Neutral Citation Number: [2024] EWCA Civ 583

Case No: CA-2023-000978

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mrs Justice Eady, Mr Desmond Smith and Dr Gillian Smith DBE
EA-2021-001282-OO

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE LEWIS

- -

Between :

GENEVIV BOOHENE and others	**Claimants/ Appellants**
- and -	
THE ROYAL PARKS LTD	**Respondent**

- -
- -

Changez Khan and **Richard O'Keeffe** (instructed by **Leigh Day**) for the **Appellants**
Julian Milford KC (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing dates: 20 & 21 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday, 24 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill:

INTRODUCTION

1. This is an appeal, with permission granted by Bean LJ, from a decision of the Employment Appeal Tribunal ("the EAT") chaired by the President, Mrs Justice Eady. The EAT overturned a decision of an Employment Tribunal sitting at London Central chaired by Employment Judge Grewal ("the ET") allowing a claim of indirect racial discrimination by sixteen contract workers ("the Claimants") doing work for the Respondent, the Royal Parks Ltd ("RPL"). The alleged discrimination consists of failure to pay the Claimants the London Living Wage ("the LLW"). The LLW is an hourly rate of pay, in excess of the national minimum wage, recommended by the Living Wage Foundation as a minimum for workers in London: it has no statutory status. I will use the phrase "pay the LLW" as a shorthand for adopting the LLW as a minimum hourly rate.

2. The Claimants have been represented before us by Mr Changez Khan, leading Mr Richard O'Keeffe, and RPL by Mr Julian Milford KC. Representation was the same in the EAT, but in the ET Mr Khan appeared for the Claimants and Mr Declan O'Dempsey for RPL.

THE FACTS IN OUTLINE

3. The facts giving rise to the claim can be sufficiently summarised for introductory purposes as follows. It will be necessary to go into more detail on one or two points when considering the particular issues.

4. RPL is the charity responsible for the management of the Royal Parks, and some other open spaces in London, under a contract with the Department for Culture, Media & Sport. It took over those responsibilities in March 2017 from the Royal Parks Agency ("RPA"), which was an agency of the Department. Where I refer to RPL and RPA together I will call them "Royal Parks".

5. For many years Royal Parks has outsourced the performance of services which mainly involve manual work, while continuing to employ directly those of its employees doing mainly office work. In their submissions the parties have referred to the retained workforce as "directly employed" and to the outsourced workforce as "indirectly employed": the latter phrase is not a term of art but it is convenient for present purposes.

6. The directly-employed workforce numbered about 160 employees at the start of these proceedings. Its members were until March 2017 civil servants, and when their employment transferred from RPA to RPL they retained their civil service terms. RPL has since introduced different terms for new employees (and for former RPA employees who choose to transfer to the new terms); but they are no less favourable than civil service terms. The directly-employed workforce is predominantly white.

7. As for the indirectly-employed workforce, at para. 28 of its Reasons the ET described the outsourced functions as "cleaning and maintenance of toilets, landscape maintenance and horticulture, gate locking and building and maintenance repairs". Catering services and event management are also outsourced by way of concessions.

The outsourced functions are the subject of a variety of contracts with different contractors. The ET made no findings as to the total size of the indirectly-employed workforce, but it is clear that it is much greater than the directly-employed workforce. As will appear, there are also no findings about its ethnic composition.

8. Pursuant to the outsourcing policy, with effect from 1 November 2014 RPA entered into a five-year contract with Vinci Construction UK Ltd ("Vinci") for what the ET describes as "public toilets and buildings cleaning services in its parks": I will refer to this as either "the toilets and cleaning contract" or "the Vinci contract". (In their Grounds of Claim the Claimants refer to themselves as "park attendants", but Mr Khan confirmed that the range of duties of workers on the Vinci contract was not as wide as that term might suggest.) At the time material to these proceedings the total number of Vinci employees working on the toilets and cleaning contract was about fifty. It seems clear from various references in the Reasons that that represented only a comparatively small proportion of the total indirectly-employed workforce.

9. In the case of the directly-employed workforce, Royal Parks has at all material times paid the LLW. As regards the indirectly-employed workforce the position is different. In his witness statement in these proceedings Mr Tom Jarvis, RPL's Director of Parks, said (at para. 90):

> "It was always aspirational for [Royal Parks] to pay its contractors the LLW.[1] Further, [Royal Parks] was always conscious that the LLW could be enshrined in legislation. It was for this reason that in 2014 [Royal Parks] asked tenderers to put forward tenders one of which sets the pay at or above the LLW. [Royal Parks] did not take up the LLW option in 2014. It was simply not affordable at the time."

Although the ET does not refer expressly to that passage, in its findings it quotes several documents which show that throughout the period material to these proceedings it was indeed Royal Parks' policy not to require contractors to pay the LLW or, therefore, to fund them to do so by pricing the contracts on that basis. Simply by way of example, a paper presented to its board by RPL's CEO, Mr Andrew Scattergood, on 8 December 2017 (quoted at para. 43 of the Reasons) reads:

> "[RPL] should encourage its concessionaires and contractors to pay LLW as contracts came up for renewal but should not make this a mandatory requirement at this time given [that] the estimated additional cost of a minimum of £2m per annum is an unaffordable burden on the charity."

That quotation makes it clear that the policy applied (as one would expect) to Royal Parks' contractors generally. (For another document to the same effect, see Mr Jarvis's letter to the Claimants' trade union quoted at para. 90 below.) It also makes clear that, since the contracts were not priced on the basis that the contractors were obliged to pay the LLW, they did not do so: that is why it would cost RPL an extra £2m. to introduce such a requirement.

[1] This sentence is over-compressed: it is the contractors, rather than Royal Parks, who would pay the LLW. But Mr Jarvis's formulation reflects the reality that contractors would pay the LLW if their contract with Royal Parks required them to do so and was priced on that basis.

10. Consistently with that policy, when in 2014 Vinci bid for the toilets and cleaning contract, it was invited to and did provide alternative tenders priced on the basis of LLW and non-LLW rates. As part of the tendering process Vinci identified the staffing levels that Vinci would provide and the rates that it proposed to pay. It told Vinci that it would be paying £7 per hour, whereas the LLW rate was £9.15.

11. RPA accepted the non-LLW tender. The acceptance letter contained the following "response/clarification" to a query from Vinci (which we do not have):

> "6. **London Living Wage** – 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."

That is not very precisely worded, but it obviously does not mean that RPA would be entitled at any point simply to require Vinci to pay the LLW: clearly it could only impose such an obligation if the contract price were increased sufficiently to fund it. The amount of any such increase would have to be the subject of negotiation. Presumably the reference point for the negotiation would be the alternative tender, but it is not clear whether the figures could simply be transposed, particularly if some time had passed since the original tenders; and any uncertainty about that might suggest that the response was not intended to have contractual effect. In any event, the right to revisit was not exercised, and Vinci accordingly did not pay the LLW, in the period material to this claim.

