.1.1);
> …
> - 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);" (ET paragraph 32)

9. 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 also set out what the cost to the respondent would be if the operatives were paid the LLW (in 2014, the LLW was £9.15 per hour), which added £144,781 to the annual cost (a total of £718,906 over the 5 year period), an overall increase of around 12%.

10. In its tender response, in answering to a question about 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 it felt that the rate paid did not reflect the true value of the employees. The increase proposed was from a minimum wage of £6.31 per hour to a minimum of £7 per hour. As the ET noted:

> "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."

11. On 4 September 2014, the respondent's predecessor wrote to Vinci stating that the option for paying staff the LLW would not be taken up at that stage but that it reserved the right to re-visit this at any point during the contract period. It was not in dispute that the respondent's predecessor was given the option of accepting a bid that would have resulted in the staff working on the contract being paid a LLW and that it decided not to take up that option.

12. Vinci was successful in its bid for the toilets and cleaning services tender, pursuant to a contract signed on 1 November 2014.

13. The respondent recognised two trade unions for collective bargaining purposes: the Public and Commercial Services Union ("PCS") and Prospect. Each year both unions submitted a joint pay claim. In June 2017 that included a request that the respondent give consideration to extending the LLW (then £9.75) to all employees of contractors. The response was that that did not form part of the pay negotiations for the respondent's employees and would be considered separately.

14. In or around October 2017, the respondent's board asked for advice on the impact of introducing LLW

for all contractors and concessionaires working within the Royal Parks. A paper was circulated to board members by the respondent's Chief Executive, recommending that the respondent would continue to pay LLW for all its staff and should encourage contractors to do so as contracts came up for renewal, although this should not be made a mandatory requirement due to the cost implications. It was stated that the respondent should: "*aspire to the LLW being paid to all of its contractors and concessionaires within ten years*."

15. As the ET noted (paragraph 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 record the respondent's then Director of Resources, Ms Rolfe, emphasising 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. In fact, upon investigation, it was found that the employee in question was in fact not being paid below the LLW.

16. On 27 June 2019, the claimants' trade union, United Voices of the World ("UVW") wrote to Vinci on behalf of their members, seeking to be recognised for collective bargaining purposes. The UVW pointed out that the vast majority of their members were paid below 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. The letter was copied to the respondent.

17. In their pay claim on 28 June 2019, PCS and Prospect made their position clear, as follows:

> "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."

18. The respondent's position at that stage was, however, the same as it had been in 2017.

19. On 9 July 2019, the account manager on the Vinci cleaning contract contacted Mr Tom Jarvis (the respondent's Director of Parks since October 2018) to arrange a meeting to discuss the pricing of the toilets and 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, which stated that 46 out of the then 48 staff on the contract fell below the LLW.

20. On 10 July Mr Jarvis wrote to UVW in the following terms:

> "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."

21. On 23 July 2019, Vinci's Commercial Manager informed Mr Jarvis that adopting the LLW would cost an additional £225,000 per annum, observing:

> "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."

22. On 2 September 2019, Mr Jarvis informed Vinci that the respondent would extend the toilets and cleaning contract on the basis of Vinci's recent proposal. In a paper presented to the respondent's board on 5 September 2019, it was 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." (see the ET at paragraph 50)

23. It was noted that the respondent's operating costs would increase by approximately £1.2 million in 2020-2021 if the recommendations were accepted, observing:

> "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."

24. The paper concluded:

> "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 *[sic]* LLW is paid to these staff is the right thing to do."

25. At the board meeting on 5 September 2019, it was agreed 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 in adopting that approach.

26. On 18 September 2019, a change control notice was issued in respect of the toilets and 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 the respondent would fund future increases to the LLW. The estimated cost of the change was said to be £120,000. It was subsequently decided that the contract would be extended under its existing terms for 12 months, with the respondent meeting the costs of the LLW (which were said to amount to £287,000) and that they would re-tender for a new contract in November 2020.

27. 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 in 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 was further confirmed that all of the respondent's employees were paid more than the LLW. It was stated:

> "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." (see ET paragraph 53)

28. On 13 December 2019, the respondent announced that Vinci staff employed on contracts to carry out work for the respondent would be paid the LLW. On 23 December 2019, Vinci wrote to its employees to inform them of the increase in their pay. The wording of the letter (agreed with the respondent) stated as follows:

> "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."

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

30. On 1 November 2020 the respondent entered into a new contract with Vinci for toilets and 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."

31. On 1 May 2021 the contract was awarded to Just Ask Estate Services Limited and the claimants' employment transferred to that company.

The Claims Before the ET

32. In their ET claims the claimants made complaints of indirect race discrimination contrary to sections 19 and 41 **EqA**. Initially, the claimants had complained about both their level of pay and about other benefits; at the full merits hearing, their claim was narrowed down to a complaint regarding their minimum level of pay.

33. In the claimants' grounds of complaint (attached to the ET1), it was explained that:

> "2. The focus of the complaint is on the contractual arrangements put in place by the Respondent (and its predecessors) for determining the pay … of outsourced workers. Those arrangements treat outsourced workers less favourably than the Respondent's direct employees. They thereby have disparate impact on workers from a black or minority ethnic ("BME") background, who are more likely to find themselves in outsourced roles."

34. The grounds of complaint then set out the history of the outsourcing of park maintenance services by the respondent and its predecessors, focusing on the toilets and cleaning contract that had been entered into with Vinci. The relevant provision, criterion or practice ("PCP") relied on for the purpose of section 19 **EqA** was described as follows:

> "12. … a. Up until 11th December 2019, the Respondent maintained the practice of a double-standard on the acceptable minimum rate of pay for staff – hereafter, "the minimum pay PCP". It was a double standard because the Respondent adopted a different minimum depending on whether the staff were direct employees (a minimum not less than LLW) or outsourced workers (a minimum of [National Minimum Wage]). Put another way, it adopted a selective approach to upholding the LLW."

