Neutral Citation Number: [2024] EAT 117

Case No: EA-2022-000473-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 July 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

MRS GEMMA TODD

DR GILLIAN SMITH MBE

Between :

MR W AUGUSTINE

Appellant

- and -

DATA CARS LTD

Respondent

- -
- -

Tristan Jones KC (instructed pro bono) for the **Appellant**
Les Chapman (director) for the **Respondent**

Hearing date: 27 June 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 15 July 2024

SUMMARY

Part time workers - regulation 5 Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

The claimant was a private hire driver, employed by the respondent. The Employment Tribunal ("ET") found he was a part-time worker for the purposes of the **Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("PTWR"). The ET rejected, however, the claimant's claim that, by imposing a flat rate circuit fee of £148 (which gave drivers access to the respondent's database), the respondent had treated him less favourably as compared to his full-time comparator; in the alternative, the ET further held that the claim must fail as any less favourable treatment was not solely on the ground that the claimant worked part-time. The claimant appealed.

Held: allowing the appeal in part

The ET had erred in its approach to the question of less favourable treatment, failing to take into account that, applying the *pro rata temporis* principle under the **Part-Time Worker Directive 97/81**, the claimant was paying a higher circuit fee than his full-time comparator when considered as a proportion of his hours worked (**British Airways plc v Pinaud** UKEAT/0291/16, and [2018] EWCA Civ 2427 applied), and/or that he was taking home a lower hourly rate of pay, once a *pro rata* reduction (pursuant to regulations 5(3) **PTWR**) was allowed for the circuit fee.

The alternative basis for the ET's decision was also flawed, as it had erroneously had regard to what it found to be an absence of intention by the respondent to treat the claimant less favourably because he worked part-time; that was irrelevant (see **R (oao E) v Governing Body of JFS and ors** [2009] UKSC 15). Following the decision of the Court of Session (Inner House) in **McMenemy v Capita Business Services Ltd** [2007] CSIH 25, [2007] IRLR 400, however, it could not be said that the ET had erred in requiring that the less favourable treatment was *solely* on the ground that the claimant was a part-time worker.

If determining the point without regard to **McMenemy**, there was no basis for requiring the claimant's part-time worker status to be the *sole* reason for the treatment; the relevant test would be whether his part-time work was the *effective* cause. There were, however, conflicting EAT decisions on this point, and while, in determining an appeal from an ET in England and Wales, the EAT was not strictly bound by a decision of the Inner House, given the Britain-wide jurisdiction of the EAT, there were strong reasons in favour of not departing from a relevant decision of a higher court in Great Britain.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

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Introduction

1. This appeal concerns two issues relating to claims made under the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("PTWR"): (1) as to the correct approach to determining whether there has been less favourable treatment; (2) in respect of the approach to causation, whether this must be established *solely* on the basis that the complainant was a part-time worker and the relevance of the employer's intention. The questions relating to causation ((2)), require us to consider apparently conflicting decisions from the EAT and the Court of Session (Inner House).

2. In giving our judgment on this appeal, we refer to the parties as the claimant and respondent, as below. This is our unanimous decision on the claimant's appeal against the reserved judgment of the London South Employment Tribunal (Employment Judge Siddall, sitting alone on 10 January 2022) ("the ET"), sent out on 31 January 2022, by which the claimant's claim of less favourable treatment under the **PTWR** was dismissed.

3. Initially considering this matter on the papers, His Honour Judge Auerbach was unable to see that it raised any arguable question of law; subsequently, after a hearing under rule 3(10) **EAT Rules 1993**, His Honour Judge Tayler permitted the appeal to proceed on amended grounds, as presented by counsel acting under ELAAS at that hearing.

4. The claimant previously acted in person but has had the benefit of advice and representation from Mr Jones KC, acting *pro bono*, at and since the rule 3(10) hearing. The respondent appeared by counsel before the ET but has been represented by its director, Mr Chapman, on this appeal.

Overview

5. The claimant was a private hire driver who (as the ET had previously found) was an employee of the respondent. The claimant had paid the respondent a 'circuit fee' of £148 per week. The circuit fee gave drivers access to the respondent's booking system; it was applied in the same sum to all drivers, irrespective of whether they were full or part-time. By his claim to the ET, the claimant contended that the circuit fee was contrary to regulation 5 **PTWR**.

6. At the ET hearing, the respondent (through its counsel) indicated that, if the ET were to find the claimant had been less favourably treated on the ground that he was a part-time worker, it would not argue that the treatment was justified (ET, paragraph 5). In the claimant's case, it was accepted that he worked an average

of 34.8 hours a week. Having regard to custom and practice within the respondent's workforce (where drivers worked a wide variety of hours, with the average worked being 43.17), the ET found that the claimant was a part-time worker (ET, paragraph 38). The claimant's comparator worked an average of over 90 hours a week.

7. The ET went on to dismiss the claimant's claim, holding: (1) that he was not less favourably treated as regards the terms of his contract; alternatively, (2) that he was not less favourably treated on the ground that he was a part-time worker. The ET summarised its reasoning as follows:

> "67. In conclusion, my decision is as follows. I find that the Claimant has not established that he was treated less favourably than a comparable full-time worker … as they were both treated in exactly the same way. If I am wrong on that and if the Claimant can establish less favourable treatment on the basis that he was taking home a lower proportion of his salary, I find that in any event the charging of the circuit fee was not on the sole ground that he was a part-time worker. The claim under regulation 5 therefore fails."

We return to the ET's reasoning in more detail below, when addressing the individual grounds of appeal.

8. By his appeal, the claimant contends that the ET's conclusions are founded upon two errors of law: (1) in deciding there was no less favourable treatment, the ET erroneously failed to take account of the fact that he was paying a higher circuit fee when considered as a proportion of his hours worked and/or pay; (2) in determining (in the alternative) that any less favourable treatment was not on the ground that the claimant was a part-time worker, the ET wrongly applied the test identified in **McMenemy v Capita Business Services Ltd** [2007] CSIH 25, [2007] IRLR 400, which stated that part-time status must be the *sole* cause of the treatment and that an examination of the employer's intention was required, rather than asking (*per* (e.g.) **Carl v University of Sheffield** [2009] ICR 1286 EAT) what was the *effective cause* of the treatment, understanding that the employer's intention was not determinative.

The Part-Time Worker Regulations and the Part-Time Worker Directive

9. The **PTWR** were introduced to comply with the United Kingdom's obligation to implement the **Part-Time Worker Directive 97/81** ("the PTWD"), an obligation that was extended to the UK by **Council Directive 98/23/EC**.

10. The **PTWD** was intended to implement the **Framework Agreement on part-time work** ("the Framework Agreement") which was annexed to it. In the Preamble to the **Framework Agreement** it is explained that:

> "This Framework Agreement is a contribution to the overall European strategy on employment. ...
> Recognizing the diversity of situations in Member States and acknowledging that part-time work is a feature of employment in certain sectors and activities, this Agreement sets out the general principles and minimum requirements relating to part-time work. It illustrates the willingness of the social partners to establish a general framework for the elimination of discrimination against part-time workers and to assist the development of opportunities for part-time working on a basis acceptable to employers and workers."

11. At clause 1, the purpose of the **Framework Agreement** is stated to be two-fold, as follows:

> "(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;
> (b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers."

12. By clause 4 of the **Framework Agreement**, it is (relevantly) provided:

> "Clause 4: Principle of non-discrimination
> 1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.
> 2. Where appropriate, the principle of pro rata temporis shall apply."

