Neutral Citation Number: [2025] EAT 67

Case No: EA-2022-001276-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 May 2025

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

MS F DJALO

Appellant

- and –

SECRETARY OF STATE FOR JUSTICE

Respondent

- -
- -

Jeremy Lewis KC, Christopher Milsom, Richard O'Keeffe (instructed by United Voices of the World) for the **Appellant**
Tom Kirk (instructed by Government Legal Department) for the **Respondent**

Hearing dates: 18 and 19 February 2025

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JUDGMENT

SUMMARY

Race discrimination

The claimant appealed against the Employment Tribunal's ("ET") decision to strike out the claim. She is employed by OCS Limited ("OCS"), a private company that provides facilities management services to the Ministry of Justice ("MOJ"), pursuant to an agreement with the respondent ("the FM Contract"). The claimant has worked as a cleaner at the MOJ's Petty France site since 2009. She does not have a contractual relationship with the respondent. She alleged that the respondent indirectly discriminated against her by denying her a level of pay accorded to the respondent's comparable directly employed staff and that workers in her position were disproportionately black or other minority ethnicity ("BME"). She contended that the respondent had a contractual power to require OCS, her employer, to uplift her pay to the London Living Wage ("LLW"), by virtue of clause 60.1(17) in the FM Contract. She argued that the respondent had applied a provision, criterion or practice ("PCP") of according different levels of pay to direct employees and to contract workers under the FM Contract and/or had required workers to be directly employed in order to be remunerated in accordance with the respondent's pay scale and that this had caused group disadvantage for BME workers in the claimant's position.

The ET struck out the claim on the basis that sections 19 and 41 of the **Equality Act 2010** ("**EqA**") do not protect the claimant contract worker against differences between her level of pay and that paid by the principal to its own employees.

After the appeal was permitted to proceed to a full hearing, the Court of Appeal ("CA") handed down judgment in **The Royal Parks Ltd v Boohene and others** [2024] EWCA Civ 583, [2024] IRLR 668 ("**Royal Parks**"), determining that section 41 **EqA** does not permit a discrimination claim to be brought by a contract worker against a principal which relates to the remuneration payable under the worker's contract with their employer, the supplier. The claimant argued that **Royal Parks** was distinguishable as the respondent's contractual power to uplift the contract workers pay enabled her to rely via the **EU Race Equality Directive** (No. 2000/43) on a comparison with employees of the respondent who did receive the LLW, as in these circumstances the criteria were met for the application of the equal pay single source principle identified in **Lawrence v Regent Office Care Ltd and others** (Case C-320/00) [2003] ICR 1092. As the claim was presented on 29 December 2020, it was agreed that sections 19 and 41 **EqA** must be interpreted in light of the **EU Race Directive**.

However, the EAT decides that the ET was correct to conclude that the claim could not come within section 41 **EqA**. Even if clause 60.1(17) conferred the alleged contractual power on the respondent, Underhill LJ's reasoning in **Royal Parks** indicates that this does not afford a material point of distinction. Additionally, there is no realistic prospect of the claimant establishing that clause 60.1(17) confers the alleged contractual power on the respondent or of a different conclusion on this being reached if the claim was permitted to proceed to a full hearing. In the circumstances, the claimant's reliance upon the single source principle did not avail her and it was unnecessary to decide whether this principle can be relied upon beyond the equal pay context.

Furthermore, the claimant has no realistic prospect of meeting the section 19 **EqA** requirements for a claim of indirect discrimination. The claimant's first formulation was incapable of amounting to a proper PCP and, as in **Royal Parks**, the second formulation did not enable her to show that the PCP was applied to her by the respondent. Accordingly, although there were some errors in the reasoning below, these were immaterial as the ET was correct in also concluding that the claim could not come within section 19. As the claim was in any event bound to fail the ET was not required to give the claimant a further opportunity to amend the claim.

The EAT also rejects the claimant's argument that the **Royal Parks** construction of section 41 **EqA** renders the United Kingdom's system of protection against race discrimination as regards the pay of contract workers non-compliant with article 14 of the **European Convention on Human Rights** on the basis that in instances of sex discrimination, the contract worker would be able to compare their pay with the principal's own employees via an equal pay claim and the application of the single source principle. The CA in **Royal Parks** proceeded on the basis that the court's construction of section 41 was consistent with the single source principle. In any event, the claimed article 14 discrimination was not "within the ambit" of article 8 or article 1 of Protocol 1; and the **Steer v Stormsure Ltd** [2021] EWCA Civ 887, [2021] ICR 1671 "package principle" applied.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. I will refer to the parties as they were known below.

2. The claimant appeals from the decision of Employment Judge Norris ("the EJ") sitting at the Central London Employment Tribunal ("the ET"), sent to the parties on 26 October 2022, striking out her claim for indirect race discrimination on the ground that it had no reasonable prospects of success.

3. The claimant is employed by OCS Limited ("OCS"), a private company that provides facilities management ("FM") services to sites in the United Kingdom and internationally. One of these sites is the Ministry of Justice ("MOJ") premises at 102 Petty France, London, pursuant to an agreement with the respondent dated 20 November 2017 ("the FM Contract"). The claimant has worked as a cleaner at the Petty France site since 2009. She does not have a contractual relationship with the respondent. She alleged that the respondent had indirectly discriminated against her by denying her a level of pay accorded to the respondent's comparable directly employed staff and that workers in her position were disproportionately black or other minority ethnicity ("BME"). She contended that the respondent had a contractual power to require OCS, her employer, to uplift her pay to the London Living Wage ("LLW"). It was said that the respondent had applied a provision, criterion or practice ("PCP") of according different levels of pay to direct employees and to contract workers under the FM Contract and/or had required workers to be directly employed in order to be remunerated in accordance with the respondent's pay scale and that this had caused group disadvantage for BME workers in the claimant's position.

4. The ET struck out the claim on the basis that sections 19 and 41 of the **Equality Act 2010** ("**EqA**") do not protect the claimant contract worker against differences between her level of pay and that paid by the principal to its own employees.

5. There are ten grounds of appeal.

6. By an order sealed on 7 March 2024, HHJ Auerbach permitted what are now Grounds 1 – 9 of the grounds of appeal to proceed to a full hearing. He also gave the claimant permission to adduce two documents that were not before the ET.

7. On 24 May 2024, the Court of Appeal ("CA") handed down judgment in **The Royal Parks Ltd v Boohene and others** [2024] EWCA Civ 583, [2024] IRLR 668 ("**Royal Parks**"). The Respondent's position

is that **Royal Parks** is fatal to the appeal, in that the CA decided that section 41 **EqA** does not permit a discrimination claim to be brought by a contract worker against a principal which relates to remuneration payable under the worker's contract of employment with the supplier (here, OCS). The claimant initially took a similar view. On 6 September 2024, an application was made to the Employment Appeal Tribunal ("EAT") for permission to amend the grounds of appeal to add a Ground 10, alleging that the effect of the construction of section 41 **EqA** adopted by the CA in **Royal Parks** is that the United Kingdom's system of protection against race discrimination as regards to the pay of contract workers is non-compliant with article 14 of the **European Convention on Human Rights** ("**ECHR**"), read together with article 8 and/or article 1 of Protocol 1 ("A1P1"). This application also sought a "leapfrog certificate" under section 37ZA of the **Employment Tribunals Act 1996** ("**ETA**"), permitting the claimant to apply directly to the Supreme Court for permission to appeal; or, in the alternative, an order that Grounds 1 – 9 be stayed pending the Supreme Court's decision on the application for permission to appeal in **Royal Parks**. The application was made on the basis that, as matters stood, Grounds 1 – 9 were "bound to fail" and were "presently unsustainable" in light of **Royal Parks**.

8. By an order sealed on 8 October 2024, John Bowers KC, sitting as a Deputy Judge of the High Court, granted the claimant's application to amend the grounds of appeal to add Ground 10, but refused the applications for a "leapfrog certificate" or a stay. The Judge made clear that it remained open to the respondent at the substantive appeal hearing to object to the article 14 contention on the basis that it was a new point that had not been raised below.

9. Thereafter the claimant's legal team decided, upon further reflection, that all ten grounds of appeal were still arguable. I set out the grounds of appeal and supporting submissions in much more detail below, but, in headline form, Mr Lewis KC contends that **Royal Parks** is distinguishable from the present case because of the Respondent's (at least) arguable contractual power to uplift the claimant's pay to the LLW level; as in these circumstances the **EU Race Equality Directive** (No. 2000/43) (the "**Race Directive**") permits the claim to be advanced on the basis of a comparison with the respondent's Band F employees, as the conditions for the application of the single source principle are met. The single source principle was identified by the European Court of Justice ("ECJ") in respect of article 141(1) of the **EC Treaty** (now article 157 of the **Treaty on the Functioning of the European Union** ("**TFEU**")) in **Lawrence v Regent Office Care Ltd and others** (Case C-320/00) [2003] ICR 1092 ("**Lawrence**"). Mr Lewis submits that it also applies to claims under the

Race Directive. He accepts that to succeed on the appeal he also needs to overturn the ET's findings in relation to the alleged PCPs, the absence of disadvantage and the inappropriateness of the alleged comparators. He submits that pursuant to the **Race Directive**, it is unnecessary for him to show that the PCP was "applied" to the claimant by the respondent. If the EAT is not with him on these arguments, Mr Lewis relies upon the Ground 10 article 14 contention.

10. It is common ground that as the claim was presented on 29 December 2020 (prior to implementation on 31 December 2020), the pre-Brexit position applies and, as the claim is against an emanation of the State, the **Race Directive** has direct effect and sections 19 and 41 of the EqA must be interpreted in light of this Directive.

11. Mr Kirk submits that the claimant's earlier assessment was correct and that the appeal is indeed bound to fail. He contends that the circumstances of this case are not materially distinguishable from **Royal Parks**, which is binding on the EAT; that the single source principle does not apply outside of equal pay claims, but that even if it does, the criteria are not satisfied where, as here, a contract worker seeks to compare their terms relating to pay with those of the principal's own employees; that the article 14 argument is premised on there being a mis-match between a contract worker's complaint of race discrimination in pay advanced under section 41 **EqA** and an equal pay claimant relying on the single source principle, when in fact no such mis-match exists; and, in any event, the claim was also rightly struck out because the requirements of section 19 **EqA** were not arguably met and these cannot be side-stepped by relying upon the **Race Directive**.

12. I indicated at the outset of the hearing that I would hear the substantive article 14 arguments *de bene esse*, along with the other grounds of appeal, and determine whether the claimant should be permitted to rely on Ground 10 as part of my reserved judgment.

13. The arguments deployed before me were extensive. The skeleton arguments were, respectively, 43 pages and 39 pages long and over 70 cases were included in the bundles of authorities. In addition to the core documentation, there was a supplementary bundle of materials comprising 160 pages. It is not feasible to refer to every point that the parties relied upon in this (inevitably lengthy) judgment. I have taken them all into account.

14. The structure of this judgment is as follows:

The material circumstances and the ET's decision:
The parties: paras 15 – 17;

Overall conclusion and outcome: paras 263 – 267

The material circumstances and the ET's decision

The parties

15. The claimant began work as a cleaner with Lancaster Office Cleaning Company Limited in 2009. She transferred under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("**TUPE**"), firstly to Amey and then, on 22 January 2018, to OCS. From 2009 onwards she worked at the 102 Petty France site. The identity of the respondent has changed more than once during the events that I am concerned with; to avoid confusion, I will refer to the respondent as female, reflecting the current Secretary of State.

16. OCS is a private company and one of a number of FM providers which have contracts with the respondent to provide FM services at MOJ premises. OCS entered into the FM Contract with the respondent on 20 November 2017 for the provision of soft facilities management services. Part of the parties' agreement was known as "Work Package D – South and Home Office South" and under this agreement OCS provided cleaning staff for 102 Petty France, amongst other premises. The contract refers to the respondent as the "Employer" and OCS as the "Contractor".

17. It is common ground that the Respondent does not directly employ the cleaners at 102 Petty France, who are the employees of OCS. It is also common ground that the respondent is a "principal" within the meaning of section 41 of the **EqA** and that the claimant is a "contract worker" in relation to the respondent.

The Amended Particulars of Claim

18. By the time of the strike out hearing before the ET, the claimant's case was set out in the Further Amended Particulars of Claim ("APC"). The pleading states that the claimant is Black African and therefore within the ethnicity category of BME and is also a foreign national, in that she is a national of Guinea-Bissau (although the arguments both before me and below were focused on her BME status).

19. The APC advanced the pay discrimination claim by reference to section 41(1)(a), 41(1)(c) and 41(d) of the **EqA** (para 101 below). By the time of the hearing below, section 41(1)(c) was no longer relied upon. The claimant relies upon two PCPs, described as follows at para 6 of the APC:

> "6.1 A practice or policy as to pay (salary or hourly rate) conferred on the Respondent's directly employed staff under their terms and conditions of employment, and as to those conferred on contract workers employed in the performance of the Contract, and the disparity

> between the two sets of terms.
>
> 6.2 A requirement that for a worker to have or to access the contractual benefits described at paragraph 6.1 above, that worker must be directly employed by the Respondent."

20. As set out at para 17 of the ET's Reasons, the wording of the second of these alleged PCPs was slightly revised during the course of the hearing before the ET to read:

> "A requirement that for a worker to access the level of pay conferred on the Respondent's directly employed staff, that they must be directly employed by the Respondent."

21. The parties referred to the first of these PCPs as the "Disparity PCP" and the second PCP as the "Access PCP". I will adopt that terminology.

22. Para 7 of the APC refers to the respondent's pay scale with its own employees, noting that in 2019/2020 those employees in Inner London were paid at least £22,677 (Band E) and £19,058 (Band F), producing hourly rates of, respectively, £11.79 and £9.91, both of which were well in excess of the claimant's prevailing hourly rate. The same paragraph also refers to Schedule E of the FM Contract (the "Price List") stipulating that when the contract commenced, workers in the claimant's position, namely Cleaning Operatives, were paid £15,728.25, equating to an hourly rate approximately equivalent to the National Minimum Wage ("NMW") – now called the National Living Wage ("NLW") for those aged 21 and over. Para 7 contends that, accordingly, the contract workers' terms and conditions were "determined or significantly influenced" by a term of the FM Contract; and that in addition "the Respondent reserved a right under the contract to increase the pay of workers servicing the contract to the level of the London Living Wage". It is the second of these two features (founded on clause 60.1(17) of the FM Contract) that is relied upon by Mr Lewis as distinguishing the present case from **Royal Parks**. The Price List was not relied upon as a point of distinction before me. Para 7 states it is clear that the para 60.1 right prevailed as there were "London Living Wage designated sites" under the FM Contract; and in the circumstances the respondent was "a body which is responsible for the inequality and could restore equal treatment", so that the single source criteria identified in **Lawrence** are satisfied.

23. The APC alleges at para 9 that the PCPs are indirectly discriminatory in connection with race, in that they place Black African, BME and/or foreign national workers at a particular disadvantage, as:

> "…groups with those protected characteristics are less likely to enjoy the contractual benefits which the Respondent's directly employed staff enjoy, by virtue of their tendency to occupy positions as contract workers rather than directly employed staff. In particular, the Claimant contends that she suffers a disadvantage in that she has enjoyed inferior terms in respect of salary

> or hourly rate."

24. The pool for comparison is identified as follows at para 10 APC:

> "…all Administrative Officer / Administrative Assistant grade staff (or alternatively Band E and/or Band F staff), and all contract workers deployed to service the Contract. All of those staff would be in materially the same circumstances, in that the Respondent is responsible for their pay and could establish equal treatment across the pool, as described at paragraph 7 above."

25. The claimant now confines the comparison to Band F (rather than Band E) direct employees. The pleading goes on to address the ethnic composition of the comparator groups. In summary, the APC pleads that in comparison with the directly employed staff, BME workers "are very much more likely to occupy contract worker roles, and be excluded from the benefits identified".

26. As to the application of the PCPs to the claimant, para 16 APC says:

> "The Claimant has been put at the relevant disadvantage in that she has been employed on statutory minimum (or close to statutory minimum in relation to hourly rate of pay) and excluded from the contractual benefits as to salary or hourly rate of pay enjoyed by the Respondent's direct employees."

27. The pleading also raised an alternative argument based on "*Enderby* discrimination", which has not been pursued.

The Grounds of Resistance

28. The respondent's Grounds of Resistance ("GOR") emphasises that OCS was responsible for the terms and conditions of its directly employed staff and that it is a separate and independent business and legal entity from the respondent. The grounds aver that the difference in their employers was a "material difference" within the meaning of section 23(1) of the **EqA**, rendering the comparison made by the claimant inappropriate. As regards the alleged PCPs, the pleading says at para 16:

> "…The Respondent denies applying any such PCP. The Respondent does not confer *any* contractual benefits on contract workers providing services under the Contract because the Respondent is not the employer of such workers nor is the Respondent privy to any contract with such workers. The Respondent's failure to confer such contractual benefits on such contract workers is not a policy or practice applied to them by the Respondent but a practical reality of the fact that responsibility for conferring such contractual benefits lies with their employer, OCS.
>
> …It is correct that the Respondent only confers such benefits on its own employees, just as OCS would only confer such benefits on its own employees including the Claimant. However, that practice does not restrict contract workers accessing such benefits (their own employer's equivalent) through their own employer, OCS." (Emphasis in original.)

29. The GOR also disputes that the alleged PCPs were "applied" to the claimant by the respondent; if they were applied at all, it was by her employer, OCS.

30. As regards the contractual position between the respondent and OCS, the pleading states (at paras 18d and 19):

> "It is denied that the Respondent has a policy, or term in the Contract, which determined or significantly influenced the contractual benefits enjoyed by the employees of the FM service providers. It is averred that the Contract did no more than refer to the base standard of terms and conditions which would otherwise be required by legislation including the National Minimum Wage Act 1998 and TUPE and required bidders to provide information on employment costs to support ongoing contract change management. Over and above such requirements, the exact contractual terms of any contract worker providing cleaning services at MoJ office buildings is a matter for each FM provider. In the Claimant's case her terms and conditions would have been governed by any contract of employment she had with OCS and may also have been historically affected by any previous TUPE transfer to which she was subject.
>
> Regarding paragraph 7, it is admitted that the overall contract price would have been costed and agreed on the basis of assumptions about terms and conditions that contract workers who had transferred pursuant to TUPE would enjoy. However, it is denied that this amounts to a policy of 'conferring contractual benefits' on the contract workers…Contractual benefits were ultimately governed by any contract of employment the Claimant had with OCS, and/or by any TUPE terms, and were thus conferred by OCS as the employer and not the Respondent."

31. The GOR denies that there is any group disadvantage. Furthermore, it asserts that there are material differences in the roles performed by the claimant and by the alleged comparators (in addition to their having different employers) and that the alleged comparators are civil servants governed by the standards of behaviour set out in the Civil Service Code, which forms part of their terms and conditions of service; that the comparators' roles have been graded pursuant to a job evaluation exercise, developed in conjunction with the Departmental Trade Union Side; and their pay has been set according to where the roles sit within the pay ranges for Band E and Band F employees, as regulated by the respondent's Pay & Allowances Manual.

32. At para 37, the respondent sets out a summary of the justification defence that will be relied upon if there is a need to objectively justify the alleged practices.

Disclosure and the hearing below

33. On 28 February 2022, at a Preliminary Hearing (Case Management), Employment Judge Isaacson listed an Open Preliminary Hearing to determine whether the claim should be struck out on the basis that it had no reasonable prospect of success. She ordered the parties to give disclosure relevant to the preliminary issues, directing that the respondent's disclosure was to include the FM Contract and "any correspondence between the respondent and OCS which demonstrates any influence the respondent had over OCS as to the terms and conditions paid to OCS's contract workers" (para 1.2). An agreed list of issues was attached to the order, which reflected the parties' pleaded cases.

34. In a letter to the ET dated 20 June 2022, the claimant referred to having requested disclosure of: (i) any correspondence between the respondent and OCS that presented the former with costings/proposals for improving or varying the pay of workers servicing the FM Contract, either in the course of the tender process or during the contract; (ii) any Compensation Event Notifications relating to the introduction of the LLW at any of the LLW designated sites during the period of the contract; and (iii) any correspondence between the two (or internally within the respondent or between the respondent and other government departments) concerning any proposal or decision to make any site a LLW designated site, during the period of the FM Contract.

35. On the first day, 8 August 2022, the claimant contended that further documentation was required before the hearing could proceed. The EJ determined that the hearing would remain as listed, but made an order requiring that:

> "If and to the extent the Respondent has designated a site as a London Living Wage (LLW) site, then the Respondent is ordered to disclose any and all associated documentation with that designation."

36. The hearing then adjourned early (with the EJ using the rest of the day as reading time). An email sent by the Government Legal Department in the early hours of 9 August 2022 indicated the respondent understood the order to refer to where she had directed OCS to treat a site as a LLW site or where she had otherwise expressly designated a site as a LLW site, whereas sites designated as LLW sites by virtue of legacy arrangements were not within the scope of the order. The email continued:

> "The Respondent wishes to confirm that it has not directed OCS to treat any site as a LLW site, nor has it designated any site as such. The Respondent wishes to confirm that any of its sites paying LLW does so only because of legacy arrangements."

37. On 9 August 2022, the EJ heard substantive submissions from both parties. There was no witness statement from the claimant, but she relied upon a statement from Mr Petros Elia, the General Secretary of United Voices of the World ("UVW"). The respondent relied upon a statement from Emma Tanner, a Senior Commercial Manager. It was agreed that neither party would cross-examine the other party's witnesses (para 6, ET's Reasons).