35. In setting out the claimants' case on discriminatory impact, it was said that the PCP had:

> "13. … a disparate impact on BME staff compared to non-BME staff. In particular:
> a. The pool for comparison consists of all the Respondent's directly and indirectly employed staff.
> b. The proportion of BME staff who are negatively affected by the minimum pay PCP is greater than the proportion of non-BME staff who are negatively affected by it. …"

36. In initially submitting its response to the claimants' claims, the respondent objected that:

> "5. The Claimants have failed to specify a provision criterion or practice which the Respondent has applied to them. The Claimants are invited to give proper particulars of the following, specifying in particular how that provision or criteria or practice prevented V[inci] from paying the LLW …
> (a) provision which it is said was imposed by the Respondent on the Claimants;
> (b) any criterion/criteria which it is said was imposed by the Respondent on the

> Claimants;
> (c) any practice which it is said was imposed by the Respondent on the Claimants."

37. The respondent nevertheless went on to set out its defence to the claims, arguing (relevantly): it had not discriminated against the claimants for the purposes of section 41 **EqA**, the terms of its contracts with Vinci allowed the claimants to be employed on such terms as they agreed with their employer; equally, it had not applied a PCP to the claimants; in any event, there were material differences between the claimants and their purported comparators (direct employees of the respondent); the claimants had not identified a relevant PCP; the wrong pool had been identified and the claimants could not show the necessary group disadvantage; and any PCP was objectively justified.

38. By letter of 14 April 2021, the UVW responded to the respondent's request for further particularisation of the claimants' case (relevantly) as follows:

> "Paragraph 5 of GoR – The provision criterion or practice applied to the Claimants, and how it prevented Vinci from paying the LLW …
> The PCP is as stated in the Grounds of Complaint, namely the Respondent's two-tier approach to remuneration …, which gave rise to a double standard as between in-house and outsourced workers. We do not understand your client to be denying that such a double standard existed. The contractual processes by which it came about are known to your client and will be a matter for evidence. We invite the Respondent to be completely transparent in its disclosure. …"

In then explaining the claimants' case as to the relevant comparison, it was stated:

> "(a) The pool for comparison consists of the Respondent's directly and indirectly employed staff. …
> …
> (c) The issue is not individual salaries but the policy on the acceptable minimum rate or standard of pay. The Respondent's in-house staff are all paid at least commensurate with the LLW.
> (d) There is no material difference between White and BAME staff, other than the protected characteristic of race itself. Both groups consist of people who work in London and are subject to the London costs of living. …
> (e) The Claimants do not accept valid differences exist …"

39. The UVW letter also explained the claimants' case on group disadvantage, as follows:

> "The Claimants rely on group disadvantage experienced by workers of the Black, Asian and Minority Ethnic racial group, but for Mr Giuseppe Marro who is a White Italian. He contends he is entitled to recover compensation in light of being placed at the relevant disadvantage by virtue of the indirectly discriminatory policy, regardless of his not sharing the characteristic – see C-83/14 CHEZ Razpredelenie Bulgaria AD. The comparators are workers who do not share the characteristic – i.e. those workers who are White."

40. Notwithstanding the further particularisation of the claimants' case, at the full merits hearing, there

was a dispute as to how the PCP was to be understood. The respondent contended that the PCP was as set out in paragraph 12a of the grounds of complaint. The claimants disagreed, arguing that, looking at the grounds of complaint as a whole, it was clear their complaint was about how the respondent treated the workers on the Vinci contract, compared to staff employed by it; that, the claimants argued, was also how the respondent had understood the PCP (as was clear from its response).

41. The ET agreed with the claimants, finding that it was clear from the pleadings that the PCP related to the outsourced workers on the toilets and cleaning contract awarded to Vinci and that the respondent understood that. The complaint the ET considered it had to determine was, therefore, 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 LLW but outsourced workers on the toilets and cleaning contract awarded to Vinci were not paid the LLW.

The ET's Decision and Reasoning

42. In setting out its reasoning, the ET referred to both the respondent's predecessor and to the respondent; for ease of reference we have here simply used the term "the respondent", which should be understood as encompassing the respondent *and* its predecessors.

43. The ET first considered whether the claimants were contract workers under section 41 **EqA**. Given the points taken by the respondent at that stage (wider than those now taken on appeal), this required the ET to answer the following two questions: (1) whether the respondent made work available for the claimants/whether their work was done for the respondent, and (2) whether Vinci supplied them in furtherance of a contract? The ET answered both those questions in the affirmative. It concluded that the relationship between the claimants and the respondent was one that fell within section 41 of the **EqA**; that, it considered, was consistent with the wording of section 41 and gave effect to **Council Directive 2000/43/EC** (the Race Equality Directive). The ET further took the view that there was nothing in the wording of section 41 **EqA** that restricted its application to cases where the PCP in question was applied only to the contract workers.

44. The ET next turned to the question whether the respondent had applied a PCP to the claimants. It noted that the decision whether or not the claimants were paid LLW was made by the respondent. The Vinci bid had contained two costings - one based on a minimum wage of £7 and the other on the LLW - and what

Vinci paid as a minimum wage depended on which option the respondent chose. If the respondent had chosen the latter option, Vinci would have paid the LLW, financed by the respondent. The acceptance of that option would not have interfered with Vinci's freedom to conduct a business (this referring to an argument ran by the respondent below, but not pursued on appeal). The decision might have been executed by Vinci but it was made by the respondent. On that basis, the ET concluded:

> "68 … 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."

45. Turning to the pool for comparison, the ET noted that this should comprise all the workers affected by the PCP. Having regard to the PCP in this case, the ET concluded that the pool comprised all the respondent's employees and all of Vinci's employees who worked on the toilets and cleaning contract.

46. The ET next considered whether the respondent's PCP of paying the LLW as a minimum wage to its employees, but not to those working on the toilets and cleaning contract, put BME persons at a particular disadvantage when compared with persons who were not BME. In addressing this issue, the ET did not consider it was required to consider whether there was any material difference between the circumstances of those employed by the respondent and those employed by Vinci but, rather, whether there was any material difference between the circumstances of the BME persons and the non-BME/white persons in the pool. Carrying out that exercise, the ET noted that some of the BME persons in the pool were employed by the respondent, others worked on the Vinci contract; the same applied to the non-BME/white persons in the pool, some were employed by the respondent and others worked on the Vinci contract. The ET thus concluded that there was no material difference between the circumstances relating to the two groups.