13. Clause 6 addresses implementation of the **Framework Agreement**, making clear that:

> "1. Member States and/or social partners may maintain or introduce more favourable provisions than set out in this agreement.
> 2. Implementation of the provisions of this Agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement. This does not prejudice the right of Member States and/or social partners to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances, and does not prejudice the application of Clause 5.1 [providing for the identification, review and (where appropriate) elimination of obstacles for opportunities for part-time work] as long as the principle of non-discrimination as expressed in Clause 4.1 is complied with."

14. The **PTWR** were made under section 19 of the **Employment Relations Act 1999**, which does not itself refer to the **PTWD**, but confers a broad enabling power on the Secretary of State to:

> "(1) ... make regulations for the purpose of securing that persons in part-time employment are treated, for such purposes and to such an extent as the regulations may specify, no less favourably than persons in full-time employment."

15. By regulation 5 **PTWR**, it is provided as follows:

> "5.— Less favourable treatment of part-time workers
> (1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker– (a) as regards the terms of his contract; or (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

> (2) The right conferred by paragraph (1) applies only if– (a) the treatment is on the ground that the worker is a part-time worker, and (b) the treatment is not justified on objective grounds.
> (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.
> (4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime."

16. The "*pro rata principle*" referenced at regulation 5(3) is defined at regulation 1(2):

> *""pro rata principle"* means that where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker."

The term "*weekly hours*" is then defined at regulation 1(3):

> "In the definition of the pro rata principle … "weekly hours" means the number of hours a worker is required to work under his contract of employment in a week in which he has no absence from work and does not work any overtime or, where the number of such hours varies according to a cycle, the average number of such hours."

17. Where an ET finds that a complaint under the **PTWR** is well founded, it may (if it considers it just and equitable) order the employer to pay compensation to the claimant (regulation 8(7)). By regulation 8(9), it is then provided that:

> "... the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances, having regard to-
> ...
> (b) any loss which is attributable to the infringement having regard, in the case of an infringement of the right conferred by regulation 5, to the pro rata principle except where it is inappropriate to do so."

Less favourable treatment (ground 1)

The ET's approach

18. The ET started from the position that all drivers were in the same position: all would have to work a certain number of hours and complete a certain number of jobs to cover the circuit fee; that number would vary according to the type of work, but drivers would have to work at least 30 hours a week to ensure the job was worthwhile and they could pay the circuit fee the following week (ET, paragraphs 43-49). From this perspective, as the claimant worked on average an average of over 34 hours a week and would thus be able to

cover the circuit fee, the ET found there was no differential treatment between the claimant and his comparator.

19. Considering, however, the claimant's argument that there was less favourable treatment if a *pro rata* approach was adopted, the ET accepted that:

> "55. ... if the amount of the fee had been reduced pro rata to reflect the hours worked by any individual driver, the Claimant would not be less favourably treated [the implication being that, a failure to make such a pro rata reduction meant that the claimant had been less favourably treated].
> 56. If I am wrong in my conclusion that the requirement to pay the circuit fee did not amount to less favourable treatment ... and if I have applied the pro rata principle correctly, I would find that the fee amounted to less favourable treatment of the Claimant. The circuit fee would represent a greater proportion of fares earned by a driver who was working 30 hours a week than by a driver who was working 60 hours a week or more."

The claimant's case

20. By his first ground of challenge, the claimant contends that the ET erred in finding there was no less favourable treatment because all drivers were treated in the same way; he submits the ET thereby failed to take account of the relevant context (see, by analogy, **Earl Shilton Town Council v Miller** [2023] EAT 5), which required that it assess the question of less favourable treatment by having regard to time and proportion (see **British Airways plc v Pinaud** UKEAT/0291/16, and [2018] EWCA Civ 2427). Whether analysed as a proportion of hours worked, or as a proportion of pay, it was clear (as the ET had found at paragraphs 55 and 56) that the claimant was treated less favourably.

21. Seen as a proportion of pay, the *pro rata* principle (per regulation 5(3) **PTWR**) would require a proportionate adjustment to the claimant's pay or other benefit: applying that principle, a flat circuit fee of £148 per week would result in part-time drivers forgoing a higher proportion of their earnings than full-time drivers, effectively reducing their pay per hour worked (albeit that other differences might then need to be taken into account in any award of compensation, again applying the *pro rata* principle). More straightforwardly, however, if seen in terms of a comparison of hours worked, it was clear the claimant was paying a higher fee as a proportion of hours worked than his comparator. Assessed in this way, the *pro rata* principle as defined by regulation 1(2) (limited to "*pay or any other benefit*") would not come into play, but that was not fatal: (i) there was nothing in the **PTWR** to suggest that proportionate adjustments could not, if appropriate, be made in other contexts; (ii) construing the **PTWR** consistently with the **PTWD** (clause 4.2 **Framework Agreement**) would require such an approach; and (iii) the EAT and Court of Appeal had so held

in **Pinaud**, which was binding on this EAT.

The respondent's position

22. The respondent says, however, that the circuit fee could be covered by a driver in a few hours (or, on occasion, by a single booking); it would depend upon the type of work undertaken: some hours are more lucrative to work than others; some types of work – e.g. airport bookings – are known to be more profitable; some more experienced drivers could earn more than others because of their knowledge of London and the local area. Moreover, the claimant could choose when to log in; if he opted to work at times when it was harder to cover the circuit fee, that was his choice.

Less favourable treatment: our analysis and conclusions (ground 1)

23. The question posed by regulation 5(1) **PTWR** is whether, (relevantly) as regards the terms of his contact, the part-time worker has been treated less favourably than a comparable full-time worker. In order to answer that question, however, it is necessary to understand what constitutes the treatment about which the part-time worker is complaining.

24. In **Earl Shilton Town Council v Miller** [2023] EAT 5, the question was whether providing female employees access to the same toilet facilities as their male colleagues amounted to less favourable treatment because of sex. As the EAT (His Honour Judge James Tayler sitting alone) observed:

> "16. … it might be said that the same toilet facilities were provided to men and women and so the treatment was the same. However, if the treatment is assessed as being the provision of toilet facilities that are appropriate to a person's requirements, the analysis may differ."

25. Considering the authorities relating to direct discrimination under the **Equality Act 2010** ("the EqA") the EAT in **Earl Shilton** continued:

> "20. Thus, the authorities establish that in certain circumstances treatment that is the "same" could be less favourable treatment and that in other circumstances treatment that is "different" would not be less favourable. Context is all – and the assessment calls for the robust common sense of the employment tribunal in determining whether there is less favourable treatment because of sex …"

26. Direct discrimination under the **EqA** is defined by section 13 as follows:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

By section 23 **EqA**, it is further explained that:

> "(1) On a comparison of cases for the purpose of section 13 … there must be no material difference between the circumstances relating to each case."

27. There is not a precise read-across from the protection thus afforded under the **EqA** to that provided by regulation 5 of the **PTWR**; on the other hand, the basic principle is the same: the protection is against less favourable treatment of one worker with a specified characteristic (here, being a part-time worker) as compared to another who does not have that characteristic (someone who works full-time). To ensure a like-for-like comparison, the circumstances of the complainant and the comparator should – other than the fact that they work part-time or full-time – be the same. To determine whether the requirement to pay the weekly £148 circuit fee amounted to less favourable treatment, however, it is necessary to understand what constitutes the treatment complained of. The claimant's complaint was not that the respondent imposed a circuit fee on all drivers (full- and part-time), but, taking his case at its most straightforward, that the imposition of a flat rate charge, which took no account of his reduced working hours, meant he was paying a higher fee than his comparator if assessed as a proportion of hours worked. The other way of characterising the claimant's complaint would be to see the payment of the fee in terms of his hourly take-home rate of pay as compared to that of his comparator: as a driver worked more hours during the course of the week, there would be a corresponding reduction in the proportion of the earnings needed to cover the charge, and, conversely, the driver's hourly take home rate would increase. As such, imposing a flat rate circuit fee would mean that the claimant (as a part-time driver, working an average of 34.8 hours a week) would forgo a higher proportion of his earnings than his full-time comparator (working an average of over 90 hours a week), resulting in a lower hourly take home rate of pay.