12. Royal Parks' position about payment of the LLW came under increasing challenge from trade unions representing the outsourced workers – the Public and Commercial Services Union ("PCS"), Prospect and, latterly, a fairly new trade union called United Voices of the World ("UVW"). Both PCS and Prospect were recognised by Royal Parks in respect of its directly-employed workforce. The ET does not state whether PCS or Prospect were recognised by any of Royal Parks' contractors in respect of the indirectly-employed workforce, but it is clear that they were concerned for the interests of those workers (no doubt on the basis that they included many of their members). Specifically, in both 2017 and 2019 both unions advanced a case to RPL that it should require its contractors to pay the LLW to the indirectly-employed workforce (see paras. 41 and 46 of the Reasons). UVW was not recognised by RPL for any purposes, but by 2019 it had members at least among the employees on the Vinci contract, and in the summer of that year it too made representations to both Vinci and RPL that those workers should be paid the LLW (Reasons, paras. 45 and 47-48). There was a threat of industrial action, though the ET makes no finding as to whether it eventuated.

13. In response to this pressure, and the threat of associated bad publicity, on 5 November 2019 the board of RPL decided that, as the ET put it at para. 51 of the Reasons, "all of its contractors should pay the LLW to all staff as soon as possible after the contracts came up for renewal, and by April 2023 at the very latest". As regards the Vinci employees on the toilets and cleaning contract, an agreement was reached with Vinci on or about 12 December 2019 to fund the payment of the LLW to them with effect from 1 November (being the date of renewal of the original contract). Vinci communicated that decision to its employees on 23 December.

THE CLAIM IN OUTLINE

14. The Claimants are employees, or former employees, of Vinci who worked on the toilets and cleaning contract and were paid less than the LLW. All but one of them are of black or other minority ethnic ("BME") origin. I will analyse in due course precisely how the claim is put; but in broad terms it is that Royal Parks' failure, until November 2019, to require Vinci to pay the LLW constituted unlawful (indirect) racial discrimination against them as contract workers, contrary to section 41 of the Equality Act 2010. Their claim is supported by UVW, which also acted on their behalf in the earlier stages of the proceedings.

15. A single ET1 claim form for fifteen of the Claimants was presented to the ET on 14 April 2020. A further Claimant presented a claim form in materially identical terms on 22 July 2020.

THE LEGISLATION

16. Part 5 of the 2010 Act is headed "Work". Its purpose is, broadly, to protect workers against discrimination and harassment on the ground of a protected characteristic. Chapter 1, which comprises sections 39-60A, is headed "Employment, etc". Its provisions are grouped under various headings. The first heading, "Employees", covers sections 39-41. Section 39 proscribes discrimination (and section 40 proscribes harassment) against employees and applicants for employment. In the present case we are concerned with section 41, which is headed "Contract Workers" and reads (so far as material) as follows:

> "(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.
>
> (2)-(4) …
>
> (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)."

"The work" referred to in subsection (1) (a) is evidently the work referred to in subsection (5), i.e. the work which is made available to the worker in furtherance of the principal's contract with the supplier.

17. Indirect discrimination is defined in section 19 of the Act as follows (again, so far as material):

> "(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.
>
> (3) The relevant protected characteristics are —
>
> …;
>
> race;
>
> …"

The phrase "provision, criterion or practice" in subsection (2) is conventionally shortened to "PCP"; and element (d) is conventionally referred to as imposing a requirement of "justification".

18. Elements (a) and (b) in section 19 (1) necessarily require the identification of the group of persons, generally referred to in the case-law as "the pool", by reference to which it should be determined whether the PCP puts those with the protected characteristic at a "particular disadvantage" – or, as it is sometimes put, has a disparate impact on them. Thus the identification of the PCP determines the composition of the pool. The position is authoritatively stated by Lady Hale in *Essop*

v Home Office (UK Border Agency) [2017] UKSC 27, [2017] ICR 640, where she says:

> "40. The second argument relates to the group or 'pool' with which the comparison is made. … In the equal pay case of *Grundy v British Airways plc* [2007] EWCA Civ 1020; [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* [2001] EWCA Civ 529; [2001] ICR 1189, at para 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of 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 and 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. This makes sense. It also matches the language of section 19(2)(b) which requires that 'it' – i.e. the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

It follows from that that, as Choudhury P put it in *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] UKEAT 0220/19/2206, [2021] ICR 1699 (para. 22):

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

19. Section 23 (1) of the 2010 Act read (at the material time):

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

THE CLAIMANTS' PLEADED CASE

20. The Grounds of Complaint are succinctly and elegantly pleaded. They fall under four headings – "Introduction" (paras. 1-3); "Facts" (paras. 4-10); "Claims" (paras. 11-14); and "Remedy sought" (para. 15). I need only refer to some parts.

21. Para. 1 pleads that the claim is of "indirect race discrimination contrary to ss. 19 and 41 EqA". The pleading itself does not identify which heads under section 41 (1) are relied on. However, it was subsequently confirmed that the case was put primarily under head (a) but in the alternative under head (d): before us Mr Khan described head (a) as "the more natural fit".

22. Para. 2 continues with an overall summary of the complaint, as follows:

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

23. As regards the facts, paras. 4-5 plead various general matters about Royal Parks, and para. 5 pleads that it has always recognised "the legitimacy of the … LLW" and paid it to its own employees. Para. 6 begins:

> "The Respondent chooses to outsource some of the park maintenance services. In 2014 its predecessor, the RPA, invited tenders from cleaning contractors."

In the remainder of the paragraph and in para. 7 the Claimants plead the making of the contract with Vinci, including the choice of the non-LLW tender. Para. 8 relates to a claim (in relation to benefits other than pay) which has since been withdrawn. Para. 9 pleads that the non-payment of the LLW to "park attendants" was maintained over the following period. Para. 10 pleads that on 12 December 2019 "the Respondent made an executive decision to increase outsourced workers' rate of pay to bring it in line with the LLW".

24. As regards the formulation of the claims, I will take the pleaded elements in turn.

25. *Section 41.* Para. 11 pleads that Royal Parks is the Claimants' "principal" within the meaning of section 41 in that it makes work available to them under its contract with their employer, Vinci.

26. *PCP.* Para. 12 pleads the Claimants' case as to the PCP on which they rely. Sub-para. (a) identifies a "minimum pay PCP" as follows:

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

(Sub-para. (b) relates to the claim which has since been withdrawn.) That formulation was repeated in further particulars supplied by the Claimants on 14 April 2021.

27. *Particular disadvantage.* Para. 13 pleads that the minimum pay PCP had

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

Again, that formulation, which reflects the definition of the relevant PCP in para. 12 (a), was repeated in the Claimants' subsequent Further Particulars. The definition of the pool at para. 13 (a) is of central importance to this appeal. On the face of it, the pleading clearly embraces all employees of contractors providing outsourced services to RPL, together with the directly-employed workforce. However, as will appear, the Claimants sought subsequently to confine the indirectly-employed element in the pool to Vinci's employees on the toilets and cleaning contract.

28. *Justification.* Para. 14 of the Grounds avers that the minimum pay PCP does not constitute a proportionate means of achieving a legitimate aim.

THE DECISION OF THE EMPLOYMENT TRIBUNAL

29. The claim was heard by the ET over four days in August 2021. I need not say much about the evidence, but a point of fundamental importance is that no evidence was adduced about the details of RPL's outsourcing contracts with any contractor except Vinci or about the workers employed under them, i.e. the remainder of the indirectly-employed workforce. In particular, the evidence adduced on the disparate impact issue – that is, evidence about the numbers of BME and non-BME employees paid less than the LLW – related only to a pool consisting of RPL's own employees and the workers on the Vinci contract and did not cover the indirectly-employed workforce generally.