47. If, however, it was wrong in its approach to this question, the ET, in the alternative, recorded that it 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. In this regard, the ET reasoned that LLW was the amount that the Living Wage Foundation considered the minimum that a person working in London needs to meet their basic living costs. That figure applied to all persons working in London, regardless of the identity of the worker's employer or the nature of their work, and applied equally to office based workers and manual labourers, and to private and public sector employees.

48. The ET next turned to the question whether the PCP put BME workers at a particular disadvantage

when compared with white/non-BME workers. It noted that of the respondent's 160 direct employees around 20 were BME and 140 non-BME, whilst of the around 50 Vinci employees working on the toilets and cleaning contract at least 40 were BME. The pool thus consisted of 210 employees, of whom 150 were non-BME and 60 were BME and the PCP applied by the respondent resulted in 20 BME workers receiving LLW as a minimum wage and 40 BME employees not receiving it; so, 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; so, 6.66% of the white/non/BME employees did not receive LLW as a minimum wage. The ET considered it was clear that the PCP applied by the respondent put BME workers at a particular disadvantage when compared with non-BME/white workers.

49. As for whether the PCP put the claimants at the relevant disadvantage, the ET noted that all the claimants were paid less than the LLW and that this was because the respondent made the decision not to accept the option for the staff on the Vinci contract to be paid LLW; had the respondent accepted that option, the claimants would have been paid LLW. The ET was thus 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.

50. The ET then turned to the question of justification, finding that the respondent had failed 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 has not sought to challenge the ET's finding on justification.

The Grounds of Appeal and the Respondent's Submissions in Support

51. The respondent's appeal is put on five grounds. Grounds 1-4 concern: the ET's approach to determining the relevant pool for comparison (ground 1); the construction of the relevant provision, criterion or practice (ground 2); the question whether that PCP had been applied to the claimants (ground 3); and, if so, whether it had been applied by the respondent (ground 4). Ground 5 raises a separate ground of appeal in respect of the claimant Mr Marro.

52. By the **first ground of appeal**, the respondent contends that the ET erred in determining the comparability of persons in the relevant pool. The ET held that there was no material difference between persons in the relevant pool on two bases: (1) workers on the Vinci Contract were both BME and non-BME,

and the respondent's own employees were both BME and non-BME ("comparison 1"); alternatively, (2) all persons working in London had equal need for payment of the LLW, whether they were office workers or manual labourers ("comparison 2"). The respondent says each was erroneous in law: the comparative exercise in section 23 **EqA** requires an assessment of the circumstances relevant to the way in which the employer has treated the claimants and other disadvantaged persons in the pool, vis-à-vis those who are advantaged (see **Shamoon v Chief Constable of the RUC** [2003] UKHL 11, [2003] IRLR 285 at paragraph 48 per Lord Hope); neither comparison 1 nor comparison 2 met that test. As made clear in **Greenland v Secretary of State for Justice** UKEAT/0323/14, relevant circumstances could include the entirety of the work in respect of which the employees in question were remunerated. More specifically, comparison 1 did not address the circumstances relevant to the respondent's treatment of contract workers vis-à-vis employees, but simply focused upon the fact that some of the Vinci contract workers were BME, and some were non-BME, and the same was true for the respondent's employees. If comparison 1 was correct, section 23 **EqA** would be a dead letter in virtually all indirect discrimination cases, because both the advantaged and disadvantaged groups are likely to contain some persons with, and without, the relevant protected characteristic. Similarly, comparison 2 did not address the circumstances of the respondent's treatment of contract workers vis-à-vis employees, but simply relied on the proposition that all workers may have equal need for the LLW. If that was correct, section 23 **EqA** would be a dead letter in any case where the LLW was claimed.

53. By the **second ground of appeal**, the respondent urges that the ET fell into error in its construction of the PCP. The ET had held that the PCP was that *"[The respondent's] 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*.", but that did not allow a logical comparative exercise for the purposes of section 19 **EqA** as it created a pool which contained all of the respondent's employees but only a small selection of its contract workers. A valid PCP under section 19 **EqA** must apply equally to all persons within the relevant pool, whether they be disadvantaged or advantaged by it; the claimants' PCP did not meet that test. By including only Vinci contract workers within the relevant pool, the ET was effectively compelled to construct two different PCPs, which applied unequally to persons in the pool, namely: (i) if you are an employee, you will be paid the LLW; and, conversely, (ii) if you are a Vinci contract worker, you will not be paid the LLW. Furthermore, insofar as the PCP related to a single decision as to what to pay on the toilets and cleaning contract, it did not meet the test

laid down in **Ishola v Transport for London** [2020] ICR 1204 CA.

54. By its **third ground of challenge**, the respondent contends that the ET erred in determining that the respondent had applied the relevant PCP to the claimants. This was a conclusion that did not follow logically from the factual findings it had made: Vinci had decided how much the claimants should be paid, in the exercise of its customary powers as an employer. The mere fact that the respondent did not pay a contract price which Vinci decided was sufficient to allow it to pay its employees the LLW, did not amount to the application of any PCP to Vinci's employees by the respondent. The arguments in respect of this point of challenge were essentially the same as those relating to the fourth ground.

55. By the **fourth ground of appeal**, the respondent argues that the ET erred in its application of section 41(1) **EqA**. Although the ET had not addressed which subsection of section 41(1) applied, it could only logically have been section 41(1)(a), which related to discrimination as to "*the terms on which the principal allows the worker to do the work*". The respondent, however, did not discriminate as to the terms on which it allowed the claimants to do the work as their contractual terms were set by Vinci; the respondent neither allowed the claimants to work, nor prevented them from working, on any particular terms whatsoever (see the guidance provided in **Allonby v Accrington and Rossendale College** [2001] ICR 1189 CA).

56. The **fifth ground of appeal** relates solely to the claimant Mr Marro. Mr Marro's race was recorded as being "white-Italian"; accordingly, he did not share the protected characteristic (being a BME person) relied upon in this case.