28. Thus analysed as a proportion of pay, the *pro rata* principle (as defined by regulation 1(2) **PTWR**) would apply to this case. As the ET found, the fee would represent a greater proportion of fares earned by a part-time driver who was working (say) 30 hours a week than a full-time driver who was working (for comparison) 60 hours a week or more (ET, paragraph 55), and, as such, given that the drivers would be paying the circuit fee out of their earnings, the part-time driver's pay would be reduced by a greater proportion than would arise from a simple *pro rata* reduction based on a comparison of the drivers' respective weekly hours. As the ET accepted, applying the *pro rata* principle, the circuit fee amounted to less favourable treatment of the claimant as compared to his full-time comparator.

29. That said, as Mr Jones KC acknowledged in oral argument, a comparative assessment of pay for these purposes would also have to take into account other factors giving rise to a difference between the hourly rates of the claimant and his comparator. These might include the kind of points identified by Mr Chapman in his submissions on behalf of the respondent, although we should record the claimant's objection, that these were not matters determined by the ET, and we do not read Mr Jones' engagement with these points as amounting to any form of concession; he has simply acknowledged, on a hypothetical basis, that calculating a driver's hourly rate of pay may have to take into account a number of variables. As we read regulation 8(9) **PTWR**, that would be an assessment that might be undertaken in the calculation of any compensatory award (where the *pro rata* principle would again apply), but we can see that this is a less straightforward approach than simply looking at the amount of the circuit fee assessed as a proportion of hours worked.

30. Adopting the latter approach, the difficulty for the claimant might seem to be that the definition of the *pro rata* principle under regulation 1(2) **PTWR** would not readily apply to this analysis (although we note that, in a case concerned with what was said to be a disproportionate requirement to work standby (as opposed to rostered) hours, it was not in dispute that the *pro rata* principle was offended; see paragraph 2 **Gibson v The Scottish Ambulance Service** UKEAT/0052/04); we do not, however, consider that presents a valid objection to the claimant's case. First, because we do not read the language of **PTWR** as precluding an approach that has regard to the treatment in issue as assessed as a proportion of hours worked; indeed, that seems to us to be an approach that will often be required when seeking to undertake a like-for-like comparison of the treatment of full- and part-time workers. Second, because construing the **PTWR** consistently with the **PTWD** would require an approach that allowed for the application of the *pro rata temporis* principle (broadly speaking, at a rate in proportion to time), per clause 4.2 of the **Framework Agreement**. Third, because we consider this to be the approach laid down in case-law that we are bound to follow.

31. In **British Airways plc v Pinaud** UKEAT/0291/16, it was common ground that the *pro rata* principle, as defined by regulation 1(2) did not apply (paragraph 19); as the EAT (His Honour Judge David Richardson sitting alone) explained, the treatment in that case concerned the term of the claimant's contract relating to the days she was required to be available to work, it did not dictate any particular number of weekly hours (paragraph 37). The EAT considered, however, that a *pro rata* assessment provided the only rational basis for comparing the treatment of part-time workers to that of full-time workers in terms of the requirement that the

former should be available for work for 3.5% more days than the latter for (proportionately) the same pay; as HHJ Richardson observed:

> "39. … Regulation 5(1)(a) requires a comparison to be made and it is not possible sensibly to make a comparison of terms relating to days of availability without assessing the days the Claimant was required to be available against the days the full-time comparator was required to be available and the respective pay of each of them. 40. ... It is important to keep in mind that in the Framework Agreement, the term "*pro rata temporis*" does not have a narrow definition. Even if the narrow definition in the **PTWR** was inapplicable, the ET was still permitted to make a comparative assessment by reference to time and proportion if it was appropriate. Here it plainly was."

32. Dismissing the employer's appeal in **British Airways plc v Pinaud** [2018] EWCA Civ 2427, [2019] ICR 487, the Court of Appeal adopted the same approach; as Bean LJ reasoned:

> "19. ... The terms of the Claimant's contract required her to be available for work 130 days per year. The terms of the comparator's contract required her to be available 243 days per year. The Claimant was paid 50% of the comparator's salary. Half of 243 is 121.5. There may be advantages to the part-time worker from the way the 14-14 contract was constituted, and these may or may not be found sufficient to establish the justification defence when the case is remitted to the ET. But that does not affect the question of whether the terms of the Claimant's contract, insofar as they require her to be available for 130 days rather than 121.5 days, were *prima facie* less favourable than those of her full-time comparator: which is all we are concerned with in this appeal. In my view the ET were right to hold that they were."

33. We respectfully agree with the approach adopted in **Pinaud**. Given our reasoning in respect of the need to adopt a *pro rata* analysis in this case - whether as that term is understood under regulation 1(2) **PTWR**, or whether adopting an analysis in proportion to the time involved, consistent with the **PTWD** - to the extent that the ET found that the circuit fee did not constitute less favourable treatment of the claimant, we uphold this ground of appeal.

Causation: "*on the ground that*" (ground 2)

The ET's approach

34. In its alternative reasoning, the ET went on to consider whether, if the requirement to pay the circuit fee amounted to less favourable treatment, what was "*on the ground that*" the claimant was a part-time worker. Following the approach laid down in **McMenemy v Capita Business Services Ltd** [2007] CSIH 25, [2007] IRLR 400, the ET considered that it was required to consider:

> "60. ... the intentions of the Respondent and the reasons why the Claimant was charged the full circuit fee."

35. Consistent with that approach, the ET went on to set out its conclusions in this regard, as follows:

> "63. The reason why the Claimant was charged a circuit fee is because this was the way in which private hire companies such as the Respondent were operating. It is the way in which the Respondent earned a revenue from the business. Unlike newer businesses such as Uber, the Respondent did not collect the fares from its cash customers. These were paid direct to the drivers. The circuit fee gave the drivers access to the Respondent's booking system. Whereas I might go so far as accepting that the Claimant was charged a circuit fee because he was treated as self-employed, (treatment that has been found to be incorrect) that in itself does not establish causation under the Regulations: because it does not show that he was charged the fee *because* he was working fewer hours than his fellow drivers. All the Respondent's drivers were treated as self-employed and were charged a circuit fee however many hours they worked.
> ...
> 66. ... it is correct that the Claimant was working fewer hours than his comparator. The result was that in some weeks he took home a lower proportion of his pay, after accounting for the circuit fee. However I find that this does not establish that the charging of the full circuit fee was on the sole ground that he was a part-time worker. The circuit fee was the means by which the Respondent obtained a revenue from its business. All drivers were treated in exactly the same way. The **McMenemy** decision, quoted above, makes it clear that the question of causation 'requires examination of the Respondents' intention: did they intend to treat him less favourably for the sole reason that he was a part-time worker?' Based upon the evidence presented I find that this claim is not made out. ... The Claimant was not charged the full circuit fee simply because he worked fewer hours than other drivers: the reason why he was charged the fee was so that he could obtain access to bookings through the Respondent's systems in the same way as any other driver. There has been no evidence to suggest that the hours a driver was likely to work had any impact upon the Respondent's requirement that the fee be paid: it is simply the condition they imposed before taking any driver on, and the means by which they made money out of the arrangement."