30. The ET's Judgment and Reasons were sent to the parties on 17 November 2021. The Reasons begin, at paras. 2-5, by addressing as a preliminary point a dispute about the correct pool for comparison. That dispute had only emerged in the course of

discussions between counsel and the Tribunal on the third day of the hearing, following the end of the evidence. RPL had at that point made clear that part of its case in the closing submissions to be made on the following day would be that, whereas the pleaded pool included the whole of the indirectly-employed workforce, the Claimants' evidence of disparate impact covered, as noted above, only part of that pool. The ET rejected the contention that there was a mismatch between the pleading and the case which the Claimants had advanced at the hearing and said that it would proceed on the basis that the relevant pool consisted only of the directly-employed workers and those employed on the Vinci contract. I will refer to the two rival pools as "the Vinci-only pool" and "the all-contractors pool"[2]. To anticipate, the EAT held that the ET's choice of the Vinci-only pool was a fundamental error in its analysis.

31. The remainder of the ET's conclusions are set out at paras. 60-75 of the Reasons. Ignoring one issue that is not material to this appeal, they can be summarised as follows.

32. First, the Claimants were contract workers within the meaning of section 41 of the 2010 Act – see paras. 61-67. That conclusion was not challenged by the RPL in the EAT.

33. Second, RPA's acceptance of Vinci's lower tender, priced on the basis that it would not pay the LLW, constituted the "application" by it of a PCP "that its employees would be paid the LLW as a minimum wage but those working on the cleaning contract with Vinci would not" – see para. 68. The ET's essential reasoning was that the explicit choice of a non-LLW tender, while reserving the right to require payment of the LLW, showed that Royal Parks had effective control of whether the LLW was paid to Vinci's workers on the contract.

34. Third, the pool for comparison comprised "all the Respondent's employees and all of Vinci's employees who worked on the toilet and building cleaning services contract", i.e. the Vinci-only pool – see para. 69. This formulation reflected its earlier decision on the preliminary point: see para. 30 above.

35. Fourth, the application of that PCP put the BME members of the pool at a particular disadvantage compared with non-BME members – see paras. 70-71. That conclusion involves two distinct components.

36. The first component is the finding, at para. 70, that there was no material difference between the circumstances either of the BME and the non-BME members of the pool or of the directly-employed members and those employed on the Vinci contract, because:

> "LLW is the amount that the Living Wage Foundation considers the minimum that a person working in London needs to meet his or her basic living costs. That figure applies to all persons working in London, regardless of the identity of the worker's employer or the nature of the work that he or she does. The LLW applies equally to

[2] These labels are strictly inaccurate, because the pool in both cases also includes RPL's directly-employed workforce; but they conveniently focus on the respect in which the two pools differ.

> office based workers and manual labourers and to private and public sector employees."

37. The second component is its finding as to the impact of the PCP on BME and non-BME workers in the pool. At para. 71 it says:

> "Of the Respondent's 160 employees 12.3% were BME and 87.7% white/non-BME. That means that about 20 of its employees were BME and 140 non-BME. In 2019 there were about 50 Vinci employees working on the toilet cleaning contract. At least 40 of them were BME. The pool consists of 210 employees, of whom 150 were non-BME and 60 were BME. The PCP applied by the Respondent resulted in 20 BME workers receiving LLW as a minimum wage and 40 BME employees not receiving it. 66.66% of the BME workers in the pool did not receive LLW as a minimum wage. Out of the 150 white/non-BME workers, 140 received LLW as a minimum and 10 did not. 6.66% of the white/non/BME employees did not receive LLW as a minimum wage."

At the risk of spelling out the obvious, in consequence of its definition of the PCP those figures relate only to the Vinci-only pool and do not include employees from the rest of the indirectly-employed workforce.

38. Fifth, the PCP put the Claimants as individuals at that disadvantage – see para. 72.

39. Sixth, RPL had not established a justification for the PCP in question – paras. 73-75. No relevant justification had been pleaded, and although a justification based on affordability had been advanced in submissions no evidence directly addressed to such a justification had been advanced. The Tribunal did nevertheless briefly consider what inferences could be drawn from such financial information as appeared in the material before it, but I need not summarise what it said because RPL did not seek to appeal to the EAT on this aspect.

THE APPEAL TO THE EAT

40. RPL appealed to the EAT on five grounds. For present purposes we are only concerned with grounds 1-4, which I can sufficiently summarise as follows:

- *Ground 1*. The ET had ignored the requirement of section 23 of the 2010 Act that the circumstances of the workers in the relevant pool should be in material respects the same – referred to as "the comparability issue".

- *Ground 2.* The ET's determination of the preliminary point about the definition of the PCP had been wrong in law.

- *Ground 3.* It was an error of law for the ET to find that the PCP relied on had been applied to the Claimants within the meaning of section 19 (1) of the Act.

- *Ground 4.* In so far as the claim was put under section 41 (1) (a) of the Act, Royal Parks' failure to require Vinci to pay the LLW to the Claimants did not constitute discrimination within the meaning of that paragraph.

41. I do not propose at this stage to set out the EAT's reasoning in full, but I can summarise it sufficiently for present purposes as follows.

42. The EAT started with grounds 3 and 4: see paras. 62-73. Its conclusion on ground 4, at para. 72, was that the ET had been entitled to conclude that the complaint "[fell] within the terms of section 41 (1)" – probably under head (a) but in any event under head (d). Since it was accepted that the arguments on grounds 3 and 4 were essentially the same, that conclusion disposed of both.

43. It then proceeded to consider ground 2, i.e. the ET's characterisation of the PCP: paras. 74-86. As to this, it upheld RPL's case that the Tribunal had been wrong to treat the PCP as applying only to the workers on the Vinci contract. Since, as I have said, the Claimants had adduced no evidence about the payment of the LLW to employees in the all-contractors pool or their ethnic composition, that conclusion meant that it had failed to prove its case on disparate impact and the claim fell to be dismissed. As it put it at para. 85, "the ET's judgment must be set aside because it cannot properly be said that the claimants had made good their case that a PCP had been applied that gave rise to the requisite group disadvantage".

44. That conclusion meant that it was unnecessary to consider grounds 1 and 5, but the EAT nevertheless did so. As regards ground 1, it concluded that the ET had reached a conclusion about comparability which was open to it on the evidence – paras. 88-92. We are not concerned with ground 5.

<u>THE ISSUES ON THIS APPEAL</u>

45. The Claimants plead four grounds of appeal. The first three all represent different aspects of their central contention that the ET was right, or in any event entitled, to find disparate impact on the basis of a Vinci-only pool; and thus that the EAT was wrong to allow ground 2 of the appeal to it. The fourth ground contends that, if the ET had indeed made the error alleged, the EAT should not have dismissed the claim but remitted it to the ET for reconsideration.

46. By a Respondent's Notice RPL seeks to revive three of its grounds below which the EAT rejected. Specifically:

    (1) It contends that its conduct in not requiring/funding the payment of the LLW by Vinci did not fall under either head (a) or head (d) of section 41 (1) of the 2010 Act – i.e. ground 4 in the EAT.

