Neutral Citation Number: [2020] EWHC 1554 (Admin)

Case No: CO/1636/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2020

Before :

LORD JUSTICE BEAN
MR JUSTICE CAVANAGH

- -

Between :

THE QUEEN

on the application of

(1) AHMED ADIATU
(3) INDEPENDENT WORKERS UNION OF GREAT BRITAIN

Claimants

- and –

HER MAJESTY'S TREASURY **Defendant**

- -

Ben Collins QC, Eleena Misra, Nadia Motraghi and Rachel Owusu-Agyei (instructed by **Leigh Day**) for the **Claimants**
Julian Milford QC, Rupert Paines and Ben Mitchell (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 11 June 2020 (on Skype for Business)

- -

Approved Judgment

Lord Justice Bean and Mr Justice Cavanagh:

1. This is the judgment of the court to which we have both contributed.

2. This claim for judicial review arises from the unprecedented circumstances arising from the COVID-19 or coronavirus pandemic, which at the time of the hearing before us had been the cause (or a cause) of the deaths of more than 40,000 people in the UK and many hundreds of thousands of people around the world. In particular it is brought in the interests of those workers whose incomes are seriously affected by stringent social distancing measures imposed by the Government, generally referred to as the "lockdown", which began in March 2020. The claim challenges certain decisions made by the Treasury in relation to the availability of support by way of Statutory Sick Pay ("SSP") and the Coronavirus Job Retention Scheme ("JRS").

3. The Independent Workers' Union of Great Britain ("the IWGB") is a trade union with around 5,000 members. Mr Adiatu, the First Claimant, is a member of the IWGB.

4. Mr Adiatu is Nigerian and has leave to remain with the requirement that he has "no recourse to public funds". He is a private hire driver for Uber and latterly also for two other private hire operators. His income decreased dramatically in March 2020 and he could not afford to pay for his private hire vehicle licence renewal in April 2020 so is now unable to work, and has fallen into rent arrears. He has a wife and four children aged from 7 months to 12 years, two in the UK and two in Egypt. In his first witness statement he understandably described his financial situation as "dire and terrifying". More recently he has received a payment under the Self-Employed Income Support Scheme ("SEISS"), but the financial pressures on him remain severe.

5. Originally, there was a Second Claimant, Mr Monshur Ali. By consent, Mr Ali withdrew from the proceedings after successfully applying for Universal Credit ("UC") and obtaining an offer of self-employed work.

6. Uber drivers such as Mr Adiatu were held by the Court of Appeal in *Uber BV v Aslam* [2018] EWCA Civ 2748; [2019] ICR 845, to be workers within the scope of s 230(3)(b) of the Employment Rights Act 1996 (though an appeal by Uber from that decision is shortly to be heard by the Supreme Court). Such workers occupy an intermediate status between those working under a contract of employment and the genuinely self-employed. The universal, if inelegant, abbreviation used by lawyers (and by the Government in some official documents) is "limb b workers".

7. The Defendant is the Government Department primarily responsible (with the Department for Work and Pensions, "DWP") for decisions in relation to the JRS, SSP and the SEISS.

8. The Claimants seek declarations that the Defendant's decisions in relation to the treatment of workers in the context of the pandemic (in particular in relation to SSP and the JRS) are discriminatory contrary to the European Convention on Human Rights ("ECHR"), EU law, and/or were taken in breach of the public sector equality duty under s 149 of the Equality Act 2010. They do not seek quashing orders, but rather ask the Court to require the Defendant to review and remake its decisions.

Chronology of the pandemic

9. On 29 January 2020 the UK's first two patients tested positive for COVID-19. On 28 February 2020 the first transmission of COVID-19 within the UK was confirmed.

10. On 12 March 2020 the Prime Minister held a press conference and stated that from 13 March 2020:

> "…if you have coronavirus symptoms, however mild – either a new continuous cough or a high temperature – then you should stay at home for at least 7 days to protect others and help slow the spread of the disease.
>
> We advise all those over 70 and those with serious medical conditions against going on cruises and we advise against international school trips.
>
> At some point in the next few weeks, we are likely to go further and if someone in a household has those symptoms, we will be asking everyone in the household to stay at home."

11. On 16 March 2020 the Government issued advice to UK citizens to work from home where possible and to avoid pubs and restaurants. The following advice was also given:

> "Today, we need to go further, because according to SAGE [the Scientific Advisory Group for Emergencies] it looks as though we're now approaching the fast growth part of the upward curve. And without drastic action, cases could double every 5 or 6 days. So, first, we need to ask you to ensure that if you or anyone in your household has one of those two symptoms, then you should stay at home for fourteen days.
>
> That means that if possible you should not go out even to buy food or essentials, other than for exercise, and in that case at a safe distance from others. If necessary, you should ask for help from others for your daily necessities. And if that is not possible, then you should do what you can to limit your social contact when you leave the house to get supplies."

12. On 17 March 2020 the Chancellor of the Exchequer announced measures to support business including loans, tax arrangements and grants.

13. On 20 March 2020 it was announced that all pubs, restaurants, gyms and other social venues would close. On the same day the JRS was announced. It was further announced that the UC allowance would be increased such that it would be paid at a rate equivalent to the rate of SSP.

14. On 23 March 2020 a nationwide "lockdown" was announced. The Prime Minister announced that people would only be permitted to leave their homes to buy food, exercise once a day or go to work if they could not work from home, and that these restrictions would be enforced by fines.

15. The Coronavirus Act 2020 received Royal Assent on 25 March 2020. The next day the Health Protection (Coronavirus Restrictions) (England) Regulations 2020/350 were made, and the SEISS was announced.

16. Recently there has been some easing of the lockdown: it is not necessary to go into the details for the purposes of this case.

The Job Retention Scheme

17. On 15 April 2020 the Defendant gave a Direction in exercise of the powers conferred by sections 71 and 76 of the Coronavirus Act 2020, known as The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction ("the Direction"). The JRS is set out in a Schedule to the Direction.

18. The key provisions of the JRS are as follows:

    (1) The JRS is a temporary scheme. It was initially in place for 4 months starting from 1 March 2020 but has recently been extended and modified. It is available wherever an employer furloughs its employees "by reason of circumstances arising as a result of coronavirus or coronavirus disease" (paragraph 6.1(c) of the Direction).

    (2) The original terms of the JRS provided that employers who furlough employees may apply for a grant that covers 80% of their usual monthly wage costs, up to a cap of £2,500 per month, plus employer's national insurance contributions and the minimum automatic enrolment amount in respect of pension contributions on the subsidised furlough pay, at the rate of 3% of an employee's income above £520 per month from 6 April 2020.

    (3) The rules of the JRS as originally laid down provided that while on furlough, an employee cannot undertake work for, or on behalf of, the organisation or any linked or associated organisation: "work" includes providing services or generating revenue. This is to be modified as the support under the JRS is gradually phased out, to enable furloughed workers to resume work on a part time basis.

    (4) For the purposes of the scheme, "employees" includes limb b workers only if they are paid by PAYE.

    (5) Employees can be on any type of employment contract including agency, flexible or zero hours contracts.

    (6) If contractually allowed, employees are permitted to work for another employer or to volunteer whilst they have been placed on furlough.

    (7) Foreign nationals are eligible to be furloughed as are employees on all categories of visa. Where foreign nationals have leave to remain in the UK subject to the condition that they must have "no recourse to public funds", grants under the JRS are not counted as public funds.

(8) If an employee is on sick leave or self-isolating due to coronavirus they will be able to obtain SSP subject to fulfilling other eligibility conditions.

(9) Employers can furlough employees who are being shielded (that is to say who are confined to their home because of a particular vulnerability), need to stay home with someone who is being shielded, off on long term sick leave or have caring responsibilities. If a non-furloughed employee becomes ill, needs to be self-isolated or be shielded then the employer may qualify for the SSP rebate scheme, enabling the employer to claim up to 2 weeks of SSP per employee.