The claimant's case

36. By his second ground of challenge, the claimant contends that the ET erred in applying the test laid down by the Court of Session (Inner House) in **McMenemy**, which stated that part-time status must be the *sole* cause of the treatment and that an examination of the employer's intention was required. It is the claimant's case that **McMenemy** (approving an earlier decision of the EAT sitting in Edinburgh, in **Gibson v The Scottish Ambulance Service** UKEAT/0052/04), had incorrectly held that the **PTWR** required that part-time work be the *sole* cause of the less favourable treatment, when that was: (i) not what regulation 5(2)(a) **PTWR** said; (ii) not consistent with a purposive construction of the **PTWR**, not least as the **PTWD** made clear that the **Framework Agreement** set minimum (not maximum) standards; (iii) not required by the principles of construction applicable to the **PTWR**; (iv) not the approach adopted by the EAT sitting in London in **Sharma v Manchester City Council** [2008] ICR 623 and **Carl v University of Sheffield** [2009] ICR

1286, where the test had been said to be one of "*effective cause"*, consistent with the approach to causation in other (analogous) statutes. Acknowledging the different views expressed by the Courts on this question, often absent full citation of all other relevant authorities, Mr Jones contended we were not strictly bound by any previous decision on the point (decisions of the Court of Session (Inner House) not being binding on the EAT when considering an appeal from an ET in England and Wales).

37. The claimant further contended that the ET had erred in adopting the **McMenemy** focus on the employer's intention: while the reasoning in **McMenemy** and **Gibson** might have reflected an uncertainty at that time as to whether causation was to be approached applying a "*but for*" test or an assessment of the subjective motivation of the decision-taker, it had also erroneously focused on the motive or intention for the treatment in question (irrelevant), rather than on what caused that treatment (**R (oao E) v Governing Body of JFS and ors** [2009] UKSC 15). The ET's reasoning at paragraphs 63-66 looked at the respondent's motives, but (at most) those matters could only go to justification (not an issue in this case), not causation.

The respondent's position

38. Mr Chapman did not address us on the legal issues raised by the authorities to which Mr Jones had referred, save to point out the factual differences between those cases and this. In broad terms, it is the respondent's case that any less favourable treatment experienced by the claimant arose from choices he had made and need not have had any connection with part-time working as a driver who logs in for fewer hours might nevertheless accept more lucrative jobs.

"*On the ground that*": our analysis and conclusions (ground 2)

The case law

39. The phrase "*on the ground that*", used at regulation 5(2)(a) **PTWR**, has been considered in a number of cases, although, unfortunately, appellate decisions have often been made without reference to all relevant authorities.

40. The first relevant appellate ruling would seem to be that of the EAT sitting in Edinburgh (Lord Johnston presiding) in **Gibson v The Scottish Ambulance Service** UKEAT/0052/04. In that case, the treatment in issue concerned a requirement on the claimant to work a higher proportion of standby to rostered

hours than his full-time comparator. Accepting that this had amounted to less favourable treatment, partly related to the claimant's part-time status, the ET (by a majority) concluded that the primary reason for the treatment related to other factors; as such, construing the **PTWR** consistently with the **PTWD** (where the reason for the treatment must be "*solely*" the worker's part-time status, *per* clause 4.1 **Framework Agreement**), the ET majority found that the necessary causal link had not been established. On his appeal against that decision, the claimant does not, however, seem to have addressed the question whether his part-time status needed to be the sole reason for the treatment; the focus of his submissions was on the question whether the ET had erred in failing to apply an objective "*but for*" test. The respondent resisted that argument, contending the approach was that laid down (in the discrimination law context) by the House of Lords in **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, and required a focus on the subjective reason for the treatment in issue. It further submitted, however, that the ET majority had correctly required that part-time status must be the sole reason for the impugned treatment, as that was the approach adopted in the **PTWD**.

41. By a majority (which included Lord Johnston), the EAT can be seen to have agreed with the submission for the respondent, reasoning as follows:

> "11. ... Whatever may be the motive of the employer, it is necessary to look at the intention behind the decision to impose part-time working, whatever may be its consequences in other aspects. We therefore reject the "but for" test in this context and we consider that for the reasons given by the Tribunal, they applied their minds to the right question and reached a conclusion, namely, that the real reason was the issue of demand in the local area which means that the appellant was not being discriminated against on the ground that he was a part-time worker per se. It is also of significance, that, on the evidence, some part-time workers in other areas did not fail to meet the "pro rata principle" and therefore it cannot be said to be a sole question that the issue was determined by simply part-time working and nothing else."

42. We pause in our consideration of the case-law at this stage to observe that a large part of the discussion in **Gibson** - that relating to whether the correct approach to causation required a "*but for*" test or a consideration of the subjective reasons of the relevant decision-taker - can be seen as reflective of the developing jurisprudence in discrimination law at that time. A "*but for*" approach had been adopted in **James v Eastleigh Borough Council** [1990] 2 AC 751, HL, where the discriminatory reason for the treatment complained of was inherent in the treatment itself and, as such, no further inquiry was needed. In **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, the House of Lords had made clear that the test required determination of the alleged discriminator's (conscious or unconscious) reason for the treatment in issue. As Underhill P (as he then was) explained in **Amnesty International v Ahmed** [2009] ICR 1450 EAT, what

appeared to be a difference in approach was merely reflective of the different nature of the cases; ultimately the question was always:

> "36. … what was the ground of the treatment complained of … the reason why it occurred …"

43. In determining the reason for the treatment in issue, in circumstances in which the discriminatory reason is not inherent in that treatment, it will be necessary to have regard to the mental processes of the relevant decision-taker, although a distinction should still be made between motive and reason; as Underhill P observed in **Amnesty International**:

> "34. … the subject of the inquiry is the ground or, or reason for, the putative discriminator's action, not his motive … a benign motive is irrelevant. …"

See **R (oao E) v Governing Body of JFS and ors** [2009] UKSC 15, per Baroness Hale at paragraphs 64-66.

44. We return to the distinction between motive and reason below. We now, however, turn to the next appellate consideration of the "*on the ground that*" requirement under regulation 5(2)(a) **PTWR**. In **McMenemy v Capita Business Services Ltd** [2007] CSIH 25, [2007] IRLR 400, the focus of the argument before the Court of Session (Inner House) was more clearly on the question whether part-time worker status must be the *sole* reason for the treatment in issue. In that case, the complaint of less favourable treatment related to the fact that Mr McMenemy, who worked part-time in the respondent's Glasgow call-centre Wednesday - Friday each week, was not given time-off in lieu when public holidays fell on Mondays, notwithstanding that full-time colleagues, who normally worked on Mondays, would be given the day off (albeit that - as the call-centre operated seven days a week - some full-time workers, working (e.g.) Tuesday - Saturday, would similarly lose out, whereas some part-time workers, working (e.g.) Monday to Wednesday, would not). Mr McMenemy would be given time-off if a public holiday fell on one of his working days but complained of suffering less favourable treatment because of the disproportionate loss of time-off for public holidays given the number that fell on Mondays.

45. The ET had not considered that this amounted to less favourable treatment *on the ground* that Mr McMenemy worked part-time, concluding that the distinction was:

> "not between full-time and part-time workers, but between those who work Mondays and those who do not, whether or not they are full-time."

46. The EAT rejected Mr McMenemy's appeal, holding that the ET had reached a conclusion that had been open to it on the facts. The Court of Session (Inner House) agreed.

47. In reaching its decision, the Inner House first considered different translations of the word "s*olely*" in the **PTWD**; doing so, it was satisfied that this only reinforced the impression gained from a straightforward reading of the English version:

> "3. ... that the less favourable treatment of part-time workers which is prohibited by the Directive must be for the reason that they work part-time and for that reason alone."

48. As for the approach it was to adopt when construing the **PTWR**, the Inner House recorded that it was agreed between the parties that:

> "5. ... The 2000 Regulations should be construed consistently with the Directive, and should be given a purposive construction."