    (2) It says that there were material differences between the workers on the Vinci contract and the directly-employed workforce such that they could not be treated as comparable for the purpose of section 23, namely;

        (a) that the work of the two groups was entirely different in character and attracted different market rates – one below and the other above the LLW;

        (b) that the pay of the two groups was set by different persons (i.e. Vinci and RPL respectively) and different processes; and

        (c) that (in short) the directly-employed workforce had always been paid civil service rates (or equivalent).

This was ground 1 in the EAT.

(3) It contends that it did not "apply" any PCP to the Claimants within the meaning of section 19, i.e. ground 3 in the EAT.

47. In the circumstances of this case, I think it is better to start with the issues raised by the Respondent's Notice.

THE RESPONDENT'S NOTICE

Introduction

48. I have set out the relevant terms of section 41 of the 2010 Act at para. 16 above. As a matter of formal analysis, determining whether the section applies in a given case involves answering three distinct questions:

(1) Are the claimant and the respondent in a relationship of "contract worker" and "principal", applying the definitions in subsections (5)-(7)? If so:

(2) Has the respondent discriminated against the claimant? That involves considering whether the respondent has acted in a way covered by one of sections 13-19A of the Act. (In the present case we are concerned with section 19 (indirect discrimination), so that the act in question is the application of a discriminatory PCP: see section 19 (1)). If so:

(3) Does the conduct in question fall under any of heads (a)-(d) under subsection (1)? It is only if it does that any discrimination established in answer to the second question is rendered unlawful.

There is potentially considerable overlap between those questions; but it is a healthy discipline for a tribunal to address each of them separately.

49. In the present case we are not concerned with question (1), because RPL did not appeal against the ET's finding that it was the Claimants' principal. The issues for us concern aspects of questions (2) and (3). It might seem more logical to start with question (2); but the shape of the argument below and before us makes it more convenient to start with question (3) – that is, whether the discrimination complained of by the Claimants falls within the scope of section 41 (1), being ground (1) of the Respondent's Notice.

Ground (1): Scope of section 41 (1)

50. As appears from my summary at paras. 31-39 above, the ET did not expressly address question (3): the only issue which it considered under section 41 was whether the Claimants were contract workers (question (1)). Having established that they were, it proceeded to consider the various issues that arose under section 19 (i.e. question (2)), and it did not return to consider whether the discrimination which it found fell under any of the heads under section 41 (1). In fact its findings in relation to questions (1) and/or (2) to some extent cover the relevant ground; but the fact remains that we have no reasoning from the ET directed to the actual language of heads (a) and (d).

51. The EAT, unlike the ET, did expressly consider the basis on which section 41 (1) applied. The relevant discussion is to be found at paras. 62-72 of its judgment and can be summarised as follows.

52. After dealing with some preliminary matters, at para. 65 the EAT sets out the terms of section 41. It continues:

> "66. In considering how section 41 should be construed, we note the guidance provided by the Court of Appeal in *Harrods Ltd v Remick and ors* [1998] ICR 156 (in relation to the precursor to section 41 …, section 7(1) of the Race Relations Act 1976), as follows:
>
> > '… in approaching the construction of section 7(1) we should, in my judgment, give a construction to the statutory language that is not only consistent with the actual words used but would also achieve the statutory purpose of providing a remedy to victims of discrimination who would otherwise be without one.'
>
> 67. We consider that a similarly purposive approach was laid down by Sedley LJ in *Allonby v Accrington & Rossendale College* [2001] ICR 1189 (there concerned with the equivalent to section 7 Race Relations Act 1976, provided by section 9 Sex Discrimination Act 1975):
>
> > '34. The section, which comes within Part II of the Act (Discrimination in the Employment Field), is there to prevent employers from avoiding the effect of the earlier provisions of that Part by bringing in workers on subcontract. … There is no reason why it should be limited … to discrimination between male and female contract workers supplied to a particular employer. Nothing in the wording of the section says that it is so limited. If would be remarkable if it, and equally s. 7 of the Race Relations Act, permitted an employer by bringing in black or female workers on subcontract to work alongside a predominantly white or male employed workforce, to give them inferior conditions so long as they were all treated equally badly or (if differentially treated) were all of the same race or sex and so unable to complain. It would be particularly remarkable if this were permitted by legislation which treats the principal's own contracted labour as employees.'
>
> 68. It is, however, important to recognise that section 41 provides a means by which a contract worker may complain about their treatment by a principal; it does not provide an alternative route (for example, to section 39 EqA) for such a worker to complain about the content of terms set by their own employer – it is not a means of simply allowing a contract worker to automatically seek parity of terms with persons employed by the principal."

The EAT goes on to develop that point by quoting from the judgments of Gage J and Ward LJ in *Allonby v Accrington and Rossendale College* [2001] EWCA Civ 529, [2001] ICR 1189, to which I will have to return.

53. Having thus dealt with the overall approach, the EAT gives its essential reasoning at paras. 69-72. At para. 69 it says:

> "… where a principal could properly be said to have directed the terms on which the contractor is to employ the worker, it would be open to an ET to find that section 41(1) was engaged if it found that this had impacted upon the contractor's ability to freely offer contractual terms to its workers."

At para. 70 it says that, in deciding whether to make such a finding, the ET

> "… is entitled to take a real-world view as to what has been allowed by the principal. If the reality is that the principal has effectively dictated the terms on which the worker is to carry out the work, the ET would be entitled to conclude that this falls within section 41(1)(a), notwithstanding the fact that the principal's decision is then implemented by the contractor through its contractual relationship with that worker. What the true position is in any particular case will, as Ward LJ observed [in *Allonby*], require the kind of common sense, fact-based enquiry that the ET is best placed to undertake."

In short, if the principal "directs" or "effectively dictates" the terms on which a contractor employs their contract workers the terms in question can be treated as "terms on which [it] allows [them] to work" within the meaning of section 41 (1) (a).

54. The EAT then goes on at para. 71 to set out various respects in which the ET's findings showed RPL exercising control over Vinci's relationship with its employees working on the toilets and cleaning contract. These principally concern its control over whether the LLW was paid. It refers to the facts that RPL chose the non-LLW tender; that it reserved the right to revisit the question of payment of the LLW; and that it was its decision which created the eventual change to payment of the LLW – as to all these, see paras. 10-13 above. But it also refers to a finding by the ET that in the course of the pre-contract negotiations in 2014 RPA "did not simply leave it to Vinci to determine minimum levels of pay within the price agreed" but specifically required it to explain how it would be able to keep its costs within the tendered amount if it paid some of its staff the hourly rates quoted.

55. The EAT's conclusion on this issue appears at para. 72, as follows:

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

> permissible view as to which entity had in fact determined the terms on which the claimants would be allowed to do their work. We duly dismiss ground 4 of the appeal."

56. I respectfully disagree with the EAT's reasoning and conclusion in those paragraphs. I give my reasons below, but I should make one point by way of preliminary. Although the EAT frames its conclusion in terms of whether the ET "reached a permissible view" on a question of fact – namely whether Royal Parks effectively dictated the terms on which the Claimants were employed by Vinci – the ET had never in fact asked itself that question in the context of the application of section 41 (1) (see para. 50 above). In substance it is the EAT, rather than the ET, which provides the reasoning on the basis of which the Claimants succeeded on this issue.

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.

58. That statutory purpose is reflected in the way that the specific kinds of detriment[3] identified in heads (a)-(c) are identified. To spell it out:

- 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.