38. At the outset of the hearing on 9 August 2022, the respondent indicated that there was nothing further to disclose. However, during the hearing Mr O'Keeffe, representing the claimant, produced an email which he said showed that the respondent had failed to give disclosure as ordered (para 7, ET's Reasons). The document

became known as the Service Management Instruction Email or the "SMI Email" for short.

39. The SMI Email was an internal MOJ email sent on 8 July 2020 headed "Post PC Requirements at OAB". "OAB" is a shorthand for the Old Admiralty Building, one of the MOJ's sites. The sender of the email, an Area Facilities Manager, said he had been asked to raise several SMI's regarding the matters that he then listed. One of these was "Confirmation that site will pay London Living Wage".

40. The EJ observed that it was "unclear whether the email in question…fell within the ambit of the Order; on balance I do not consider it did". She said in light of her conclusions, she did not consider it "relevant or necessary in determining the questions before me" (para 7, ET's Reasons).

The EJ's decision

41. The EJ recorded that Mr O'Keeffe had argued that she should make no findings of fact at this stage of the proceedings. However, she said she proposed to adopt the undisputed evidence. She recognised the hearing was not a mini-trial, indicating she would only make findings that were "strictly necessary to inform my decision in this matter". She said there were no core issues that turned on oral evidence and to the extent there were disputed factual issues, "I have resolved them in the Claimant's favour" (para 21, ET's Reasons).

42. The EJ noted the FM Contract was awarded following a competitive tendering process under the **Public Contracts Regulations 2015** and that it would have been awarded on the basis of OCS submitting the most economically advantageous tender for the work, as the Regulations required. The Regulations set out a number of factors for excluding a bidder, one of the discretionary factors being where the bidder had been in breach of "environmental, social and labour law". As the EJ commented, such violations could include where the bidder had been found to be in breach of the **National Minimum Wage Act 1998**. She explained that the FM Contract was amended and re-stated in March 2018 (para 24, ET's Reasons).

43. The EJ referred to the Price List (para 22 above). She said the document had been heavily redacted, but appeared to show the cost to employ everyone who worked to supply the services in question, including Cleaning Operatives, with the costs shown for the United Kingdom generally and percentage uplifts stipulated for those who worked in Central London (para 25, ET's Reasons).

44. The EJ also referred to the provisions regarding Compensation Events, explaining that this was the mechanism by which OCS was contractually permitted to increase the price it charged the respondent for the

provision of its services (para 27, ET's Reasons). The Compensation Events that can trigger such a price increase are listed in para 60.1 of the FM Contract. In the original version, 14 events were listed. To give a flavour, this includes the following:

> "(3) The *Employer* does not provide the right of access to the Affected Property in accordance with the Accepted Plan.
>
> (4) The *Service Manager* gives an instruction to stop or not to start any work.
>
> (5) The *Employer* or Others do not work in accordance with the Accepted Plan or within the conditions stated in the Service Information.
>
> (6) The *Service Manager* does not reply to a communication from the Contractor within the period required by this contract.
>
> (7) The *Service Manager* changes a decision which he has previously communicated to the Contractor." (Emphasis in original.)

45. The amended re-stated document included three additional Compensation Events. The claimant relies upon the third of these as giving the respondent the power to require payment of the LLW. The new sub-clauses were as follows:

> "(15) Any changes to the minimum hourly rate of pay set by the Government which applies to workers.
>
> (16) Any change to the rate of employer's National Insurance.
>
> (17) Any introduction of a compulsory Living Wage or London Living Wage or any change thereto which applies to workers."

46. The EJ described the effect of these additional Compensation Events as "where there are increases in the labour costs that are outside the contractor's control, OCS is contractually entitled to pass on those additional costs to the client" (para 27, ET's Reasons).

47. The EJ then referred to the form that was to be completed when a Compensation Event occurred. The form required, among other things, that OCS provide a quote and stipulate the sub-clause in paragraph 60.1 of the contract which was relied upon (para 28, ET's Reasons). She noted that there would be a Compensation Event when (amongst other things) there was an increase in employer's National Insurance Contributions or pension auto-enrolment costs, pursuant to legislative changes. A separate form had to be completed for designated LLW sites (para 29, ET's Reasons).

48. The EJ then set out her conclusions regarding the contractual provisions as follows:

> "30. I accept the Respondent's submission that neither the Contract itself nor the "Price List" stipulate the amount that the Claimant is to be paid. The Price List gives the generic (minimum) rate per hour of Cleaning Operatives; it gives the total price that the Respondent has to pay its contractor at the date the Contract is entered, subject to revision if the increases envisaged therein

> come about.
>
> 31. It is a matter for OCS if it wishes to pay those Operatives at a higher rate and thus make less profit from the Contract. The only mandatory requirement from the Respondent is that OCS shall not breach minimum wage legislation nor act in a way that would breach TUPE, i.e. that OCS shall comply with its legal obligations as regards labour law.
>
> 32. I do not accept Mr O'Keeffe's submission as to subclauses (15) and (17)… As I understand it, he contends that they are essentially tautologous unless one reads the words "by the employer" into subclause (17) after "Any introduction", given that in subclause (15) the words "set by the Government" appear. I disagree that that would be a necessary gloss for the subclauses to read something different from each other. For instance, one does not need to read "by the Government" into subclause (16) because it is inevitably the Government that sets the rate of employer's NI contributions. I consider that the same is true of subclause (17). It is always in an employer's discretion whether it pays the (London) Living Wage at present, provided it pays above the NMW. Were the Government to make a (London) Living Wage compulsory, that would be a Compensation Event because OCS would have no option but to implement that rise, and it would be permitted by this clause to pass on the additional cost to the Respondent. The clauses already make sense and are not duplicative of each other without additional wording."

49. Accordingly, the EJ rejected the claimant's argument that subclause 60.1(17) conferred a contractual power on the respondent to increase the pay of workers servicing the FM Contract to the LLW level. As I have foreshadowed, this is one of the central issues in this appeal.

50. Next, the EJ turned to the question of comparators. She noted that the respondent's Band F workers included "Domestics" who worked in Judges' Lodgings. The scope of their tasks was wider than those of OCS's Cleaning Operatives. The pay of the respondent's employees was set by reference to agreements reached via the collective bargaining process, which did not apply to the Cleaning Operatives, who were paid by reference to their own contracts of employment with OCS and by reference to statutory minimum rates and TUPE obligations (para 35, ET's Reasons).

51. The EJ noted that the LLW was paid at some of the sites covered by the FM Contract, such as the OAB, but not at others, including 102 Petty France, continuing at para 36:

> "That is not the same thing as saying that it is the Respondent who has designated sites as LLW sites or not. As I have found above, OCS "inherited" the pay rates from Amey, and they from Lancaster. OCS had no choice about whether to pay LLW rates at those designated sites; TUPE (and not the Respondent) requires it so to do. OCS is not required by TUPE or by the Respondent to pay the LLW at sites which are not designated as such."

52. From para 38 onwards, the EJ set out her conclusions. Firstly, she rejected the alleged PCPs. She said that the Disparity PCP was "two different PCPs" (para 38, ET's Reasons). As regards the Access PCP, she said that it was obvious that to be paid as a directly employed worker, a person had to be directly employed by the entity in question, so that she was "not persuaded that this can amount to a PCP for statutory purposes" (para 39, ET's Reasons). She referred to **NTL Group Ltd v Difolco** [2006] EWCA Civ 1508 ("**Difolco**"), a

disability discrimination case where the claimant had refused to apply for an allegedly suitable alternative role unless the hours were first changed to part-time. She claimed that in failing to change the hours, her employer had breached a duty to make reasonable adjustments. The CA held that until the claimant had applied for the job, no duty to make reasonable adjustments arose; if the mere fact of advertising a full-time job could constitute an "arrangement" for these purposes, then there would be potential discrimination against the whole class of possible disabled applicants for the job. The EJ then said (at para 42):

> "In similar vein in this case, if the fact that only employees who work for the Respondent are entitled to be paid pursuant to its contractual terms can be said to be a PCP, that would potentially discriminate against the whole innominate class of those whose work is carried out on the Respondent's premises via a contractor (or possibly an even wider pool, namely all those in the UK who carry out work as cleaning operatives and who do not work directly for the Respondent). One might also, in that case, ask why the Claimant would have removed from the terms of the PCP other benefits that are paid to the Respondent's directly employed employees such as sick and maternity pay and employer pension contributions. I conclude it is because if the point is thus stretched, its inherent unsuitability as an argument becomes even more apparent."

53. The EJ's comment in this passage about the claimant removing from the PCP other benefits paid to the respondent's directly employed employees, was a reference to one of the amendments made to her claim.

54. The EJ then turned to whether the alleged PCPs had been applied to the claimant by the respondent and whether she had been disadvantaged as a result. She concluded that as the claimant had not applied to work for the respondent, the Access PCP had not put her at a disadvantage. In any event, neither PCP was being applied to the claimant *by the respondent* as she had not imposed any terms as to pay or conditions on the Cleaning Operatives employed by OCS (para 43, ET's Reasons). In this regard, the EJ relied upon **Iteshi v The General Council of the Bar** UKEAT/0161/11/DM ("**Iteshi**"), a case decided under the legacy legislation (para107 below).

55. Accordingly, the EJ concluded at para 45 that:

> "The Respondent needs to know from what point on the pay scale its contractor is starting so that it can assess, when there has been a CE, both whether the claim by that contractor for additional payment is permissible and, if it is, the additional amount to be paid. As Mr Kirk submits however, the employees' wages themselves are the realm of the employer and not the client. The Respondent has no "practice" or "policy" as to the wages paid to OCS's employees."

56. The EJ went on to observe that this was supported by emails from January 2018 between Ms Gwilliam, Head of HR, Facilities Management, Defence and Justice at Amey and Mr Elia of UVW regarding an uplift in salary to align with the LLW and uplifts to sick pay and holiday entitlement to a level enjoyed by the directly

employed staff. Ms Gwillam said that Amey were unable to implement the wage increase without the client's consent and as to sick pay and holidays; "MOJ have outlined that this [is] a decision for the contractor however given the proximity of the transfer, it was felt that it would be more appropriate for OCS to consider this request because they would be the ongoing contractor in this situation" (para 46, ET's Reasons). The EJ saw this as consistent with the position that ultimately it was the contractor, rather than the respondent, who decided what the contract workers were paid; the contractor, whether Amey or OCS, was able to decide to pay its workers more and take less profit from the FM Contract (paras 47 - 49, ET's Reasons).

57. Next, the EJ rejected the submission that the Price List showed the respondent had significant influence over the salary that OCS paid to its employees. The EJ cited **DEFRA v Robertson and others** [2005] ICR 750 ("**Robertson**") and **Lawrence**, including reference to the two-limbed single source test (para 114 below). She noted that the claimant's circumstances did not come within the three categories of single source situations identified by the Advocate General in **Lawrence** (para 115 below) and then continued at para 52:

> "The Respondent here is not involved in negotiating the pay or conditions on which OCS's employees are employed – even those who work on the Respondent's premises, and manifestly not those who work for other clients of OCS - and nor is its approval required for any pay rise which OCS may agree with those employees. If the Crown is not considered a "single source" even for the pay of all civil servants whom it actually employs, it is impossible to see how it could be held responsible for the pay of those whom it does not employ."

58. The EJ said that the claimant was not assisted by **Asda Stores Limited v Brierley** [2019] ICR 1118 CA ("**Asda**"), as the respondent's relationship with OCS was not analogous to that of Asda and its US parent, Wal-Mart Inc. (para 53, ET's Reasons). At para 54 she continued:

> "Instead, it is OCS (by reference to the terms and conditions on which its employees transferred into its employment) which is responsible for any unequal treatment between its employees and those of the Respondent, and OCS that is ultimately for restoring equality if it chose to do so. Otherwise, as Mr Kirk submits, the Respondent would be in the invidious position of having to be responsible for the pay of its contactors' employees, without any right to participate in the negotiations in relation thereto (or alternatively, OCS would have no right to determine the pay of its own employees and would instead be dictated to by each of its hundreds or even thousands of clients as to the terms on which it employed them). The Government has chosen not to implement a London Living Wage. It is not the responsibility of a client to impose such a wage on its contractors; I accept the Respondent's submission that to find otherwise would be to ignore the commercial reality of outsourcing arrangements generally."

59. The EJ noted that there had been occasions when the respondent's personnel had been involved in discussions with the claimant's colleagues / UVW, at least in 2018 when strike action was contemplated. However, this was not surprising as although the industrial action was against OCS, it was the respondent's buildings that were not being cleaned as a result (para 55, ET's Reasons). If OCS had agreed to raise the wages

of the claimant and her colleagues and the respondent did not accept that the increase arose from a Compensation Event, OCS would have had to bear that increase. In this context, it was apparent from the documentation that the respondent "repeatedly considered but refused to 'greenlight' the increase" given the costs ramifications (para 56, ET's Reasons).

60. The EJ accepted that the Domestics could arguably be suitable comparators but rejected the attempted comparison with Administrative Assistants and Administrative Officers, whose work was "obviously materially different" to the claimant and there was no concept of work being "rated as equal" or of "equal value" in a race discrimination pay claim (paras 57 – 59, ET's Reasons).

61. Lastly, the EJ turned to whether the claimant could bring her complaint within section 41 **EqA**, saying at para 60:

> "As to the Claimant's arguments on contract workers under section 41 EqA, these are also unsustainable on closer inspection. The Respondent correctly observes that the Respondent does not discriminate against the Claimant as to the terms on which it "allows" the Claimant to do the work, nor does it afford (or not afford) her access to benefits, facilities or services and nor does it subject her to any other detriment. It imposes no requirement on OCS of the nature suggested by Mr O'Keeffe such as the offering of a bonus only to those who speak (perfect) English. It only requires OCS to do the legal minimum in terms of pay. Even if there is a different racial balance in the workers who work for OCS at LLW designated sites and hence receive the LLW and those who work at 102 Petty France and other NMW only sites (as to which there was no evidence before me), I come back once more to the simple fact that it is not the Respondent but the Claimant's contract with OCS that dictates where the Claimant works or how much she earns."

62. The EJ indicated that she did not regard this as an area of law that was uncertain or developing. She concluded that the claim stood no reasonable prospects of success.

Evidence relied upon by the claimant

63. In light of the grounds of appeal, I will also refer briefly to some aspects of the evidence before the ET that were not referred to expressly in the EJ's reasoning.

64. The witness statement from Mr Elia said there were Whitehall buildings housing other Government Departments covered by the FM Contract, where contract workers received the LLW when deployed to these sites. He gave Eduardo Veintimilla Briceno's case as an example (para 66 below). Mr Elia set out an extract from OCS's August 2018 submission to the Central Arbitration Committee which included the following:

> "3. Petty France is one site amongst 191 sites, which collectively are covered under a commercial contract with the Ministry of Justice…
>
> 4. Petty France is one of 9 head office buildings based in Westminster that employ 362

> total staff. The 9 sites are Whitehall (2xBuildings), QEII, 102 Petty France, Wales Office, Sanctuary Building, Tottenham Court Road, Attorney General Office, Clive House with Admiralty Building joining towards the end of 2018 which will total 10 sites…
>
> 5. The terms and conditions on each site vary as each site was previously managed by a number of outsourced facilities management providers and came under the newly formed Facilities Directorate formed January 2019 therefore OCS honour the terms as protected under TUPE regulations."

65. The witness statement from Ms Tanner said that some Government sites/Departments did pay the LLW, but that this was due to TUPE obligations agreed by a previous provider and was not in the control of the Government Departments.

66. Mr Briceno brought claims against OCS for unauthorised deductions from wages and under section 145A of the **Trade Union and Labour Relations (Consolidation) Act 1992**, on the basis that he had been made an unlawful offer to transfer sites for a higher rate of pay (the LLW level) in order to induce him not to take part in the activities of an independent trade union. The latter claim was upheld by the ET (Case Number: 2207113/20). The details of the case do not matter for present purposes, but the claimant relies upon the judgment as confirming that when Mr Briceno worked as a cleaner at 102 Petty France, he was not paid the LLW but he was offered a transfer to the OAB on the basis that he would be paid the LLW at that site. Mr Lewis says that this shows that LLW was not simply paid where OCS was obliged to pay it to a particular employee as a result of **TUPE** obligations.

67. An August 2018 MOJ internal document headed "Executive Committee" contained a submission prepared by Nick Sammons, Deputy Director – Estates (approved by Cheryl Avery, Commercial Director), in the aftermath of a UVW organised strike by cleaners employed by OCS. One of the strikers' demands was to be paid the LLW. The paper discussed "the principal option" of "mandating the LLW for the cleaners who went on strike", but recommended, given the MOJ's current financial position, that "you hold the department's current position of mandating the statutory pay wages only and leaving all other pay matters to their employers". Mr Lewis attaches significance to the use of the word "mandating". An internal MOJ email chain from earlier in August 2018 relates to Mr Sammons' submission. In an email sent on 10 August 2018, James Rawlings, Commercial Director, HMPPS noted:

> "The contracts that we have in place with OCS (and with all of our providers across the MoJ) do not have a specific requirement to pay the London Living Wage. As a department we currently require, as a minimum, that providers meet their statutory obligations of paying the Minimum Wage (for 21 – 25 year olds) and the National Living Wage (for 25+). Suppliers can then determine whether they chose to pay the voluntary London Living Wage (in London) or Real Living Wage (outside London) …

> If as a department, we chose to establish a policy and mandate the LLW and RLW we could do so by making 'changes' to all of our existing contracts. This would require us to identify every contract where people are paid the MW or NLW, write to each supplier, obtain a quote to increase, negotiate a sum and implement. This is a substantial piece of work but is entirely possible if the department choses to take that position…"

68. On 11 September 2018, Barry Hooper, the MOJ's Chief Commercial Officer, emailed a summary of a telephone call earlier that day to OCS. This included that "government policy is minimum wage not the London living wage".

69. I have already referred to the orders made by HHJ Auerbach and by John Bowers KC in this case (paras 6 - 8 above). HHJ Auerbach gave the claimant permission to rely on two further documents that were not before the ET. The first is a letter dated 23 October 2015 from the Rt Hon Nicky Morgan MP, then Secretary of State in the Department of Education, based at Sanctuary Building, to Neil Jameson, the Director of Citizens UK. The text refers to an earlier letter in which the writer had said that she had asked the Department's Head of Property to work with their FM contractors "to establish how the living wage could be paid to all contractors" and then continues:

> "I am pleased to confirm that all Department of Education's staff and agency workers are now paid above the living wage, and that from 1 December 2015, all facilities management contractors working in my Department will also be paid at least living wage rates."

70. The second document is a letter on OCS notepaper dated 16 May 2023 and headed "Re: Backdated Pay". The text says:

> "We do not pay the London Living Wage on the MoJ account, however in certain buildings the client wants us to pay the equivalent rate to the London Living Wage.
>
> In Sanctuary Building we have been pleased to process the increase to £11.95 per hour effective from 1st April 2023, which is OCS's pay review date…There is no obligation on any employer to pay these rates, it is encouraged but is entirely voluntary…To re-iterate, OCS is not a Living Wage Employer and therefore not tied to any recommendation made by the Living Wage Foundation."

71. The only other EAT order that I refer to for completeness is the order made by Eady J (then President) of 8 March 2023. At that stage, the Royal Parks litigation was before the EAT, with the substantive appeal due to be heard shortly. Eady J refused the application to consolidate the two cases, ordering instead that this appeal be stayed pending the EAT's determination in the Royal Parks case.

The grounds of appeal

72. It is convenient to identify the grounds of appeal in more detail before turning to the legal framework.

Ground 1: errors in the ET's approach to the facts

73. **Ground 1** raises an over-arching complaint that the ET erred in finding that the respondent "did not have the power to correct (or reduce) the inequality in pay" and in finding that "the employee's wages themselves are the realm of the employer, and not the client" (para 45, ET's Reasons). It is said that fact-sensitive issues were involved that could not properly be determined against the claimant on a strike out application and the ET failed to take the claimant's case at its reasonable highest. Ground 1 also advances four sub-grounds, Grounds 1A – 1D.

74. **Ground 1A** in part relates to the SMI Email (paras 38 - 40 above), which it is said indicated that the parties to the FM Contract considered that it included a power for the respondent to impose rates of pay/minimum rates of pay and that on at least one occasion the respondent had exercised a power to give such an instruction as to the level of pay or minimum pay to be applied to contract workers. Further, that the respondent failed to give disclosure in relation to this. The claimant alleges:

> "The ET erred in finding that the SMI Email did not fall within the scope of the order for disclosure. No reasons were given for that conclusion, which was not **Meek** compliant. If correct, it in any event indicated that the disclosure so ordered did not embrace disclosure on matters relevant to R's responsibility for pay rates and power to equalise pay.
>
> The ET erred in finding that the SMI Email, and further disclosure, was not relevant or necessary. That conclusion was not **Meek** compliant, no reasons having been given for it, and was perverse."

75. There is a second aspect of Ground 1A, as follows:

> "There was evidence of "designated LLW sites" and that these had been subject to Compensation Event notifications (ET Reasons §§29). The ET erred in finding (at ET Reasons §36) that in so far as LLW was paid at some sites, this arose from pay rates inherited under TUPE rather than designation of any sites as LLW by R. It was not open to the ET to make such a finding on a strike out application, before full disclosure and testing the evidence, and without addressing the apparent inconsistency with the SMI Email and that workers were paid LLW who did not transfer from an LLW site.
>
> Further, C relies on a letter from OCS of 16 May 2023 stating that the LLW was paid at a site (Sanctuary Building) because R wanted OCS to do so."