And:

> "6. ... It was not suggested that the 2000 Regulations went further than the Directive in conferring protection on part-time workers, or were intended to do more than to bring United Kingdom law into line with Community law."

49. Having thus agreed the approach that should be taken to the construction of the **PTWR**, the dispute between the parties was focused on the implication of the inclusion of the word "*solely*" in clause 4.1 of the **Framework Agreement**. On this question the Inner House reasoned as follows:

> "6. ... In our opinion, the language of clause 4.1 of the Directive connotes the need to consider whether there is a causative connection between the discrimination complained of by the worker and the part-time nature of the worker's employment. ... [T]he prohibition is against less favourable treatment of part-time workers, than comparable full-time workers, for the reason that they work part-time and for that reason alone. This necessitates inquiry into the employer's intention in so treating the part-time worker. [the Court then cited the EAT's judgment in **Gibson v Scottish Ambulance Service** at paragraph 11] ...
> We agree with this approach. The part-time worker who complains that his employer is treating him less favourably than he does a comparable full-time worker in breach of the legislation must therefore establish that the employer intends to treat him less favourably on the sole ground that he is a part-time worker .... Additional reasons for construing the word 'solely' in this way are that, as counsel for the respondents pointed out, there is, firstly, no reference in the Directive to indirect discrimination and, secondly, different treatment, if established, may nevertheless be 'justified on objective grounds'."

50. In reaching this view, the Inner House also made reference to the decision of the European Court of Justice in **Wippel v Peek & Cloppenburg GmbH & Co KG** Case C-313/02 [2004] ECR I-9483, in which it had been observed that clause 4 of the **Framework Agreement**:

> "54. ... precludes part-time workers from being treated less favourably than comparable full-time workers on the sole ground that they work part-time unless different treatment is warranted on objective grounds."

51. Asking whether the less favourable treatment suffered by Mr McMenemy was solely because he was

a part-time worker, the Inner House reiterated its view that this:

> "14. ... requires examination of the respondents' intention: did they intend to treat him less favourably for the sole reason that he was a part-time worker?"

On the facts, it considered that the ET and EAT had provided the correct answer:

> "14. ... On examination of the facts, the reason why the appellant received less favourable treatment than did a comparable full-time worker was through the accident of his having agreed with the respondents that he would not work for them on Mondays or Tuesdays. It is at this point that it becomes legitimate to consider hypothetical situations, in order to test the true intention of the respondents. It is clear on the evidence that, in accordance with the respondents' policy on public holidays, if a full-time member of the appellant's team worked a fixed shift from Tuesday to Saturday, he would not receive the benefit of statutory holidays which fell on Mondays. Likewise, if the appellant, or any other part-time member of his team, worked on Mondays, they would receive the benefit of statutory Monday holidays in exactly the same way as full-time employees would do. We can therefore see no reason to fault the reasoning of the employment tribunal or the Employment Appeal Tribunal, ..."

52. The way in which the question of causation is to be approached under the **PTWR** next arose for consideration in **Sharma and ors v Manchester City Council** [2008] ICR 623, a decision of the EAT sitting in London (Elias P (as he then was) presiding). In that case, the claimants were part-time lecturers who, in contrast to their full-time comparators, were employed under contracts which could be varied from year to year. The ET had rejected the claims under the **PTWR** on the basis that, as the particular provision in issue did not apply to all part-time workers, the reason for the less favourable treatment was not "*solely*" due to the claimants' part-time status. Allowing the claimants' appeal, the EAT held that the ET had erred in its construction of the **PTWR** in this regard. In reaching this conclusion, the EAT noted that this had been an argument taken by counsel for the respondent in **Gibson** and that the EAT in that case, while not directly approving the submission, had appeared to agree with it, albeit that it had "*hardly given a ringing endorsement of the construction*" (**Sharma**, paragraphs 31 and 47). Considering the use of this term in the **PTWD**, the EAT in **Sharma** reasoned as follows:

> "48 In our judgment, the reference to "solely" in Directive 97/81 is simply intending to focus upon the fact that the discrimination against a part-timer must be because he or she is a part-timer and not for some other independent reason.
> 49 To take a simple example, if the employer decided to discriminate against all part-timers over the age of 30 it could be said that there were two reasons for the discrimination: being a part-timer, and being of a certain age. Similarly, if the employer deliberately discriminates against all his part-timers in factory A but not those with identical full-time comparators in factory B, can it really be said that, because only some part-timers are selected for the less favourable treatment, the Directive (and by extension the Regulations) are not intended to be applicable?
> 50 In our judgment it is inconceivable that the Directive was not intended to outlaw

> such treatment (subject to justification) and we have no doubt whatsoever that it would inevitably be construed by the European Court of Justice to do so. Any other conclusion would wholly undermine the very purpose of the Directive. The fact that not all part-timers are treated adversely does not mean that those who are cannot take proceedings for discrimination if being part-time is a reason for their adverse treatment.
> 51 In our judgment, once it is found that the part-timer is treated less favourably than a comparator full-timer and being part-time is one of the reasons, that will suffice to trigger the Regulations."

53. On that basis, the EAT upheld the claimants' appeal. In any event, however, it considered that the ET had been wrong to characterise the less favourable treatment in that case as being for more than one reason:

> "52 ... Properly analysed, it was only because the claimants were part-timers."

54. Finally, the EAT went on to observe:

> "53 We would add that in any event, it is open to a member state to give more favourable protection than the Directive accords, and accordingly in our judgment there is no need to read limitations in the Directive into the Regulations. In this connection it is to be noted that the Regulations were made under section 19 of the Employment Relations Act 1999, which confers a broad enabling power not just limited to implementing the terms of the Directive."

55. The decision of the Court of Session (Inner House) in **McMenemy** does not appear to have been referenced in **Sharma** (it is not referred to in the EAT's judgment). It was, however, before the EAT sitting in London (His Honour Judge Peter Clark presiding) in **Carl v University of Sheffield** [2009] ICR 1286, when (with both sides being represented by counsel) all the authorities we have referenced above were fully considered in argument. The EAT in **Carl** agreed with Elias P's observation that it had been open to the UK to give more favourable protection than afforded by the **PTWD** and that, therefore, the limitation that the EAT in **Gibson** had been persuaded to read into the **PTWR** was unnecessary. Considering that it was not bound by any of the previous cases cited, the EAT reasoned as follows:

> "42. ... we agree with Elias J in *Sharma* that, whereas domestic legislation must provide the protection contained in the Directive, it is not limited to such protection. "On the ground that" in regulation 5(2)(a) means what Mummery J [in *O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School* [1997] ICR 33, 43F] said the similar expression in the Sex Discrimination Act 1975 meant. Part-time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause."

56. These observations were, however, strictly *obiter*. In **Carl**, a further point arose for consideration, relating to whether it was possible for the claimant to rely on a hypothetical comparator under the **PTWR**. The EAT held that she could not, and duly allowed the employer's cross-appeal on that basis.

57. So far as we have been able to discern, the phrase "*on the ground that*", used at regulation 5(2)(a) **PTWR**, was next considered, again by the EAT sitting in London (HHJ Richardson sitting alone), in **Engel v Ministry of Justice** [2017] ICR 277. It would not appear that any of the preceding authorities we have referenced were referred to in **Engel**, although the question of causation arose in relation to Mr Engel's argument that the ET had wrongly rejected his claim on the basis that the respondent had demonstrated the existence of a non-discriminatory reason for the treatment in issue. In rejecting Mr Engel's submission that regulation 5(2)(a) **PTWR** must never be construed in a way such as to defeat a claim under regulation 5(1), HHJ Richardson observed:

> "18. In this respect, the **2000 Regulations** entirely follow the provisions of the **PTWD** that they were enacted to implement. The **PTWD** was concerned to provide a remedy for those who were treated in a less favourable manner than comparable full-time workers "solely because they work part-time". While the language of the **2000 Regulations** is wider, their purpose is the same. As [counsel for the respondent] put it in their skeleton argument, the purpose of the legislation is not to redress any and all injustices that may exist; it is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time workers."