- Head (b) applies to cases where P discriminatorily does not allow W to work (or continue to work) at all – for example if the supplier (S) supplies a black worker and P says that it is not prepared to have him or her on site.

- Head (c) applies to cases where P discriminatorily denies W access to (for short) benefits which would be available notwithstanding the absence of an employment relationship between them – an example frequently given is where P excludes a black worker from its canteen.

These are all situations in which P has the power, because of its control of the work or the workplace, to subject W to some detriment. They have nothing to do with W's rights under his or her contract with S.

59. That distinction is clearly recognised in the reasoning of this Court (Ward and Sedley LJJ and Gage J) in *Allonby*, to which I have already referred. The applicant in that

[3] "Detriment" is the correct overall label because head (d) refers to "any *other* detriment".

case was a female part-time lecturer whose employment at a college of further education was terminated when the college decided to change to a system where the services of its part-time lecturers (who were mostly female) were supplied on a self-employed basis through an agency (ELS). Under the new arrangement the college agreed a fee per lecture with ELS, and ELS paid a proportion of that fee to the lecturer. The applicant continued to work under the new arrangements, but it was her case both that her earnings were less than they had been when she was an employee of the college and that she ceased to have access to various benefits. The benefits in question are identified at para 7 of the judgment of the EAT (EAT/1081/98), as follows:

> "The applicant ... said that the benefits of continuous employment which she lost were the right to have notice of termination of the contract, the right to payment for classes cancelled, the right of notice of closure of unviable classes, the right to attend staff development classes and the benefit of a professional indemnity insurance which had been paid by [the college]."

60. The applicant brought proceedings in the employment tribunal making a variety of claims, including a claim for equal pay and a claim against the college under section 9 of the Sex Discrimination Act 1975, which was in materially identical terms to section 41 of the 2010 Act, for (indirect) sex discrimination against her as a contract worker. We are not concerned with the equal pay claim, which was eventually dismissed following a reference to the European Court of Justice. As regards the benefits other than pay, the tribunal held that for the purpose of establishing discrimination a contract worker could not compare themselves with a direct employee of the principal ("the comparison issue"). This Court held that that was a misdirection and that the claim needed to be remitted to the tribunal. But that was subject to whether a claim could lie against the college at all, even if the correct approach to comparison was followed: it is that which is the material issue for our purposes. I need to refer to the judgments of all three members of the Court.

61. Sedley LJ gave his decision on the comparison issue at the start of para. 35 of his judgment and observed that thus far the applicant's argument succeeded. But he continued:

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

> question[4] – they are in my view capable of ranking under s.9(2) [the equivalent of section 47 (1)] and ought to be considered by the Employment Tribunal … ."

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. (It is a complication that, as Sedley LJ notes, it is very doubtful whether the kinds of benefit in respect of which she claimed were in fact non-contractual; but what matters is the nature of the distinction. He does of course mention more obvious examples of benefits accorded by the principal rather than the supplier, namely access to canteen and washroom.)

62. At para. 73 of his judgment Gage J begins by agreeing with Sedley LJ on the comparison issue. He continues:

> "… I further agree that where a complaint is made about matters which are essentially contractual a complaint, if any, lies against the employer and not against the principal as defined in section 9.
>
> 74. As it seems to me, the question on this ground of appeal is whether the matters complained of by Ms Allonby in paragraph 3.3 (1) [of her grounds of complaint] are contractual matters or benefits, services or facilities denied her by the College.
>
> 75. In my judgment there can be no doubt that the matters in particulars (1)(a) to (h) are contractual matters. In my opinion, the likelihood is that the same applies to those in (i) to (l). It seems to me that professional insurance indemnity is the sort of matter which is likely to be the subject of a contractual term. However, I accept that it is arguable that some of these matters might be properly categorised as benefits afforded by the College to its employed staff but not to those brought in through ELS. In the circumstances, I also agree that this issue should be remitted to the Employment Tribunal …"

We do not know what the precise particulars referred to by Gage J are, though they evidently covered the matters in the EAT's summary; but, again, what matters is that, 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.

63. Ward LJ likewise held that the employment tribunal had misdirected itself on the comparison issue. As regards the scope of the enquiry on remittal he said this, at paras. 91-92 (emphases in the original):

> "91. To discriminate the principal must apply to her a requirement or condition which, by virtue of s.1(1)(b) is disproportionate in its impact on women, unjustifiable and detrimental to her personally. It seems to me, therefore, that the proper question for the Tribunal to be asking is whether or not, in relation to the work available for doing by the

[4] This a reference to para. 75 of Gage J's judgment, quoted below.

contract worker (in this case the teaching), the College has applied a discriminatory condition or requirement in the terms on which it allows her to do that work or in the way it affords her or denies her access to any benefits, facilities or services. That is very much a commonsense, fact-based enquiry and, therefore, very much one for the Tribunal to undertake.

92. The Tribunal must ask upon what terms *the College* allowed her to do her work. The College is the principal and it is the principal's conduct, not the supplier's (E.L.S.'s) conduct which may constitute the unlawful discrimination. If, therefore, she does not enjoy the rights and benefits set out in her claim, is that because she is not allowed *by the College* to do her work on those terms? If she is denied those rights and benefits because her contract with E.L.S. has excluded them, it may still be necessary to enquire whether the College would only allow her to do her work if E.L.S. so stipulated. In my judgment, whilst the contractual arrangements are very relevant, they may not be determinative. Thus the way in which *the College* affords her or refuses her access to any benefits (e.g. of professional indemnity insurance) or facilities (e.g. the right to attend staff development classes) may – like the provision of canteen facilities – be a matter of administration and business organisation without a contractual reference point, but denying the contract workers access to the canteen may nevertheless offend s. 9."

64. The EAT observed that there was "potentially a tension" between Gage J's view that if the complaint related to term of the worker's contract with the supplier no claim could lie against the principal and Ward LJ's view that "the contractual arrangements" are relevant but not determinative: see para. 69 of its judgment. I will return to that question below, but I should say at this stage that I can see no difference between the judgments of Sedley LJ and Gage J in this respect, so that if Ward LJ is indeed to be regarded as having taken a different view from them he was in the minority.

65. Although I have had to quote quite extensively from the judgments in *Allonby*, the basic point made at least by Sedley LJ and Gage J is straightforward, 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) section 41, as analysed at paras. 57-58 above.

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 <u>on W</u> as a condition of W being allowed by P to do the work, and not with any stipulation imposed by P <u>on S</u>. Mr Khan submitted that we should

adopt a broad construction of the word "allow"; but it is in my view artificial to the point of impossibility to describe the payment of the LLW by S as a term on which Royal Parks allows the Claimants 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.

67. The EAT's answer to this point, as we have seen, is that the approach taken by Sedley LJ and Gage J in *Allonby* does not apply in a situation where the principal has "directed" or "effectively dictated" a term of the contract between the supplier and its employees: where (taking a "real-world view") that is the case, the term in question can properly be regarded as a term of the kind described in subsection (1) (a). Mr Khan supports that distinction. He says that the issue of "dictated terms" did not arise in *Allonby*, so that Sedley LJ and Gage J's formulation cannot be treated as determinative of the correct approach in such a case. He also relies on what he says is the more flexible formulation propounded by Ward LJ at para. 92 of his judgment, where "the contractual arrangements" are said to be relevant but not determinative.

68. 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 to a greater or lesser extent controlled by the principal.