76. This aspect of Ground 1A relies in part on the documentation that I have summarised at paras 64 – 68 above and the new evidence I have referred to at paras 69 - 70 above.

77. **Ground 1B** concerns the interpretation of clause 60.1(17) of the FM Contract. The claimant contends that:

> "The ET reached a perverse conclusion and/or took into account irrelevant considerations or failed to take into account relevant considerations in finding that it was not reasonably arguable that paragraph 60.1(17) of the Contract encompassed a power for R to make payment of at least a Living Wage or LLW compulsory, or compulsory for a particular site (such that R had power to correct inequality at least up to that level). As to this:
>
> (a) On the ET's construction paragraph 60.1(17) was surplusage; it added nothing to paragraph 60.1(15).
>
> (b) Contrary to the ET's approach, the construction advanced by C did not require reading in the words "by the employer" (or "by the Service Manager" or "by the client"). The subparagraph left open by whom the obligation to pay the LLW could be introduced.
>
> (c) The requirement of being "compulsory" was consistent with entailing that OCS was required to implement it, whether by direction of R or the Government, such that the additional cost would be borne by R.
>
> (d) Full disclosure, and testing of oral evidence, was material for an assessment of the context, any shared understanding of the parties and how clause 60.1(17) operated in practice.
>
> If 60.1(17) did not provide the contractual basis for an SMI such as set out in the SMI Email, it was necessary to consider what the basis was for the instruction in that email and for treating an uplift in the LLW as a Compensation Event. That would require considering whether the power could be derived from elsewhere in paragraph 60.1."

78. **Ground 1B** goes on to contend, in the alternative, that the respondent had the power to stipulate applicable minimum rates of pay on awarding or renewing a contract with the contractor and had considered doing so.

79. **Ground 1C** relates to the degree of influence that the respondent was said to have over the claimant's pay and to the EJ's finding that the single source criteria were not met in this instance. The ground states:

> **"**It was sufficient that R had the power to mandate changes in terms irrespective of whether that power was exercised (**Asda Stores v Brierley** [2019] ICR 1118 (CA)…Further it was relevant to have regard to the position in practice. There was documentation showing that R had considered "mandating" payment of a LLW (report of August 2018) and further material (referred to at ET Reasons §46) referring to the need for client consent on uplifting pay to LLW. It was not permissible on a strike out application to make findings to the effect this did not in practice reflect a power to require changes in pay. The fact relied upon by the ET (at Reasons §46) that R stated this was a decision for the contractor, was consistent with a practice of declining to exercise a power to require pay changes, consistent with the asserted PCP.
>
> The finding (ET Reasons §52) that R was not involved in negotiating the pay and conditions of OCS's employees was in issue and not capable of being determined against C on a strike out application. Further, the ET took into account an irrelevant consideration in that R was not involved in negotiating the pay of those working for other clients, which had no bearing on the issue as to whether there was indirect discrimination in the rate of pay in working for R.
>
> It was perverse not to accept that it was reasonably arguable that R had sufficient responsibility for pay, or that this required considering after full disclosure and testing of evidence, by virtue of an arguable case as to:

> (a) R having contracted with C's employer as to the minimum rate of pay for C (and the other Contract Workers), and the maximum that R would be liable for absent a Compensation Event (ET Reasons §30), and/or
>
> (b) R having the contractual power, or being able in practice, to set revised minimum rates of pay or to impose the LLW, whether during the Contract or upon setting the terms on which it was prepared to enter into it or upon re-tendering; and/or
>
> (c) R having "repeatedly considered" uplifting the pay of Cleaning Operative Contract Workers at their own expense (as found at §56) and mandating that this be done or giving a "greenlight" to the increase (at §46)."

80. **Ground 1D** alleges that at para 54 of her reasons, the EJ relied upon an evaluation of policy considerations that were properly to be addressed in light of all the evidence at a final hearing and/or in relation to objective justification. It is also said that she failed to take into account a relevant consideration, namely that the effect of not permitting the comparison, was that discriminatory treatment could be embedded by contracting out groups of workers.

Ground 2: the PCPs

81. The claimant contends that the ET erred in rejecting the PCPs advanced by the claimant in that:

> "The ET failed to have regard to the substance of the PCPs relied upon by C that the practice of the Respondent ("R") was (in general) that it did not require or procure that those staff working for it via a contractor ("Contract Workers"), or doing so pursuant to the contract with OCS ("the Contract"), were paid for such work at rates not less than those applicable to comparable directly employed workers. In substance, in relation to C this entailed the practice of not requiring or procuring payment in accordance with the lowest band (Band F).
>
> The ET erred in concluding that C's first formulation of the PCP, referring to the disparity between the terms applicable to directly contracted employees of R and Contract Workers, amounted to two different PCPs and was impermissible. This failed to focus on the substance of the allegation relating to the practice of differentiation between R's directly contracted employees and Contract Workers as to rates of pay applied or required to be applied when working for R. In any event, the combined effect of two PCPs, or two aspects of a PCP, could give rise to indirect discrimination.
>
> The ET erred in finding the effect of the PCP was to involve a comparison with "the innominate class of those whose work is carried out on the Respondent's premises via a contractor" and that this rendered the PCP impermissible. The correct comparison was between those directly employed by R and Contract Workers (or those in comparable work) in relation to whom R was a 'single source' in the sense of R having a sufficient responsibility for pay and power to remove or reduce the pay disparity. Alternatively, if the comparison was with those who worked for R without being directly employed by R, or those who did so where R had a power to uplift pay as a single source, that did not make the PCP invalid rather than impacting on the evidence material to establishing disparate impact."

82. The respondent contends that the reference to the substance of the PCPs being that the respondent *did not require or procure* an uplift in the pay of the contractor workers to the level of its direct employees is a

further re-formulation of the PCP.

83. This ground also raises two more specific points. Firstly, that the EJ erred in considering that the respondent's position was supported by the claimant's decision to amend her case to remove references to other benefits (para 52 above). Secondly, that she erred in relying upon **Difolco** (para 52 above), which was concerned with whether a duty to make reasonable adjustments arose prior to application for a role and was "of no material relevance" to the present case.

Ground 3: particular disadvantage

84. The claimant alleges that the ET erred in finding that because the claimant had not applied for a role with the respondent, the PCPs had not put her at a disadvantage (para 54 above). It was sufficient that there was a causative link between the PCP and that disadvantage, assessed at the time when the PCP is applied (**Games v University of Kent** [2015] IRLR 202 (EAT)); whether the claimant could have obtained employment with the respondent was irrelevant. Further, the EJ's conclusion was perverse as it was "objectively disadvantageous that C was paid less than she would have been paid if she had been directly employed".

Ground 4: application of the PCPs by the respondent to the claimant

85. The claimant contends that the ET erred in finding that the PCPs were not applied to the claimant:

> "The ET's emphasis that R had not imposed on workers such as C any terms as to pay or conditions did not address the PCPs relied upon or their substance: R's practice was not to require that Contract Workers were paid in accordance with its pay bands (or minimum pay band).
>
> The ET failed to direct itself or overlooked that a practice can consist of an omission (in this case not applying its pay bands or its minimum pay band to Contract Workers and/or declining to adopt a policy as to the rate of pay or minimum rates of pay to be paid to Contract Workers).
>
> The issue of whether the practice was applied was fact-sensitive and not appropriate for a strike out application (as to which reliance is placed on Ground 1 above).
>
> The ET misdirected itself in relying upon [**Iteshi**], which concerned a previous iteration of the legislation which required that a claimant could not comply with a requirement or condition. A PCP may be applied indirectly via a contractor."

Ground 5: the contractor's discretion to increase pay

86. The claimant asserts that the ET erred in relying on the proposition that it was always open to OCS to

increase the workers' pay by reducing its profit margin; whether another party could also remove the pay disparity did not answer the issue of whether the respondent's practices were indirectly discriminatory.

Ground 6: section 41 EqA

87. The claimant contends that both section 41(1)(a) and (1)(d) are broad enough to encompass the pleaded circumstances. In light of **Royal Parks**, the heart of this ground of appeal lies in the last two sub-paragraphs, which state:

> "Further or alternatively, the test of what had been "allowed" by R for the purposes of s.41(1)(a) EqA, and whether R (and not merely the contractor) had subjected C to the alleged detriment, is not to be construed more narrowly than the test for a single source. In any event, this required a fact-sensitive approach, which was not appropriate for a strike out application, having regard to the degree of involvement and control in relation to rates of pay, and the real-world impact of R's decisions, assessing whether R had sufficient responsibility for the relevant terms and whether R was capable of correcting or reducing the inequality. The ET erred in failing to so direct itself, and R relies on the matters set out in Grounds 1 and 7.
>
> Dicta in **Allonby v Accrington & Rossendale College** [2001] 364 (per Sedley LJ (at [35, 36]) and Gage J (at [74]), that the predecessor of s.41 EqA relating to sex discrimination did not cover contractual terms, were distinguishable. They concerned sex discrimination (where discrimination as to terms is separately addressed) and they were on the premise that the contractor alone set the terms of employment of contract workers, which in turn raises the fact-sensitive issues addressed in Grounds 1 and 7."

Ground 7: single source

88. As this ground is also central to the appeal, I will set out the bulk of it in full:

> "The ET erred in the respects set out under Ground 1 and in the following respects in finding that C could not satisfy the 'single source' test (pursuant to which, or by analogy with which, where satisfied, so as to comply with Directive 2000/43/EC which proscribes discrimination on grounds of race, and the general EU principle of equality, either by way of direct application to R and/or by way of interpretation of the EqA, C must be permitted to compare herself with workers carrying out comparable work who were not in the same employment) and in any event that there could not be a comparison with workers directly contracted with R:
>
> > The ET erred in excluding a comparison between workers directly contracted by R and Contract Workers irrespective of comparability of the work carried out for R.
> >
> > The ET failed to set out a correct self-direction of the single source test and/or the correct approach to s.41(1) EqA and whether the PCPs were applied to C in that, applying or by analogy with the approach adopted in equal pay cases, and/or the principles underlying those authorities and in any event:
> >
> > (a) The test would be satisfied and/or s.41(1)(a) and/or 41(1)(d) would be capable of applying if (i) R had a sufficient responsibility for the relevant terms (being those terms subject to the complaint of inequality) of both groups of workers being compared; and (ii) R was capable of correcting the inequality or reducing it.
> >
> > (b) These factors require a fact-sensitive evaluation of all the evidence.
> >
> > (c) It would be sufficient if R was responsible for part of and had the power to

> partially correct the inequality (such as by imposing minimum pay rates), in which case it would be that part of the disparity of treatment which, if it had an indirectly discriminatory effect, would require justification.
>
> The ET misdirected itself as to the effect of the decision in [**Robertson**]…**Robertson** turned on the statutory delegation of power to set pay ([**Asda**] at [110, 111].
>
> The ET misdirected itself in so far as it proceeded on the basis that there could not be a comparison with employees of a different employer outside of the three categories identified by the Advocate General in **Lawrence** (ET Reasons at [51]), and failed to treat these as examples only of where there might be a single source or where there could be a comparison."

89. Finally, Ground 7 says that the error identified at Ground 4 is repeated. It is clear from the text that follows that this is a typographical error and the intended reference is to Ground 5.

Ground 8: comparators

90. The claimant contends that the ET erred in rejecting the comparison with Administrative Assistants on the basis that their work was materially different and that there is no provision for an equal value assessment in race discrimination claims. It is asserted that the differences between the roles were not necessarily sufficient to amount to a "material difference" and that in any event this was an evidential issue not capable of determination on a strike out application.

Ground 9: amendment

91. The claimant alleges that the ET erred in striking out the claim on the basis of its analysis of the pleaded claim, without considering whether an amendment to the pleaded PCP would clarify or correct the deficiencies and without affording the claimant an opportunity to do so.

Ground 10: article 14 ECHR

92. The claimant's position is that it was argued below that the United Kingdom's obligations under article 14 **ECHR**, read with article 8, required section 41 **EqA** to be construed in a way that permitted race discrimination claims as to pay to be brought against someone other than the worker's employer, where they amounted to a "single source" in relation to the worker's pay and that of the comparator, as otherwise such claims would only be possible in equal pay cases where discrimination was allowed on the grounds of sex. The claimant acknowledges that the argument below did not also rely on article 14 read with A1P1, as she now

seeks to do. Ground 10 then continues:

> "The Tribunal erred in not dealing with the ECHR argument and in any event in failing to effect that construction pursuant to s.3 of the Human Rights Act 1998, in that:
>
> > The facts of the case came within the ambit of Art. 8 ECHR, as discrimination in pay related to a protected characteristic is capable of having a serious impact on the feelings of self-worth and self-confidence of members of the group treated less favourably and as such to impact on the private lives of the group. That is particularly so in relation to minimum rates of pay or payment of a living wage, and which are capable of having profound consequences for opportunities to establish and develop relationships with others. Accordingly, the legislation prohibiting such discrimination had a sufficient connection with Article 8 as to fall within its ambit.
> >
> > The facts of the case came within the ambit of A1P1 in that:
> >
> > (a) Where a State creates rights under domestic law which falls within the ambit of a Convention article, it must do so in a non-discriminatory manner.
> >
> > (b) The right under the Equality Act 2010 (including the Act read together with the EU Treaty) to claim equal pay for equal work by comparison with someone in different employment where the requirements of single status are satisfied is a property right within the meaning of A1P1.
> >
> > (c) There is no reason for this purpose to differentiate between whether the source of the right is wholly domestic or one arising from the State having entered into a Treaty obligation.
> >
> > In light of the Court of Appeal's construction of s.41 EqA in [**Royal Parks**] (in which the impact of the ECHR was not considered), without a Convention compliant construction the UK's system of discrimination protections contains a condition that any claim for discrimination as to pay against a single source other than the worker's employer must be on the basis of sex discrimination rather than any other protected characteristic and/or omits a right to claim equal pay for equal work by comparison with a worker employed by a different employer of a single source from the regime for race discrimination ("the Sex Discrimination Condition").
> >
> > The situation of C as a BME worker bringing a claim of race discrimination is analogous to that of a worker bringing a sex discrimination claim.
> >
> > The difference in treatment is on one of the listed grounds within the meaning of Art 14 in that the Sex Discrimination Condition entails indirect race discrimination. It has the effect that BME workers have less protection than non-BME workers against the totality or various types of discrimination which they are likely to experience and so are more likely to be unable to establish a claim to be paid at the same rate as others on equal work. Judicial notice can be taken that the majority of race discrimination claimants are BME.
> >
> > The Sex Discrimination Condition is not a proportionate means of achieving any legitimate aim."

93. The respondent's Answer relies upon the ET's Reasons and a number of additional points. I include these additional contentions within my summary of the respondent's submissions from para 190 below.

The legal framework

The power to strike out a claim

94. The ET's power to strike out a claim was found in rule 37(1) of the Employment Appeal Tribunal Rules 1993 (now rule 38(1)). As relevant it provides that:

> "…at any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds -
>
> (a) That it is scandalous or vexatious or has no reasonable prospects of success."

95. In **Mechkarov v Citibank NA** [2016] ICR 1121 (EAT) (para 14), Mitting J summarised the approach to be taken to a strike out application in a discrimination case:

> "(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

96. The question of when it is appropriate to strike out a claim involving disputed facts was also addressed by Underhill LJ in **Ahir v British Airways plc** [2017] EWCA Civ 1392. At para 16 he said:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context…Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test of the making of a deposit order, which is that there should be '*little* reasonable prospect of success'." (Emphasis in original.)

97. Linden J summarised the principles to similar effect in **Twist DX Limited v Armes** UKEAT/0030/20/JOJ ("**Twist DX**") at para 43. He emphasised that the power to strike out under the "no reasonable prospects of success" ground is designed to weed out claims and defences that "are bound to fail" and that the issue, therefore, is whether the claim has "a realistic as opposed to a fanciful prospect of success". Linden J noted that establishing a ground for striking out a claim gave the tribunal a discretion to do so ("*may* strike out all or part of a claim or response") and that a claim "which has a reasonable prospect of success" would not normally be struck out "simply on the basis of the quality of the pleading"; rather the tribunal "would normally consider the pleadings and any written evidence…with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic".

The EqA provisions

98. The **EqA** defines indirect discrimination as follows:

> "**19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

99. Subsection (3) indicates that the "relevant protected characteristics" for these purposes include race.

100. Section 23 addresses comparators. As relevant it provides:

> "**23 Comparison by reference to circumstances**
>
> (1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case."

101. Section 41 addresses discrimination against contract workers. As relevant, it states:

> "**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)."

102. Sex equality in respect of contractual terms is addressed in the separate provisions in Part 5, Chapter 3 of the **EqA**.

The Race Directive

103. As I have already indicated, it is agreed that EU law as it applied prior to the implementation period governs the position in this case. Accordingly, those parts of the **EqA** which are derived from EU law, must be interpreted consistently with EU law: Baroness Hale of Richmond in **Essop and others v Home Office (UK Border Agency)** [2017] UKSC 27, [2017] 1 WLR 1343 ("**Essop**") at para 19.

104. Article 2.1 of the **Race Directive** provides that the principle of equal treatment shall mean that there should be no direct or indirect discrimination based on racial or ethnic origin. Article 2.2(b) indicates that:

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

105. Article 3 addresses the scope of the Directive, providing that it shall apply to all persons, as regards both the public and private sectors in relation to "employment and working conditions, including dismissals and pay" (amongst other circumstances).

The ingredients of indirect discrimination

106. It is uncontroversial that two PCPs may work in combination with each other, where both are applied to the claimant by the respondent. This is confirmed by Baroness Hale in **Essop** (para 26), citing **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704 as an example. **Ministry of Defence v DeBique** [2010] IRLR 471 is a further example. However, counsel were not aware of any authority that recognises a PCP can arise from two different PCPs applied by two different people to two different groups of workers.

107. **Iteshi** concerned an unsuccessful claim for indirect race discrimination brought under the legacy statute, the **Race Relations Act 1976**. At the material time, the original definition of indirect discrimination appeared at section 1(b) of that Act and an alternative definition, reflecting the **Race Directive** and corresponding to the later section 19 **EqA** definition, had been added at section 1(1A) (as set out at para 24 of the judgment). The claimant had been unable to secure pupillage in a barristers' chambers and attributed this

to a rule imposed on barristers' chambers by the respondent, the General Council of the Bar, that all pupillages were required to be funded. The EAT's first reason for rejecting the claimant's appeal was that the Bar Council's system imposed requirements *on barristers' chambers*, but made no requirement of those who applied for pupillages. The EAT concluded: "At no time has the Respondent imposed on applicants such as the Claimant, any requirement regarding the funding of their pupillages" (para 40).

108. The identification of the correct pool in an indirect discrimination case was explained by Baroness Hale in **Essop** as follows:

> "40. …In the equal pay case of *Grundy v British Airways plc* [2007] EWCA Civ 1012; [2008] IRLR 74, at para 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in *Allonby v Accrington and Rossendale College* [2011] EWCA Civ 529; [2001] ICR 1189, at para 18, he observed that identifying the pool was not a matter of discretion or fact-finding but of logic. Giving permission to appeal in this case, he observed that 'There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition'.
>
> 41. Consistently with these observations, the *Statutory Code of Practice* (2011) prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that:
>
> > 'In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively.'
>
> In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it…There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

109. As Mr Lewis emphasises, indirect discrimination requires a causal link between the PCP relied upon and the particular disadvantage suffered by the group and by the individual: **Essop** at paras 25 and 33.

110. In **Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsla** [2016] 1 CMLR 491 ("**Chez Razpredelenie**"), the ECJ was concerned with an apparently neutral PCP whereby electricity meters were installed on pylons at a height of six - seven metres in a particular district of Bulgaria. This was liable to put persons of Roma origin at a particular disadvantage, as the meters were so high up that it was difficult for consumers to check their meters to monitor their consumption and the district was mainly inhabited by people of Roma origin. A central issue in that case was whether an inhabitant of the district who was also disadvantaged by this PCP, but who identified her ethnic origin as Bulgarian, rather than Roma, had a viable claim under the **Race Directive**.

111. Plainly, that particular issue does not arise in the present case, but Mr Lewis relies on this case for the court's general statements of principle. The court recalled that given its objective and the nature of the rights which it seeks to safeguard, the **Race Directive** cannot be defined restrictively (paras 56 and 66). The **Race Directive** gives specific expression, in its field of application, to the principle of non-discrimination on grounds of race and ethnic origin that are enshrined in article 21 of the Charter (para 72). Indirect discrimination stemmed from a measure, which "albeit formulated in neutral terms, that is to say by reference to other criteria not related to the protected characteristic, leads, however to the result that particular persons possessing that characteristic are put at a disadvantage" (para 94). The neutral criteria "has the effect of placing particular persons possessing that characteristic at a disadvantage" (para 96). In a similar vein, at para 107, the court referred to the practice in that case as being "liable to affect persons possessing such an ethnic origin [Roma] in considerably greater proportions" and accordingly putting them at a particular disadvantage. Mr Lewis emphasises these passages as exemplifying that the test is essentially one of causation.