58. At least some of the decisions relating to causation under regulation 5 **PTWR** were referenced in **Ministry of Justice v Blackford** [2017] ICR 277, a decision of the EAT sitting in London (Lady Wise sitting alone). Noting that there appeared to be a direct conflict between the approach in **Carl** and that adopted in **McMenemy** and **Engel**, Lady Wise did not, however, consider it necessary to express a view on which approach was correct as this was ultimately not an issue on the appeal before her (**Blackford**, paragraph 73).

59. The next, and (so far as we are aware) most recent judicial consideration of the question of causation under the **PTWR**, appears to have been in **Forth Valley Health Board v Campbell** UKEATS/0003/21. Mr Campbell was a part-time phlebotomist who complained of less favourable treatment in that, when he worked on weekdays, his shifts were four-hours long with no breaks, whereas full-timers were given a 15 minute paid break when they worked past six hours on their weekday shifts. Although Mr Campbell also had a paid 15 minute break on his (six hour) weekend shifts, he was successful before the ET in claiming that his treatment on weekdays amounted to less favourable treatment for the purposes of regulation 5 **PTWR**.

60. Upon the employer's appeal to the EAT (sitting in Edinburgh; Lord Fairley sitting alone), it seems that reference was made to the decisions in **Gibson** and **McMenemy** but not to **Sharma** or **Carl** (certainly the latter two decisions are not referenced in the judgment). Unsurprisingly, Lord Fairley adopted the same

approach as the Court in **McMenemy**, although he was clear that he would have reached the same conclusion had he adopted a less restrictive approach:

> "13. ... Even applying "but for" causation, however, it is hard to see how the Tribunal was able to reach the conclusion that the week-day shift pattern worked by the Claimant was in any way related to his part-time status. Nothing in its findings in fact or in the agreed facts justified such an inference. That absence of evidence alone meant that the Tribunal could not properly conclude that there was, in the case of the Claimant, any causal connection between his part-time status and the length of his shifts. ...
> 14. In any event, and having regard to the facts as agreed and found by the Tribunal, there was no basis in law on which the Tribunal could properly have come to the view that the difference in treatment between the Claimant and his full time comparator was "on the ground" that he was a part-time worker, far less that his part-time status was the sole ground for such difference in treatment (per **McMenemy**). The agreed and proven facts were wholly destructive of any such conclusion. ..."

61. For the claimant in the present case, Mr Jones submits that we should not consider ourselves bound by any of the above authorities. He makes the point that, as we are considering an appeal from an ET within the jurisdiction of England and Wales, we are not bound by the decision of the Court of Session (Inner House) in **McMenemy**. As for earlier decisions of the EAT, acknowledging the guidance provided in **British Gas Trading Ltd v Lock and anor** [2016] ICR 503, he submits that, given the conflicting decisions reached by different compositions of this Tribunal, we are entitled to reach our own conclusion as to the correct approach.

"On the ground of": our view

62. We consider the approach we should take on the question of precedent below. Given, however, that the question of the correct approach to the "*on the ground that*" test under regulation 5(2)(a) **PTWR** is at the heart of the appeal before us, we think it appropriate, at this stage, to set out our view as to what that approach should be.

63. Starting with the language used at regulation 5(2) **PTWR**, we note that this makes clear that the right under regulation 5(1), not to be subjected to less favourable treatment, "*applies only*" if the treatment is (a) "*on the ground that the worker is a part-time worker*" and (b) is not objectively justified.

64. The phrase "*on the ground that*" will seem familiar to those working in the fields of employment and discrimination law; a very similar phrase ("*on the ground of*") was (for example) part of the definition of direct discrimination under section 1(1) of the legacy statute, the **Sex Discrimination Act 1975**; the words "*on the ground that*" remain a standard part of the test applied in detriment cases under the **Employment Rights Act**

1996 (see, for example, the right in respect of protected disclosures, at section 47B). Equally familiar will be the approach that has been adopted to this phrase in those other contexts.

65. Thus, in **O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School** [1997] ICR 33 EAT (Mummery P (as he then was) presiding), it was made clear that the question of causation "*on the ground of [the claimant's] sex*" was to be answered according to what were said to be "*well established and uncontroversial legal principles*", as follows (citing guidance provided by the Court of Appeal in **Banque Bruxelles Lambert S.A. v Eagle Star Insurance Co Ltd** [1995] QB 375, at p 406):

> "(i) The tribunal's approach to the question of causation should be "simple, pragmatic and commensensical."
> (ii) The question of causation has to be answered in the context of a decision to attribute liability for the acts complained of. It is not simply a matter of a factual, scientific or historical explanation of a sequence of events, let alone a matter for philosophical speculation. The basic question is: what, out of the whole complex of facts before the tribunal, is the "effective and predominant cause" or the "real or efficient cause" of the act complained of? As a matter of common sense not all the factors present in a situation are equally entitled to be treated as a cause of the crucial event for the purpose of attributing legal liability for consequences.
> (iii) The approach to causation is further qualified by the principle that the event or factor alleged to be causative of the matter complained of need not be the only or even the main cause of the result complained of, though it must provide more than just the occasion for the result complained of. "It is enough if it is *an* effective cause ..."

66. Similarly, in **Fecitt and ors v NHS Manchester** [2011] EWCA Civ 1190, [2012] ICR 372, considering the requirement that, for the purposes of section 47B **Employment Rights Act 1996**, the detriment must be "*on the ground that*" the worker had made a protected disclosure, it was held that:

> "43. ... liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act."

In explaining his reasoning in **Fecitt**, Elias LJ (with whom Davis and Mummery LJJ agreed), acknowledged that the whistleblowing protection under section 47B was not derived from EU law, but nevertheless continued:

> "43. ... However the reasoning which has informed the EU analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing."

67. If we were approaching regulation 5 **PTWR** absent any prior judicial consideration, we would not hesitate to adopt the same approach. To require that the complainant's status as a part-time worker be an effective cause of the less favourable treatment, even if not the sole cause of that treatment, seems to us to be

entirely consistent both with the language of regulation 5(2) and with the protective purpose of the legislation. To hold otherwise would seem to us to be inconsistent with the approach standardly taken to questions of causation (see per Mummery P in **O'Neill**), and to risk the obviously perverse outcomes hypothesised by Elias P at paragraph 49 of **Sharma**.

68. In setting out our view in this regard, we recognise that the **PTWR** were intended to ensure the UK's compliance with the **PTWD**, and that we should therefore approach questions of construction, as far as possible:

> "26. ... in the light of the wording and the purpose of the Directive so as to achieve the result it has in view ..." (**Paola Faccini Dori v Recreb Srl** Case C-91/92 [1995] All ER (EC) 1; cited at paragraph 5 **McMenemy**)

That, however, would not lead us to alter our approach.

69. First, because we note that the **Framework Agreement** is expressly stated to set out "*minimum requirements*". As such, we are clear that it sets a floor, not a ceiling, for the protections to be afforded to part-time workers, and allows that a member state might provide for a more favourable protection than under the **PTWD**. Thus, if the **PTWR**, introduced pursuant to the broad enabling power conferred by section 19 **Employment Relations Act 1999** (which made no reference to the **PTWD**), provides for a wider approach to the question of causation than that specified under clause 4.1 of the **Framework Agreement**, we do not consider there is any requirement to reduce that protection (and see **Sharma** at paragraph 53).