The Claimants' Submissions in Response

57. In respect of the **first ground of appeal**, the claimants contend that the first comparative exercise undertaken by the ET was consistent with the approach laid down by section 19 **EqA** and paragraph 4.15 **Equality and Human Rights Commission Code of Practice (Employment)**. In any event, the ET was entitled to conclude that, for the purposes of the comparison exercise, there was no relevant material difference between the respondent's direct employees and its contract workers. The two groups shared the same common denominators: all were workers; all had their work based in London so were exposed to higher basic living costs; all worked for the respondent; and all had their pay substantially controlled by the same source (see, by analogy, **Lawrence and ors v Regent Office Care Ltd and ors** [2003] ICR 1092). The formal identity of

their employers and the nature of their particular jobs were not "material" differences relevant to the LLW context: the LLW set a minimum living standard in London, which applied regardless of the niceties of a worker's contractual arrangements, the nature of his or her job, or the historical context for their level of pay (see paragraph 26 **Essop and ors v Home Office; Naeem v Secretary of State for Justice** [2017] ICR 640).

58. As to the **second ground of appeal**, the claimants submit that the PCP was framed, and the pool constructed, as widely as it could have been on the evidence. The respondent had not disclosed evidence of how it managed the procurement process or pay rates in relation to any of its other contractors. The ET had correctly focussed on the issues before it; its role was not to embark upon a wider evidence-gathering exercise of its own motion. In oral submissions, it was emphasised that the claimants would not have known the detail of other contracted-out services and would not have been able to establish whether the respondent had exercised the same degree of control; including other groups of contract workers would have risked falling into the error identified in **Allen v Primark Stores Ltd** [2022] IRLR 644 EAT.

59. In respect of the **third ground of appeal**, the claimants contend that the ET had been entitled to find that the respondent applied the PCP to the contract workers, given its peculiarly close involvement in the pay-setting process. The real decision to depart from LLW was taken upstream by the respondent, albeit formally executed downstream by Vinci. The ET had been correct to apply section 19 **EqA 2010** in a realistic way given the principal/contract worker context; otherwise, section 41(1)(a) (prohibition on a principal to discriminate as to contractual terms) would be a dead letter.

60. As for the **fourth ground of appeal**, the claimants first object that this is a new point that should not be permitted to be raised for the first time on appeal (see **Secretary of State for Health v Rance** [2007] IRLR 665). In any event, it is the claimants' case that the discrimination in this instance might properly be characterised as falling under either sections 41(1)(a) or (d) **EqA**. As to subsection (a): "*allow*" in this context did not mean "*would otherwise not permit*" – an eventuality covered by subsection (b); it was more nuanced and should be interpreted purposively (see per Sedley LJ at paragraph 34 **Allonby**). In the present case, the respondent's decisions were singularly focussed on the remuneration terms on which the work would be made available to the contract workers; the ET had been entitled to find this fell within section 41(1)(a). Alternatively, as to subsection (d): by opting against the LLW bid, the respondent was discouraging or disincentivising the workers' direct employer from paying them in line with LLW – this amounted to

subjecting them to "any other detriment" (the statute having been drafted in wide, catch-all terms).

61. Finally, turning to the **fifth ground** and the case of Mr Marro, it is the claimants' case that he was subject to associative indirect discrimination of the sort identified in **CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia** (C-83/14); see **Rollet and ors v British Airways plc** ET Case No. 3315412/2020.

Discussion and Conclusions

62. The claimants brought claims of indirect race discrimination in respect of their treatment as contract workers. The ET thus had to consider whether, if the complaints in question fell within the definition of indirect discrimination under section 19 **EqA**, the treatment in issue was rendered unlawful by reason of section 41. For the respondent, Mr Milford KC has described the section 41 issue as a "threshold" for the claims and, although addressed by the fourth ground of appeal, we have adopted the same approach as the ET, and the parties in their oral submissions, and have considered this question first.

63. By way of preliminary point, we reject the suggestion (first made in the claimants' skeleton argument for this hearing) that this amounts to a new issue, raised for the first time on appeal. At paragraph 39 of the grounds of resistance, the respondent pleaded its case as follows:

> "The terms of the Contracts allowed the claimants to be employed on such terms as they agreed between themselves and Vinci. Vinci was allowed to pay them at what rate it sought fit. The costing of the Contract made provision for proposed rates of pay between Vinci and its staff; however the Respondent could only require Vinci to pay the minimum specified as a cost. It could not require Vinci to pay more than that. However, Vinci and the Claimants were entitled to reach any higher pay agreement. The only effect that this would have would be to affect the profit margin of Vinci. Thus the claim that the Respondent discriminated against the Claimants in relation to the terms on which it allowed them to do the work is misconceived."

64. Although it is fair to say that this point was not the focus of the respondent's closing submissions before the ET (as we have already observed, it had raised a number of other points that are not the subject of the present appeal), we are satisfied that the relevant issue had been identified in its pleaded case.

65. Turning then to the substantive arguments, by section 41 **EqA**, it is provided:

> **41 Contract workers**
> (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*).

66. In considering how section 41 should be construed, we note the guidance provided by the Court of Appeal in **Harrods Ltd v Remick and ors** [1998] ICR 156 (in relation to the precursor to section 41 **EqA**, section 7(1) of the **Race Relations Act 1976**), as follows:

> "… 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."

67. We consider that a similarly purposive approach was laid down by Sedley LJ in **Allonby v Accrington & Rossendale College** [2001] ICR 1189 (there concerned with the equivalent to section 7 **Race Relations Act 1976**, provided by section 9 **Sex Discrimination Act 1975**):

> "34. The section, which comes within Part II of the Act (Discrimination in the Employment Field), is there to prevent employers from avoiding the effect of the earlier provisions of that Part by bringing in workers on subcontract. … There is no reason why it should be limited … to discrimination between male and female contract workers supplied to a particular employer. Nothing in the wording of the section says that it is so limited. If would be remarkable if it, and equally s. 7 of the Race Relations Act, permitted an employer by bringing in black or female workers on subcontract to work alongside a predominantly white or male employed workforce, to give them inferior conditions so long as they were all treated equally badly or (if differentially treated) were all of the same race or sex and so unable to complain. It would be particularly remarkable if this were permitted by legislation which treats the principal's own contracted labour as employees."