(10) Employees with more than one employer can be furloughed for each job. Each job is separate and the cap applies to each employer individually. Employees can be furloughed in one job but continue working for another employer and receive their normal wages.

(11) For employees with variable pay who have been employed for a full year, employers will claim the higher of either: (i) the amount the employee earned in the same month last year; or (ii) the average monthly earnings for the previous year. If the employee has been employed for less than one year, employers can claim an average of the employee's regular monthly wages since starting work.

The Self-Employed Income Support Scheme

19. The key provisions of the SEISS Direction, as set out in the version of the SEISS Guidance issued on 4 May 2020, are as follows:

(1) The scheme permits the self-employed to claim a taxable grant worth 80% of trading profits up to a maximum of £2,500 per month, available for 3 months but subject to extension. The grant is subject to income tax and national insurance contributions but does not need to be repaid.

(2) To qualify, the self-employed individual must:

(i) have submitted a Self Assessment tax return for the tax year 2018 to 2019;
(ii) have traded in the tax year 2019 to 2020;
(iii) be trading at the point of application (or would be except for COVID-19);
(iv) intend to continue to trade in the tax year 2020 to 2021;
(v) have lost trading profits due to coronavirus.

(3) The self-employed individual's trading profits must account for more than half of their total income for either the tax year 2018/2019 or the average of the three tax years from 2016/17 through to 2018/19. Trading profits must be no more than £50,000.

(4) HMRC will use data from tax returns already submitted to identify those who are eligible.

Universal Credit

20. UC is a means-tested benefit for working age people on low income which was designed to replace social security benefits including Child Tax Credit, Housing Benefit, Income Support, Income-Based Jobseekers' Allowance ("JSA"), Employment and Support Allowance ("ESA") and Working Tax Credit. For those who have worked in the last two to three years, what is termed "new style" JSA and ESA may still be available, in the latter case where the applicant has a health condition or disability affecting his or her ability to work.

21. UC is available to those in the UK on low income or out of work. If an applicant has savings over £6,000 (joint savings are taken into account where the applicant lives with a partner) the payment is reduced by £4.35 a month for each £250 (or part of £250) of capital above £6,000. Where savings exceed £16,000 an applicant is not eligible for UC. Entitlement to UC is further affected where an applicant has children.

22. UC is not available to those who are subject to immigration control for benefits and services (for example if "no recourse to public funds" is a condition of their leave to remain, though this rule is modified in cases where an applicant with leave to remain in the UK would otherwise be destitute or in imminent risk of destitution: see *R(W) v SSHD* [2020] EWHC 1299 (Admin)).

23. The Employment and Support Allowance and Universal Credit (Coronavirus Disease) Regulations 2020/289 amended the scheme for the payment of UC in order to address needs arising from the pandemic. With effect from 13 March 2020 there has been a temporary suspension of the minimum income floor for those infected by COVID-19, in isolation, or caring for a child or qualifying young person within their household.

24. On 20 March 2020, the Government announced that there would be an increase to the UC standard allowance and that, because of the removal of the minimum income floor, self-employed persons could access UC at a rate equivalent to SSP.

25. On 3 April 2020 it was reported that almost 950,000 people had applied for UC in the previous two weeks with a substantial number of them seeking an advance payment of UC, which is made by way of loan. The usual waiting time for a first payment where a successful application is made (online after also setting up an account for the applicant's partner within the same household) is five weeks. This volume of claims was far higher than usual: we were told that fortnightly new claims averaged 110,380 in the year ending 9 January 2020, and never exceeded 130,000 during this period.

The legal framework

The coronavirus legislation

26. The Explanatory Notes to the Coronavirus Act 2020 include the following:

> "The purpose of the Coronavirus Act is to enable the Government to respond to an emergency situation and manage the effects of the COVID-19 pandemic. A severe pandemic will lead to a reduced workforce, increased pressure on health services and death management processes. The Act contains temporary measures designed to either amend existing

> legislative provisions or introduce new statutory powers which are designed to mitigate these impacts.
>
> The Act aims to support Government in doing the following:
>
> • Increasing the available health and social care workforce
>
> • Easing the burden on frontline staff
>
> • Containing and slowing the virus
>
> • Managing the deceased with respect and dignity
>
> • Supporting people
>
> The Act is part of a concerted effort across the whole of the UK to tackle the COVID-19 outbreak. The intention is that it will enable the right people from public bodies across the UK to take appropriate actions at the right times to manage the effects of the outbreak.
>
> As part of its contingency planning, the Government has considered what measures would be needed during a severe COVID-19 outbreak to reduce the pressure of key services and limit the spread of infection."

27. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350 ("the Coronavirus Regulations") were made on 26 March 2020 pursuant to powers conferred by the Public Health (Control of Disease) Act 1984.

28. Regulation 6(1) provides that during the emergency period, no person may leave the place where they are living without reasonable excuse. Among the reasonable excuses listed in Regulation 6(2) is "to travel for the purposes of work……..where it is not reasonably possible for that person to work…….from the place where they are living" (Regulation 6(2)(f)).

Statutory sick pay

29. Section 151(1) of the Social Security Contributions and Benefits Act 1992 ("SSCBA") provides:

> "Where an employee has a day of incapacity for work in relation to his contract of service with an employer, that employer shall, if the conditions set out in sections 152 to 154 below are satisfied, be liable to make him, in accordance with the following provisions of this Part of this Act, a payment (to be known as "statutory sick pay") in respect of that day."

30. Section 155(1) SSCBA provided that SSP is not payable for the first three qualifying days of entitlement. Section 157(1) provides for a weekly rate of SSP which is currently £95.85.

31. Section 163 SSCBA defines "employee" as:

> "a person who is gainfully employed in Great Britain either under a contract of service or in an office (including elective office) with earnings (within the meaning of Parts 1 to 5 above)...
>
> but subject to regulations, which may provide for cases where any such person is not to be treated as an employee for the purposes of this Part of this Act and for cases where any person who would not otherwise be an employee for those purposes is to be treated as an employee for those purposes…"

32. SSP is not payable unless the employee earns above a minimum threshold known as the lower earnings limit, "the LEL" (s.5 and Sch. 11 SSCBA). In the current tax year the lower earnings limit is £120.

33. On 13 March 2020 the Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 (SI 2020/287 – the "SSP Coronavirus Regulations") came into force, followed by further Amendment Regulations (SI 2020/304 on 17 March 2020 and 2020/427 on 16 April 2020), extending the provision of SSP to those self-isolating due to coronavirus.

34. Sections 39 to 44 of the 2020 Act deal with SSP. Section 39 provides a power for state funding of employers' liabilities for SSP. Section 40 provides a power to disapply the 3-day waiting period.

35. Sums paid by way of SSP are wages for the purposes of the Employment Rights Act 1996 (s.27(1)(b)). It has also been held that they are pay for the purposes of EU law (*North Western Health Board v McKenna* [2006] ICR 477).

The grounds of claim

36. The Claimants submit that the following decisions are unlawful:

> (1) The decision to exclude limb b workers from the JRS ("the JRS decision").
>
> (2) The decision to amend the scheme for SSP as a response to the pandemic without:
>
> > (a) including limb b workers within the scheme; or
> >
> > (b) raising the level of SSP; or
> >
> > (c) removing the lower earnings limit ("the SSP decision").

37. We are asked to grant a declaration that the decisions are unlawful:

> (1) Pursuant to section 6 of the Human Rights Act 1998, because they amount to violations of Article 14 read with Article 1 of the First Protocol to the Convention ("A1/P1") (a separate argument based on Article 8 has not been pursued); and/or

(2) Because, with the exception of the decision to exclude limb b workers from the JRS, they are discriminatory on grounds of race and/or sex contrary to EU law; and/or

(3) Because in taking the decisions the Defendant failed to comply with its public sector equality duty ("the PSED") under s 149 of the Equality Act 2010.

THE CLAIMS UNDER THE ECHR

38. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The Convention right which the Claimants contend has been infringed in the present case is Article 14, when read with A1/P1.