70. Second, and in any event, we consider our construction of regulation 5(2) **PTWR** to be entirely consistent with the purpose of the **Framework Agreement**, in particular:

> "to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;"

As for the language used at clause 4.1 of the **Framework Agreement** - "*solely because*" - we do not consider that is to be read as meaning that, in circumstances where the fact of the complainant's part-time status amounts to an *effective cause* of the less favourable treatment, protection is nevertheless lost if there is also some other factor that can be seen as part of the cause of the less favourable treatment in issue. As the EAT observed in **Sharma** (see paragraphs 48-49), that would be inconsistent with the purpose of the **PTWD** and the **Framework Agreement**. And, for completeness, we do not consider the judgment of the ECJ in **Wippel v Peek & Cloppenburg GmbH & Co KG** Case C-313/02 [2004] ECR I-9483 (cited by the Court of Session (Inner House) in **McMenemy**) suggests otherwise. Having set out the language of clause 4.1 of the

Framework Agreement, the ECJ went on to make clear that:

> "56. The prohibition on discrimination enunciated in the abovementioned provisions is merely a particular expression of a fundamental principle of Community law, namely the principle of equality under which comparable situations may not be treated differently unless the difference is objectively justified. ..."

71. On our analysis, therefore, the correct approach to the phrase "*on the ground that*" under regulation 5(2)(a) **PTWR** is as identified in **Sharma** and **Carl**: part-time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause.

72. In reaching this view, we recognise that we would be departing from earlier EAT decisions in **Gibson**, **Engel**, and **Forth Valley**, and our approach would run counter to that of the Court of Session (Inner House) in **McMenemy**. At this stage, however, we are explaining our view on the assumption that those decisions are not binding upon us; as such, we are unable to see any basis for inserting the word "*solely*" (per **Gibson**, **McMenemy** and **Forth Valley**) or the phrase "*if and only if*" (*per* **Engel**) into regulation 5(2)(a) **PTWR**. Equally, acknowledging that clause 4.1 of the **Framework Agreement** includes the word "*solely*", for the reasons provided in **Sharma** (and as we have explained above), we do not consider this gives rise to an obligation to construe domestic legislation as requiring that the protection afforded to part-time workers be limited to cases where the less favourable treatment is *solely* due to their status as such. Indeed, having regard to our collective practical experience of issues relating to part-time work, we are mindful that discrimination against part-timers will often take place because of factors associated with their part-time status; limiting the protection to less favourable treatment *solely* on the ground of part-time work risks excluding such cases, where the part-time nature of the work might be the effective, but not the sole, reason for that treatment. As that would seem counter to the purpose of the **Framework Agreement**, we share the view expressed at paragraph 49 of **Sharma** that it seems unlikely that this is how clause 4.1 ought to be construed. Even if we are wrong about that, however, we cannot see why that minimum requirement should limit a wider protection allowed under domestic law; in this regard, we consider that the concession recorded at paragraph 6 **McMenemy** was wrongly made. As for the additional reasons given for the **McMenemy** construction (cited at the end of paragraph 6 in that case), we are unable to see why any lack of reference to indirect discrimination in the **PTWD**, still less the inclusion of a justification defence, should be seen as supporting a narrow approach.

73. For completeness, to the extent that the ET considered the respondent's intention to be a relevant consideration when determining causation (see, e.g., the ET at paragraph 60), we would also consider this to

demonstrate an error in its approach. As has been made clear in the case-law, when determining the reason why the treatment in question occurred, the motive or intention of the relevant actor or decision-taker is not relevant (**Amnesty International**; **JFS**). Insofar as the reasoning of the EAT in **Gibson** ("*it is necessary to look at the intention behind the decision* ..."), or that of the Inner House in **McMenemy** ("*This necessitates inquiry into the employer's intention* ..."), suggests that the employer's intention or motive is a relevant factor, we would find that hard to reconcile with the approach that has been laid down in later cases.

The question of precedent

74. Having explained our view as to the correct approach to regulation 5(2)(a) **PTWR** as if we were approaching our task without being bound by any prior judicial consideration, we now turn to consider the question of precedent.

75. We start by considering the position in relation to the decisions reached by other, earlier, compositions of the EAT. In this regard, we do not distinguish between the EAT sitting in London and the EAT sitting in Edinburgh; although the latter is sometimes mistakenly referred to as "*the Scottish EAT*", the EAT is a single appellate court, with a jurisdiction that covers the entirety of Great Britain. Thus, as section 20(2) **Employment Tribunals Act 1996** makes clear, although required to have a central office in London, the EAT:

> "may sit at any time and in any place in Central London."

76. Although a superior court of record (section 20(3) **Employment Tribunals Act 1996**), strictly speaking, the EAT is not bound by its own decisions. That said, the EAT will normally follow previous decisions made in this jurisdiction, even where the later division has doubts about the earlier ruling; as HHJ Peter Clark observed, in **Duncombe and ors v Department for Education and Skills** UKEAT/0433/07:

> "26. ... where a later division has reservations about an earlier EAT decision, it is permissible, in the interests of comity, to follow the earlier decision, leaving the Court of Appeal to correct any error in approach."

77. In **British Gas Trading Ltd v Lock and anor** [2016] ICR 503, the EAT (Singh J (as he then was) sitting alone) helpfully summarised the principles that will guide the EAT when invited to depart from an earlier decision in this jurisdiction:

> "75. ... Although this Appeal Tribunal is not bound by its own previous decisions, they are of persuasive authority. It will accord them respect and will generally follow them. The established exceptions to this are as follows:

> (1) where the earlier decision was *per incuriam*, in other words where a relevant legislative provision or binding decision of the courts was not considered;
> (2) where there are two or more inconsistent decisions of this Appeal Tribunal;
> (3) where there are inconsistent decisions of this Appeal Tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;
> (4) where the earlier decision is manifestly wrong;
> (5) where there are other exceptional circumstances."

78. Referring back to the earlier EAT decisions that have engaged with the question of causation under regulation 5 **PTWR**, we observe that it seems that the appeals in **Forth Valley**, **Engel**, and **Sharma** were all determined without consideration of prior relevant decisions (the EAT in **Forth Valley** considered **McMenemy** and **Gibson**, but not **Engel**, **Carl** or **Sharma**; it appears that none of these authorities were cited to the EAT in **Engel**; in **Sharma**, reference was made to **Gibson** but not to **McMenemy**). Although all prior relevant decisions were considered by the EAT in **Carl**, the observations made on the issue of causation were strictly *obiter*: the EAT went on to dismiss the appeal on the basis that there was no valid comparator. As for **Gibson**, the majority decision in that case was reached without being fully addressed on the issue with which we are most concerned (the submissions for Mr Gibson did not address the "*solely on the ground that*" point), and the reasoning provided cannot be said to amount to a "*ringing endorsement*" of the respondent's argument on construction (see *per* Elias P, paragraph 47 **Sharma**). In these circumstances, and given that there are clearly two or more inconsistent decisions of the EAT (**Lock**, paragraph 75(2)), if we were only considering the jurisprudence of the EAT, we would see this as a case that clearly falls within the established exceptions identified in **Lock**.