68. It is, however, important to recognise that section 41 provides a means by which a contract worker may complain about their treatment by a principal; it does not provide an alternative route (for example, to section 39 **EqA**) for such a worker to complain about the content of terms set by their own employer – it is not a means of simply allowing a contract worker to automatically seek parity of terms with persons employed by the principal. That distinction was the subject of judicial consideration in **Allonby**, where (amongst other claims) Ms Allonby (a female part-time lecturer at a further education college, who had been dismissed by the college and then offered re-engagement through a service provider, ELS) pursued a complaint of sex

discrimination as a contract worker under section 9 **Sex Discrimination Act 1975**. Addressing this claim at paragraphs 33-36, Sedley LJ determined that the ET had erred in its approach insofar as it had failed to recognise that section 9 could allow for a comparison between a contract worker and an employee, explaining:

> "35 …[Ms Gill, counsel for the claimant's] problem is to show that in the present case the principal – that is, the College – is discriminating against the appellant when it uses her services through ELS [. It is ELS, says Mr Jeans [for the respondent], against whom the applicant's complaints lie, because it is they alone who set the terms of her employment.
> 36. This is largely but not entirely true. There are still some benefits which, Ms Gill would argue, are afforded by the College to its employed staff but not to those brought in through ELS – professional indemnity insurance, for example, and career development support. These are some way from the instances which are usually given, such as an inferior canteen or washroom for contract workers, but – while I share the doubts of Mr Justice Gage on this question – they are in my view capable of ranking under section 9(2) and ought to be considered by the Employment Tribunal…"

Agreeing with the conclusion reached by Sedley LJ, Gage J (as he then was) set out his reasoning at paragraphs 73-75, as follows:

> "73. …I further agree [with Sedley LJ] that where a complaint is made about matters which are essentially contractual a complaint, if any, lies against the employer and not against the principal as defined in section 9.
> 74. As it seems to me, the question on this ground of appeal is whether the matters complained of by Ms Allonby … are contractual matters or benefits, services or facilities denied her by the College.
> 75. In my judgment there can be no doubt that the matters in particulars (1)(a) to (h) are contractual matters. In my opinion, the likelihood is that the same applies to those in (i) to (l). It seems to me that professional insurance indemnity is the sort of matter which is likely to be the subject of a contractual term. However, I accept that it is arguable that some of these matters might be properly categorised as benefits afforded by the College to its employed staff but not to those brought in through ELS. In the circumstances I also agree that this issue should be remitted to the Employment Tribunal…"

Ward LJ also concurred as to the result but provided his own reasoning (see paragraphs 87-93), specifically:

> "91. To discriminate, the principal must apply to [the claimant] a requirement or condition which, by virtue of s.1(1)(b), is disproportionate in its impact on women, unjustifiable and detrimental to her personally. It seems to me, therefore, that the proper question for the tribunal to be asking is whether or not, in relation to the work available for doing by the contract worker (in this case the teaching), the college has applied a discriminatory condition or requirement in the terms on which it allows her to do that work or in the way it affords her or denies her access to any benefits, facilities or services. That is very much a commonsense, fact-based enquiry and, therefore, very much one for the tribunal to undertake.
> 92. The Tribunal must ask upon what terms *the College* allowed her to do her work. The College is the principal and it is the principal's conduct, not the supplier's (ELS's) conduct which may constitute the unlawful discrimination. If, therefore, she does not enjoy the rights and benefits set out in her claim, is that because she is not allowed *by the College* to do her work on those terms? If she is denied those rights and benefits

> because her contract with ELS has excluded them, it may still be necessary to enquire whether the College would only allow her to do her work if ELS so stipulated. In my judgment, whilst the contractual arrangements are very relevant, they may not be determinative. Thus the way in which the college affords her or refuses her access to any benefits (eg of professional indemnity insurance) or facilities (eg the right to attend staff development classes) may - like the provision of canteen facilities - be a matter of administration and business organisation without a contractual reference point, but denying the contract workers access to the canteen may nevertheless offend s.9."

69. It seems to us that there is potentially a tension between the reasoning of Gage J and Ward LJ as set out above; the former apparently seeing the contractual nature of a particular term or benefit as determinative. While acknowledging that the terms of an employment contract between worker and contractor will generally fall outside the scope of section 41, our preference, nevertheless, would always be to apply the language of the statute: as Ward LJ identified, the question must be on what terms the principal *allowed* the worker in question to do their work. Putting this issue to Mr Milford in oral argument, he accepted that that must be a relevant question, and agreed that the fact that the terms in question were the subject of contractual arrangements between the worker and the contractor need not be determinative. Mr Milford also sought to emphasise, however, that privity of contract should mean that terms agreed between the contractor and its workers would fall outside the ambit of section 41, although he acknowledged that, where a principal could properly be said to have directed the terms on which the contractor is to employ the worker, it would be open to an ET to find that section 41(1) was engaged if it found that this had impacted upon the contractor's ability to freely offer contractual terms to its workers. That, it seems to us, must be correct. It is consistent with both the legislative language and intent: the focus is on what the principal has allowed and, by thus preventing an employer avoiding the earlier provisions of Part 5 of the **EqA** by sub-contracting its work, it addresses the mischief against which section 41 is intended to protect.

70. In assessing the principal's conduct in this regard, we can agree with the respondent that this must be more than merely providing a disincentive as to the terms on which the worker is to carry out the work. On the other hand, we consider that the ET is entitled to take a real-world view as to what has been allowed by the principal. If the reality is that the principal has effectively dictated the terms on which the worker is to carry out the work, the ET would be entitled to conclude that this falls within section 41(1)(a), notwithstanding the fact that the principal's decision is then implemented by the contractor through its contractual relationship with that worker. What the true position is in any particular case will, as Wall LJ observed, require the kind of

common sense, fact-based enquiry that the ET is best placed to undertake.