69. If the approach proposed by Ward LJ in *Allonby* is inconsistent with the foregoing, I would respectfully disagree with him. But I am not in fact sure that it is. Although I do not find para. 92 entirely easy to follow, I am inclined to think that all that Ward LJ is saying is that the principal could contravene section 9 by giving a female contract worker inferior benefits – say, access to canteen or washroom facilities – than afforded to male workers (whether its own employees or other contract workers) notwithstanding that it was not under any contractual obligation to provide the benefits in question.

70. That conclusion is supported by a further, and in my view cogent, point advanced by Mr Milford. He pointed out that if the Claimants had been basing their claim under section 41 on sex rather than race discrimination there would be a mismatch between the position for which they contend and that obtaining under the equal pay provision (originally in the Equal Pay Act 1970, and now in Chapter 3 of Part 5 of the 2010 Act). The result of the reference to the ECJ in *Allonby* ([2004] ICR 1328] was to confirm that 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". Importantly, the Court said, at para. 48 of its judgment:

> "The fact that the level of pay received by Ms Allonby 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 Ms Allonby's conditions of pay and those of the male worker paid by the College."

(As noted above, the part-time lecturers' pay was in fact set as a percentage of the fee paid to ELS by the college.) It would, he submitted, be surprising and unsatisfactory if claimants in such a case could circumvent that clear and principled position by bringing a claim under section 41. That problem does 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.

71. That is a sufficient reason to decide this ground in RPL's favour. But I should say that I am in any event troubled by the implications of the concept of the principal "directing" or "effectively dictating" (on "a real-world view") the terms of the supplier's contracts with its workers. The starting-point is that we are not concerned with a case where the principal actually prescribes what a supplier will pay its workers. There is no finding that Royal Parks' contract with Vinci positively prohibited it from paying the LLW. 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 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[5]. 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

[5] One obvious concern is that the tenderer might be quoting on the basis of rates of pay which would be too low to be sustainable and prejudice proper delivery of the services. The ET in fact notes that RPA raised a query of that kind about the proposed non-LLW rates in the present case – see para. 54 above.

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*.

73. I should say that I have not found any assistance from the general observations from *Harrods Ltd v Remick* [1998] ICR 156 and from *Allonby* quoted at paras. 69 and 70 of the EAT's judgment. The issue in *Harrods v Remick* was very different from the issue in this case. As for the passage quoted from the judgment of Sedley LJ in *Allonby*, it is clear that that was directed to what I have called the comparison issue and not to the issue in the case before us (on which of course his view was in accordance with mine). No doubt the statute must be construed purposively and so that victims of discrimination are not deprived of a remedy in circumstances which it was plainly intended to cover. But in my view the construction which I have advanced above is fully in accordance with the purpose of section 41. It is important not to lose sight of the fact that the worker will always have a right under section 39 to claim against its own employer for any discriminatory terms of his or her contract with it.

Ground (2): Comparability of the directly- and indirectly-employed workforces

74. My conclusion on ground (1) means that it is unnecessary to consider this ground, and I prefer not to do so. The question whether the evident differences between the circumstances of the directly-employed and indirectly-employed workforces, as summarised at para. 46 (2) above, are material within the meaning of section 23 of the 2010 Act is not straightforward, and it would involve me proceeding on a basis about the effect of section 41 which I believe to be wrong. I would only say that the difficulty of the question reinforces my view that section 41 was not intended to permit workers to claim against the principal in respect of detriments arising from their contract with the supplier.

Ground (3): Did RPL "apply" any PCP ?

75. Both parties accepted before us that, although the issue raised by this ground is analytically distinct from the issue under ground (1), it involved the same considerations. The same reasoning that leads to me to conclude that RPL did not subject the Claimants to any detriment as regards the terms of their contracts with Vinci means also that it cannot be regarded as having applied any PCP to them within the meaning of section 19 of the Act.

Conclusion on the Respondent's Notice

76. For the reasons given above, I would allow grounds (1) and (3) of RPL's Respondent's Notice and uphold the EAT's decision on that basis. That makes it strictly unnecessary to consider the Claimants' appeal, but I believe that I should nevertheless do so.

THE APPEAL

77. The central issue raised by the Claimants' appeal is whether the ET was wrong to treat the relevant PCP as confined to the workers on the Vinci contract and thus, since the two issues are interdependent (see para. 18 above), to find disparate impact on the basis of a pool consisting only of those workers and RPL's own employees: see paras. 5 and 68-69 of its Reasons. The ET based its decision about the characterisation of the PCP on its understanding of the Claimants' pleaded case, but I think it is helpful to start by considering what, on its findings, the correct PCP in fact was.

What was the correct PCP?

78. I do not believe that there is any doubt about what, on the facts as found by the ET (and assuming that section 41 is engaged at all), the correct PCP was. As appears from para. 9 above, 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. The evidence there summarised clearly shows that that policy applied generally, and not simply to Vinci's employees on the toilets and cleaning contract: it would indeed be surprising if it were otherwise. The PCP must be defined accordingly.

79. In his oral submissions Mr Khan relied heavily on the fact that the evidence before the ET did not identify any details of the contracts between Royal Parks and its contractors other than Vinci. He submitted that that was important because, even if the policy had been applied generally, it could not be assumed that the terms of the contracts with its other contractors gave Royal Parks the same degree of control over whether they paid the LLW as had been found in the present case, which was central to whether they should be included in the pool.

80. I do not accept that submission. The evidence and findings summarised at para. 9 above clearly show that the policy was "applied" to the other contractors in the same sense as it was applied to Vinci. The essential point is that none of the contracts was priced on the basis that the contractor would pay the LLW, but they would of course do so if the contracts were re-priced accordingly. As I have already noted in a different context (see para. 71 above), that would be so as a matter of reality whether or not they had all been asked, as Vinci was, to submit alternative LLW and non-LLW tenders[6] and whether or not Royal Parks had expressly reserved the right to revisit "the LLW option"; and that is sufficient by itself to establish that the same PCP was being applied to all outsourced workers.

The way the case was pleaded

81. As already noted, the ET's definition of the PCP, and thus its choice of pool, depended on the way the case was pleaded. In the context of the preliminary point which it considered at the start of its Reasons (see para. 30 above) it concluded that the Grounds of Claim, properly construed, meant that the Claimants were relying on a Vinci-only pool and that that was accordingly the basis on which the issue of disparate impact should be decided.

[6] Though in fact Mr Jarvis's witness statement says that all contractors were indeed asked to submit alternative tenders: see para. 9 above.

82. I agree with the EAT that it is impossible on an objective construction to read the Claimants' pleading in the way that the ET did. I have set out the relevant terms of the Grounds of Complaint at paras. 21-28 above. The summary of the claim in para. 2 contrasts the treatment of "outsourced workers" as compared with direct employees. The same language is used in para. 12 (a), where the PCP is expressly defined. "Outsourced workers" is an entirely general description: the pleading does not, as it could have, refer to workers on the Vinci contract. Even more explicitly, para. 13 (a) pleads the relevant pool as comprising "*all* the Respondent's directly and indirectly employed staff". That language is repeated, as I have said, in the Claimants' Further Particulars. There is on the face of it no reason to read it as meaning anything other than what it says. Indeed, it corresponds to the pool that one would expect to see pleaded, since it is the correct pool on the basis of the facts: see paras. 78-80 above.