The single source principle

112. **Lawrence** concerned equal pay claims brought by female school catering and cleaning staff who had been employed by a local authority, but whose employment was transferred to the respondent companies after a process of compulsory competitive tendering, where they were paid less than their previous wages. They sought equality of pay with male comparators who were still employed by the local authority (and whose work had been rated as of equal value), relying initially on article 119 of the EC Treaty, which subsequently became article 141 **EC**. Article 141(1) provided:

> "Each member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."

113. The CA referred the question of whether the applicants could rely on article 141(1) to the ECJ. The ECJ highlighted that: (i) the person whose pay was being compared worked for different employers; (ii) the work which the applicants currently performed was identical to that which some of them had performed before the transfer; and (iii) their work had been recognised as being of equal value to that performed by their comparators (para 15). The court noted that there was nothing in the wording of article 141(1) to suggest that its applicability was limited to situations where men and women worked for the same employer and that the court had previously held that the article could be invoked before national courts "in cases of discrimination

arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service". The court then continued:

> "18. However, where, as in the main proceedings here, the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision."

114. It is common ground that the ECJ identified a two limbed test in relation to whether the respective pay conditions could be attributed to a single source, namely that there is a body which is both responsible for the inequality and can restore equal treatment.

115. The fuller reasoning of the Advocate General included reference to "three categories" of cases where there was a single source:

> "49. Three categories are involved. The first comprises cases in which statutory rules apply to the working and pay conditions in more than one undertaking, establishment or service. By way of example, one may think of the salaries of the nursing staff working for a service such as the National Health Service. Secondly, there are cases in which several undertakings or establishments are covered by a collective works agreement or regulations governing the terms and conditions of employment. Finally, the third category concerns those cases in which the terms and conditions of employment are laid down centrally for more than one organisation or business without a holding company or conglomerate.
>
> 50. In all of these cases it is possible, going beyond the boundaries of the individual undertaking or service, to compare male with female employees in order to determine whether there is discrimination prohibited by article 141 EC.
>
> 51. The features common to the three categories is that regulation of the terms and conditions of employment actually applied is traceable to one source, whether it be the legislature, the parties to a collective works agreement, or the management of a corporate group.
>
> 52. Advocates General Cosmas and Lenz, and now the United Kingdom Government, were right to stress that as being an essential criterion. Why? Article 141 EC is addressed to those who may be held responsible for the unauthorised differences in terms and conditions of employment. In the cases mentioned, they are the legislature, the parties to a collective works agreement and the management of a corporate group. They may be held accountable in this regard. On the other hand, if differences in pay arise as between undertakings or establishments in which the respective employers are separately responsible for the terms and conditions of employment within their own undertaking or establishment, they cannot possibly be held accountable for any differences in the terms and conditions of employment between those undertakings."

116. The Advocate General went on to conclude that the applicants' argument that the services provided by the local authority and those provided for it were ultimately funded from the same source was untenable:

> "61. …Public authorities purchase goods and services on a large scale. The council cannot be obliged, when contracting out specified services, to impose on the suppliers concerned a requirement that the terms and conditions of employment for women whom they employ must be the same as those of male workers who perform equivalent work for the council. A fortiori, that argument cannot be used to oblige the present employers to continue to bring the working conditions of women whom they employ into line with those of men performing equivalent work for the council."

117. **Lawrence** was applied by the ECJ in **Allonby v Accrington & Rosendale College and others** [2004] ICR 1328 ("**Allonby ECJ**"). The respondent college did not renew the contracts of a number of female part-time lecturers, instead engaging them as sub-contractors through the respondent agency, Education Lecturing Services ("ELS"). The lecturers' income fell and they lost a number of benefits that had been attached to their previous employment with the college. The applicant claimed, pursuant to article 141 **EC**, that she was entitled to be paid equally to a male full-time lecturer employed by the college. The CA sought a preliminary ruling from the ECJ as to whether the applicant could use this comparison for the purposes of her equal pay claim against the agency. The applicant argued that the circumstances were distinct from **Lawrence** as: the college was the source of the pay discrimination in taking the decision to use ELS as an intermediary; the applicant was still subject to the direction and instruction of the college; and, by virtue of its agreement with ELS, the college was able to influence the level of the applicant's pay (paras 27 – 28, Advocate General's opinion).

118. However, the ECJ rejected this argument, saying:

> "47. It is clear from the order for reference that the male worker referred to by the applicant is paid by the college under conditions determined by the college, whereas ELS agrees with the applicant the pay which she receives for each assignment.
>
> 48. The fact that the level of pay received by the applicant is influenced by the amount which the college pays ELS is not a sufficient basis for concluding that the college and ELS constitute a single source to which can be attributed the differences identified in the applicant's conditions of pay and those of the male workers paid by the college.
> …..
> 50. …article 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received from equal work or work of the same value by a man employed by the woman's previous employer."

119. As I explain at para 140 below, **Allonby ECJ** was referred to by Underhill LJ in **Royal Parks**, in concluding that there was consistency in the scope of protection against pay discrimination afforded for equal pay claimants under the single source principle and for complaints of pay discrimination involving the protected characteristics other than sex under section 41 **EqA**.

120. The EJ attached some significance to the CA's decision in **Robertson** (paras 120 - 121 above). In that case, pursuant to a series of agreements, the Treasury had delegated responsibility for pay bargaining to individual government departments. Collective bargaining arrangements were made by each department and neither the Treasury nor the Cabinet Office was involved in the pay negotiations and their approval was not

required. In consequence, there was significant divergence in the pay scales and terms of service applying to the different departments. The claimants were male civil servants employed by the Department for Environment Food and Rural Affairs ("DEFRA") who sought equality of pay with female civil servants working in other government departments, on the basis that their work had been rated equivalent. The CA held the sheer fact that both the claimants and their comparators were in common employment with the Crown was an insufficient basis for comparison; it was necessary to consider whether their terms and conditions were traceable to a single source which had responsibility for the claimed inequality and the capacity to restore equal treatment. The CA, agreeing with the EAT, held that there was no single source; it was clear that the individual departments fixed the terms and condition, were responsible for any inequality and could restore equal treatment.

121. The claimants had argued that the responsibility for pay was ultimately with the Crown as the employer and the Crown had the power to revoke the delegation to the departments at any time. Mummery LJ (who gave the leading judgment) rejected the significance of these points, saying:

> "41. …Retention of power by the Crown after delegation to the department means that there is a theoretical legal possibility of the Crown exercising its power at some time in the future, but the retention of a legal power, which has not in fact been exercised by the Crown over pay conditions in the particular case, does not make the Crown 'the body responsible' for the actual negotiations and decisions on pay by the individual departments resulting in the pay differences of which complaint is made.
> …..
> 43. I would reject [the power to revoke] submission as inconsistent with *Lawrence*. The argument is based on a theoretical legal possibility that delegation will be revoked at some time in the future rather than on recognition of the realities of the existing employment situation. The department, not the Crown as employer, is actually responsible for conducting the negotiations on pay and other terms and conditions and for reaching agreement on them. I agree with the conclusions of the appeal tribunal on this point…'the fact that the present situation could be changed, that the delegation could be simply revoked, is of no significance if it had not been. A new situation would then arise, which has not arisen'".

122. In **North Cumbria Acute Hospital NHS Trust v Potter** [2008] IRLR 176 ("**Potter**"), the EAT held that it was unnecessary to incorporate the concept of a 'single source' into the domestic legacy legislation, section 1(6) of the **Equal Pay Act 1970** ("**EPA**") (the forerunner to Part 5, Chapter 3 of the **EqA**). Unlike article 141(1) **EC,** which did not contain any detail as to the comparison required or permitted for equal pay purposes, the **EPA** defined the circumstances in which male comparators were to be treated as being in the same employment as a woman (paras 80 and 87). The EAT went on to observe that whether a particular body was responsible for the inequality and could restore equal treatment "depends on an evaluation of all the

evidence" and was thus an issue of fact for the employment tribunal to determine (para 108).

123. **Robertson** was discussed by the EAT: Scotland in **Fox Cross Claimants v Glasgow City Council** [2013] ICR 954 ("**Glasgow City Council EAT**"). The claimants were female employees of three bodies, a community interest company and two limited liability partnerships, set up by the respondent council for the purposes of transferring three of its services. The limited liability partnerships were known as arm's length external organisations ("ALEOs"). Prior to their transfer, the claimants had been directly employed by the council. The claimants sought to compare their terms and conditions with men who were still in the direct employment of the council. The EAT concluded that the men were employed by an "associated employer" within the meaning of section 1(2) **EPA** and so would be treated as being in the same employment as the claimants. However, the EAT went on to also consider, *obiter*, whether the tribunal had been right to conclude that the council was not a "single source" for the purposes of the article 157 **TFEU** equal pay claim (para 70); finding that it had failed to faithfully apply the two limbs of the **Lawrence** test, so that the case would have been remitted if this had been the only issue (para 91).

124. Mr Lewis relies upon the analysis of Langstaff J (then President), who said:

> "82. …What must be explored is the position of the body which it is said has responsibility for and power to alter the wages in both A and B. This is the party or institution or collective agreement which is said to be the single source.
>
> 83. To focus on the powers of the immediate employer of a claimant is therefore potentially to look in the wrong direction. It is not irrelevant, for these powers may be such as effectively exclude any superior or distinct body having responsibility and power; but that the central investigation must be as to the powers and responsibilities of the person, institution or agreement alleged to be the single source must not be in doubt.
>
> 84. …the factual inquiry was not simply into who had set the terms in respect of pay. The question per [**Lawrence**] is whether there is a 'body which is responsible for the inequality *and which could restore equal treatment'*. [**Potter**] is Employment Appeal Tribunal authority on the meaning of the first part of the phrase: responsibility for inequality. The sense it adopts is one of ongoing rather than causative responsibility for the disparity.
> …..
> 86. The tribunal did not ask whether Glasgow could remedy pay inequalities in practical terms. It was right to conclude that a theoretical right to do so would not suffice unless exercised, but the elimination of a theoretical power, such as that in [**Robertson**]…unless there was evidence that it had actually been exercised, is different territory from an inquiry into the practical realities of the employment and governance relationships in a situation such as that before us." (Emphasis in original.)

125. The Court of Session rejected the council's appeal in **Glasgow City Council v Unison Claimants** [2014] IRLR 532 ("**Glasgow City Council**"), agreeing with the EAT that the tribunal had erred both in rejecting the "associated employer" argument and the "single source" argument. Like the EAT, the court's comments on the latter point were *obiter dicta* (para 47). Lord Brodie (giving the opinion of the court)

identified the tribunal's error as follows:

> "According to the tribunal, it was not enough to be a single source that a body retained legal power to remedy disparity in pay if that power was not in fact exercised. As the tribunal had found that Glasgow had, as a matter of practice, restricted its control over the ALEOs to a strategic level, it was to be regarded as the equivalent of the Crown in *Robertson*. In our opinion the tribunal's decision is based on a misreading of *Robertson* and the decision of the Court of Justice in *Lawrence*…Consideration must be given to 'responsible for the inequality' but for present purposes the focus is on 'which could restore equal treatment'. Based on its reading of *Robertson*, the tribunal took the view that, irrespective of whether it had power to do so, if in practice Glasgow did not concern itself with the terms and conditions of those employed by [the ALEOs] then it could not be held to be a single source. That is not what was said in *Lawrence* and it is to fail to have regard to the facts in *Robertson* where the power to negotiate and set most aspects of pay of the civil servants employed in DEFRA was specifically delegated by the Minister for the Civil Service by statutory instrument."

126. In **Asda** the claimants, most of whom were women, were employed by the respondent on hourly paid jobs in the appellant's stores. They sought equal pay with the male comparators who worked in the distribution depots, alleging that the work was of equal value. The tribunal considered a number of preliminary issues, including finding that there was a "single source" of pay and conditions. The EAT dismissed an appeal from this conclusion and Asda appealed to the CA. As will be apparent, the two groups of workers in this case had the same employer. Citing Baroness Hale JSC's judgment in **Dumfries and Galloway Council v North** [2013] ICR 993, Underhill LJ observed that in the ordinary case, employment by the same employer would satisfy the requirement for a single source and a **Robertson** type situation would be untypical (paras 58 – 59 and 61). He was satisfied that this was the position; the claimants' and the comparators' terms were set by the same employer who had the power to equalise them (para 107). He rejected Asda's argument that there were different "sources" for retail and distribution terms because they were arrived at by different processes within Asda, reflecting the managerial separation between these parts of the operation. He agreed with Kerr J's analysis in the EAT that this was "an ordinary case of a large organisation delegating the setting of pay to separate internal organs"; and that the tribunal had avoided the mistake made by the tribunal in **Glasgow City Council** of treating **Robertson** as "creating a category of dual source cases where power to set pay is delegated and then not interfered with on a regular basis". Further, that **Robertson** was a "wholly exceptional" case that "turned on the unique position within the civil service" where the setting of pay and most other terms of civil servants on a departmental basis was enshrined in statutory and other instruments that would have to be expressly revoked if power was to be reclaimed by the Treasury and exercised centrally. Whereas in the present case Asda or Wal-Mart (its parent company) could interfere "at the stroke of a pen or, more likely, the click of a mouse" (paras 110 – 111).

Section 41 EqA

127. Given its significance for the present appeal, it is necessary to consider **Royal Parks** in some detail.

128. Royal Parks Ltd ("RPL") is the charity responsible for the management of the Royal Parks and some other open spaces in London. Its predecessor, the Royal Parks Agency ("RPA") outsourced the performance of certain services involving mainly manual work, but directly employed those doing mainly office work. The directly employed employees, who were predominantly white, were paid the LLW. RPA's policy was not to require its contractors to pay the LLW. One of the contractors, Vinci, had a five-year contract for the provision of cleaning services. When it bid for the contract it was invited to provide alternative tenders, one on the basis of LLW rates for its employees and the other at non-LLW rates. RPA accepted the non-LLW tender, stating in its acceptance letter that in respect of the LLW "this option will not be taken up for the moment but [RPA] reserves the right to revisit this at any point during the Contract Period". Ultimately, RPL decided that all of its contractors should pay the LLW and it reached an agreement with Vinci to fund the payment of the LLW from the point when the contract was renewed. The claimants were Vinci cleaners who were supplied to the principal; they were predominantly of BME origin and they had been paid less than the LLW. They brought claims for indirect discrimination against RPL under sections 19 and 41 **EqA** based on its failure to pay the LLW until 2019.

129. The tribunal upheld the claims of indirect race discrimination. It accepted that in choosing the non-LLW tender whilst reserving a right to require payment of the LLW, RPA (and subsequently RPL) had effective control over whether the LLW was paid to the Vinci employees. It held the pool for comparison comprised all of RPA/RPL's employees, and all of Vinci's employees who worked on the cleaning services contract. On this basis, it found that the particular disadvantage test and the other elements of section 19 were made out. The EAT allowed RPL's appeal and remitted the case. It did so on the relatively narrow ground that the claimants had not adduced evidence capable of meeting the particular disadvantage test in respect of the pool that the tribunal had adopted. The claimants appealed this conclusion and RPL raised further issues by a Respondent's Notice, including that: its conduct in not requiring/funding payment of the LLW by Vinci did not come within either section 41(1)(a) or (1)(d) **EqA**; the work of the two groups was entirely different in character; the pay of the two groups was set by different persons, Vinci and RPL; and that it did not "apply"

any PCP to the claimants within the meaning of section 19.

130. As Underhill LJ noted (at para 48), determining whether section 41 applied involved answering three questions:

(i) Whether the claimant and the respondent are in a relationship of "contract worker" and "principal" applying the definitions in subsections (5)-(7). If so;

(ii) Whether the respondent has discriminated against the claimant, by acting in a way covered by one of sections 13-19A **EqA**. If so;

(iii) Whether the conduct in question fell under any of heads (a)-(d) in subsection (1).

131. The first question was not in issue; it was accepted that RPL was the claimants' principal. Underhill LJ considered that in light of the arguments raised by the parties, it was more convenient to focus upon the third question before returning to the second. The tribunal had not expressly addressed the question of whether the conduct came within section 41 (para 50). The EAT did address this question, finding that the conduct was capable of coming within the section. The EAT's reasoning on that issue is set out fairly fully at paras 52 – 55 of Underhill LJ's judgment. By way of summary the EAT reasoned:

(i) A purposive construction of section 41 should be adopted;

(ii) 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 a tribunal to find that section 41(1) was engaged;

(iii) The tribunal was entitled "to take a real-world view as to what has been allowed by the principal". If the principal has "effectively dictated" the terms on which the worker is to carry out the work, the tribunal would be entitled to conclude that this falls within section 41(1)(a), notwithstanding the fact that the decision is implemented by the contractor through its contractual relationship with the contract worker; and

(iv) Having regard to the degree of control that the principal exercised in this instance as to the minimum rate of pay for workers in the claimants' position, the tribunal was entitled to find that this was a case falling within section 41(1), either under (1)(a) or (1)(d).

132. Underhill LJ indicated that he disagreed with the EAT's analysis for the reasons that he then set out. He began by considering the statutory purpose of section 41, as follows:

> "57. The starting point must be to identify the mischief to which section 41 is directed. Part 5 of the 2010 Act is concerned, broadly, with discrimination at work, or – to put it another way –

> with discrimination in the context of relationships under which individuals provide their work. Typically, the only relevant relationship is the (contractual) relationship between the worker and the employer, so that any discrimination which occurs at work is, subject to the detailed provisions of the Act, the responsibility of the employer under section 39. However, the peculiarity of contract work is that access to the work and what happens at work is the responsibility not of the employer but of a third party, i.e. the principal: that situation creates an additional (non-contractual) relationship – "the principal-worker relationship". The purpose of section 41 is to proscribe discrimination in the context of that relationship."

133. Next Underhill LJ observed that the statutory purpose was reflected in the specific kinds of detriment identified in section 41(1)(a)-(c). As regards subsection (1)(a) he said:

> "Head (a) covers a situation where the principal (P) will only "allow" the worker (W) to work on particular "terms". "Term" does not of course mean a contractual term, since P has no contract with W: it evidently connotes a (discriminatory) requirement imposed as a condition of being allowed to work. An example would be a prohibition by P on W wearing clothes or jewellery of ethnic or religious significance."

134. After addressing heads (1)(b) and (1)(c), Underhill LJ commented that they were all situations in which the principal has the power, because of its control of the work or the workplace, to subject the worker to some detriment. He continued: "They have nothing to do with W's rights under his or her contract with S" (the supplier). He went on to say that this distinction was recognised in the CA's reasoning in **Allonby v Accrington and Rossendale College and others** [2001] EWCA Civ 529, [2001] ICR 1189 ("**Allonby CA**"). As I have described earlier, the CA referred questions regarding the alleged comparator for the article 141(1) **EC** equal pay claim to the ECJ (para 117 above). There was also a claim against the college brought under section 9 of the **Sex Discrimination Act 1975** ("**SDA**"), in relation to access to certain benefits and facilities. Section 9 **SDA** was in similar terms to section 41 **EqA**. The CA remitted this aspect of the claim to the tribunal, as further findings were required. After citing Sedley LJ's reasoning at para 35 in **Allonby CA**, Underhill LJ observed (at para 61):

> "Sedley LJ is thus in that passage making a distinction between rights enjoyed by the applicant under her contract with ELS, in respect of which no claim could lie against the college, and access to "benefits … afforded by the College", in respect of which it could."

135. Underhill LJ next referred to Gage J's indication at para 73 in **Allonby CA**, 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 by section 9 **SDA**. He then summarised the position (at para 62) as follows:

> "…like Sedley LJ he draws a clear distinction between benefits which derive from ELS under the applicant's contract with it and non-contractual benefits accorded by the college."

136. Underhill LJ considered that there was no material difference between the views expressed by Sedley LJ and Gage J on this issue:

> "65. …namely that a complaint by a contract worker that the terms of his or her contract with the supplier are discriminatory can only be made against the supplier because such terms are no part of the principal-worker relationship. That reflects the basic structure and purpose of (what is now) s 41…"

137. Underhill LJ explained that this analysis was fatal to the case before him, as;

> "66. On the face of it, therefore, the Claimants can have no claim against RPL under section 41, because the discrimination which they allege relates to the remuneration payable under their contracts with Vinci and has nothing directly to do with the principal-worker relationship. Translating that specifically into the terms of heads (a) and (d):
>
> - As to (a), the only natural reading of the phrase 'terms on which the principal allows the worker to do the work' is that it is concerned with a stipulation imposed by P on W as a condition of W being allowed by P to do the work, and not with any stipulation imposed by P on S….it is artificial to the point of impossibility to describe the payment of the LLW to S as a term on which Royal Parks allows the Claimant to work.
>
> - As to (d), it is Vinci, as their employer, and not RPL, who has subjected the Claimants to the detriment of being paid less than the LLW."

138. Underhill LJ also explained that he was not persuaded by the claimants' submission that the circumstances in **Royal Parks** were distinguishable from those in **Allonby CA**, because the principal in **Royal Parks** was able to direct or effectively dictate the terms of the contract as to LLW (as the EAT had found):

> "I do not accept that it would be right to distinguish *Allonby* on that basis. I accept that the court in that case did not have to consider the issue of dictated terms and that its decision may accordingly not be strictly binding. But I believe, for the reasons given above, that the distinction recognised by Sedley LJ and Gage J between detriments which are the result of the terms of the worker's contract of employment and detriments imposed by the principal accords with the statutory purpose and is reflected in the language of section 41(1). It would, in my view, be inconsistent with the rationale of that distinction to treat the terms of the worker's contract of employment as falling within section 41(1) even if they could be said to be a greater or lesser extent controlled by the principal."