71. In the present case, the ET recorded that it was not in dispute that Vinci's tender had offered the respondent's predecessor two options: the first would mean that the work would be undertaken on terms that did not include the LLW as a minimum; the second provided that the work would be done for pay that was at least at the LLW rate. It was the choice of the respondent's predecessor as to which option it decided to accept. That choice, the ET found, was determinative as to the terms on which the workers would undertake their work insofar as the minimum level of pay was concerned: as contractor, Vinci might have executed the decision but it was taken by the principal in this relationship. The respondent says that it had still been open to Vinci to pay its workers the LLW as a minimum rate, but the ET was entitled to also have regard to the higher level of control exercised by the principal in this case, which further supported its conclusion that this was the entity which had really determined the terms on which the workers would be allowed to carry out their work. In particular, we note that the respondent's predecessor did not simply leave it to Vinci to determine minimum levels of pay within the price agreed on the contract, but specifically challenged the contractor on the hourly rate it proposed to pay, requiring Vinci to demonstrate how that would keep daily costs within £60 per day (see the ET at paragraph 36, referenced at paragraph 10 above). More than that, the respondent's predecessor had expressly reserved the right to re-visit the issue of minimum pay rates at LLW levels at any point during the contract period, and it is apparent that this is a matter that was actively considered in subsequent years. And finally, it was the respondent's decision to move to LLW rates for workers on the toilets and cleaning contract: a change that the board paper of 5 September 2019 characterised as something that the respondent would "*require*" of its contractors (see the ET at paragraph 50, cited at paragraph 22 above).

72. Having regard to the very specific choice made by the principal in this instance, and the real-world impact that had, and also to the further degree of control that it exercised on the minimum rate of pay that would be allowed to be paid to workers working on the toilets and cleaning contract, we consider the ET was entitled to reach the conclusion that this was a case falling within section 41(1) **EqA**. The most natural reading of the ET's judgment is that it treated this as a case falling under section 41(1)(a) but we do not consider that the reasoning would change if considered under section 41(1)(d), which would still require that it is the principal (and not merely the contractor) that subjects the worker to the relevant detriment. In either event, in the present case, we are satisfied that the ET reached a permissible view as to which entity had in fact

determined the terms on which the claimants would be allowed to do their work. We duly dismiss ground 4 of the appeal.

73. For convenience, we next turn to ground 3, by which the respondent contends that the ET erred in determining that it had applied the relevant PCP to the claimants. As the respondent accepted in oral submissions, the arguments on this ground are essentially the same as those set out under ground 4 and for the reasons we have already provided, we similarly reject ground 3 of the appeal.

74. Although convenient to address ground 3 immediately after our consideration of ground 4, the initial step required under section 19 **EqA** would properly require the ET to first identify the PCP said to have been applied. Identifying the PCP will then define the appropriate pool for comparison (the two issues raised by ground 2 of the present appeal). As Choudhury P explained in **Dobson v North Cumbria Integrated Care NHS Foundation Trust** [2021] ICR 1699, EAT:

> "22. … the starting point for identifying the pool is to identify the PCP. Once that PCP is identified then the identification of the pool itself will not be a matter of discretion or of fact-finding but of logic."

By ground 2, the respondent contends that the ET fell into error in its construction of the PCP in the present case and, as a consequence, in identifying the relevant pool for comparison.

75. The respondent's complaint essentially relates back to the dispute between the parties at the hearing below, in relation to how the PCP had been pleaded by the claimants: the respondent contended that the relevant PCP had been defined in terms of the divide between its direct employees and the outsourced workers employed by its contractors; the claimants said that the PCP was defined by the distinction drawn by the respondent between its direct employees and the outsourced workers employed by Vinci on the toilets and cleaning contract. The ET resolved this dispute in favour of the claimants. The respondent submits this was an error that fatally undermined the ET's approach to the comparative assessment it then had to undertake.

76. In considering this objection, we bear in mind that it is for the claimant to identify the PCP in issue; as Sedley LJ observed in **Allonby**:

> "12. … If the [claimant] can realistically identify a [PCP] capable of supporting her case … it is nothing to the point that her employer can with equal cogency derive from the facts a different and unobjectionable [PCP]."

77. We also note that, although a claimant has no right to choose their comparators (per Keene LJ, paragraph 17 **Cheshire & Wirral Partnership NHS Trust v Abbott** [2006] EWCA Civ 523), there may be

a range of logical options open to the ET in determining which pool would realistically and effectively test the particular allegation in issue (per Cox J, **Ministry of Defence v DeBique** [2010] IRLR 471 EAT). That said, the determination of the pool for comparison must be logically defensible (see the discussion at paragraph 33 **Allen v Primark Stores Ltd** [2022] IRLR 644 EAT) and, when analysing the impact of a PCP, the pool being considered should consist of the entire group it affects (or would affect), either positively or negatively, while excluding those who are not affected by it; see **Essop and ors v Home Office; Naeem v Secretary of State for Justice** [2017] ICR 640, per Lady Hale at paragraph 41.

78. Accepting that it was thus for the claimants to identify the PCP in issue in these proceedings, we find it difficult to see how the pleaded case could be seen to have limited the scope of the PCP to solely those outsourced workers employed by Vinci on the toilets and cleaning contract. In our judgement, the grounds of complaint were clear: it was the claimants' case that the respondent had maintained a practice of applying a different minimum level of pay (by reference to the LLW) depending on whether the staff in question were its direct employees or outsourced workers employed by its contractors (not limited to Vinci or to any particular contract). That is what was stated when describing the PCP at paragraph 12, and that was consistent with what was said to be the focus of the complaint, at paragraph 2 (see as set out at paragraphs 33 and 34 above). It was, moreover, how the claim was clarified in the letter from the UVW of 14 April 2021, when those acting for the claimants expressly responded to the request to state the relevant PCP, which was identified as the "*two-tier approach to remuneration … as between in-house and outsourced workers*", and the pool for comparison was stated to consist "*of the Respondent's directly and indirectly employed staff*." (see paragraph 38 above). Given the claimants' pleaded case, we are unable to see any proper basis for the ET's finding that the PCP applied by the respondent was "*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*" (ET paragraph 68, cited at paragraph 44 above).