39. Article 14 provides:

> "*Prohibition of discrimination*
>
> The enjoyment of the 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."

40. A1/P1 provides, in relevant part:

> "*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."

41. It was not disputed before us that the subject-matter of the Claimants' ECHR challenge comes within the ambit of A1/P1.

42. We begin by observing that it is not in dispute, firstly, that the pandemic has caused grievous loss of life and social disruption on a scale not seen in this country since the end of the Second World War and, secondly, that these effects are not evenly spread throughout the population. The Claimants in this case focus on the financial effects on workers not in secure employment. But it is has also become apparent as the disease has spread that coronavirus is a far greater danger to the elderly than to the young; that within most age groups men are somewhat more at risk than women; that there are regional and local variations in the prevalence of the disease; and that the BAME population has been particularly badly affected (as documented in a recent report from Public Health England). The social effects of lockdown are particularly severe for children at risk; and also, in different ways, for children with special educational needs and parents who have to look after them at home. Many other examples could be given.

43. But we accept the submission of Mr Milford that "this case is not, and cannot properly be, about the broad political question of how the Government should respond to the needs of particular groups as a result of the pandemic. There is no legal answer to that question, which raises open-ended policy choices to which there is no right answer".

44. It is also right to observe, particularly in the context of the Defendant's alleged non-compliance with the procedural requirements of the public sector equality duty, that the JRS, SEISS and other policies to address the pandemic were, in the words of the Defendant's skeleton argument "worked up in a matter of days, under huge pressure, in order to respond to an unprecedented public health and economic emergency" and that they "involve enormously important macro-economic and macro-political judgments." Mr Milford argues that "it is difficult to conceive of circumstances where the margin of discretion available to the Government should be wider". There is force in that submission, although it is not suggested that the Defendant's decisions are immune from legal scrutiny.

Exclusion of limb b workers from the Job Retention Scheme

Are they analogous to furloughed employees?

The Claimants' submissions

45. The assistance provided by the JRS is only available to those who are paid by PAYE. That includes almost all employees but excludes, according to the Claimants, the "vast majority" of limb b workers.

46. Mr Collins QC, on behalf of the Claimants, submits that limb b workers who are unable to perform their jobs are in an analogous position to PAYE employees who are unable to perform their jobs. Employees, however, may benefit from the provisions of the JRS which permit them to continue to be paid at least 80% of their salary while not working.

The Defendant's submissions

47. Mr Milford QC, on behalf of the Defendant, submits that in evaluating whether limb b workers are subject to differential treatment by their exclusion from the JRS, we should not compare limb b workers with furloughed employees. That is because limb b workers' access to the JRS is not dependent on such a distinction: individuals are included within the JRS if they are employed for tax purposes and paid by the PAYE system. Indeed, certain limb b workers who are paid by PAYE qualify for the JRS. Because limb b workers are excluded from the JRS on the basis of whether they are paid by PAYE, rather than on the ground of their status as a limb b worker, their complaint of differential treatment cannot get off the ground.

48. Mr Milford submits that even if limb b workers who are not paid by PAYE can be compared with those who are paid by PAYE, the obvious differences between these two groups mean that they are not in an analogous position. Employees who are paid by PAYE work on a real time system which is checked by HMRC, unlike limb b workers who are not paid by PAYE. Limb b workers submit a tax return which does not contain any information that can enable HMRC to ascertain whether they are in fact limb b workers or whether they are self-employed. Moreover, employees paid by

PAYE are taxed on wages whereas those who are not paid by PAYE are taxed on profits.

Discussion

49. The proper approach for considering whether there has been a violation of Article 14 was described by Lady Black in *R (Stott) v Secretary of State for Justice* [2020] AC 51 at para 8:

> "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 different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173. He observed that once the first two elements are satisfied:
>
> > 'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact'."

50. Mr Milford is correct to say that the JRS does not exclude limb b workers as such: it excludes anyone who is not within the PAYE system. We do not think that this is a decisive point; but it does mean that the comparison to be drawn is between limb b workers such as Mr Adiatu who are not within the PAYE system, and employees or other workers who are.

51. The Defendant relies on the following distinctions between the two groups to argue that their situations are not analogous in the context of the JRS; alternatively that their different treatment is justified.

1) Those within the PAYE system are employed by employers who make regular PAYE returns in respect of them. Thus HMRC is able to check the amounts payable to employers in respect of furloughed employees within the PAYE system, by correlating furlough payments with PAYE records: not so with those outside the PAYE system.

2) The self-employed do not provide any information which enables HMRC to ascertain whether they are limb b workers, or are genuinely in business on their own account, so that HMRC cannot check whether a person outside the PAYE system is entitled to a "wage" as a "worker" in the first place.

3) Both of those points would leave the JRS wide open to massive fraud if it included the self-employed.

4) In any case, the entire notion of a furlough scheme based on wages has no meaning for the self-employed, who pay taxes on profits.

52. We are encouraged by the observations of Lord Nicholls in *Carson* and of Lady Black in *Stott* to think that the question of whether two groups are in an analogous situation for the purposes of Article 14 does not always admit of a "yes or no" answer. Certainly this is not a case where it is "plain", "clear" or "obvious" that they cannot sensibly be compared. Our answer in the present case is that the situations of limb b workers who are outside the PAYE system and employees or other workers who are within it are analogous to some extent. The real question in our view is whether, to the extent that the situations of the two groups are analogous in the context of the JRS, the difference in their treatment is justified. That brings us to the important question of the standard to be applied.

The legal test for justification

The Claimants' submissions

53. In *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 the Supreme Court held that the applicable test when considering the justification of adverse effects, *"at any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits"* (*per* Lord Wilson at para 65), is whether the measure is manifestly without reasonable foundation ("MWRF"), adopting the language used in *Stec v United Kingdom* (2006) 43 EHRR 47.

54. In *JD & A v UK (Application nos. 32949/17 and 34614/17),* the European Court of Human Rights ("ECtHR") reviewed the proper approach to the test for justification and concluded that:

> "although the margin of appreciation in the context of general measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality…… Thus, even a wide margin in the sphere of economic or social policy does not justify the adoption of laws

> or practices that would violate the prohibition of discrimination. Hence, in that context the Court has limited its acceptance to respect the legislature's policy choice as not "manifestly without reasonable foundation" to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality..."

55. The Claimants accept that this Court is bound by the Supreme Court, but argue that *DA* was a case about welfare benefits whereas the present case is a case about employment, and in particular about earnings. As a matter of law wages paid to furloughed workers are still wages, notwithstanding that the employer can claim 80% reimbursement from the state.

56. The Claimants acknowledge that the Court of Appeal in *R* (*Drexler) v Leicestershire CC* [2020] EWCA Civ 502 concluded that the effect of *DA* is not limited to welfare benefits, but argue that *Drexler* must nevertheless be understood in its context, which was a decision by a local authority about whether free transport to and from school should be provided for children with special needs aged over 16 but under 19. Local authorities, unlike the Government, have to operate within fixed spending limits. Mr Collins submits that the present case is accordingly distinguishable from both *DA* and *Drexler* – because it is a case about employment protection and pay, and because the Defendant has stated publicly that these are not circumstances in which the allocation of finite resources should play a role. Further, given the limits to the test expressed by the ECtHR in *JD&A*, it would be wrong to expand the scope of the MWRF standard beyond the field in respect of which this Court is bound to follow those cases. Mr Collins submits that since the Court of Appeal in *Drexler* did not lay down what degree of deference to the discretion of the executive is appropriate outside the context of welfare benefits, the Strasbourg decision in *JD&A* should mean that the degree of deference should not be too high, even in decisions involving the allocation of large sums of public money. Where a policy has different impacts on those of different status, it remains for the Court to examine the reasons given to establish whether the Defendant has justified those different impacts. It is accepted that worker status is not a core ground such as race or gender - nevertheless the Court will examine the Defendant's justification with care.