139. Mr Kirk submits that this analysis is directly applicable to and similarly fatal to the claimant's contentions regarding the respondent's influence over payment of the LLW in the present case.

140. Underhill LJ derived support for his approach from the "cogent" point that if the claimants had been basing their claim on sex rather than race discrimination, there would have been a mismatch between the position they contended for as applying to section 41 and the position under equal pay law, as **Allonby ECJ** confirmed that a "contract workers cannot bring an equal pay claim based on comparison with directly-employed employees of the principal because they had different employers and their terms of employment

accordingly did not derive from a 'single source'" (para 70). Underhill LJ cited the passage from para 48 of the ECJ's judgment, which I set out at para 118 above. It would be "surprising and unsatisfactory" if the claimants in such a case could "circumvent that clear and principled position by bringing a claim" under section 41. However, this problem did not arise if the scope of section 41 "excludes any rights arising from the contract with the supplier – which is in substance the same as the 'single source' test" (para 70).

141. Mr Kirk submits that this passage is significant for two reasons. Firstly, as further confirmation of the restricted circumstances in which the "single source" criteria will be satisfied; and secondly, as showing, contrary to the premise underpinning the Ground 10 argument, there is no mismatch between the scope of section 41 and the "single source" principle in terms of when comparisons may be made between the supplier's employees and the principal's employees for the purposes of pay discrimination claims.

142. Underhill LJ indicated that whilst this was sufficient reason to decide the issue in RPL's favour, he was also troubled by the implications of applying the concept of the principal "directing" or "effectively dictating" (on a real world view) the terms on which the supplier contracted with its workers. After noting that there was no finding that the principal's contract with Vinci positively prohibited the latter from paying the LLW, he continued:

> "71. …The reason, evidently, why it did not do so was that the contract was priced on the basis that it would pay its workers £7 per hour, and paying £9.15 would have reduced, and perhaps eliminated, its anticipated profit margin. But that simply reflects the basic commercial reality in every contracting-out situation that what a supplier can afford to pay its workers (and would agree to pay if the principal so stipulated) depends on the overall contract price. The EAT's reasoning tacitly acknowledges that kind of control is not enough. Rather, it relied on the specific facts of the present case, in particular the requirement for alternative tenders identifying the rates that Vinci would pay its employees on a LLW and a non-LLW basis and Royal Parks' retention of the right at some future point to revisit the question of Vinci paying the LLW. But I am not sure that those facts distinguish the present case from the general rule. It is very common in the case of large outsourcing contracts, particularly where competitive tendering is a legal requirement, for the principal to require tenderers to indicate what rates they would pay if awarded the contract: that is important to enable it to assess the commercial viability of the tender. That additional element of transparency does not affect the fundamental analysis: the principal controls the rates of pay paid by the supplier to its workers in the sense, but only in the sense, that it does in all contracting out cases. I cannot see that it makes any difference in principle that in this case alternative LLW and non-LLW tenders were sought. That does no more than point up what was anyway the case, namely that Royal Parks could always have made it a term of the contract that Vinci pay the LLW (provided the contract price was sufficient to fund it to do so); and the same, I think, goes for RPA's reservation of the right to do so in the future. I find it hard to see that any of these facts means that RPL "effectively dictated" what Vinci paid its workers to a greater extent, or in a different way, than is inherent in the principal-contractor relationship.
>
> 72. I emphasise that the concerns expressed in the previous paragraph are not central to my decision on this ground. I believe that the Claimants' complaint falls outside the scope of section 41 because it is concerned with rights arising from the employer-worker relationship and not the

> principal-worker relationship, irrespective of any influence that Royal Parks had over the content of those rights. But the absence of any clear markers for identifying at what point the principal's (inevitable) influence over what the supplier pays its workers crosses the line into "direction" or "dictation" is a further reason for preferring the straightforward criterion which emerges from *Allonby*.

143. Having addressed the section 41 issue, Underhill LJ then explained that, for the same reasons as led him to conclude that the principal had not subjected the claimants to any detriment in respect of their contract with Vinci, RPL had not "applied" a PCP to the claimants for the purpose of section 19 **EqA** (para 75).

144. Although it followed from this analysis that the CA allowed the first and third grounds of the Respondent's Notice (preferring not to express a view on the comparators point), Underhill LJ also addressed the issues raised by the claimants' appeal. It is unnecessary for me to include his analysis of the correct pool, however I note that he proceeded on the basis that the PCP in that case (as identified by the claimants) was that "it was the policy or practice of Royal Parks, while paying the LLW to its own employees, not to require or fund, its contractors to pay it to the indirectly employed workforce" (para 78).

Contractual construction

145. The approach to be taken in construing a written contract was summarised by Lord Neuberger of Abbotsbury in **Arnold v Britton** [2015] UKSC 36, [2015] AC 1619 as follows:

> "When interpreting a written court, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words…in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

146. In **Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA** [2010] EWCA Civ 397 (in the context of summary judgment powers in civil cases), Jacobs LJ addressed the circumstances in which the court could summarily determine the construction of a contract. He said:

> "4. …The factual matrix is key to understanding what the parties must have intended by the words they used. But it far from follows that the need to know what the matrix was requires a full trial with discovery, evidence and cross-examination of witnesses. If there is no actual conflict of evidence on a relevant point of background matrix, it is only when there really are reasonable grounds for supposing that a fuller investigation of the facts as to the background might make a difference to construction that the court should decline to construe the contract on a summary judgment (including strike out) application.

> 5. The court should not be over-astute to decline to deal with the construction of a contract summarily merely on the basis that something relevant to the matrix might turn up if there were a full trial. Most disputes as to 'pure' construction of a contract will be suitable for summary determination because the factual matrix necessary for its construction will itself be determinable on that application."

Raising new points on appeal to the EAT

147. The EAT possess a discretion to permit a new point to be raised before it for the first time. In **Glennie v Independent Magazines (UK) Ltd** Laws LJ emphasised that this discretion must be exercised in accordance with established principles, which he summarised as follows:

> "It is a general principle of the law that it is a party's duty to bring forward the whole of his case at the proper time. The reasoning of Robert Walker LJ in *Jones v Governing Body of Burdett Coutts School* [1999] ICR 38 is, with great deference, consonant with this. A new point ought only to be permitted to be raised in exceptional circumstances, as Robert Walker LJ held at page 44B…There is a public interest, beyond the interests of individual parties, that statutory tribunals exercise the whole of but exceed none of the jurisdiction which Parliament has given them upon such facts as are proved or admitted before them…"

148. Mr Lewis drew attention to **Revenue and Customs Comrs v Stringer** [2009] UKHL 31, [2009] ICR 985 ("**Stringer**"), where the appellants were permitted to rely on the EU principle of equivalence although this had not been raised below. Lord Walker of Gestingthorpe's observed, "National courts are required to consider relevant issues of Community law even if not raised at the right time by the parties" (para 58).

Article 14 ECHR

149. Pursuant to section 3(1) of the **Human Rights Act 1998** ("**HRA**"):

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

150. The Convention rights for these purposes are the articles of the **ECHR** set out in Schedule 1 to the HRA. This includes:

> "**Right to respect for private and family life**
>
> **Article 8**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> **Prohibition on discrimination**

> **Article 14**
>
> The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

151. Schedule 1 also includes the A1P1 right to protection of property:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

152. As I have indicated, the claimant relies upon article 14 read with article 8 and/or A1P1. As Lady Black summarised in **R (Stott) v Secretary of State for Justice** [2018] UKSC 59, [2020] AC 51:

> "In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or 'other status'. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the treatment will be lacking."

153. In **Royal Cayman Islands Police Association and others v Commissioner of the Royal Cayman Islands Police Service and another** [2021] UKPC 21, [2022] ICR 117 ("**Royal Cayman**"), Lord Stephens JSC (giving the judgment of the Board) followed the approach identified by Lord Bingham at para 4 of **M v Secretary of State for Work and Pensions** [2006] 2 AC 91 for deciding whether the "within the ambit" test was met (paras 56 and 58). In the passage cited by Lord Stephens, Lord Bingham said:

> "It is not difficult, when considering any provisions of the Convention…*to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all*. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for…I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind." (Emphasis added by Lord Stephens.)

154. Lord Stephens confirmed that for article 14 to be engaged, the core values or interests that the right exists to protect can be infringed or undermined without the substantive right being violated (para 60). Lord Stephens also emphasised that whilst the European Court of Human Rights ("ECtHR") had consistently given a wide interpretation to the term "within the ambit", it was still necessary to consider this phrase in the specific

context of the article in question (para 64).

155. In **Denisov v Ukraine** [2018] ECHR 76639/11 ("**Denisov**"), a case concerning the dismissal of the president of the Kyiv Administrative Court of Appeal, the ECtHR gave detailed guidance as to the application of article 8 ECHR in the employment context. The court explained that the applicant's "private life" could arise in one of two ways: (i) where private life was the reason for the dispute (referred to as the "reason-based approach"); and (ii) where private life was derived from the consequences of the impugned measure (the "consequence-based approach") (para 102).

156. As regards the reason-based approach, complaints concerning the exercise of professional functions had been found to fall within the ambit of article 8, when factors relating to private life "were regarded as qualifying criteria for the function in question" and "when the impugned measure was based on reasons encroaching upon the individual's freedom of choice in the sphere of private life" (paras 103 and 106).

157. Pursuant to the consequence-based approach, even where a measure affecting an individual's professional life was not linked to their private life, article 8 could still arise insofar as it had or may have serious negative effects on the individual's private life. The court had taken into account negative consequences regarding: (i) impact on the individual's "inner circle", in particular where there are serious medical consequences; (ii) the individual's opportunities to "establish and develop relationships with others"; and (iii) the impact on the individual's reputation (para 107). The court emphasised that a minimum level of severity applied to this approach, such that "convincing evidence showing that the threshold of severity was attained has to be submitted by the applicant…applicants are obliged to identify and explain the concrete repercussions on their private life and the nature and extent of their suffering" (para 114). This threshold was described as being of "crucial importance"; the applicant had to show convincingly that it was attained and the court would only accept that article 8 was applicable where very serious consequences affected their private life "to a very significant degree" (para 116).

158. The court recognised that there would be instances where it was appropriate to employ both approaches in combination (para 109). Typical aspects of private life that could be affected by employment-related disputes were "dismissal, demotion, non-admission to a profession or other similarly unfavourable measures" (para 115).

159. In **Royal Cayman**, Lord Stephens identified the core values protected by article 8 in relation to an

employment dispute between an individual and a state, in order to determine whether the "within the ambit" criterion was met in respect of the particular article 14 challenge before the Board. He said:

> "81. …In addition to the overriding core value of human dignity and human freedom the core values in relation to an employment-related dispute between an individual and the state which are protected under article 8 can be discerned from *Denisov* and from *JB v Hungary*. [Application No 45434/12 (unreported)]. In *Denisov* the core values are protection from measures whose reasons are primarily though not exclusively, connected with a suspect ground…or from measures whose consequences are 'very serious affecting private life to 'a very significant degree'. In *JB v Hungary* at para 131 the core value is freedom of choice in the sphere of private life. The substantive right in issue is relevant to whether the material facts are within the ambit of that right…In the context of an employment-related dispute between an individual and a state the reasons under the reason-based approach are limited and severity is a necessary component of a consequence-based approach. Those limitations must affect the assessment of whether the material facts are within the ambit of that aspect of article 8 ECHR."

160. **Royal Cayman** concerned an article 14 challenge relying upon the status of age, to the Police Commissioner's policy that officers who had been subject to mandatory requirement at age 60 could only be re-engaged at the rank of constable, regardless of their previous seniority within the Royal Cayman Islands Police Service. The Board decided that the "within the ambit" test was not met. Mandatory retirement on grounds of age was an ordinary incident of modern life, far removed from the core values that article 8 was intended to protect in an employment-related dispute (para 89). Furthermore, approaching ambit from the perspective of the consequence-based approached, the lack of any very serious consequences affecting the individual police officers' private life to "a very significant degree", indicated that there was only a tenuous link to the core values of article 8 (para 99).

161. In **JT v First-tier Tribunal** [2018] EWCA Civ 1735, [2019] 1 WLR 1313 ("**JT**") the CA addressed the circumstances in which a legal claim could amount to a proprietary interest for the purposes of A1P1. The claimant, who had been repeatedly sexually abused and raped by her grandfather during her childhood, applied to the Criminal Injuries Compensation Authority for compensation. Her application was refused on the basis of a rule within the statutory scheme which retained the "same roof" exclusion in respect of criminal injuries suffered before 1 October 1979. The CA held that the domestic criminal injuries compensation legislation created a right to an award for a victim of crime who fulfilled the eligibility criteria and that this was sufficient to establish a proprietary interest falling within the ambit of A1P1 for the purposes of her article 14 claim.

162. Giving the leading judgment, Leggatt LJ (as he then was) referred to the Grand Chamber's decision in **Stec v United Kingdom** (2005) 41 EHRR SE18 ("**Stec**"), that where an applicant had been denied all or part of a state benefit on a discriminatory ground covered by article 14, the relevant test is "whether, but for

the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question" (paras 45 and 49). Leggatt LJ noted that later cases showed that this "but for" test had also been applied where a person was excluded from a benefits scheme in a discriminatory manner (para 49). He saw "no logical reason" why the ECtHR's approach should be confined to cases involving welfare benefits:

> "50. …It seems to me to be an application of the general principle…that where a state creates rights under its domestic law which fall within the ambit of a Convention article, it must do so in a non-discriminatory manner. It follows from this general principle that article 14 is engaged if a person would have had such a right but for discrimination covered by article 14."

163. Leggatt LJ referred to **Fabris v France** (2013) 57 EHRR 19 (a case concerning a denial of a right to inherit property, rather than welfare benefits), where the test was stated as being, "whether, but for the discriminatory ground, about which the applicant complains, he or she would have had a right enforceable under domestic law in respect of the asset in question" (para 52). He said, applying this test, the question was whether, but for the "same roof" rule, the claimant would have had a claim which amounted to a "possession" within the meaning of A1P1 (para 53).

164. In **R (AA and another) v Secretary of State for Education and others** [2022] EWHC 1613 (Admin), [2023] ELR 700 ("**AA**") the claimants argued that the inability of the First-tier Tribunal ("FtT") to award compensation when it found they had been discriminated against by their schools, was an infringement of article 14 **ECHR**, read with article 8 and/or A1P1. As a statutory exclusion prevented the FtT from awarding financial relief, the claimants sought a declaration of incompatibility. After referring to the tests identified in **Stec** and **JT**, Saini J explained that the claimants relied on two ways of establishing that their claim was within the ambit of A1P1. Firstly, they argued that a claim under the **EqA** against the responsible body of the school was a "possession" and but for the claim being brought on the ground of disability and the impugned statutory exclusion, the claimants would have a right to that possession. Secondly, even if the claimants' **EqA** claims were not a "possession", the claimants could rely on the "positive modality" principle; the United Kingdom had chosen to give victims of discrimination the right to bring claims against both the responsible body of schools and against Further Education and Higher Education institutions under the **EqA** and in all the circumstances, save for discrimination in schools, the scheme permitted the court or tribunal to make an award of damages. Accordingly, the "but for" test explained by Leggatt LJ in **JT** was satisfied.

165. Saini J rejected the first way the "within the ambit" argument was put. Referring to **Draon v France**

(2005) 43 EHRR 40, he noted that for a claim to be capable of being considered an "asset" falling within the scope of A1P1, the claimant must establish that the claim has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it, so that the concept of "legitimate expectation" came into play (para 56). He noted that the **Draon** line of authorities had been considered in **R (Reilly) v Secretary of State for Work and Pensions (No. 2)** [2016] EWCA Civ 413, [2017] QB 657, where the CA held that a right that had never legally accrued could not be a possession for the purpose of A1P1 (para 57). Applying these principles, there was no right to damages for disability discrimination in schooling where a claim was made to the FtT. However, Saini J accepted the second way in which the "within the ambit" argument was put:

> "On the basis of the modality reasoning, the Claimants are entitled to submit for Art 14 purposes that where the state has created a right under its domestic law which falls within the ambit of a Convention Article, it must do so in a non-discriminatory manner. It follows from this general principle that Art 14 is engaged if a person would have had such a right but for discrimination covered by Art 14."

166. In **R (SC and others) v Secretary of State for Work and Pensions and others** [2021] UKSC 26, [2022] AC 223 ("**SC**") Lord Reid PSC described the ECtHR's gradual recognition, over a series of cases, that indirect (as well as direct) discrimination could found a violation of article 14 (paras 49 – 53). At para 49, Lord Reid described article 14 indirect discrimination as arising:

> "…in a situation where a general measure or policy has disproportionately prejudicial effects on a particular group. It is described as 'indirect' discrimination because the measure or policy is based on an apparently neutral ground, which in practice causes a disproportionately prejudicial effect on a group characterised by a salient attribute or status."

167. Lord Reid explained what had to be established in an indirect discrimination claim (at para 53) as follows:

> "…it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, so as to give rise to a presumption of discrimination. Once a prima facie case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge this burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means…"

168. Whilst it is unnecessary to address the general principles regarding justification of discriminatory treatment in any greater detail, I will refer to an aspect that is relied upon by Mr Lewis in support of his "within the ambit" argument in relation to article 8 (para 187 below). The ECtHR has adopted a strict approach to

differential treatment on the ground of race or ethnic origin, stating that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society: per Lord Reid at paras 108 and 115(1) in **SC**.

169. Lord Reid also discussed the "other status" requirement (applicable where the treatment is not on the ground of one of the characteristics listed in article 14 itself), noting that "in the context of article 14 'status' merely refers to the ground of the difference in treatment between one person and another" and that cases where the ECtHR had found the "status" requirement not to be satisfied were "few and far between" (para 71).

170. In **Steer v Stormsure Ltd** [2021] EWCA Civ 887, [2021] ICR 1671 ("**Steer**"), Bean LJ addressed the "status" requirement and applied the "package principle" in determining whether less favourable treatment had been established. The claimant brought a sex discrimination claim in respect of her dismissal. She applied for interim relief, contending that there was a breach of article 14 **ECHR** read with article 6 and/or article 8, as domestic law under the **EqA** did not provide for such a remedy in discrimination and victimisation claims, in contrast to the position under section 128 of the **Employment Rights Act 1996** ("**ERA**") where interim relief could be sought by a whistleblowing claimant. The CA proceeded on the assumption that the "within the ambit" test could be shown in relation to article 8. However, the court held the fact that a particular remedy was available in litigation of one type but not of another, did not constitute article 14 discrimination against the claimant on the ground of a "status" (as a discrimination claimant). Bean LJ's analysis of the "status" issue included the following:

> "39. It is so well known as to be a matter of judicial knowledge that the overwhelming majority of claimants alleging sex discrimination are women, but this does not mean that the availability of a particular remedy in a type of claim, such as whistleblowing, which…is brought by women and men in roughly equal numbers, and the unavailability of the same remedy in a sex discrimination claim, constitutes a difference in treatment on the grounds of sex or some form of indirect discrimination against women. Otherwise, this would lead to a comparison between every form of litigation brought approximately equally by men and women with sex discrimination claims.
>
> 40. For example, let us suppose for the purposes of argument that claims for personal injuries in road traffic accidents are brought approximately equally by men and women. Personal injury claims have some advantages by comparison with discrimination claims, but also some disadvantages. The differences are many and various, and it is sufficient to point to a few…I do not consider that a discrimination claimant is entitled to say that the unavailability in her case of certain remedies given to a road traffic accident victim amounts to a breach of her rights under article 8 read with article 14 of the ECHR.
>
> ……
>
> 42. …The reason why a claimant in a discrimination case cannot claim interim relief is because she has not brought one of the small and select group of substantive claims in which Parliament has conferred jurisdiction on the employment tribunal to grant interim relief. The fact that a particular remedy is available in litigation of type A but not of type B does not constitute discrimination against the claimant in a type B case on the ground of her status as a type B

claimant."

171. The court's conclusion on the "status" issue meant that the claim failed. However, Bean LJ went on to consider the issues of analogous situations (which he assumed in the claimant's favour), less favourable treatment and justification. He began his analysis of whether less favourable treatment had been shown by observing that this question should be "viewed as a whole". He referred to **Totel v Revenue and Customs Comrs** [2018] 1 WLR 4053 ("**Totel**"), where Lord Briggs had said (at para 31) that less favourable treatment was not established merely because the procedure for one type of claim contains a restriction or condition that is absent from another type of claim; it was common to find that different claims were subjected to "a package of procedural requirements, such that some of those affecting claim A are less favourable, but others are more favourable than those affecting claim B". Bean LJ noted that whilst **Totel** concerned the principle of equivalence under EU law, he could see no reason why it should not apply in human rights law to a comparison of the remedies available in different type of claims (paras 51 – 52). Bean LJ went on to list a number of respects in which the requirements for discrimination and victimisation claims were more favourable to claimants than those that applied in respect of section 103A **ERA** whistleblowing claims (para 52). At paras 53 and 54, Bean LJ expressed his agreement with the view of Cavanagh J (who heard the appeal in the EAT), who had concluded:

> "Taking into account all of the various procedural/remedies features of discrimination/ victimisation claims and of section 103A claims, including interim relief, in my judgment it is not the case that the procedural/remedies requirements of discrimination and victimisation cases are less favourable than those that apply to section 103A claims. Whilst the right to claim interim relief is a real benefit, it does not, in my view, outweigh the procedural and remedies advantages of discrimination/victimisation claims, as described above. It is necessary to take a practical and realistic approach to this comparison. If this is done, then, in my opinion, the features of discrimination/victimisation claims which are more favourable to claimants are considerably more valuable in practice than the countervailing features of section 103A claims."