79. Furthermore, having defined the relevant PCP in this way, the ET determined that the pool for comparison was no longer between the respondent's "*directly and indirectly employed staff*" (the claimants' pleaded case) but was restricted to the direct employees and only those outsourced workers employed by Vinci on the toilet and cleaning contract. In our judgement, that was an incomplete and indefensible comparison.

80. As the respondent has observed in its submissions, properly understood, the ET had effectively

constructed two different PCPs: the first, providing that anyone carrying out work for the respondent must be one of its direct employees in order to secure LLW as a minimum rate of pay; the second, providing that anyone employed by Vinci to carry out work for the respondent on the toilets and cleaning contract would not be guaranteed LLW as a minimum rate of pay. The problem with that analysis is that it also created two different comparative assessments, neither of which was undertaken by the ET. The first would require a comparison between both directly employed and outsourced workers; the second would need to compare those working on the toilets and cleaning contract with all others (whether directly employed or outsourced) carrying out work for the respondent. By failing to appreciate the bi-directional nature of the PCP it had constructed, the ET erroneously limited the pool for comparison to "*all the respondent's employees and all of Vinci's employees who worked on the toilets and cleaning contract*" (ET paragraph 69). That, however, indefensibly left out of the picture all other outsourced workers undertaking work for the respondent.

81. The claimants say that the ET cannot be criticised: the respondent had not disclosed evidence relating to the procurement process with other contractors and the ET was thus bound to focus on the case before it, which was limited to the contract with Vinci. In exploring this question with Mr Khan in oral argument, it was not suggested that the ET had thereby analysed a more limited case than the claimants were seeking to pursue; indeed, it was stated that the claimants could not have pursued a wider case because they had no knowledge of the other service contracts the respondent had entered into, and as to whether those demonstrated the same approach to the LLW, or, more generally, the same degree of control or direction.

82. We acknowledge that this is not a case where the error we have identified straightforwardly arose from the ET's misunderstanding of the case advanced before it: the ET adopted the approach that was urged by the claimants, albeit we consider this amounted to a clear change of position from their pleaded case. We also accept that, although it is for a claimant to prove the PCP relied on, a difficulty arose in this case as the claimants would be unlikely to know the details of the terms applied to other outsourced workers and could not be expected to have sufficient understanding of the procurement process that had operated in other instances so as to be able to show the requisite degree of control and direction. All that said, we do not agree with Mr Khan's suggestion (made in response to our questions at the hearing) that it would have been impossible for the claimants to obtain this information. That would be to suggest that there was no provision for seeking further information or specific discovery, which (of course) is not the case.

83. This was not a situation where any such application for further information or disclosure on the part of the claimants could have been dismissed as a fishing expedition: their case had expressly put the spotlight on the distinction drawn by the respondent between its direct employees and outsourced workers, and there was material within the documentation that had been disclosed which supported that characterisation (for example, within the documents referenced at paragraphs 13-15, 17-18, 20, 22-25 and 27 above). The letter from UVW of 14 April 2021 demonstrated that those acting for the claimants were aware of the need to obtain disclosure from the respondent to make good their pleaded case (see paragraph 38 above), but it seems that this was not then pursued. Certainly, we were not told of any application, or subsequent complaint regarding inadequate disclosure, in these proceedings, and it was not part of the claimants' case before the ET that, in any event, an inference could be drawn, from the information that was available, that the toilets and cleaning contract with Vinci should be taken to be representative of the respondent's other outsourced service contracts. Rather, it appears that a tactical decision was taken on behalf of the claimants to put the case at trial in a more limited way.

84. In our judgement, the way that the claimants' case was thus put before the ET meant that the comparative assessment that was then undertaken was incomplete. By limiting the pool for analysis to only the respondent's direct employees and those employed on the toilets and cleaning contract with Vinci, no account was taken of the respondent's treatment of other outsourced workers. That was illogical and amounted to an error of law as, whichever way it was defined, the PCP complained of by the claimants plainly required an assessment of its impact across all those directly and indirectly engaged to carry out work for the respondent. That was how the case had originally been pleaded. It was, however, also the necessary implication of the revised PCP identified by the ET, which either required a comparison between the respondent's direct employees and all outsourced workers, or a comparison between those engaged on the Vinci toilets and cleaning contract and all other workers (whether directly employed by the respondent or working for it (indirectly) pursuant to its other outsourced contracts).

85. An interesting question had been raised by the claimants' pleaded case, which sought to raise the issue as to how contracting-out practices might be said to be indirectly discriminatory in a way that was rendered unlawful under section 41 **EqA**. Unfortunately, the way this case was then analysed in the present proceedings was fundamentally flawed. This might be considered to have been a missed opportunity to engage with the

issues identified by these claims but, having explored this question with the parties, we are satisfied that it cannot be said that the error arose from a misunderstanding of how the case was being put at trial, such that it might be open to us to remit this to the ET for reconsideration. In the circumstances, we are led to the conclusion that the ET's judgment must be set aside, because it cannot properly be said that the claimants had made good their case that a PCP had been applied that gave rise to the requisite group disadvantage. We therefore allow the appeal on the basis of the objection raised by ground 2.

86. For completeness, we make clear that we were not similarly persuaded by the respondent's alternative argument under ground 2, to the effect that the matter complained of in this case (as defined by the claimants at trial) was limited to a one-off act which could not give rise to a PCP under section 19 **EqA** (see per Simler LJ at paragraph 38 **Ishola v Transport for London** [2020] ICR 1204 CA). The claimants' pleaded case had made clear that they were complaining of a more general practice applied by the respondent, which drew a distinction between how its direct employees were to be treated as compared to its outsourced workers. Even on the more limited case put at trial, the claimants relied on what they contended amounted to an underlying practice by the respondent, as evidenced by its retention of the power to re-visit the question of LLW during the lifetime of the toilet and cleaning contract and the subsequent reviews carried out by its board in later years. To the extent that this was a point taken below (which is not apparent from the respondent's closing submissions before the ET), we would not consider that it has been shown that the ET's decision was flawed in this respect.