83. The ET's reasons for reaching the opposite conclusion can be summarised as follows. At para. 3 of the Reasons it referred to a submission by Mr Khan that it was necessary to look at the Grounds of Complaint as a whole and not at para. 12 in isolation: that paragraph had to be construed in the context of the pleading of the particular facts at paras. 4-10, which covered only matters relating to the terms of the Vinci contract. At para. 4 of the Reasons it set out a further argument by Mr Khan to the effect that it was clear from paras. 46-48 of the Grounds of Resistance that RPL had understood the Claimants' case to be based only on the Vinci pool. Para. 5 of the Reasons reads (so far as material):

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

There are three strands to that reasoning – (a) that when the pleading is read as a whole it is clear that the Claimants are relying only on the Vinci pool (first sentence of para. 5, accepting the submissions at para. 3); (b) that that is how RPL understood it (first sentence of para. 5, accepting the submissions at para. 4); and (c) that UVW did not know what workers were paid on other contracts and whether those contracts had included the option of paying LLW (second sentence of para. 5). I take those strands in turn.

84. As to (a) – the need to read the pleading as a whole – I cannot accept that the way that the facts are pleaded at paras. 4-10 of the Grounds of Complaint justifies reading paras. 2, 12 and 13 in anything other than their natural sense. I have no difficulty with the general proposition that the Grounds of Complaint must be read as a whole, but there is no inconsistency between the Claimants pleading the facts about the Vinci contract, which is a necessary part of their case, but then going on to plead a PCP extending also to workers under different contracts.

85. As to (b) – how RPL understood the case being advanced – this could in fact be said to be irrelevant: the pleading has to be construed objectively. However, as I understand it, the ET thought that the fact that (as it believed) RPL understood the Claimants' case to be based on a Vinci-only pool supported its view that that was the correct construction of the Grounds of Complaint. (I should also say – though this is not how either the ET or Mr Khan put the case – that if it was sufficiently clear that both parties had conducted the proceedings on the shared understanding that the correct pool was Vinci-only RPL might have been estopped from contending otherwise.)

86. Assuming that RPL's contemporary understanding of the Claimants' pleading is potentially relevant on that basis, I do not agree with the ET that paras. 46-48 of the Grounds of Resistance show that RPL understood the Claimants to be basing their case on a Vinci-only pool. Paras. 46-47 come under the heading "PCP". It is necessary to set out the whole section:

> "44. The Claimants have not identified a relevant provision criterion or practice applied by the Respondent to the Claimants.
>
> 45. The Claimants have used deliberately loaded language to describe what they claim was the PCP applied to them by the Respondent. However in reality there was no unified PCP of this nature at all.
>
> 46. On a true analysis the correct PCP is that the Respondent pays its employees according to the agreements reached either [with] individuals or via the recognised trade unions. It does not apply any pay/benefit rule to staff it does not employ, but it does allow Vinci to pay them at such rate as it thinks fit, which may be at LLW or above it.
>
> 47. The Respondent relies on the pleading of the Claimants in respect of the alleged PCPs to illustrate the point that the Claimants' claim is an abuse of process of the tribunals. The claim is that the Respondent adopted a double standard because the Respondent 'adopted' a different minimum depending on whether staff were employees or outsourced workers. However this is clearly an objection to the Respondent's administrative decision to award the contract to Vinci on the terms on which it was awarded. That claim is not actionable before the tribunals."

Para. 48 is part of a different section, headed "Wrong Pool". It begins:

> "The Claimants cannot claim that the pool should be restricted solely to those employed by Vinci in order for Vinci to undertake the contracts and those employed by the Respondent. The Claimants have not identified the correct pool for logical comparison."

It then goes on to suggest two alternative "correct pools", neither of which contains any indirectly-employed workers over and above the workers employed by Vinci. However, para. 49 goes on to say:

> "The claimants do not indicate what is meant by the phrase 'directly or indirectly employed staff' and it is not a term recognised under the Equality Act 2010. However, if what is being asserted is that it should be all those who do work for the Respondent (in the sense of providing something which is of benefit to the Respondent), the pool should include anyone who is employed by any organisation which provides a service to the Respondent. The Claimants have provided no indication of any evidence of how such a pool is made-up in terms of the protected characteristics of race upon which they rely."

87. I do not find that pleading entirely easy to analyse (and Mr Milford expressly disavowed the alternative pools pleaded in para. 48). But I cannot read it in the same way as the ET appears to have done. The "PCP" section seems, so far as I can understand it, to be making a separate point about whether RPL could be said to be applying *any* PCP to workers whom it does not employ. As for the "Wrong Pool" section, while para. 48 might in isolation suggest that RPL had understood the pleaded pool to be Vinci-only, that is inconsistent with para. 49, the second sentence of which shows that it contemplated that it could extend to the entire indirectly-employed workforce. Overall, as I read it, RPL's approach was not directly to respond to the Claimants' actual pleading but to address more generally how the case might be put and advance arguments as to why none of the possibilities worked. That is not, perhaps, the approach which a purist would recommend, but it is not unusual in a discrimination case for it to take a little time for the issues to be accurately identified. In any event, all that matters for our purposes is whether the Grounds of Resistance evince a clear understanding that the Claimants' pleading meant the opposite of what, on any natural reading, it says. I do not believe that they do.

88. Mr Khan also relied on a document which is not referred to by the ET in its Reasons (though it is fair to say that he had relied on it in his closing submissions). This was an e-mail sent by RPL's solicitors (DAC Beachcroft) to the Claimants' solicitors (Leigh Day) at the end of the second day of the hearing, referring to the possibility of RPL giving further disclosure. The relevant passage says:

> "Additional documents are now being collated. These are not obviously relevant to this case as they relate to the LLW in respect of individuals working on other contracts, for example landscape maintenance. This is a completely different role and requires completely different skills and qualifications. The claimants have not referred to landscape maintenance in their claims and their claims relate to their roles and the respondent's own employees."

In the event, no further disclosure occurred. Mr Khan submitted that the e-mail clearly shows that DAC Beachcroft understood that the Claimants' case was based only on the Vinci pool, which is why disclosure about workers on other contracts was "not obviously relevant". I agree that that may be the inference from this passage, but it is not possible to draw any firm conclusions about it in isolation and without any relevant findings by the ET. I certainly do not think that it is useful as an aid to construction of the Grounds of Claim.

89. In connection with this strand of the argument Mr Khan argued that the burden was on RPL, if it intended to mount a positive case that a PCP other than the one pleaded

had been applied, to plead and prove that alternative case, and to give disclosure of documents relevant to it. That may be so, although it must also be open to a respondent simply to deny that it applied the PCP alleged without proposing an alternative. It may be, as I have said, that RPL's pleading was not wholly clear about how it was going to argue the case. But, whatever course RPL chose to take, the burden remained on the Claimants to prove the case which they had pleaded. Here their pleaded case was on the face of it based on an all-contractors pool, and if they failed to provide the necessary evidence in support of that pool (if necessary, seeking disclosure of such evidence as they required) it is irrelevant what case RPL did or did not advance. (We cannot of course make any assumption about whether the all-contractors pool would have shown the same disparate impact as the Vinci-only pool.) The Claimants at no stage sought any disclosure from RPL or from the contractors about the terms of the other outsourcing contracts or the numbers of employees working under them who received the LLW or their ethnic breakdown. At para. 83 of its judgment the EAT says:

> "[W]e were not told of any application, or subsequent complaint regarding inadequate disclosure, in these proceedings, and it was not part of the claimants' case before the ET that, in any event, an inference could be drawn, from the information that was available, that the toilets and cleaning contract with Vinci should be taken to be representative of the respondent's other outsourced service contracts. Rather, it appears that a tactical decision was taken on behalf of the claimants to put the case at trial in a more limited way."