The Defendant's submissions

57. In relation to the appropriate standard of review, Mr Milford submits that we should afford the Defendant the very highest degree of deference when determining whether any differential treatment is justified. The correct standard is whether the treatment is MWRF, as the Supreme Court made clear in *DA.* Although the *DA* case concerned welfare benefits, Mr Milford submits that this standard applies to other contexts, particularly when they concerned the allocation of scarce financial resources.

58. To that end, he relies on recent domestic authorities, particularly *Drexler* and the cases cited in it (such as *R (Turley) v Wandsworth LBC* [2017] EWCA Civ 189), for the proposition that the courts should afford a high degree of deference to democratically elected decision makers in matters of public expenditure generally, not only in the area of welfare benefits. Mr Milford also distinguishes Strasbourg authorities, such as *JD & A*, on the basis that the "weighty grounds" necessary for

justifying sex or disability discrimination do not apply when the subject of the treatment in question is limb b workers who are not paid through the PAYE system. Mr Milford also rejects any contention that the Government, in its public pronouncements about the JRS, had accepted that the JRS was not subject to considerations of public expenditure.

Discussion

59. In the case of *DA* the Supreme Court decided that decisions of the Government about the scope and level of welfare benefits cannot be impugned under the ECHR unless they are MWRF. A Chamber of the Strasbourg court took a somewhat different view in *JD & A* in the context of alleged discrimination on the basis of disability and gender; but the decision of the Supreme Court remains binding on us and all domestic courts.

60. The Claimants' argument that the standard to be applied in the present case is a more intrusive one, because the JRS is about "employment protection and pay" rather than welfare benefits, cannot survive the decision of the Court of Appeal in *Drexler*. We draw attention to the following passages in the judgment of Singh LJ:-

> "56. ….[T]he courts recognise that they are not well placed to question the judgement made by either the executive or the legislature in relation to matters of public expenditure. This is both on the ground of relative institutional competence and on the ground of democratic legitimacy. The allocation of scarce or finite public resources is inherently a matter which calls for political judgement. This does not mean that the courts have no role to play but it does mean that they must tread with caution, affording appropriate weight and respect to the judgement formed by the executive or the legislature.
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> …
>
> 70. ….[T]here is no binding decision of the Supreme Court which requires this Court to hold that the "manifestly without reasonable foundation" test is inapplicable outside the context of welfare benefits.
>
> 71. In contrast, there are decisions of this Court which clearly have applied that test outside that context. One example is *R (Turley) v Wandsworth LBC* [2017] EWCA Civ 189; [2017] HLR 21, which concerned social housing. In giving the main judgment, Underhill LJ said, at para. 25, that he could see "no difference between access to social housing and access to welfare benefits. Both represent public resources – in the case of social housing a particularly scarce resource – the conditions for access to which must be pre-eminently a matter for political

> judgment." I respectfully agree and can see no relevant difference from the present context either. The underlying principle is not confined to "welfare benefits" but arises from the fact that certain decisions concern the allocation of scarce public resources.
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> ……..
>
> 76…. in my view, the crucial point is not so much whether the "manifestly without reasonable foundation" test is the applicable test; it is rather how the conventional proportionality test, even if that is the applicable test, should be applied given that the context is one in which a public authority is required to allocate finite resources and to choose priorities when it comes to setting its budget; and is also a context in which the ground of discrimination is not one of the "suspect" grounds. In this context, it seems to me that there is no material difference between application of the conventional proportionality test, giving appropriate weight and respect to the judgement of the executive or legislature, and the "manifestly without reasonable foundation" test…"

61. It is also important to bear in mind that the status relied on by the Claimants (being a limb b worker outside the PAYE system) is not one of the suspect grounds: indeed, it is only in the most extended sense a personal characteristic for the purposes of Article 14, and is at the outer limit of what Lord Reed (in *R (RJM) v SSWP* [2009] 1 AC 311) described as the "concentric circles" of statuses warranting protection under Article 14.

62. The arguments for the Claimants make repeated reference to statements by the Prime Minister, the Chancellor of the Exchequer and other senior ministers that the Government will do "whatever it takes" to fight the pandemic, however great the cost may be. We do not consider that these statements alter the applicability of the tests laid down by the Supreme Court in *DA* and the Court of Appeal in *Drexler*. The sums already involved in the JRS, SEISS, alterations to UC and other measures are enormous. It is not for this court, nor for any court, to say that as a matter of ECHR, EU or domestic law money must be no object.

63. We conclude that in considering the Defendant's justification for excluding limb b workers outside the PAYE system from the JRS we should give very great weight and respect to the judgment of the executive. The lesson we draw from the judgment of Singh LJ in *Drexler* is that the distinction between this standard of review and the MWRF test is in some cases a fine one, if not academic.

Justification: the facts

The Defendant's submissions

64. In considering the issue of justification on the facts it is convenient to set out the Defendant's arguments before the Claimants'.

65. Mr Milford gives five reasons why the Defendant was justified in excluding from the JRS limb b workers who are not paid by PAYE. First, the purpose of the JRS was to assist employers. It was designed to ensure employers could meet labour costs so that their relationships with their employees could be retained. This is evident from the way in which the JRS is financed: funding is given to employers rather than employees. The vast majority of limb b workers work for multiple employers, which is why the appropriate vehicle for supporting them is direct payment through the SEISS.

66. Secondly, their exclusion is justified on grounds of practicality. Since HMRC lacks the information to readily distinguish limb b workers from the self-employed, it would be reliant on individuals (or their employers) to self-declare as limb b workers. As recent cases like *Uber* indicate, it is difficult to determine whether an individual is a limb b worker or self-employed, so self-declaration would be unworkable in practice. HMRC also lacks other information to make the scheme deliverable for limb b workers at short notice. Because individuals outside the PAYE system are taxed on profits, for example, HMRC would lack information about workers' wages.

67. Thirdly, the inclusion of limb b workers in the JRS would create a significant risk of fraud, because HMRC would not be able to rely on the PAYE system which it currently uses to correlate JRS payments to employers. Increasing the likelihood of fraud is not rendered acceptable just because the present system already brings some risk of fraud. The risks posed by the Claimants' proposal are far greater than the current risks and, in any case, the Defendant is entitled to establish limits on the extent to which it will tolerate such risks.

68. Fourthly, there are alternative measures of support for limb b workers. The SEISS is not exactly equivalent to the JRS but it was intended to achieve a relatively similar outcome: 80% of profits can be claimed as opposed to 80% of wages.

69. Fifthly, even if the Claimants are right that some individuals seem to be in very similar circumstances save for their inclusion or exclusion from the PAYE system, a bright line has to be drawn by reference to some criterion in order to make a scheme such as the JRS deliverable in the context of a pandemic. The advantages of flexibility and speed outweigh such disadvantages.

The Claimants' submissions

70. Mr Collins submitted that the great majority of limb b workers, in contrast to PAYE employees:

    (1) do not benefit from the provisions of the JRS;
    (2) are more likely to be unpaid;
    (3) are more likely to lose their contracts;
    (4) are more likely to seek to continue to work in circumstances where doing so:
        (a) risks their own and their household's health;
        (b) poses a risk to public health; and
        (c) exposes them to a risk of breaching the Coronavirus Regulations.

71. Mr Collins submits that there was no valid reason to justify such drastically different treatment. First, Mr Collins rejects the Defendant's justification (as originally set out

in the Summary Grounds of Resistance) that the purpose of the JRS was to assist employers rather than employees. That the JRS was designed also to benefit employees is evident from its design, operation and the Defendant's own evidence. In terms of design, the JRS was clearly not introduced only to ensure that employers could avoid the cost of redundancies. It was also introduced to preserve the relationship between employers and employees during the pandemic. In terms of its operation, the JRS includes measures specifically designed to assist employees. It enables employers to re-employ former employees in order to furlough them and to extend employees' fixed-term contracts, even though there are no such obligations on the employer. Finally, the Defendant's own evidence, and in particular its equality impact assessment, indicates that the Defendant considered the JRS to be a vehicle for supporting employees.