87. Although rendered academic by our conclusion on ground 2, we have, in any event, gone on to consider the question raised by ground 1, namely: whether the ET erred in its approach to comparability.

88. Section 19 **EqA** requires a comparative assessment: persons with whom the claimant shares the relevant protected characteristic must be put at a disadvantage from the application of the PCP when compared to persons with whom the claimant does not share that characteristic. For these purposes, section 23 **EqA** makes clear:

> "**Comparison by reference to circumstances**
> (1) 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…"

89. In **Shamoon v Chief Constable of the RUC** [2003] UKHL 11, Lord Hope noted that this provision

(as enacted in the relevant Order in Northern Ireland) directed attention to:

> "48. … all the circumstances which are relevant to the way in which the [claimant] has been treated".

90. To the extent that the ET considered that it was not required to assess the circumstances of the two groups (those directly employed by the respondent as compared to those working on the toilets and cleaning contract), we agree that it adopted an unduly restrictive approach. As the respondent has observed, in many cases involving claims of indirect discrimination, both the advantaged and disadvantaged groups are likely to contain some persons with, and some without, the relevant protected characteristic; that will often be the natural consequence of the application of an apparently neutral PCP. The ET did not, however, limit its consideration of the case before it in that way, but went on to consider, in the alternative, whether there were any material circumstances that rendered the comparison between the two groups inapt in this instance. In adopting this second approach, the ET concluded that there was no material difference in relation to any circumstance relevant to payment of the LLW: both those in the advantaged and disadvantaged groups worked in London and the reasoning supporting payment of the LLW applied equally to those in the public and private sector and to those carrying out office-based or manual jobs.

91. The respondent argues that the ET thereby failed to take account of the historical context in this case or of the very different market rates that would apply to the jobs in question. It is said that the equal pay provisions within the **EqA** would not permit a comparison of contractual terms in this case (the work in question not being the same or of equal value) and it is urged that this should lead to the conclusion that a comparison should equally not be allowed for section 19 purposes. The claimants also seek to draw analogies with the approach taken in the equal pay context, suggesting that this might be seen as a "single source" case (see **Lawrence and ors v Regent Office Care Ltd and ors** [2003] ICR 1092). In any event, they argue that it is necessary to limit consideration of any differences to those that are "material", which – in the context of LLW – would not extend to the nature of the particular job being undertaken or the historical reasons for the different pay terms applied.

92. We do not consider it is helpful to seek to read across from the equal pay provisions within the **EqA** or the particular jurisprudence that has developed in that regard. Pursuing their claims under sections 19 and 41 **EqA**, the claimants were not required to demonstrate that they were doing like work, work that had been

rated equivalent, or work of equal value. Although they were required to show that the PCP in issue put persons sharing the relevant protected characteristic at a disadvantage, as compared to those who did not, the comparison required the ET to have regard to all the *relevant* circumstances; that must mean, all those circumstances actually relevant to the adverse treatment of which the claimants were seeking to complain (and see Lady Hale's discussion of this issue at paragraph 26 **Essop**). In the present case, the ET concluded that the identity of the employer, and the nature of the work undertaken, were not material. That, it seems to us, was a conclusion it was entitled to reach on the evidence and its findings of fact in this case. In particular, the ET made a very specific finding that the respondent (and its predecessors) had committed to a benchmark whereby it ensured that its direct employees would not be paid at less than the LLW (see ET paragraph 31, cited at paragraph 7 above). The ET did not find that commitment was linked to the type of work undertaken by the employees in question, or to any assessment of the market rate for their work. In the circumstances, we do not consider that we would be entitled to interfere with the ET's assessment of comparability in this case. In other instances, a different view may well be taken as to the relevance of market forces vis-à-vis the payment of LLW for different groups of employees; on the particular facts of this case, however, we consider the ET reached a conclusion that was open to it on the evidence. We would therefore dismiss ground 1 of the appeal.

93. Finally, we turn to ground 5, which relates solely to the claimant Mr Marro. This too has been rendered academic by reason of our conclusion on ground 2. Had that not been the case, however, we would have been bound to allow the appeal on this further ground and to remit the point raised to the ET.

94. As is common ground between the parties, Mr Marro did not share the protected characteristic relied on in this case (being a BME person). Those acting for the claimants had, however, addressed this point in the particulars provided in the UVW's letter of 14 April 2021, indicating that Mr Marro's case was put as a form of associative discrimination, by analogy with the approach laid down in C-83/14 **CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia** [2016] 1 CMLR 14. Although the different position of Mr Marro had thus been identified in the pleadings, we are unable to see that either party then addressed the ET on this issue at trial, and it is not a matter that is the subject of any finding in the ET's reasoning. Those acting for the claimants have sought to suggest that this need not be fatal and that the EAT might nevertheless reach its own conclusion as to the basis for the complaint of unlawful discrimination in Mr Marro's case. In this regard, the claimants rely on the ET decision in **Rollet and ors v British Airways plc** Case No.

3315412/2020, to the effect that, where a PCP had been applied that put persons with a particular protected characteristic at a disadvantage, there was jurisdiction to consider a claim of indirect discrimination under section 19 **EqA** brought by a complainant who had suffered the same disadvantage from the application of the PCP albeit that they did not share the same protected characteristic as those falling within the disadvantaged group.

95. It seems to us clear, however, that where the ET has failed to determine the particular facts relating to an individual claimant in these circumstances, and has carried out no assessment as to the nature of the discrimination said to have been suffered, the appropriate course would inevitably be for that case to be remitted. In the present proceedings, the ET erred by failing to address the point raised on the pleadings in Mr Marro's case and, had this question not been rendered academic by our conclusion on ground 2, we would therefore have allowed this ground of appeal but remitted the point back to the ET for determination.

Disposal

96. For the reasons provided, we allow this appeal and duly set aside the judgment of the ET, substituting a decision that the claims of indirect race discrimination must be dismissed.