90. As to (c) – the Claimants' ignorance about the other contracts – again the starting-point is that the pleading must be read objectively: the Claimants' state of knowledge about the matters pleaded is, as such, irrelevant. I would accept, however, that general language in a pleading might have to be read in a more limited sense if it would have been apparent to the other party that the pleader could not have been aware of some matters that were apparently covered by the language used. But that cannot assist the Claimants here. It is clear from the ET's own findings that UVW knew (and RPL knew that it knew) that the policy of which it complained applied generally to the indirectly-employed workforce. Para. 48 of the Reasons quotes a letter to it from Mr Jarvis dated 10 July 2019, in response to its demand for payment of the LLW, which says in terms that "payment of the London Living Wage is not currently a mandatory requirement on Royal Parks contracts". It was thus told both that there were other contractors performing outsourced services and that the same policy was applied to them as to the Vinci contract. It would in fact be pretty surprising if UVW was not already aware of both points, but the letter puts it beyond doubt. It is true that it gives no details of the contracts in question, but it was a sufficient basis for the Claimants to plead the existence of a minimum pay PCP applying to the indirectly-employed workforce generally. It makes no difference, at this stage of the argument, that UVW did not know precisely how many employees of such contractors did not receive the LLW: what matters is that their employers were not required or funded to pay the LLW as a minimum and therefore will not have done so. (I would add that, as the EAT found, if UVW felt that it required more information it could have asked for it: see para. 98 below.)

91. For those reasons, I agree with the EAT's conclusion that the pool as pleaded by the Claimants consisted of RPL's direct employees plus the entirety of the indirectly-employed workforce and that it was wrong of the ET to confine its analysis to the Vinci-only pool. Accordingly, I reject the first three grounds of appeal, all of which are variants of the Claimants' challenge to that conclusion.

92. It follows that the Claimants did not prove their pleaded case (which was, on the evidence, analytically the correct case) because they did not adduce any evidence about the indirectly-employed workforce apart from the workers engaged on the Vinci contract: more particularly, they adduced no evidence about its ethnic composition, which was essential to proving that the minimum pay PCP had a disparate impact on BME members of the pool.

Should the EAT have remitted the claim to the ET?

93. The Claimants' fourth ground of appeal challenges the EAT's decision not to remit the case to the ET. At para. 85 of its judgment it said:

> "[H]aving explored this question with the parties, we are satisfied that it cannot be said that the error arose from a misunderstanding of how the case was being put at trial, such that it might be open to us to remit this to the ET for reconsideration."

94. On the face of it, the EAT's decision not to remit was plainly right. The ET had not misunderstood the case which the Claimants advanced at the hearing about what pool should be used: on the contrary, it accepted it. The problem for the Claimants is that that case did not correspond to their pleaded case and that they had not adduced the evidence necessary to prove that the PCP which they had in fact pleaded had a disparate impact on the relevant pool. It was their responsibility to prove their case as pleaded and they had not adduced the evidence necessary to do so: that being so, there can be no question of their being given a second chance.

95. Mr Khan referred us to the well-known decision of this Court in *Jafri v Lincoln College* [2014] EWCA Civ 449, [2015] QB 781, that where the EAT finds that an ET has made an error of law the case should be remitted for reconsideration unless there is only one possible answer. But that does not assist him. The error which the ET made in this case was to decide the claim by reference to a pool other than the pool which had been pleaded. If it had considered the correct pool, there was indeed only one possible answer, namely that the claim failed because no evidence had been adduced to show that the PCP had a disparate impact on BME members of that pool.

96. Mr Khan also argued that the case should have been remitted to the ET because of RPL's failure to disclose what he referred to in his skeleton argument as the "evidence of 'other' contracts" which the Claimants needed to prove their case: that evidence is said to have been exclusively within its control. In his oral submissions he confirmed that the disclosure in question comprised the terms of the contracts with other contractors, which would have shown whether Royal Parks had the same degree of control over whether they paid the LLW as it did under the Vinci contract, together with whether the contractors in question had in fact paid less than the LLW, and if so to which employees.

97. It seems to me doubtful whether the Claimants needed more information about the terms of the contracts with other contractors in view of RPL's consistent acknowledgment, both in correspondence and in Mr Jarvis's evidence, that its policy of not requiring contractors to pay the LLW applied generally. I accept, however, that for the purpose of the disparate impact assessment they would have had to know what proportion of the other employees in the indirectly-employed workforce received the LLW and (though this was not in fact a point explicitly made by Mr Khan) their ethnic composition, so that an exercise of the kind carried out for the Vinci-only pool (see para. 37 above) could be carried out for the all-contractors pool.

98. The EAT addressed what was essentially this point at paras. 82-83 of its judgment. At para. 82 it said:

> "… [W]e do not agree with Mr Khan's suggestion (made in response to our questions at the hearing) that it would have been impossible for the claimants to obtain this information. That would be to suggest that there was no provision for seeking further information or specific discovery, which (of course) is not the case."

At the start of the following paragraph it pointed out that any such application could not have been dismissed as a fishing expedition. However, it went on to say, in the passage which I have quoted at para. 89 above, that no such application had ever been made. The view taken by the EAT was thus that the Claimants could not complain for the first time on appeal of failures by RPL to provide disclosure for which they had never asked because they had taken the view that it was not necessary for the way that they were putting their case.

99. I agree with the EAT's approach. Applying it in the context of remittal, I do not think it could have been right for it to remit a case which otherwise fell to be dismissed because of any such alleged failure of disclosure.

<u>Conclusion on the Appeal</u>

100. I would therefore have dismissed the appeal irrespective of my conclusion on the Respondent's Notice.

101. It is not comfortable to find that a claim would have failed because of a misunderstanding by a party about what the true issues were and, consequently, about what evidence was required in order to prove their case. Since we were not taken through the full procedural history we are not in a position to judge how it came about that the misunderstanding in this case did not emerge until so late a stage. The EAT, as we have seen, referred to the Claimants having apparently made "a tactical decision … to put the case at trial in a more limited way", but I do not know what lies behind that rather general label. In the end, however, it was plainly right to hold that, in the absence of any clear understanding to the contrary, the issues to be determined at the hearing had to be based on the Claimants' pleaded case.

102. Whatever the origins of the misunderstanding, this case provides a useful reminder of the importance of identifying at the case management hearing what issues emerge from the case as pleaded and what kinds of evidence will need to be adduced by each party (and if necessary obtained from disclosure) in order to prove its case on those

issues. The primary responsibility lies with the parties, but there is an important role for the judge in analysing the pleadings and teasing out and resolving any aspect on which the parties may be at cross purposes. That is true in any kind of case, but discrimination (and in particular indirect discrimination) cases are liable to be particularly complicated, and particularly careful analysis is likely to be required.

Peter Jackson LJ:

103. I agree.

Lewis LJ:

104. I also agree.