72. Secondly, Mr Collins rejects the contention that the exclusion of limb b workers could be justified on the basis of practicality and the need to minimise fraud. Mr Collins queries the alleged difficulties in amending the JRS in real time, given that the DWP is making immediate UC payments to applicants, and submits that any justification based on the risk of fraud should not be overstated given that schemes such as the JRS will necessarily carry such risk. Mr Collins submits that the Government considers such risks to be acceptable in other aspects of its response to the pandemic, so there was no good reason to treat the avoidance of fraud as a silver bullet for justifying the scope of the JRS in this context. UC payments are made without any independent verification, employers are trusted to not give work to their furloughed employees, and the bounce-back loan scheme uses self-declaration.

73. Mr Collins also rejects the submission that there would be insurmountable difficulties in calculating the amount that limb b workers should be paid. Those sorts of difficulties already exist and yet they are considered manageable. The JRS covers employees who work on zero-hours contracts and, from July, furloughed employees will be able to return to work part-time, which means that the operators of the JRS will have to process information provided by employers about actual hours worked by their employees. Thus, Mr Collins submits that while being within the PAYE system might be a convenient "bright line" for determining eligibility for the JRS, it is far from necessary.

74. Thirdly, Mr Collins rejects the Defendant's justification based on affordability, given that Ministers have repeatedly stated that cost considerations did not apply to the Government's response to the pandemic.

75. Fourthly, Mr Collins rejects the contention that the exclusion of limb b workers was justified because the self-employed have alternative support via the SEISS. The SEISS is not available to workers who have moved from employment to self-employment since April 2019. But even when it is available, the SEISS provides significantly worse protection to limb b workers than is provided to employees under the JRS. The SEISS allows for pay at 80% of profits, not income, which results in workers with fixed overheads – such as the cost of maintaining and ensuring a private hire vehicle – receiving lower payment. Furthermore, whilst payments under the JRS can be paid on a weekly or monthly basis in keeping with employees' arrangements prior to the pandemic, SEISS payments have been delayed until June.

76. For those reasons, Mr Collins submits that there was no valid reason to justify the exclusion of limb b workers as a proportionate means of achieving a legitimate aim. If necessary, he submits that their exclusion was manifestly without reasonable foundation.

Discussion and conclusion

77. The essential feature of the JRS is that it is a payment to employers to support continued employment. We accept that its scope involved very difficult decisions as to the balance between the interests of maintaining employer/employee links and supporting employees on the one hand; and the need to encourage people back to work, not to prop up unviable businesses and not to create unsustainable public debt on the other.

78. Mr Milford correctly points out that if the aim of the JRS were to support employees (alone), then it would be unnecessary for any payments to be made to employers at all. Just as with SEISS, payments could be made directly to workers. The fact that payments are instead made to employers reflects a fundamental aim of the scheme, that is inapplicable to relationships other than employment.

79. We also accept the submission on behalf of the Defendant that:

> " simplicity in the JRS design – in this case, the binary distinction between employees within PAYE and non-employees outside PAYE – was essential not simply to prevent fraud, but to deliver the policy at all. Of all the possible situations where there might be benefit from simplicity and bright line rules, this is one of the clearest."

80. As Mr Milford put it:

> "that is not simply a matter of administrative convenience: it is an issue which comes to the heart of what the JRS and SEISS are attempting to achieve, which is the provision of swift assistance to those who need it."

81. The JRS is a taxpayer-funded employment support programme on a vast scale, created in circumstances of the utmost urgency to provide help to millions of furloughed employees by seeking to preserve their jobs at least during the worst of the crisis. The Defendant was entitled to take the view that any system which took months to establish would be almost useless, and a system which involved officials making rapid decisions in very large numbers of individual cases while minimising fraud would be impracticable.

82. In the result we are satisfied that as a matter of law, in particular under Article 14 and A1/P1 of the ECHR, and applying the test of a wide margin of discretion, the decision to confine the JRS to employees and other workers within the PAYE system was plainly justified.

Exclusion of limb b workers from statutory sick pay

The analogous situations issue

83. Mr Milford submits that many of the points which he made in relation to the JRS ground apply to limb b workers' exclusion from SSP. He argues that the Claimants again fail to draw the proper comparison because entitlement to SSP is not determined on the basis of limb b worker status but on the basis of whether the individual is self-employed or an "employee" as set out in Part XI of the SSCBA 1992. As such, many limb b workers do in fact receive SSP.

84. But even if limb b workers can be compared with employees, Mr Milford submits they are not in an analogous position. Unlike limb b workers outside the PAYE system, employees within the PAYE system make regular PAYE returns and are employed by employers who have established payroll systems, which means that HMRC can correlate claims with their data and their SSP can be calculated more easily. As above, because HMRC lacks adequate data to establish whether a limb b worker is not genuinely self-employed, it would have to rely on individuals self-declaring their status. This would result in incorrect claims, given the difficulties in establishing limb b worker status, and increase the risk of fraudulent applications.

85. Mr Collins submits that the modifications made to the SSP regime during the pandemic in the case of PAYE workers, extending entitlement to claim to those who are experiencing symptoms of COVID-19 or who live in the same household as someone else who is experiencing such symptoms, are designed – unusually – to encourage claimants *not* to attend for work, in order to limit the spread of the virus. The same rationale, he argues, should apply to limb b workers (and indeed to the self-employed).

86. The situations of limb b workers outside the PAYE system and of employees and other PAYE workers are in our view more analogous in the context of SSP during the pandemic than in the context of the JRS.

87. With that preliminary observation, and following the approach suggested in *Carson* and *Stott*, we go on to the issue of justification. Again we set out the Defendant's justification arguments before those of the Claimants.

The justification issue

The Defendant's submissions on justification

88. Mr Milford submits that the Claimants' challenge to SSP would involve redesigning the SSP scheme as a whole, which would amount to "making government policy under the pretence of the vindication of Convention rights", a practice which Laws LJ warned against in *R (Carson) v Secretary of State for Work and Pensions* [2003] Pens LR 215. Mr Milford provides a number of specific reasons why the Defendant was justified in excluding limb b workers who are not paid by PAYE from the JRS.

89. First, the redesigning of the SSP scheme and rewriting of its statutory scheme would take time, which would be inappropriate when an urgent response is required to address the pandemic. Secondly, determining who is a limb b worker and who is not –

and formulating a method for ascertaining their wages – would raise difficult questions which cannot be resolved speedily during a pandemic. Thirdly, as above, the extension of SSP to limb b workers would increase the risk of fraud because applications could not be verified by the PAYE system.

90. Fourthly, it would be difficult to determine how SSP should be calculated when limb b workers often work for multiple employers on separate platforms and in different ways. Lastly, the Government has made provision for the self-employed by establishing schemes such as the SEISS or by amending UC. Given that UC has been amended to the same rate as SSP during the pandemic and its minimum income floor has been lifted, there is no need for SSP to be extended to limb b workers who are not paid by PAYE.

91. In a letter of 9 April in response to pre-action correspondence the Defendant identified an alternative justification for excluding limb b workers from SSP (relying on *Parkin v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin)):

> "to make work pay, and to encourage claimants to do more productive activities in order to encourage them, over time, to reduce their reliance on benefits. The practical effects of the legal distinctions between the two groups mean that a work requirement imposed on an employee has an immediate, predictable and measurable effect. There is no directly effective practical equivalent in the case of a self-employed claimant…[so] a different mechanism had to be designed in order to influence their behaviour."

The Claimants' submissions on justification

92. Mr Collins rightly submits that many of those following Government instructions to self-isolate will face potentially disastrous consequences if they are not able to maintain an income for themselves and their families. He argues that by excluding limb b workers from SSP, the Defendant has failed to provide for many of those who are amongst the most vulnerable in the UK, with the obvious consequences that those who face total or serious loss of income by reason of complying with public health advice on self-isolation will either: (1) face severe and disproportionate financial hardship, with consequential adverse effects on their own and their families' physical and mental health; or (2) feel unable to comply with the advice, and feel compelled to go to work, thereby increasing the spread of the virus, contributing to the burden on the NHS and achieving the very opposite of the purported aims of the Government; and putting themselves and their families at serious risk of illness and death.