172. A similar approach was adopted in **AA** (paras 164 - 165 above). Saini J rejected the submission that the parts of Bean LJ's judgment in **Steer** relating to less favourable treatment and the package principle were *obiter dicta* and incorrect in that they reflected EU law, rather than **ECHR** principles. Even if the reasoning was *obiter* (contrary to the judge's primary view), it was correct and applicable to **ECHR** cases (para 75). Saini J went on to indicate that even if he was not bound by **Steer**, he would adopt the same approach:

> "77…There is no magic in the concept under EU law of less favourable treatment. Like an Art 14 comparison, it raises a factual question as to whether there has been different (less favourable) treatment when the Claimants' position is compared to the comparators. The Claimant has the burden of showing this. They have not discharged it. I accept the evidence of Ms Bond that there are substantial benefits to FtT complainants which do not apply in the County Court…I do not

> consider when this package is considered in a holistic manner that the lack of a financial remedy before the FtT has been shown to establish less favourable treatment against the only proper comparator…"

Submissions

The claimant

173. This part of my judgment should be read in conjunction with the description of the grounds of appeal at paras 73 -92 above. As the grounds of appeal were formulated before the CA's judgment in **Royal Parks**, some of the points raised in the grounds had receded into the background by the time of the appeal hearing (albeit they have not been formally abandoned in any respect). I will begin with Mr Lewis' submissions on Grounds 6 and 7, since these lie at the heart of the way that the appeal is put post **Royal Parks**.

174. Mr Lewis relies on a legal right on the part of the respondent to uplift the claimant's pay to the LLW level, pursuant to clause 60.1(17). He says that in light of this contractual right, the respondent did have the right to restore, or at least reduce, the pay inequality, so that this aspect of the single source requirements was met. Further, that this is a materially distinguishing feature from **Royal Parks**, as there was no equivalent contractual right in that case, where an increase in pay to LLW rates would have needed to be the subject of further negotiation between RPA/RPL and Vinci. He says that the CA could not have intended to exclude contractual right situations from section 41 **EqA**, as if that were the case, there would be disharmony with the single source principle, yet Underhill LJ intended his interpretation of section 41 to be consistent with that principle. Mr Lewis also derives support from the last few lines of para 71 in **Royal Parks**, where Underhill LJ contemplated that the position might have been different if the principal in that case had made it a term of the contract that Vinci pay the LLW. In terms of the contractual right taking the present case outside of the *ratio* of **Royal Parks**,

175. Mr Lewis accepts that in light of **Royal Parks**, in order to show an ability on the respondent's part to restore equality for the purpose of the single source test, it was insufficient for him to rely on the "real world" influence that the respondent had over OCS, although, along with the contractual power, this was still relevant to satisfying the other limb of the single source test, responsibility for the inequality.

176. Mr Lewis acknowledges that as the **Race Directive** had been raised in the written arguments before the CA in **Royal Parks** and it had been relied upon by the tribunal in that case, he could not say that the CA's decision was *per incuriam* in terms of the Directive. However, he contends that he is entitled to rely upon the

Race Directive, if I accepted it was arguable that the alleged contractual power existed in this case and that it was a material point of distinction from **Royal Parks**. Mr Lewis' position is that it matters not whether the **Race Directive** is used to re-interpret section 41 **EqA** or it is relied upon as directly effective; it leads to the same result. He emphasises that as the **Race Directive** reflects fundamental EU law principles of equality, its terms must not to be construed narrowly and the single source principle is itself a restriction that had been read into article 141 **EC**. Furthermore, there was no reason why the **Race Directive** should adopt a more restrictive approach to comparators in pay claims than the ECJ case law had taken in respect of equal pay claims.

177. Mr Lewis submits that the **Race Directive** requires section 41(1)(a) to be read so as to include a situation where a single source principal failed to exercise a contractual power to uplift the pay of a contract worker to the level of its (comparator) direct employees, thereby "allowing" the contract worker to be paid at a lower rate (here, than the LLW). Further or alternatively, he says that the Directive requires that section 41(1)(d) be read as a matter of causation, so that the failure to exercise the contractual right to uplift the claimant's pay to the LLW has put her at a disadvantage and subjected her to a detriment, as it has caused her not to receive the LLW level of pay. He also says that the same result is achieved by reading section 41(1)(d) as encompassing subjecting the contract worker to a detriment "directly or indirectly".

178. Mr Lewis drew attention to the way that the single source question was posed by the EAT in **Dolphin and others v Hartlepool Borough Council** UKEAT/0559/05/LA, namely "what is the body responsible for setting the terms and conditions of employment *of which complaint is made* and which can restore equality?". Here the issue is the setting of the minimum value of the claimant's pay, so the fact that the respondent did not have contractual power in relation to other aspects of her terms and conditions was not in point, as it had a legal entitlement to uplift pay and thus was able to restore her equality of pay. Further, unlike **Allonby ECJ**, the claim was not concerned with the absence of a general power on the part of the respondent to set wages levels for workers in the claimant's position, as opposed to a specific power to reduce inequality by setting a LLW rate of payment. Mr Lewis contends that the EJ was wrong to base her reasoning on the Advocate General's three categories in **Lawrence** (para 115 above); these categories were not adopted in the ECJ's judgment and they were simply examples identified by the Advocate General in extrapolating the general principle. He also says that **Glasgow City Council** and **Asda** have confined the decision in **Robertson** to the particular circumstances of the statutory delegation within the civil service (paras 123 - 126 above); and that

Glasgow City Council EAT underscored that the EJ had wrongly focused on the *ability of OCS* to change the terms and conditions of the workers (para 124 above).

179. Ground 1 is closely interlinked with Grounds 6 and 7 and Ground 1B, which concerns the ET's interpretation of clause 60.1(17), is particularly important to the claimant's case. Although Mr Lewis accepts that at this level he cannot succeed by simply showing an arguable case of the respondent having *influence* over OCS in respect of the claimant's level of pay, he says that the factual context is nonetheless relevant to the construction of clause 60.1(17), as there was, at least, ambiguity in its wording and the EJ erred in failing to appreciate this and in failing to take account of factual material that supported the claimant's interpretation that this clause encompassed a contractual right on the part of the respondent to impose the LLW.

180. As regards the wording of clause 60.1(17) itself, Mr Lewis describes the EJ's reasoning as "very thin". He says that the use of "compulsory" in subclause (17) does not assist Mr Kirk's argument, as if the respondent exercised its contractual right in respect of the LLW, it would be imposed on OCS and thus it would indeed be "compulsory". Furthermore, a general introduction of the LLW by the Government would in any event come within the wording of 60.1(15) ("any change to the minimum hourly rate of pay set by Government which applies to workers"), so that 60.1(17) cannot be confined to that eventuality, as it would be unnecessary and duplicative. Clause 60.1 is concerned with identifying events that would have a cost neutral effect on OCS and there is no reason why the respondent mandating that the LLW be paid did not fit within this scheme. Mr Lewis does not accept that it is significant that sub-clauses (1) – (14) identified the person or party undertaking the act in question; the absence of a reference to a specific person or party in sub-clause (17) was readily explicable as the eventuality could apply *both* to where the Government made payment of the LLW compulsory and where the respondent imposed it upon OCS.

181. Mr Lewis recognises that what is done subsequently under the contract is not a guide to its interpretation; however, he says that the subsequent material can provide an indication of the matters that were live issues when the contract was entered into and the material currently available, at least, suggests that there is further pertinent disclosure to be given before the merits of the claim are determined. In this regard, Mr Lewis refers to the contents of the 22 January 2018 email (para 56 above) and also to Mr Elia's witness statement, which he says shows that uplifting to the LLW was an ongoing, much-discussed issue. Mr Lewis points to a number of documents that he says indicate that certain Government department premises, such as

the Sanctuary Building, had been designated LLW sites and he relies upon Mr Briceno's case in relation to the OAB as showing that the payment of LLW at such sites cannot simply be explained on the basis that **TUPE** *required* the contract worker to be paid at the LLW level (para 66 above); and upon para 13 of Mr Elia's witness statement. Mr Lewis maintains that it would be relevant to the interpretation of the contract to see documentation relating to the history of LLW designations prior to the FM contract being entered into. He also suggests that the SMI Email (paras 38 - 39 above) evidences a practice of sites being designated as LLW sites by the respondent; and that it would be relevant to have the Compensation Event Notices in respect of increases in the rate of LLW at the LLW sites, to see which provision of the contract was relied upon in that context. Similarly, given the documentation indicates that at least two Government Departments had a policy of paying the LLW, it is important to see whether the mechanism that avoided the increased costs being passed on to the supplier was founded upon clause 60.1(17). Mr Lewis also points to the new document dated 16 May 2023 in which OCS said, "the client" (i.e. the respondent) "wants us to pay the equivalent rate to the London Living Wage" (para 70 above).

182. Mr Lewis faintly argues, by way of an alternative fallback position, that even if I am not with him on the meaning of clause 60.1(17), if there was an offer made by OCS to uplift pay to the LLW level and that was accepted by the respondent, then that in itself would give rise to the necessary contractual entitlement.

183. Mr Lewis accepts that even if I am with him in respect of Grounds 1, 6 and/or 7 in relation to section 41(1) **EqA**, he also has to succeed on Grounds 2, 3, 4 and 8 in respect of the ingredients of the indirect discrimination claim. Mr O'Keeffe submits that the EJ's reasoning for rejecting the Disparity PCP was very limited and that there is no reason in principle why the claimant cannot rely upon the effect of two PCPs; the wording of section 19 does not preclude this (and pursuant to section 6 of the Interpretation Act 1978 the singular can be interpreted as including the plural). Furthermore, Underhill LJ had accepted that the pay differentiation relied upon in **Royal Parks** gave rise to a viable PCP (para 144 above), which, in substance, was not significantly different to the PCPs relied upon in the present case. As regards the Access PCP, the EJ had adopted a flawed approach to the pool; this was not a broad and innominate class, rather it was specific to contract workers in the claimant's cohort and the comparator employees of the respondent, as was evident from the pleaded claim. Mr O'Keeffe also addressed Ground 9, submitting that if the EJ had concerns about the formulation of the PCP and/or the scope of the pool, the proper approach would have been to give the

claimant an opportunity to re-formulate her claim, rather than striking it out. Mr O'Keeffe clarified that the only re-formulation relied upon for these purposes is the way that the PCP is described at para 8.1 of the Grounds of Appeal (the first paragraph of quoted text at para 81 above). Mr O'Keeffe dealt with Ground 3 briefly, indicating that it was obvious that the EJ was in error, as set out in the grounds of appeal.

184. In relation to Ground 4, Mr Lewis advanced a new argument based on the **Race Directive**. The Directive did not require that the PCP be *applied to the claimant by the respondent* and this was an unwarranted gloss. Where the single source test was satisfied in relation to the PCP complained of, it is simply a question of causation; did the PCP put the claimant at "a particular disadvantage".

185. Ground 8 was not addressed orally, but the claimant's skeleton argument submits that differences in the respective roles were not necessarily material to the comparison; and that in any event whether the roles were of equal value required a fact-sensitive assessment that could not be determined on a strike out application. Further, as the EJ had accepted that Domestics were arguable comparators, she clearly did not regard the distinct statutory requirements of civil servants as precluding the comparison.

186. As regards Ground 10, Mr Lewis emphasises that a contention based on article 14 was not advanced in **Royal Parks** and that this argument has not been addressed before. He submits that the claimant should be permitted to rely upon the "within the ambit" argument in relation to A1P1, although it was not raised below. The respondent would not be prejudiced by this, the landscape had shifted in light of the **Royal Parks** decision and this is a strike out, rather than a situation where a party sought to raise a new argument post-trial. Furthermore, the A1P1 contention overlapped with arguments that were raised below. As this case was likely to go to a higher court, it would be helpful to have the EAT's determination of this point.

187. As regards the "within the ambit" requirement and article 8, Mr Lewis emphasises the history of BME workers suffering exploitation and low pay and that the complaint in this case (the non-payment of the LLW), was about *minimum* standards of pay and race, one of the "suspect grounds". He relies primarily upon the reason-based approach (paras 155 - 156 above), contending that the subject matter of the claim related to identity, exclusion and self-worth. As regards A1P1, Mr Lewis says that there was a basis for the indirect discrimination claim in national law "but for" the discriminatory condition, the Sex Discrimination Condition (para 92 above), of which complaint is made.

188. In his oral argument, Mr Lewis clarified the alternative ways that the case was put on less favourable

treatment. Firstly, he said that the Sex Discrimination Condition amounted to indirect race discrimination against BME workers, as set out in Ground 10 (para 92 above). As he put it, the bar on bringing a pay discrimination claim "was more likely to bite" in respect of a BME claimant. Secondly, the disparity between race discrimination claimants and sex discrimination claimants in pay cases amounted to direct discrimination between two analogous groups.

189. Mr Lewis submits that the package principle (paras 171 - 172 above) has no application to the present circumstances; **Steer** was concerned with a comparison between two remedies relating to two different claims, whereas here it is the substantive claim that is not permitted in the claimant's situation. Mr Lewis' argues that I do not need to be concerned with the overall position as regards equal pay claims and race discrimination pay claims, in terms of the respective advantages or disadvantages of the criteria that must be satisfied for a successful claim, rather I should "zoom in" on the single source doctrine and its development in the equal pay context. He relied upon the "positive modality" principle as applied in **AA** (para 165 above).

The respondent

190. Mr Kirk submits that Underhill LJ's reasoning in **Royal Parks** is fatal to the claimant's contention that the claim against the respondent is within section 41 **EqA**. The effect of the CA's decision, which is binding on the EAT, is that a contract worker employed by OCS is unable to complain about her pay being lower than the pay of those employed directly by the principal and this is the case no matter how much influence the principal has over the contract worker's pay and whether that influence is a matter of contractual right or not. Accordingly, even if Mr Lewis were right about clause 60.1(17), which is disputed, it would not avail the claimant. Mr Kirk says that there is no material distinction between **Royal Parks** and the present case in terms of the facts; he points to the right that RPA/RPL reserved under the contract to increase pay and to the fact that, as Underhill LJ acknowledged, RPA/RPL could always have made it a term of the contract that Vinci paid the LLW (paras 128 and 142 above). Furthermore, it could be said that the facts were more strongly in the claimant's favour given that, ultimately, the LLW was paid as a result of the principal's decision.

191. Mr Kirk submits that **Allonby ECJ** is fatal to the claimant's attempt to rely upon the single source principle, since the ECJ concluded as a matter of law that there is no single source in a situation where a contract worker seeks to compare their pay with that of the principal's employees. The arguments that were

roundly rejected by the ECJ in terms of the policy considerations and in terms of the significance of the principal's influence over the supplier, are analogous to those advanced by Mr Lewis. Mr Kirk argues that the categories identified by the Advocate General in **Lawrence** (para 115 above) are an exhaustive articulation of the circumstances where the single source doctrine can apply in equal pay cases. He says that none of the subsequent authorities relied upon by the claimant are authority for the proposition that a principal's contractual power to uplift the pay of contract workers in its contract with the supplier, is sufficient for the principal to be regarded as a single source for the pay of its employees and the contract workers. Mr Kirk says that the present situation is "a world away" from the circumstances of **Glasgow City Council** or **Asda**; OCS is an independent limited company, responsible for setting the terms and conditions of its employees and it can pay its employees the rate that it chooses to. Furthermore, the EJ correctly directed herself in relation to the single source principles.

192. Whilst emphasising that the factual circumstances do not meet the single source criteria, Mr Kirk also submits that the single source doctrine cannot avail the claimant in any event, as it only applies to equal pay claims and not to pay discrimination claims under the Race Directive; this analysis is supported by **Lawrence** and by **Potter** and Mr Lewis is unable to point to authority to the contrary.

193. Mr Kirk contends that in light of this analysis, Grounds 6 and 7 must fail and the EJ was right to strike out the claim. Ground 5 simply highlights the EJ's accurate acknowledgment of the commercial reality. Ground 1 does not advance matters from the claimant's perspective as there were no *relevant* disputes of fact before the ET. As regards clause 60.1(17), the EJ was correct in concluding that there was no reasonable prospect of the claimant establishing that this gave the respondent a contractual power to require payment of the LLW. He says it is important not to lose sight of what a Compensation Event is; it is a contractual mechanism for OCS to pass on costs to the respondent in the circumstances identified in clause 60.1; clause 60.1 is not concerned with conferring additional powers on the respondent. Furthermore, says Mr Kirk, the wording of clause 60.1(17) is quite clear; the use of the word "compulsory" indicates that it is the introduction of the LLW by Government legislation that is being referred to here. He submits that sub-clause (17) is not surplusage or unnecessary; sub-clause (15) relates to changes to the rates of existing entitlements to NMW and NLW, not to the introduction of the LLW.

194. Mr Kirk also disputes that the documents relied upon by the claimant throw light on the interpretation

of clause 60.1(17). In the main, they post-date the contract and thus cannot be relevant to its construction. In terms of the new documents (paras 69 - 70 above), the 23 October 2015 letter relates to the Department of Education and it is not clear that the OCS document of 16 May 2023 is linked to it; nor is it clear that "the client" referred to in the second line of this document is the MOJ, as the claimant suggests. The SMI Email does no more than indicate that the LLW is paid at the OAB; a point not inconsistent with the respondent's position that this is because it is a legacy **TUPE** site. Further, even if OCS has paid the LLW to some workers at the LLW sites when not required to do under **TUPE**, this did not say anything about the intention of OCS and the respondent at the time of entering into the FM Contract. Equally, Compensation Event Notices would simply be examples of how the contract had been operated in practice *after* it had been agreed. The 10 August 2018 email (para 67 above) showed the MOJ's understanding as to the re-negotiations that would need to take place if it was decided that the LLW should be paid; and this was not materially different to the principal's degree of influence in **Royal Parks**.

195. In addition to the fact that the claimant cannot bring her complaint within section 41 **EqA**, Mr Kirk submits that the indirect discrimination requirements of section 19 are not met. The statutory requirement that the PCP be applied to the claimant by the respondent cannot be side-stepped by reliance on the **Race Directive** and the claimant has never identified a PCP that has been applied to her by the respondent. In any event, the reliance on the **Race Directive** here is a new argument raised for the first time in the claimant's skeleton argument for this hearing and objection is taken to it being pursued. The Disparity PCP is not a proper PCP as it relies upon two different PCPs, applied to different groups of people by two different employers. Further, the correct pool to be used to test a PCP's impact must be obvious from the PCP itself and this is not the case with the Access PCP, where the pool would be incredibly wide. As regards Ground 3, given the way the Access PCP is formulated, the EJ was right to ask whether the claimant had been disadvantaged in terms of whether she had sought employment with, or wanted to be employed by, the respondent.

196. As regards Ground 8, Mr Kirk says that the EJ was plainly correct to find that the respondent's employees were not appropriate comparators; the circumstances were outside of section 41(1) **EqA**, the claimant's pay was set by a wholly different body and the direct employees are civil servants who have a particular constitutional role. In relation to Ground 9, Mr Kirk emphasises the opportunities that the claimant has already had to amend her claim and says that a viable claim has still not been identified.

197. Mr Kirk does not accept that the article 14 contention was argued below. There was a brief mention of article 14 read with article 8 in the claimant's skeleton argument for the ET hearing, but this was not advanced orally and the point was not formulated in the "Sex Discrimination Condition" way that it is now put in Ground 10. A party is expected to put its case at first instance; and to permit article 14 to be argued at this stage could open up new areas of fact and it would prejudice the respondent.

198. Mr Kirk submits that, in any event, Ground 10 is predicated on a false premise; there is no relevant mismatch, in terms of the available comparator, between the position of an equal pay claimant and a race discrimination pay claimant in terms of advancing a claim against a single source other than the worker's employer. He says that Underhill LJ was correct in **Royal Parks** in considering that the tests are the same and produce the same results.

199. Mr Kirk does not accept that the circumstances are within the ambit of article 8. The employment-related disputes where article 8 has been engaged have involved dismissals, direct discrimination and/or harassment. This case is far removed from those sorts of situations and none of the authorities cited supported Mr Lewis' argument. So far as the consequence-based approach is concerned, the claimant had provided no evidence at all as to the impact on her. He also disputes that the situation is within the ambit of A1P1; there is no sufficient basis for the claim in national law and thus it cannot be a "possession". **AA** was a very different sort of case, as there was a right to claim for disability discrimination, but a carve out meant that damages could not be awarded. Further, or alternatively, Mr Kirk submits that the two situations are not analogous and, in any event, the **Steer** package principle applies, so that Mr Lewis cannot simply pick a particular aspect of an equal pay claim and seek to compare that single element with the position of contract workers alleging race discrimination in pay against their principal. Mr Kirk also submits that Mr Lewis relies upon the wrong pool of comparators.

Analysis and conclusions

Grounds 1, 5, 6 and 7: section 41(1)(a) and (1)(d) EqA

Ground 6 and the scope of section 41

200. In common with the approach taken by Underhill LJ in **Royal Parks**, it is convenient to begin with the prospects of the claimant showing that the conduct she complains of comes within section 41(1)(a) and/or

(d) **EqA** (para 130 above). This involves consideration of her Grounds 1, 5, 6 and 7. The over-arching question is whether she has a realistic, as opposed to a fanciful, prospect of success on this issue (para 97 above).