79. A more difficult question arises, however, in relation to the decision in **McMenemy**. When (as here) we are considering an appeal from a decision of an ET in England, under the doctrine of precedent, decisions of higher courts in England and Wales will be binding upon us. As Mr Jones has observed, however, that is not true of decisions of higher level courts in other jurisdictions; as such, we are not strictly bound to follow the decision of the Court of Session (Inner House) in **McMenemy**. Not to follow a decision of the Inner House on a point relating to an employment law provision that applies throughout Great Britain can, however, give rise to unhelpful inconsistencies. Thus, in **Marshalls Clay Products Ltd v Caulfield and ors** [2004] ICR 436, the EAT sitting in London (Burton P presiding) declined to follow the decision of the Court of Session (Inner House) in **MBS Structures Ltd v Munro** [2004] ICR 430 on a point of construction relating to the **Working Time Regulations 1998**, causing some uncertainty as to whether an employer's payment of "*rolled*

up" holiday pay could be lawful. On the subsequent appeal to the Court of Appeal ([2004] EWCA Civ 422, [2004] ICR 1502), it was argued that the EAT had thereby erred as a matter of law; rejecting that submission, Laws LJ observed as follows:

> "31. ... I acknowledge these following propositions ... (1) The ET, EAT, and the Court of Session on appeal from the EAT administer in Scotland (with some esoteric qualifications not relevant for present purposes) the same statutory regimes as do the ET, EAT, and the Court of Appeal on appeal from the EAT in England. (2) Indeed the EAT spans the jurisdictions of England Wales and Scotland as a single jurisdiction: s.20 of the Employment Rights Act 1996 provides that it is to be a superior court of record and is to have a central office in London, but may sit in any place in Great Britain. (3) As a matter of pragmatic good sense the ET and the EAT in either jurisdiction will ordinarily expect to follow decisions of the higher appeal court in the other jurisdiction (whether the Court of Session or the Court of Appeal) where the point confronting them is indistinguishable from what was there decided.
> 32. In my judgment, however, none of this brings [counsel's] argument home. The rules of precedent or *stare decisis* cognisable here are given by the common law. Part of their substance, though not its whole, is that decisions of the Court of Appeal bind the Court of Appeal itself and all lower courts. They include refinements which teach where the edge of precedent is to be found, so that often the earlier decision can be distinguished. I need not go into those. The essence is that precedent confines the very power of the courts subject to it. It is not a rule of discretion or comity or anything of the kind. It is therefore of necessity a doctrine whose reach is limited to the jurisdiction in which the courts in question operate. ... Now, statutory provisions which give dominion to courts in one jurisdiction (international or otherwise) over courts in another are apt, here at least, to father constitutional tensions. But it is at least clear, and here is the point on this part of the case, that it would be a constitutional solecism of some magnitude to suggest that by force of the common law of precedent any court of England and Wales is in the strict sense bound by decisions of any court whose jurisdiction runs in Scotland only or – most assuredly – *vice versa*. Comity and practicality are another thing altogether. They exert a wholly legitimate pressure."

80. Subsequently, in **Airbus UK Ltd v Webb** [2007] ICR 956 the EAT sitting in London (Elias P presiding) referred back to the observations of Law LJ in **Marshall's Clay**, noting that:

> "57. This Tribunal is not bound by the decisions of the Inner House, but as Laws LJ observed in **Marshall's Clay Products Ltd v Caulfield** ... "pragmatic good sense" would suggest that we should ordinarily follow it, and I consider that to be so even where there may be narrow grounds for distinguishing the Scottish case."

81. Returning then to the decision in **McMenemy**, notwithstanding the view we have ourselves formed as to the approach we should adopt to the construction of regulation 5(2)(a) **PTWR**, we recognise the pragmatic good sense in following the decision of the Inner House in that case. The point can be made good by considering the position had this case come before us, sitting in Edinburgh, on appeal from a decision of an ET in Scotland. In such circumstances, no question would have arisen: we would have been bound to follow the decision of the Inner House in **McMenemy**.

82. Although the decision in **McMenemy** does not bind us as a matter of law, we consider there is a

compelling case for not departing from what has been acknowledged to be good practice, whereby the EAT - which has a Britain-wide jurisdiction - should ordinarily follow relevant decisions of higher Courts within Great Britain, notwithstanding that the doctrine of precedent would not normally apply. Where, as here, the decision in question relates to a legislative protection that extends throughout Great Britain, and where there is no separate question as to the application of Scottish law, or the law of England and Wales, there is a legitimate public interest in consistency of approach. The fact that the issue raised by the present appeal has come before us by way of an appeal from an English ET is a matter of chance; as the case-law makes clear, this is an issue that has arisen (not infrequently) in cases both north and south of the England/Scotland border. In these circumstances, we consider that the appropriate course is to approach this appeal on the basis that the decision in **McMenemy** is binding upon us.

83. For completeness, we should make clear that we thus consider we are required to read regulation 5(2)(a) of the **PTWR** as providing that the less favourable treatment must be :

> "on the sole ground that he is a part-time worker." (**McMenemy**, paragraph 6)

84. That, as we see it, is the ratio of the judgment of the Inner House, notwithstanding that, on the facts of the case, it might have been thought that the addition of the word "*solely*" was unnecessary: the reason for the less favourable treatment was unrelated to the fact that Mr McMenemy worked part-time, it purely arose from the fact that he did not work on Mondays.

Our conclusions on ground 2

85. We now return to the decision in the present case, and the ET's alternative reasoning, postulated on the basis that the claimant had established that he had been treated less favourably than his full-time comparator by the imposition of a flat rate circuit fee of £148 per week.

86. To the extent that the ET's decision was based upon what it found to be the respondent's intention - or, more accurately, lack of intention ("'*... did they intend to treat him less favourably for the sole reason that he was a part-time worker?' Based upon the evidence presented I find that this claim is not made out. …*") - we consider that gave rise to an error of law. Acknowledging that this might seem to be the approach laid down by the Inner House in **McMenemy**, we consider that the later case-law, which includes decisions of the Supreme Court, such as that in **JFS**, makes clear that this would be wrong: the relevant question for the ET

was to ask what was the respondent's reason for imposing a flat rate circuit fee, not whether it was intended to thereby treat part-time workers less favourably.

87. On that basis, we would, *in part*, uphold the claimant's second ground of appeal: the ET erred in law because its decision on the question of causation was informed by what it found to be the respondent's intention.

88. We cannot, however, agree that the claimant's appeal (and his claim under regulation 5 **PTWR**) must therefore be upheld. Asking whether the charging of the flat rate circuit fee was on the *sole* ground that the claimant was a part-time worker, we are unable to say that the ET would have been bound to find that was the case (and we note that Mr Jones did not seek to put his case that high). As the ET found (and as Mr Chapman emphasised in his submissions to us), the respondent's drivers (whether part-time or full-time) worked a wide range of hours. The less favourable treatment identified by the claimant arose from the failure to apply a fee that took into account hours worked. As such, it might be said that, at least in part, the claimant was treated less favourably because he worked part-time; but the same would also be true of many of the drivers who would be characterised as working full-time. Indeed, even if the claimant had not been part-time, but had worked above the average of 43.17 hours per week (which we understand to have been treated by the ET as the number of hours below which a driver would be treated as working part-time), when compared to his comparator (working an average of over 90 hours per week), the imposition of the flat rate circuit fee would still have meant that he was being treated less favourably.

Disposal

89. For the reasons provided, we therefore uphold the claimant's appeal on ground 1 and, in part, on ground 2 (to the extent that the ET's decision took into account the respondent's intention).

90. On the question of disposal, we have considered whether the issue of causation must now be remitted to the ET for re-hearing. On the ET's findings in this case, however, if it is correct that the relevant test would require the less favourable treatment to have been on the sole ground that the claimant was a part-time worker, our preliminary view is that the only possible outcome would be that the claim under regulation 5 **PTWR** must fail. In such circumstances, we consider that it would be unnecessary to remit this matter for further consideration by the ET (see **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] ICR 920). We are,

however, mindful that the parties have not had the opportunity to address us on the question of disposal in the light of our judgment. In these circumstances, we consider the appropriate course is to permit the parties to make any representations on the question of disposal, in writing (sent to the EAT and copied to the other party), within seven days of the handing down of this judgment. We also direct that any other consequential applications or representations relating to our final order determining this appeal should similarly be filed and served within the same period.