93. The Claimants take issue with the assertion by the Defendant that the inclusion of all limb b workers in the SSP regime would "require a fundamental redesign of the statutory scheme for SSP", on the basis that "the regime provides for payments to cease when an employee's contract of service comes to an end" and that "it is unclear how that would apply to those whose work arrangements do not involve any overarching contract with an employer, extending beyond a single engagement (as will be the case with many if not most limb (b) workers)." The Claimants argue that same difficulty arises with employees who are engaged on a series of short contracts of employment. The Claimants argue that including all limb b workers in the SSP

regime would not involve any great difficulty or major redesign of the statutory scheme.

94. As for the Defendant's argument that the difference in treatment is justified by different tax treatment between those paid via PAYE (who pay Class 1 National Insurance Contributions) and those who are self-employed for tax purposes (who pay Class 2 and 4 National Insurance Contributions), the Claimants submit that "such differences in treatment could not begin to offset the disproportionate impact of the lack of access to SSP on limb (b) workers in the course of the pandemic." Even were that not so, they submit that it is not legitimate for a scheme to decide entitlement to a benefit paid by the employer by reference to payments made to the state. In any event, the Claimants argue that such an approach is inconsistent with the Defendant's avowed approach of doing "whatever it takes" to protect the public.

95. On the question of whether a bright line was necessary, as opposed to convenient, Mr Collins referred in reply to *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015 1 WLR 3820, where Baroness Hale of Richmond DPSC said at [37]:

> "….even if a bright line rule is justified in the particular context, the particular bright line rule chosen has itself to be rationally connected to the aim and a proportionate way of achieving it: see, for example, *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2014] UKSC 35, [2015] AC 49. Secondly, however, it is one thing to have an inclusionary bright line rule which defines all those who definitely should be included. This has all the advantages of simplicity, clarity and ease of administration which are claimed for such rules. It is quite another thing to have an exclusionary bright line rule, which allows for no discretion to consider unusual cases falling the wrong side of the line but equally deserving. Hitherto the evidence and discussion in this case has tended to focus on whether there should be a bright-line rule or a wholly individualised system. There are obvious intermediate options, such as a more properly tailored bright line rule, with or without the possibility of making exceptions for particularly strong cases which fall outside it. …."

96. Mr Collins submits that for these reasons the exclusion of limb b workers from SSP during the pandemic was manifestly without reasonable foundation.

Discussion and conclusion

97. SSP, although paid by the employer, is mandated by the State, and in our view is analogous to a welfare benefit, so that the decision about whether limb b workers should be eligible to receive it falls plainly within the terms of the MWRF test laid down in *DA.* It is a benefit which was created by primary statute long before the pandemic and confined, with minor exceptions, to employees and some others within the PAYE system.

98. The additional costs for employers, and for Government, of extending SSP in this way would have been very significant. It was not practicable to extend SSP to all limb b

workers in a speedy or sudden manner. It would have required a fundamental rewrite of the SSP system at a time when the scale of the problem combined with the urgency of the crisis required a bright line solution. Limb b workers who were not on PAYE would not be on payroll systems which could be used to calculate and then pay SSP. There was no readily available information which could be used to determine whether a person was a limb b worker, rather than a different type of self-employed person or a small business, and it was not sensible, or even possible, to adopt a new criterion for entitlement on no notice in the middle of a pandemic. Features that are common in limb b work, such as multi-apping for minicab drivers and delivery drivers, would not be easy to deal with under SSP. There would have been a real risk of fraud. The Government could not have checked employers' applications for rebates against PAYE or Class 1 NIC records. Many limb b workers work for a range of different businesses and it would have been difficult, if not impossible, to adapt the SSP scheme to them. As stated above, the self-employed, including limb b workers, are taxed on profits, and it would not have been possible to work out how much of a person's profits was the equivalent of salary for an employed person.

99. We are entirely satisfied that the decision to exclude limb b workers outside the PAYE system from eligibility for SSP has a reasonable foundation.

THE EU LAW CHALLENGES

100. This part of the judgment will deal with the questions that arise in relation to the EU law claims in the following order:

(1) What is the treatment complained of?;

(2) What are the causes of action relied upon by the Claimants? Who is the appropriate Defendant and what is the correct forum?;

(3) Do the Claimants have standing to bring their claims?;

(4) Does the treatment complained of mean that the Claimants are subjected to a provision, criterion or practice ("PCP") which means that women and/or BAME workers are treated less favourably than men and white workers?;

(5) If so, is the treatment justified as being a proportionate means of achieving a legitimate aim? This breaks down into two subordinate questions: (a) what is the test to be applied for justification?; and (b) applying the appropriate test, is the treatment a proportionate means of achieving a legitimate aim?; and

(6) Conclusion.

(1) What is the treatment complained of?

101. The Claimants contend that women and BAME workers are more likely to be low-paid and to have limited financial resources with no access to occupational sick pay, and so that the low rate of SSP means that a disproportionate number of women and BAME members of the workforce will feel compelled to go to work when they are suffering symptoms of coronavirus or should be self-isolating. They cannot survive

on SSP alone. Moreover, those who do go to work when sick with coronavirus are more likely to suffer serious ill-health if they are BAME. The Claimants submit that this cannot be justified and so is indirect discrimination on grounds of sex and race, contrary to EU law.

102. The Claimants further contend that the requirement of a minimum rate of weekly earnings in order to qualify for SSP, imposed by the LEL, disadvantages female and BAME members of the workforce, because they are more likely to be low-paid and so to fall below the threshold and be deprived of the protection of SSP. The Claimants also rely on the comparatively poor outcomes for BAME workers who are infected by the coronavirus. Again, the Claimants submit that this is not justified and is indirect sex and race discrimination.

103. In relation to the low rate of SSP and the LEL, there is no ECHR challenge: the only challenge is the EU law one (apart from the PSED challenge).

104. The Claimants also contend that the exclusion of most limb b workers from SSP is indirect race discrimination. They say that it puts BAME workers at a particular disadvantage because of the poorer outcomes when they are infected by coronavirus. For the reasons relied upon in the ECHR challenge, the Claimants submit that the exclusion of most limb b workers from SSP is not justified as a matter of EU discrimination law.

105. The Claimants do not bring a sex discrimination claim in relation to the exclusion of most limb b workers from SSP, and they do not bring either a sex or race discrimination complaint in relation to the exclusion of most limb b workers from the JRS.

(2) What are the causes of action relied upon by the Claimants? Who is the appropriate Defendant and what is the correct forum?

The relevant EU legislation

106. The Claimants rely upon EU law for their challenges that are based on race and sex discrimination. They rely upon the direct effect of the Equal Pay article of the Treaty on the Functioning of the European Union ("the TFEU"), Article 157, and upon two EU Directives, Council Directive 2000/43/EU, implementing the principle of equal treatment between persons irrespective of racial or ethnic origins, and on the Recast Equal Treatment Directive 2006/54/EC, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

107. Notwithstanding that the European Union (Withdrawal Agreement) Act 2020 was passed on 23 January 2020, the United Kingdom remains subject to EU law during the implementation period which runs until 31 December 2020 (section 1A). This is not in dispute between the parties.

108. In relevant part, Article 157 provides that:

> "1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
>
> 2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."

109. Article 157 has direct effect and so can be relied upon by an individual against his/her employer, even if the employer is not a part of the State or a State authority.

110. In the present case, the Claimants' EU law complaints are concerned with SSP. SSP is paid by the employer to the employee. The amount of SSP is determined in accordance with statute, but, in most cases, the Government does not provide employers with funds with which to pay SSP to employees (the exception is that, in response to the coronavirus pandemic, the Government has provided for SSP rebates for SME employers for up to two weeks of SSP payments made to employees as a result of coronavirus: see Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) Regulations (SI 2020/512)). It follows that SSP is part of the remuneration that is paid by employers to employees as a result of the employment relationship, albeit, as we have said, the amount of the SSP payment is determined by statute.