201. Mr Lewis accepts that **Royal Parks** is binding upon me and that (subject to the Ground 10 ECHR argument, considered below) the decision is fatal to the claimant's prospects of success unless he is able to show that there is an arguable distinguishing feature. As I have explained, he relies on the proposition that in this instance, unlike in **Royal Parks**, there was a legal right on the part of the respondent to uplift the claimant's pay to the LLW level, pursuant to clause 60.1(17).

202. I will firstly consider whether an arguable contractual entitlement of this nature would afford a point of material distinction from **Royal Parks**. In order to determine this question, it is helpful to distil the key planks of Underhill LJ's reasoning (addressed more fully at paras 130 – 142 above), which I summarise as follows:

i) The specific kinds of detriment identified in section 41(1)(a)-(c) reflect the statutory purpose of the section, namely to proscribe discrimination in the context of the non-contractual relationship between contract worker and principal, where the responsibility for and control of access to the work, the workplace and what happens at work lies with the principal, rather than the worker's employer (the supplier). The provisions are not concerned with the worker's rights under their contract with their employer (paras 132 – 134 above);

ii) As recognised in **Allonby CA** and as the basic structure of section 41 reflects, a complaint by a contract worker that the terms of their contract with their employer are discriminatory can only be made against that employer, because such terms are not part of the principal-worker relationship (paras 134 – 136 above);

iii) It follows that the phrase in section 41(1)(a), the "terms on which the principal *allows* the worker to do the work", is concerned with a stipulation that is imposed by the principal on the worker as a condition of the worker being allowed by the principal to do the work and not with any stipulation imposed by the principal on the supplier. The sub-section (1)(d) reference to the principal "subjecting the worker to any other detriment" is to be similarly understood (para 137 above);

iv) Given this dichotomy between detriments which are the result of the terms of the worker's contract of employment and detriments imposed by the principal, the fact that the principal is able to

direct or effectively dictate the terms of the contract between the worker and their employer does not alter this position (para 138 above);

v) This approach to section 41 is in harmony with the position in relation to equal pay claims, where a contract worker cannot bring an equal pay claim based on a comparison with directly employed employees of the principal unless their terms of employment derive from a "single source" (para 140 above); and

vi) Further support for this interpretation of section 41 is to be found in the fact that there would be no clear marker for identifying the point at which the principal's influence over the worker's employer crossed the line into "direction" or "effective dictation". It is very common in large outsourcing contract arrangements for the principal to have some influence over what the supplier pays the contract workers (para 142 above).

203. Accordingly, Underhill LJ identified a distinction between complaints concerning rights arising from the employer-worker relationship, which were outside the terms of section 41, and detriments stemming from the principal-worker relationship, which could come within it. The distinction was identified as a clear-edged one of principle, rather than a continuum whereby a particularly high level of direction or dictation by the principal as to the terms of the workers' employment contracts with the supplier might tip the circumstances into section 41 territory. Underhill LJ's reasoning is binding on me and, in any event, I respectfully agree with it. There is nothing in his reasoning that suggests a power on the part of the principal in its contract with the supplier that enabled it to uplift the pay of the latter's employees would be an exception to this otherwise clear dichotomy; indeed, such a conclusion would run contrary to the line of reasoning that I have just summarised. Accordingly, I consider that the existence of a contractual power on the part of the principal to require the supplier to pay its employees at the LLW level would not give rise to a section 41 claim against the principal on the basis that it had chosen not to exercise that power in circumstances where it pays its own employees at the higher LLW level. The complaint would still be a complaint about the rights arising from the employer-worker relationship (the level of pay), rather than about the principal-worker relationship. As I come on to address at paras 227 – 232 below, Mr Lewis' submissions on the "single source" principle do not assist his argument.

204. As I noted at para 174 above, Mr Lewis suggests that the last few lines of para 71 in **Royal Parks**

indicate that Underhill LJ did recognise the position might be different if the principal in that case had made it a term of its contract with the supplier that Vinci pay the LLW to its employees. I do not accept this. The point that Underhill LJ was making at paras 71-72 of **Royal Parks** (para 142 above) was to the opposite effect, namely that, if the claimant's construction was adopted, there would be no clear markers for identifying the point at which a principal's influence over what the supplier paid its employees crossed the line into "direction" or "dictation" and thus came within section 41. To illustrate *this point* Underhill LJ referred to a number of possible scenarios, including one where Royal Parks made it a term of the contract that Vinci pay the LLW. If he had thought that this scenario in fact provided, or might provide, a clear marker and principled point of distinction, I am confident that Underhill LJ would have said so.

205. There may also be some force in Mr Kirk's point that the facts in **Royal Parks** were more strongly in the claimant's favour than they appear to be in the present instance (para 190 above). However, I do not need to reach a conclusion on this last point, in light of the clear distinction of principle, which I have explained and which I am bound to apply.

206. Accordingly, whilst I will still address the specific sub-grounds, the broad over-arching contention that underpins Ground 1 must fail; this is not a case where the prospects of success depend upon fact-sensitive issues that cannot be properly determined against the claimant on a strike out application. That the claimant has no realistic prospect of bringing the claim within section 41 is a point of law which is perfectly suitable for determination at the strike out stage. The core of Ground 6 is that the EJ erred in failing to appreciate that both sections 41(1)(a) and (1)(d) are broad enough to encompass the pleaded claim. For the reasons I have identified, that ground must fail. (I address the single source aspect, which is the focus of Ground 1C and Ground 7 from para 227 below.)

Ground 1B and the construction of clause 60.1(17)

207. As I have concluded that the pleaded circumstances cannot fall within section 41 even if the respondent has the contractual right to uplift the claimant's pay to the LLW level, that is a complete answer to this area of the appeal. Nonetheless, because I recognise that the case may well go to a higher level, I will also address whether there is an arguable case that clause 60.1(17) confers this contractual right and whether it was premature to strike out the case on the basis that this is a question that depends upon factual evidence that

should be the subject of a full hearing.

208. Before doing so, I can briefly dismiss Mr Lewis' alternative fallback argument that if it was agreed between OCS and the respondent that she would meet the costs of the FM Contract workers being paid at the LLW level, then there would be a contractual obligation on her to do so (irrespective of what clause 60.1(17) says) (para 182 above). The short point is that this affords no material point of distinction from **Royal Parks**; as the same could be said in that case.

209. For reasons I will go on to identify, I have concluded that there is no realistic prospect of the claimant showing that clause 60.1(17) confers a legal right on the respondent to make payment of the LLW compulsory for the FM Contract workers and that the EJ was correct in her conclusion in this regard. I consider that the position is clear at this stage from clause 60.1(17) itself, construed with regard to its wording, the related contractual provisions and the clause's evident purpose. Furthermore, there is nothing objectionable about arriving at this conclusion at this stage of the proceedings; applying the approach I identified at para 146 above, there are no reasonable grounds for supposing that a fuller investigation of the facts might make a difference to the construction of this provision.

210. I referred to the March 2018 amendment to the FM Contract and the material provisions that were introduced at that stage, including clause 60.1(17), at paras 42 – 45 above.

211. Clause 60.1 begins with the words "The following are compensation events…". As Mr Kirk submitted, it is important to keep in mind that the purpose of clause 60.1 is to identify a series of Compensation Events; and that a Compensation Event is a contractual mechanism that enables OCS to pass on costs to the respondent in the particular circumstances that are identified. It is not a provision that is aimed at conferring additional contractual powers on the respondent, rather, as is apparent from its terms, it identifies particular events and contingencies which will be treated as Compensation Events. None of the other Compensation Events listed in clause 60.1 can be read as enlarging the respondent's rights under the contract.

212. Secondly, the wording of clause 60.1(17) itself plainly supports the EJ's construction that it identifies the Government's enactment of a Living Wage or a LLW as a Compensation Event. The sub-clause's phrase "*introduction* of a *compulsory*" Living Wage or LLW does not appear apt to refer to a change in the contract workers' wage levels effected by one of the parties exercising a contractual power to do so, still less for this to be the very wording that confers the power upon the respondent to do so. It much more naturally refers to a

legislative change enacted by the Government, as does the inclusion of reference to both a "Living Wage or London Living Wage". Mr Lewis' submission that *if* a contractual power to introduce LLW pay levels is exercised, this, in effect, becomes "compulsory", is simply a circular chain of reasoning; the question is whether this wording confers that contractual power to do so. In my judgement, it does not.

213. Thirdly, it is of some significance that where other compensation events defined by clauses 60.1(1)-(14) have envisaged events brought about by one of the parties to the contract such as "the employer", the drafters have said so. Examples appear in the sub-clauses set out at para 44 above. I do not accept the claimant's proposition that clause 60.1(17) includes *both* a situation where the Government introduces legislation requiring payment of a LLW *and* one where the respondent requires OCS to pay the LLW to its relevant employees. I have already explained why the wording tends strongly against the proposition that this provision is introducing an additional contractual power for the respondent to that effect; and this is all the more so if, as Mr Lewis submits, it is being done via reference to an eventuality that also applies if brought about by the wholly different context of Government legislation.

214. Fourthly, the interpretation that I endorse accords a meaning to clause 60.1(17) that is consistent with the other Compensation Events added at the same time in clauses 60.1(15) and 60.1(16), as these relate to Government legislative changes in respect of the minimum hourly rate of pay and the rate of employer's national insurance contributions. There was no need to specify "the Government" in clause 60.1(16) or clause 60.1(17), as it is evident that both changes to employer's national insurance contributions and the introduction of a Living Wage or LLW would be undertaken by the Government.

215. Fifthly, I do not accept the claimant's contention that the EJ's interpretation of clause 60.1(17) renders it otiose. As Mr Kirk submits, clause 60.1(15) refers to changes in "the minimum hourly rate of pay set by the Government", that is to say amendments to the existing minimum hourly rates of pay set by the Government by the NMW and NLW. By contrast, clause 60.1(17) covers "the introduction" of a compulsory Living Wage or London Living Wage. It is necessary to have this provision so that in the event of the Government introducing the Living Wage or the LLW, OCS would be able to pass on the costs of this on to the respondent.

216. Accordingly, I conclude that the claimant's proposed construction of clause 60.1(17) is unarguable; far from the EJ's conclusion being perverse, the only sustainable construction of this provision is that it identifies an introduction of a Living Wage or LLW by the Government as a Compensation Event. Equally, as

my reasoning shows, the EJ did not take into account irrelevant considerations or fail to take into account relevant ones; her reasoning was relatively brief, but she arrived at the correct conclusion.

217. It will be apparent from my reasoning that the view I have expressed is not dependant upon the resolution of any of the factual disputes between the parties. Furthermore, I do not consider that a fuller investigation of the facts would alter this position. In the circumstances I will deal relatively briefly with the multiple contentions advanced by the claimant in respect of specific documentation.

218. As Mr Kirk points out, most of the material relied upon by Mr Lewis post-dates the relevant March 2018 amendment to the FM Contract and thus cannot be a guide to the interpretation of clause 60.1(17).

219. In any event, this material does not indicate any reasonable prospect of a different construction of clause 60.1(17) being adopted to the one that is clearly indicated by the factors I have identified. There is nothing in the documentation that is specific to clause 60.1(17). Indeed, a number of the materials are supportive of or consistent with the meaning of the clause that I have endorsed. The emails between Ms Gwilliam and Mr Elia in January 2018 proceeded on the basis that a decision on the LLW was one for the *contractor* (para 56 above). OCS's August 2018 submission to the Central Arbitration Committee referred to OCS adopting varying terms and conditions at the MOJ's sites on the basis of the **TUPE** protections (para 63 above). The 10 August 2018 MOJ internal email from James Rawlings referred to *suppliers* determining whether they chose to pay the LLW (para 67 above). The possibility of "mandating" the payment of LLW was understood to involve a process of re-negotiation with the suppliers that is set out in the second paragraph that I quoted from this email. This does not afford support for the claimant's reliance on clause 60.1(17) and appears to contemplate a process that is not materially distinct from that in **Royal Parks**, where the principal could, and ultimately did, mandate payment of the LLW. The "Executive Committee" paper that followed (also at para 67 above), explained that the respondent's position was one of "mandating the statutory pay wages only and leaving all other pay matters to their employers". The sheer fact that the uplifting of contract workers' pay to the LLW level was a "live issue" (as Mr Lewis put it) around the time that the FM Contract was amended (as well as at various other stages) does not in and of itself provide significant support for the proposition that clause 60.1(17) – which has a plain alternative meaning - was intended to confer a contractual power upon the respondent to do so.

220. There does appear to be a dispute between the parties as to whether the payment of the LLW at some

of the sites covered by the FM Contract, including the OAB and the Sanctuary Building, is wholly referrable to legacy **TUPE** obligations; Mr Briceno's case being given as an example (paras 64 and 66 above). Nonetheless, the complaint in his case was that *OCS* had offered to pay him at the higher LLW level in order to induce him not to take part in the activities of an independent trade union; it was neither found nor suggested that he was to be paid at this higher rate because the respondent had exercised a contractual right to require this at the site in question. In other words, the circumstances of OCS paying the LLW in Mr Briceno's case do not materially assist in the process of construing clause 60.1(17). More broadly, as Mr Kirk submits, even if OCS has paid the LLW to some workers at the LLW sites when it was not required to do so under **TUPE**, this in itself does not indicate anything meaningful about the intention of the contracting parties at the time when the FM Contract was amended in March 2018.

221. Equally, I do not accept that there is force in Mr Lewis' other specific points. Compensation Event Notices would simply be examples of how the contract was operated in practice *after* it had been agreed. The October 2015 letter from Nicky Morgan MP (para 69 above), relates to the Department of Education, rather than the MOJ; and the fact that, following her request, work had been undertaken which led to contractors in her Department being paid the LLW rate, indicates nothing meaningful about the specific provisions of the FM contract negotiated by the MOJ some years later. It is not clear who "the client" is in OCS's May 2023 letter (para 70 above), but even if this was the MOJ, the fact that it "wanted" OCS's workers to be paid at a rate equivalent to the LLW does not assist with whether there is a contractual power to require this under clause 60.1(17), agreed five years earlier.

222. In so far as it is said on behalf of the claimant that some of the documents show that the MOJ was considering whether contract workers pay should be paid at the LLW level and whether to "greenlight" such an increase, the circumstances are not materially different to those in **Royal Parks**.

223. Accordingly, the claimant's Ground 1B fails.

Ground 1A and the SMI Email

224. I turn to specifically consider the SMI Email (para 39 above) and Ground 1A. As is set out in this sub-Ground, the claimant contends that the terms of this email indicate that the parties to the FM Contract considered it included a power for the respondent to impose minimum rates of pay *and* that this power was

exercised by the giving of the instruction referred to in the email. However, this contention involves reading far too much into the email, that is not actually present. The email does not state or indicate (or even arguably state or indicate) either of those matters. The SMI Email simply says that a SMI has been given confirming that the LLW will be paid at the OAB. There is no indication of what has led to this instruction being given, nor what power is being exercised on the part of the respondent. There is nothing in this email which is inconsistent with the respondent's position that LLW was paid by OCS at the OAB to accord with legacy **TUPE** requirements. Moreover, as I have emphasised earlier, this email was sent over two years after the FM Contract amendment was agreed and cannot inform its interpretation. Given the respondent's explanation of the way she had interpreted the EJ's disclosure order (paras 35 – 36 above), I do not consider that any adverse conclusion is to be drawn from the respondent's non-disclosure of this email. In any event, for the reasons I have just indicated, the EJ was entitled to conclude that it was not relevant or necessary to a determination of the questions before her (para 40 above).

225. As regards the second aspect of Ground 1A (para 75 above), I have addressed why neither the SMI Email, nor OCS's May 2023 letter, avails the claimant. As regards the EJ's para 36 finding as to why the LLW rate was paid at certain sites (para 51 above), given the narrower way that the claimant's case is now put post **Royal Parks**, the position in respect of these sites could only support the claimant's case if there was evidence in relation to them that bore directly on the interpretation of clause 60.1(17) and whether it conferred a power on the respondent to require the LLW to be paid to OCS's employees working on the FM Contract. I have not been shown any such evidence. As I have already noted, the sheer fact that the LLW may have been paid to some OCS employees at these sites where this was not required by **TUPE** does not afford that support.

Ground 1D

226. The claimant is not assisted by Ground 1D. It was not inappropriate for the EJ to refer to the matters she identified in para 54 of her Reasons (para 58 above). In part, she was simply and quite properly distinguishing the present circumstances from those in **Asda**. In so far as she identified certain policy considerations as supporting her conclusion, a number of her points reflect those made by Underhill LJ in **Royal Parks**, including that OCS is responsible for the level of its employees' wages and that the influence the respondent was said to have over OCS was a reflection of "the commercial reality of outsourcing

arrangements generally". It is also said that the EJ erred in failing to appreciate that her approach meant that discriminatory treatment could be embedded by contracting out groups of workers, but there is nothing to suggest that she was not alive to this; moreover, the equivalent policy arguments were raised without success in **Lawrence**, **Allonby ECJ** and **Royal Parks**.

Grounds 1C, 5 and 7 and single source

227. As I have summarised at paras 176 and 177 above, Mr Lewis' argument that the Race Directive requires section 41(1)(a) to be read so as to include a situation where a single source principal fails to exercise a contractual power to uplift the pay of a contract worker to the level of its (comparator) direct employees, depends upon my accepting that it is arguable *both* that the respondent has such a contractual power and that this provides a material point of distinction from **Royal Parks**. However, as I have rejected both of these propositions, it follows that the Race Directive single source argument must fail. Nonetheless, I will address the specific single source arguments, albeit relatively briefly in these circumstances. (Mr Lewis accepts that at this stage of the litigation because **Royal Parks** is binding upon me, he cannot rely on the aspects of Ground 1C and 7 that are simply predicated on the respondent having some influence over the level at which OCS pays its employees.)

228. I do not need to determine the logically anterior question of whether the single source principle can apply outside of EU equal pay law, to pay discrimination claims brought by contract workers able to rely upon the direct effect of the Race Directive. Counsel were agreed that this is a novel question on which there is no authority. For the purposes of the points that I go on to consider, I will assume, without deciding, that such a proposition is at least arguable.

229. I agree with Mr Kirk's submission that **Allonby ECJ** is fatal to the claimant's attempt to rely upon the single source principle, even if (contrary to my primary conclusions) she did have an arguable case in relation to clause 60.1(17). As I have explained at paras 117 – 118 above, the ECJ was quite clear that the fact that the level of pay received by the applicant was influenced by the amount which the college was willing to pay ELS (the applicant's employer) was not a sufficient basis for concluding that the differences in income and other benefits between the applicant and the full-time male lecturers employed by the college was attributable to a single source. In arriving at this conclusion, the ECJ emphasised that the male lecturers were paid by the

college under conditions determined by the college, whereas the applicant's pay was agreed with her employer, ELS. There was no suggestion that the nature or extent of the college's influence over ELS could make a difference to this. Furthermore, Underhill LJ was quite clear in **Royal Parks** that **Allonby ECJ** was authority for the general proposition that "a contract worker cannot bring an equal pay claim based on comparison with direct-employed employees of the principal because they had different employees and their terms of employment did not derive from a 'single source'" (para 140 above).

230. As **Allonby ECJ** therefore precludes the difference in minimum pay levels between the claimant and the respondent's direct employees from being attributed to the respondent as a single source, it is unnecessary for me to also decide whether the EJ was right to say that the Advocate General's three categories in **Lawrence** constitute an exhaustive articulation of the circumstances in which the single source criteria can be satisfied (para 115 above).

231. My review of the post **Allonby ECJ** domestic authorities at paras 120 – 126 above indicates that the present situation is quite distinct from the circumstances in **Glasgow City Council** and in **Asda**, essentially for the reason that Mr Kirk identifies (para 191 above). Further, as he submits, none of the cases cited by the claimant are authority for the proposition that a principal's contractual power to uplift the pay of the contract workers in its contract with the supplier is sufficient for the principal to be regarded as a single source for the pay of its employees and the contract workers.

232. Lastly, in terms of this area of the case, I will address some further discrete points that are made in the claimant's grounds. In finding that the single source criteria were not met, the EJ did direct herself in accordance with the **Lawrence** two-limbed test (para 57 above). I agree that the EJ was wrong to attach the significance that she did to **Robertson** (para 57 above). As Lord Brodie explained in **Glasgow City Council**, **Robertson** was a decision on its facts, where the crucial point was that the power to negotiate and set most aspects of the pay of the civil servants employed in DEFRA was specifically delegated to the department by the Minister for the Civil Service by statutory instrument (paras 120, 121 and 125 above). Accordingly, the decision in **Robertson** does not in itself preclude a single source conclusion in the present case. However, this is immaterial; it only formed one strand of the EJ's reasoning and she arrived at the correct conclusion in rejecting the single source submission, for the reasons I have identified. Similarly, whilst I accept the claimant's submission that it was irrelevant for her to take account of the fact that the respondent was not

involved in negotiating the pay of OCS employees who worked for other clients (para 57 above), again, this was an immaterial error. Although Mr Lewis highlights the observation in **Glasgow City Council EAT** that the central investigation must be as to the powers and responsibilities of the alleged single source, Langstaff J recognised that powers of the immediate employer of the claimant were not irrelevant (para 124 above). The fact that it was always open to OCS to increase its employees' pay by reducing its profit margin was not an irrelevant point; it was part of the material commercial context.