111. It is clear that sick pay is "pay" for the purposes of Article 157: *North Western Health Board v McKenna (C-191/03)* [2006] ICR 477. The *McKenna* case was concerned with a contractual occupational sick pay scheme, but the same applies in relation to SSP, in which the amount is laid down by statute. The fact that the amount of an element of remuneration is determined by legislation, and is outside the control of the employer, does not mean that it is not "pay" for the purposes of Article 157: *Lloyds Banking Group Pension Trustees Ltd v Lloyds Bank plc* [2018] EWHC 2839 (Ch); [2019] Pens LR 5, see, eg, paragraph 251.

112. Direct or indirect sex discrimination by an employer in relation to the payment of SSP would, therefore, contravene Article 157.

113. The Recast Equal Treatment Directive (2006/54/EC) states, at Article 4, that:

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

114. Article 2.1(e) of the Equal Treatment Directive defines "pay" as:

> "the ordinary basic of minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer."

115. The meaning of "pay" for the purposes of the Equal Treatment Directive is the same as the meaning of pay for the purposes of Article 157, and so encompasses SSP. However, Directives, unlike Article 157, do not have direct effect and so cannot be relied upon by workers in the private sector for the purposes of claims against their employers. The rights of private sector workers are protected by the domestic implementing legislation, the Equality Act 2010.

116. So far as race discrimination is concerned, the Claimants rely upon the Racial Discrimination Directive, 2000/43/EU. Article 1 of the Directive states that its purpose is to lay down a framework for combatting discrimination on the ground of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment. Article 2.1 states that the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin. Article 3.1(c) states that the Directive will apply to all persons, as regards both the public and private sectors, in relation to employment and working conditions, including dismissals and pay.

117. There is no reason to doubt that "pay" has the same meaning for the Racial Discrimination Directive as for Article 157 of the TFEU. However, as this is a Directive, it does not have direct effect in relation to claims by private sector workers in relation to the pay that they receive from private sector employers. Once again, the rights of workers in the private sector are protected by the domestic anti-discrimination legislation, set out in the Equality Act 2010. In particular, s 19 renders unlawful indirect discrimination in relation to a number of protected characteristics, including race, and s 39(2)(b) prohibits direct or indirect discrimination on the ground of race by an employer in relation to a worker's terms of employment (which include pay).

Indirect discrimination

118. The Claimants' challenge is based on indirect discrimination. There is no complaint of direct discrimination on sex or race grounds. The meaning of "indirect discrimination" is defined in effectively identical terms in Article 2.2(b) of the Racial Discrimination Directive, and Article 2.1(b) of the Equal Treatment Directive. Indirect discrimination is to be taken to occur where:

> "an apparently neutral provision, criterion or practice ["PCP"] would put persons [with the protected characteristic] 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."

119. The same test for indirect discrimination applies for the purposes of Article 157, and, although the wording is slightly different, the test is the same in domestic law, as set out in the EA 2010, s 19(2).

Who is the appropriate Defendant, and what is the right forum?

120. At first blush, the Claimants have brought their claims against the wrong Defendant, in the wrong forum.

121. So far as an equal pay claim, or race discrimination claim related to pay is concerned, the appropriate Defendant/Respondent is the employer and the appropriate forum is ordinarily the Employment Tribunal.

122. As the claims are premised on the basis that the sex and race discrimination relates to pay, in the ordinary course of events the Defendant/Respondent is the person who is responsible for the pay, namely the employer. As we have said, the fact that there is a statutory framework which applies to the type of pay in question does not detract from the position that any act of discrimination is the act of the employer. In theory, there would be nothing to prevent employers from extending sick pay payments, equivalent to SSP, to limb b workers. Similarly, an employer could ignore the LEL for SSP payments, or pay a higher sum than the SSP regulations require. The ultimate responsibility for any unlawful discrimination rests with the employer (or the pension scheme if the issue relates to pensions): see the *Lloyds Banking Group* case.

123. Ordinarily, an equal pay claim must be brought in the Employment Tribunal or the County Court. A race discrimination claim relating to pay must be brought in the Employment Tribunal: see EA 2010, ss 113, 114 and 120.

124. In the present case, however, the Claimants have proceeded by way of judicial review, and the Defendant is not the individual Claimant's employer, but the Government, as the Defendant is HM Treasury (in fact the Government Department with primary responsibility for SSP is the Department of Work and Pensions, but no point is taken on this by the Defendant). It is easy to see why, as a practical matter, this course of action makes sense. In the real world, the vast majority of employers make SSP available in accordance with the relevant statutes and regulations. The DWP is the "controlling mind" of SSP and it is the Government, rather than individual employers, which is best placed to explain the schemes and to provide evidence and arguments as to why it is said that the treatment under challenge does not place women or BAME workers at a particular disadvantage or, if it does, is a proportionate means of achieving a legitimate aim. Also, the issues under consideration are suitable for judicial review as they do not require oral evidence from witnesses or cross-examination. Still further, the relief sought by the Claimants is very urgent, and it would not have been possible for them to obtain the declaratory relief that they seek through proceedings in the Employment Tribunal. In any event, as a result of the coronavirus pandemic, there are substantial delays in Employment Tribunal proceedings and some hearing centres, such as Central London, are presently unable to hold full hearings, even remotely.

125. Claims against the individual Claimant's employer in reliance upon the Directives would face the further hurdle that such Directives do not have direct effect against private sector employers, and so such claims would inevitably have been struck out (though the Claimants could have proceeded instead with claims under the EA 2010).

126. In light of this, claims for judicial review were the only practical option for the Claimants.

127. In our judgment, these claims can proceed by way of judicial review against the Defendant (subject to the standing issue, which we deal with separately below). The Defendant has not sought to argue otherwise.

128. The EU law challenges to the rate of SSP and to the exclusion of limb b workers from SSP are in substance challenges to the contents of statutory instruments, as the type of workers who qualify for SSP and the rate of SSP are set out in delegated legislation. Judicial review proceedings can be brought to challenge delegated legislation on the basis that is unlawful because it is indirectly discriminatory in contravention of an EU Directive. This is what was done in *R v Secretary of State for Employment, ex part Seymour-Smith (No 2)* [2000] 1 WLR 435 (HL), in which the Claimants challenged, by way of judicial review, the Unfair Dismissal (Variation of Qualifying Period) Order 1985 on the basis that it was indirectly discriminatory contrary to the then Equal Treatment Directive. The European Court of Justice in *Seymour-Smith* held that unfair dismissal compensation was "pay": *(C-167/97)* [1999] 2 AC 554**,** and so the nature of the challenge was the same as in the present case. Although the House of Lords in *Seymour-Smith* did not consider whether judicial review was the right form of action, this matter was considered by the Court of Appeal in *R v Secretary of State for Employment, ex part Seymour-Smith (No 1)* [1995] ICR 889. The Court of Appeal held that a challenge of this nature was amenable to judicial review: see Balcombe LJ at pp 898-901**.**

129. As regards the challenge to the LEL, this is a challenge to something that is set out in primary legislation. Even in such cases, claims for judicial review are permissible. In *R v. Secretary of State for Employment, Ex parte Equal Opportunities Commission* [1994] I.C.R. 317, the House of Lords granted to the Equal Opportunities Commission ("the E.O.C.") a declaration that those provisions of the Employment Protection (Consolidation) Act 1976 which limited the rights of employees who worked for less than 16 hours per week to compensation for unfair dismissal were incompatible with the Equal Treatment Directive. These were judicial review proceedings. The House of Lords said that the Divisional Court had jurisdiction to declare that primary legislation was incompatible with Community law.