Conclusion

233. It therefore follows that I reject Grounds 1, 5, 6 and 7 of the claimant's appeal. The claimant's legal team was correct in its earlier view that these grounds were unsustainable in light of **Royal Parks** (para 7 above). The claimant has no realistic prospect of bringing the circumstances complained of within section 41 **EqA** and the EJ was correct to strike out the claim.

Grounds 2, 3, 4, 8 and 9: section 19 EqA

234. Mr Lewis rightly accepts that the claimant can only avoid a strike out if she is also able to show that she has a realistic prospect of meeting the applicable requirements for a claim of indirect discrimination. As I have already concluded that the claim is bound to fail as the circumstances do not arguably come within section 41 **EqA**, I will deal with this aspect more briefly.

Grounds 2 and 9: the PCPs

235. As I have indicated, the claimant relies upon the Disparity PCP and the Access PCP (paras 19 – 21 above). I consider that the EJ was correct to reject the Disparity PCP as unarguable because it involved "two different PCPs" (para 52 above). As I have acknowledged, a claimant may rely upon the combined effect of two PCPs which are both applied to her by the respondent (para 106 above). However, the pleaded claim here is very different. The complaint concerns the disparity between the practice or policy on pay that the respondent applies to its own directly employed staff (payment of the LLW) and the practice or policy regarding contract workers employed in the performance of the FM Contract (non-payment of the LLW). This is not a complaint about an ostensibly neutral PCP that is applied to both the group that shares the claimant's protected

characteristic and the comparator group and which disadvantages the former; it is a complaint about overtly differing treatment of the two groups arising from two different PCPs. As is apparent from the statutory language, section 19 **EqA** requires that the PCP applied to B (the claimant) is also applied, or would be applied, to persons with whom B does not share the relevant protected characteristic and that it puts those with whom B shares the protected characteristic at a particular disadvantage when compared with that other group (para 98 above). As explained by Baroness Hale in **Essop**, the essence of indirect discrimination involves comparing the respective impact of the same PCP on the group with the relevant protected characteristic and its impact on the group without it (para 108 above).

236. Accordingly, I do not consider that the Disparity PCP formulation is capable of meeting the requirements of section 19. Even the claimant's grounds of appeal describe the Disparity PCP as a complaint relating to the "*practice of differentiation* between R's directly contracted employees and Contract Workers as to rate of pay applied or required to be applied when working for R" (para 81 above; emphasis added). Self-evidently, the claimant has not brought a direct discrimination claim in respect of these differing contractual arrangements, as the difference in treatment is not because of a protected characteristic (even if it could be shown that the respondent was responsible in law for both); but this difficulty cannot be avoided by recasting the making of the different arrangements for the two groups as itself a PCP for the purposes of section 19.

237. I take a different view in relation to the Access PCP. I accept the claimant's submissions that the EJ's reasons for rejecting this as an arguable PCP were flawed. There were three specific errors.

238. Firstly, I do not see the logic of her reasoning that because it was "obvious" that a person had to be directly employed by the respondent in order to access the level of pay conferred on her directly employed staff, the reformulated Access PCP could not amount to a PCP within the meaning of section 19 (para 52 above).

239. Secondly, I do not share the EJ's concern – at least for strike out purposes – that the pool for the Access PCP would be too wide to be meaningful. The EJ thought that the claimant's group for these purposes would comprise all those who worked at the respondent's premises via a contractor or, the even wider pool, of all those in the United Kingdom who carry out work as cleaning operatives (para 52 above). However, the APC had identified the claimant's cohort for the purposes of the pool in narrower terms, as "all contract workers deployed to service the Contract". In terms of the claimant's group, I do not see how the pool would be wider

than those supplied to work at the respondent's premises pursuant to the FM Contract, as it is the respondent's failure to use the alleged power in that contract to uplift the contract workers' pay that lies at the heart of the complaint. At the very least, this is arguably so. Insofar as this way of putting the claim may be dependent upon the further re-formulation of the Access PCP referred to in the grounds of appeal (paras 81 – 82 above), I address amendment of the claim at para 243 below. Furthermore, the EJ was wrong to attach significance to the CA's decision in **Difolco**, which concerned an entirely different issue, namely whether a duty to make reasonable adjustments in respect of an advertised role arose was owed to those who had not applied for the post.

240. Thirdly, I agree that the EJ was wrong to accord significance to the fact that the claimant had removed complaints about sick pay, maternity pay and employer pension contributions from the claim (para 52 above). There was nothing to suggest that this was because the claimant accepted there was an inherent difficulty in formulating a claim along the lines of the Access PCP; it was simply consistent with the re-focusing of the claim upon the respondent's alleged power to uplift the contract workers' pay to the LLW.

241. Whilst not seeking to support every element of the EJ's reasoning, Mr Kirk submitted that the PCP must be identified in a single sentence and that the correct pool must be "obvious" from that text. However, that proposition is not borne out by the authorities. In giving guidance as to the identification of the appropriate pool, the appellate courts have repeatedly emphasised that its composition will follow as a matter of logic from the identification of the PCP, as all those affected by the PCP should be included in the pool, so that its impact can be properly tested: see, for example, Baroness Hale in **Essop** at para 108 above. However, that is not the same thing as requiring the parameters of the pool to be "obvious" from the PCP; still less that the PCP must be expressed in a single sentence. There are numerous cases where discerning the correct pool proved a less than easy task for those involved and/or where the CA or EAT took a different view as to the pool from that identified by the tribunal below; as far as I am aware, it was not suggested in any of these instances that this meant that the pool was not "obvious" and, as such, there was no viable PCP and the claim must fail.

242. Accordingly, it is at least arguable that the Access PCP is capable of amounting to a PCP for the purposes of section 19. However, this does not avail the claimant in light of the conclusion I reach at paras 245 - 250 below, that it is not arguable that this PCP was "applied" to her by the respondent.

243. If this claim for indirect discrimination was otherwise arguable (which it is not), I would be inclined

to accept that the claimant should be given an opportunity to further amend the PCP that is relied upon. It is apparent from the grounds of appeal and the oral submissions that the claimant seeks to re-cast the PCP in terms of an *omission* on the respondent's part to require or procure that the contract workers supplied to work at her premises under the FM Contract were paid at rates not lower than those of her directly employed workers in terms of the LLW. This formulation is relatively similar to the PCP that Underhill LJ referred to in **Royal Parks** (para 144 above). However, I do not consider that the EJ erred in not affording the claimant an opportunity to amend, as alleged in Ground 9, given that the claim was in any event bound to fail for reasons that she identified and which I have upheld in this judgment. Although the claimant placed reliance on **Twist DX**, Linden J's observation on giving a party the opportunity to amend their pleading related to a situation where the claim would be struck out "simply on the basis of the quality of the pleading" (para 97 above).

Ground 3: particular disadvantage

244. I agree that the EJ erred in her reasoning that the Access PCP had not put the claimant at a particular disadvantage because she had not applied to work for the respondent (para 54 above). If the claimant could overcome the "applied" criterion (which she cannot), there would be a causative link, or at least an arguable link, between the PCP and the disadvantage that she complains of, namely that she is paid at a lower rate than she would have been paid if she had been directly employed by the respondent. That she had not applied to work for the respondent is simply irrelevant.

Ground 4: application of the PCP by the respondent to the claimant

245. I will only focus on the Access PCP, as I have already found that the Disparity PCP is unarguable. I will firstly consider the points identified in Ground 4 in respect of the EJ's conclusion that the PCP had not been applied to the claimant by the respondent, as she had not imposed any terms as to pay or conditions on the Cleaning Operatives employed by OCS (para 54 above).

246. It is unfair to criticise the EJ for not approaching this issue on the basis that the complaint was really about an *omission* by the respondent (not to require that the contract workers were paid in accordance with its pay bands / paid the LLW), as that is not the way the PCP was put in the APC, as opposed to more recently in the grounds of appeal. In any event, it is unarguable that the PCP, whether in the terms of the Access PCP or

framed as an omission in the grounds of appeal, was "applied" by the respondent to the claimant, within the meaning of section 19(1) **EqA**, in light of **Royal Parks**. Underhill LJ's conclusion that the PCP relied upon in that case had not been "applied" by RPL to the claimants (para 143 above) is binding on me. There is no material distinction and this is a conclusion of law that does not involve a fact-sensitive assessment that is inappropriate for determination on a strike out application, as Ground 4 asserts.

247. Furthermore, I do not consider that the EJ misdirected herself in relying upon **Iteshi**. In that case the EAT considered both the original statutory definition of indirect discrimination in the legacy legislation and the definition added at section 1(1A), which corresponds to section 19 **EqA** (para 107 above). **Iteshi** is still cited as the leading authority on the need for the PCP to have been applied by the respondent to the claimant in **Harvey on Industrial Relations and Employment Law** (Division L, para 309.02).

248. Accordingly, Ground 4 as it is pleaded, fails. As I have indicated, Mr Lewis advances a new argument based on the **Race Directive**. He submits that the Directive does not require the PCP to have been applied to the claimant by the respondent; and that as the single source test is satisfied in relation to the PCP in this case, it is sufficient to show that the PCP put her at a particular disadvantage (para 184 above).

249. However, I decline to permit the claimant to raise this new argument at such a late stage. I consider that Mr Kirk's objection is well-founded. Unlike the position in respect of Ground 10 (which I consider below), there was no application made to amend the grounds of appeal to include this point. The claimant had ample time to consider the impact of **Royal Parks** and to do so. The contention first appeared in the claimant's skeleton argument served before the appeal hearing. Even after Mr Kirk raised objection at the hearing, no application was made to amend the grounds of appeal to include this contention and no draft amended Ground 4 has been provided. The point that Mr Lewis seeks to advance raises potentially important issues regarding the inter-relationship between the section 19 **EqA** criteria and the definition of indirect discrimination in the **Race Directive**. It is important that such a contention is clearly formulated and that the respondent has proper advanced notification and a fair opportunity to deal with it. No good reason was given as to why this contention was not the subject of an application to amend the grounds of appeal. As Mr Kirk submits, whilst national courts are required to consider relevant issues of EU law in cases where it has direct effect (as here); this does not remove the obligation on a party to properly identify their grounds of appeal and to give appropriate advanced notice of those grounds.

250. In the circumstances, I will say little about the substantive merits of this contention. I simply make three short observations. Firstly, Mr Lewis accepts that the argument is contingent upon the undetermined question of whether the single source principle applies to claims brought under the **Race Directive** *and* upon the single source principle applying in this instance, a proposition I have rejected as unarguable. Secondly, none of the domestic authorities I have been shown that have considered both section 19 **EqA** and the **Race Directive** have suggested that a claim under the latter does not require the claimant to show that the PCP was applied to them by the respondent. Thirdly, insofar as Mr Lewis suggests that **Chez Razpredelenie** is an authority in his favour, it appears to me that the PCP in question was applied to the applicant in that case (para 110 above).

Conclusion

251. Whilst I have accepted that some elements of the EJ's reasoning was flawed, it follows for the reasons I have identified, that neither the Disparity PCP nor the Access PCP provide the claimant with an arguable basis for a claim of indirect discrimination pursuant to section 19 **EqA**. This is another reason why the claim is bound to fail and was rightly struck out. In the circumstances I have not gone on to also consider Ground 8, which relates to the validity of the chosen comparators.

Ground 10: article 14 ECHR

Permission to rely on this ground

252. As I have indicated, the respondent objects to the article 14 contention being raised on the basis that it was not argued below (para 197 above). The order granting the claimant permission to add Ground 10, left this question open for the substantive appeal hearing (para 8 above).

253. I accept that the article 14 contention was raised below, albeit in more limited terms. It was advanced at paras 40 – 42 of the claimant's skeleton argument for the hearing before the EJ. The document submitted that section 23 **EqA** was to be interpreted in line with article 14 **ECHR**, which did not envisage any hierarchy between sex and race protected statuses. It was said that a claim for race discrimination in the context of employment fell within the ambit of article 8 **ECHR**; and that a regime which provided for more extensive protection from discrimination on grounds of sex than on grounds of race, had a particular discriminatory effect

on BME workers, as it offered them less protection against the range of discrimination that they were likely to face, than that afforded to non-BME workers. I understand that this argument was not developed orally at the hearing.

254. I note that the submission was only articulated in this relatively brief way and that article 14 was specifically raised in the context of the correct interpretation of the comparators provision, section 23 **EqA** (para 100 above), rather than as to the scope of section 41. Nonetheless, whilst the argument is now put in a much more detailed way, I accept that the general thrust of the contention identified below is similar, namely that article 14 requires the **EqA** to be construed in a way that permits race discrimination claims to be brought against someone other than the worker's employer, where they are a single source in relation to the worker's pay and that of a comparator, as otherwise there would be a discriminatory difference with equal pay claims, as where the discrimination is due to sex, a single source claim is permitted. Accordingly, the article 14 contention is not a new point, raised for the first time in the context of this appeal. In light of **Royal Parks**, being decided by the CA between the hearing below and this appeal, it is unsurprising that the article 14 argument has now assumed a much greater prominence. The respondent and the EAT were given appropriate notice of the way the contention is now put by the addition of Ground 10 to the grounds of appeal.

255. Mr Lewis accepts that the "within the ambit" argument based on A1P1 was not advanced below. I bear in mind that permitting new points to be raised on appeal is generally an exceptional course (para 147 above). However, I will permit this argument to be advanced given it is closely interlinked with the reliance on article 8, in particular the same alleged discriminatory effect is relied upon. As I have already noted, the respondent was given fair notice of this contention, via the amendment to the grounds of appeal to add Ground 10 and she has had a proper opportunity to deal with it. The way that the argument has been advanced does not involve the introduction of any new evidential material. In all the circumstances, I do not consider that the respondent is prejudiced by my taking this course. In addition, as I am told that the article 14 contention is likely to be pursued to a higher level, it is helpful for both of the ways that it is put to be considered at this stage.

The merits of the ground

256. Given that the article 14 contention was not advanced orally, it is perhaps unsurprising that the EJ did not address it in her Reasons. In any event, article 14 does not avail the claimant. It does not require, or

arguably require, a different interpretation of the EqA provisions than that identified in **Royal Parks**. For the reasons I explain below, there are at least four reasons why the article 14 contention fails. Each one of these reasons is fatal in itself. In light of this position, I will not address the other disputes that were covered in the parties' submissions.

257. Firstly, the argument is predicated on the proposition that the circumstances in which a contract worker can bring a section 41 **EqA** discrimination claim on the basis of a protected characteristic other than sex against the principal for differences in their rate of pay, as compared to the pay of the principal's own employees, is more restrictive than the equivalent opportunities for equal pay claims against the principal in reliance on the single source principle. Thus, if there is no relevant difference, then the article 14 argument falls away. As I have explained, in **Royal Parks**, Underhill LJ considered that his interpretation of section 41 was in keeping with the equal pay single source principle; indeed, this was one of his reasons for adopting it (paras 140 – 141 above). I have also decided that the circumstances of the present case do not, arguably, afford a material distinction from **Royal Parks** (paras 201 - 223 above); and, furthermore, that a principal's contractual power with the supplier to uplift the pay of contract workers is insufficient in itself for the principal to be regarded as a single source in terms of the pay of its own employees and the contract workers (paras 229 - 231 above).

258. Secondly, I do not accept that the circumstances fall within the ambit of article 8 or A1P1 or that this is arguably so.

259. The earlier cases where article 8 has arisen in the employment context have generally involved dismissal, demotion or the equivalent (para 158 above). No case was cited to me where a complaint about the level of pay, whether on the basis of discrimination or otherwise, was found to have engaged article 8 or to be within its ambit, despite the myriad of situations in which workers have litigated over their level of pay. There can be no question of the consequence-based approach applying here; no evidence has been adduced to indicate that the pay differential complained of here has very serious consequences for the claimant affecting her private life to a very significant degree (para 157 above). As Lord Stephens identified in **Royal Cayman**, the reasons-based approach may apply in respect of measures that are primarily connected with a suspect ground (para 159 above). Whilst it is well established that race is a suspect ground for article 14 purposes (para 168 above), this is not a situation where it is alleged that the treatment complained of – the pay differential – was itself on the ground of race. I bear in mind Mr Lewis' submission that the claim is about *minimum* standards of pay and

about the claimant's sense of worth, but, as in **Royal Cayman** (which related to re-hiring former officers at a lower rank), I consider that there is no more than a tenuous link to the core values of article 8.

260. Mr Lewis' reliance on A1P1 is no more promising from his point of view. The claimant's claim for pay discrimination does not amount to a "possession". She cannot show that, but for the discriminatory ground about which she complains, she would have an enforceable right in domestic law to equality of pay in LLW terms with a cohort of the respondent's employees (paras 161 – 165 above). The claimant in **JT** fulfilled the eligibility criteria and would have had a good claim for criminal injuries compensation, but for the "same roof" exclusion. The claimants in **AA** – whose A1P1 argument did not succeed by this route - had brought a successful discrimination claim, but could not be awarded compensation as a result of the challenged measure. By contrast, even if section 41 **EqA** fell to be interpreted as the claimant contends, it is far from clear that the present circumstances would come within it; in any event, the claim would fail because of the inability to meet the section 19 definition of indirect discrimination; and there are outstanding issues regarding, for example, the appropriateness of the chosen comparators and whether the alleged disparate impact on BME workers can be established. The modality reasoning that Saini J applied in **AA** does not assist the claimant either, as it depends upon the person having the domestic law right relied upon but for the discrimination (para 165 above). In the present instance, the claimant does not have the right absent the Sex Discrimination Condition; as I have explained, there are a number of additional reasons why the claim will fail or may fail.

261. Thirdly, I do not consider that the claimant would satisfy, or arguably satisfy, the requirement that the difference in treatment she complains of is on the ground of a relevant "status". It appears to me that the reasoning of Bean LJ at paras 39 – 42 of **Steer** (para 170 above) is applicable to the present situation, so that being a claimant in a certain type of claim is not a "status" for these purposes. Whilst in this case the article 14 contention is concerned with the criteria for establishing liability, rather than the non-availability of a particular kind of remedy, if the status requirement is satisfied in the present kind of circumstances, then this opens the way up for comparisons to be attempted with the liability criteria applicable to a range of other claims that do not relate to circumstances that disproportionately impact on BME claimants.

262. Fourthly, in any event, the contention is precluded by "the package principle" that Bean LJ adopted in **Steer** and Saini J applied in **AA** (paras 171 – 172 above). As Saini J explained, the claimant needs to establish the existence of less favourable treatment and, in order to determine whether they have discharged that burden

it is appropriate to consider the full picture of the respective benefits and respective disadvantages concerning their claim and the comparator claim in a holistic manner. As this arises from the essential requirements of a discrimination claim, there is no distinction of principle to be drawn between aspects of the claims that relate to liability and those that relate to remedies or to procedure. In the present instance the claimant has not discharged, or arguably discharged, this burden. Whilst, little attention was paid to this wider picture in Mr Lewis' submissions (because he argues that it is not relevant and I can "zoom in" on the Sex Discrimination Condition); some of the benefits that the non equal pay claimant enjoys are readily apparent; they can rely upon hypothetical comparators and the section 23 **EqA** approach to comparators is more straightforward than the equal pay requirements of establishing like work, work rated as equivalent or work of equal value.

Overall conclusion and outcome

263. The claim is bound to fail and was rightly struck out by the ET. The CA's decision in **Royal Parks** as to the scope of claims by contract workers against the principal under section 41 **EqA** is binding upon me and precludes the pleaded circumstances from coming within section 41(1)(a) or 41(1)(d). For the reasons I have explained at paras 201 – 223 above, the claimant is unable to distinguish **Royal Parks**, in particular, there is no realistic prospect of her establishing either that the respondent has the contractual power to require the claimant's pay to be uplifted to the LLW level or that, even if this contractual power existed, it would be a point of material distinction from the CA's decision. The failure of the claim depends upon points of law and contractual construction which are appropriate for determination at the strike out stage; the claimant's prospects would not be improved by a fuller investigation of the facts (paras 217 - 225 above). In the circumstances, and for the reasons identified in these passages, I have rejected Grounds 1, 5, 6 and 7, which all relate to the EJ's decision that the claim cannot come within the scope of section 41.

264. In any event, the claim is also bound to fail because the claimant cannot show that all of the ingredients for a claim of indirect discrimination pursuant to section 19 **EqA** are arguably satisfied. The Disparity PCP does not identify a practice that is capable of amounting to a PCP for these purposes (paras 235 - 236 above). Whilst I accept that the EJ erred in her analysis of the Access PCP and of particular disadvantage, so that I uphold Ground 2 in part and Ground 3, this does not assist the claimant, as in any event she cannot show that the PCP was applied to her by the respondent (paras 245 - 250 above). Accordingly, Ground 4 fails and, in the

circumstances, it is unnecessary for me to determine Ground 8. Ground 9 also fails, given that the suggested amendment to the formulation of the PCP would not alter the fact that the claim is bound to fail (para 243 above).

265. Ground 10 alleges that the effect of the construction of section 41 **EqA** adopted in **Royal Parks** is that the United Kingdom's system of protection against race discrimination as regards pay claims brought by contract workers against the principal on the basis of a single source comparison with the pay level of the principal's own employees is non-compliant with article 14 **ECHR**. I have permitted the claimant to rely upon this ground in relation to the arguments based on both article 8 and A1P1, but I have rejected it on its merits (paras 252 - 262 above).

266. Accordingly, the appeal is dismissed.

267. I will give counsel the opportunity to address any consequential matters in writing.