130. Accordingly, in our judgment, although these claims cover ground that would ordinarily mean that the claims should be brought in the Employment Tribunal, the Divisional Court has jurisdiction to hear the claims, and HM Treasury is an appropriate Defendant.

(3) Do the Claimants have standing to bring their EU law claims?

131. The Defendant submits that the Claimants do not have standing to bring some of their claims under EU law. The Defendant submits that a person may invoke EU law to challenge a measure of domestic law only if and insofar as the measure engages directly effective EU law rights that they hold, with limited and irrelevant exceptions. As Mr Adiatu does not qualify for SSP in the first place, he is not affected by the rate of SSP, or the LEL.

132. There is a further potential problem with standing, concerning the challenge based on sex discrimination/equal pay, in that neither of the Claimants is a woman.

133. The Defendant further submits that the IWGB, as a trade union, has no standing to bring these claims. There is no standing issue regarding the EU law claim relating to the exclusion of most limb b workers from SSP, as this directly affects the individual Claimant, Mr Adiatu, as a limb b worker.

134. In our judgment, the starting-point is that it would be unfortunate if these claims were to be decided on standing issues alone. They have been brought by the IWGB, together with Mr Adiatu and until recently Mr Ali, in the public interest and as a matter of great urgency. Whatever the outcome of these challenges may be, it is much better that they are determined on their merits rather on that on a procedural ground, such as standing.

135. Whilst it is true that, in the light of our finding on the ECHR challenge, Mr Adiatu, as a limb b worker, is outside the scope of SSP, we do not think that this is a fatal impediment to his *locus standi*. He is actively looking for work, and it is possible that he might obtain jobs as an employee in the near future, in which case he would be affected by the scheme for SSP. An employee would have standing to challenge the SSP scheme even if s/he was not currently off sick, and, by the same token, a person who is in the employment market should have standing to do the same.

136. There is a more serious potential impediment to Mr Adiatu's standing in relation to the sex discrimination/equal pay challenges in that these challenges are based on the proposition that the relevant schemes are indirectly discriminatory towards women. On the face of it, a man does not have standing to bring such a claim. However, in our view, the answer to the Defendant's objection to standing is as follows. In the unusual circumstances of this case the Third Claimant, the IWGB, should be regarded as having sufficient standing. The IWGB has 5,000 members, and it is safe to assume that, amongst them, there will be women who are in employment and so who are within the scope of SSP. No doubt, given more time, the IWGB could have put forward a female individual claimant. In any event, the IWGB is in the same position as an interest group or pressure group, and such bodies are often regarded as having sufficient standing to bring a claim for judicial review.

137. This is not a case of a frivolous challenge by a person or persons with no real interest in the subject-matter of the claim. We therefore reject the Defendant's challenges based on lack of standing. It would not be appropriate for the Court to take a strict line in relation to standing in this case.

138. For completeness, we add that the fact that Mr Adiatu might potentially have an alternative remedy, in the form of an Employment Tribunal claim for equal pay or race discrimination, is not, of itself, a reason to reject the judicial review claims. The matter is urgent, and a claim in the Employment Tribunal would not give rise to any prospect of providing the Claimants with the relief that they seek.

(4) Does the treatment complained of mean that the Claimants are subjected to a provision, criterion or practice ("PCP") which means that women and/or BAME workers are treated less favourably than men and white workers?

139. This issue needs to be considered separately in relation to the challenge to the rate of SSP, on the one hand, and the other grounds of challenge, on the other.

The rate of SSP

140. The Claimants submit that the PCP is the rate itself. Mr Collins QC says that, given that female and BAME employees are disproportionately represented in the lowest earning groups, they are disproportionately likely to be unable to have the resources to

manage with such a low income, and are accordingly disadvantaged by the rate of SSP (either losing income or going to work when they ought not to do so). This disadvantage is exacerbated, in the case of BAME workers, in light of their poorer outcomes for coronavirus.

141. In our judgment, this argument is misconceived. The rate of SSP is not a PCP which places certain categories of employees at a particular disadvantage. The classic PCP which does so is a requirement that must be satisfied in order for persons to qualify for a particular opportunity or benefit, such as a height requirement in order to be permitted to join a police force, or the requirement to be a full-time worker in order to qualify for a pension. These examples place women at a particular disadvantage because women are less likely than men to be tall, and are more likely to be part-time workers (because of child-care responsibilities). The rate of SSP is not a barrier or gateway in this sense. It is a sum that is paid, in exactly the same way, to everyone who receives SSP, regardless of their protected characteristics. It does not place women or BAME employees at a particular disadvantage: everyone is treated the same.

142. The nature of a comparative disadvantage was explained by Baroness Hale in *Secretary of State v Rutherford* [2006] UKHL 19, [2006] IEC 785, at paragraph 73, as follows:

> "73. But the notion of comparative advantage or disadvantage is not straightforward. It involves defining the right groups for comparison. The twists and turns of domestic case law on indirect discrimination show that this is no easy matter. But some points stand out. First, the concept is normally applied to a rule or requirement which *selects* people for a particular advantage of disadvantage. Second, the rule or requirement is applied to a group of people who *want* something. The disparate impact complained of is that they cannot have what they want because of the rule or requirement, whereas others can."

143. A similar issue to that which arises in the present case was considered by Neuberger J in *Trustees of Uppingham School Retirement Benefits Scheme for Non-Teaching Staff v Shillcock* [2002] EWHC 641 (Ch); [2002] Pens. L.R. 229. *Shillcock* was concerned with an occupational pension scheme which excluded salary below the lower earnings limit applicable to state pensions, for the purpose of assessing pensionable salary for those in the scheme. This meant that those who, like Mrs Shillcock, earned less than the lower earnings limit, were not admitted to the scheme at all. Mrs Shillcock contended that lower earners were likely to be women and they were therefore more likely to end up with no occupational pension at all, and so that the scheme operated a PCP which placed women at a particular disadvantage.

144. Neuberger J rejected this argument. He said, at paragraph 46 of the judgment:

> "…. subtracting the lower earnings limit from the earnings of every employee for the purpose of assessing pensionable salary involves a consistent, not a discriminatory, approach to all categories of employee."

145. Neuberger J held that this was consistent with the ruling of the House of Lords in *Barry v Midland Bank* [1999] ICR 859. In that case, the Bank's method for calculating an employee's severance payment for voluntary redundancy took account of the salary at termination date. In Mrs Barry's case, she had been a full-time worker for most of her period of service but had gone part-time, and she said that it was indirectly discriminatory against women to take account only of salary at termination date. The House of Lords rejected her claim. In *Shillcock***,** Neuberger J accepted a submission that the correct interpretation of the House of Lords' judgment in *Barry* was that the majority of the House of Lords had held that there was no difference in treatment which placed particular employees at a particular disadvantage, and so there could be no indirect discrimination. In *Barry***,** everyone received a severance payment calculated by reference to their current pay. There was no precondition or requirement which was harder for women to satisfy than for men.

146. *Shillcock* is an exact parallel with the present case. There is a benefit which is the same for everyone. This is not a PCP which places women or BAME employees at a particular disadvantage. The fact that women and/or BAME employees are less likely to have access to other financial resources, and so are more likely than male or white employees to depend upon SSP (if it is a fact) is beside the point. If it were otherwise, then it would be possible for indirect discrimination challenges to be made in relation to the rate of pay for a particular job, even if all job-holders were paid the same. It could be said that employees with a particular protected characteristic "needed" the money more and so were placed at a particular disadvantage. This is not how the law of indirect discrimination works. Mr Collins QC acknowledged that he could not point to any reported case which concerned a PCP consisting of the level of a benefit, rather than the requirements for access to a benefit.

147. Again, although the statistics provided by PHE about the poorer outcomes for BAME people with coronavirus are deeply disturbing, they do not mean that the level of SSP is converted into a PCP.

148. The Claimants rely upon the judgment of the Supreme Court in *Essop v Home Office* [2017] UKSC 27; [2017] 1 WLR 1343. The claim in *Essop* concerned an assessment process for promotion in the Civil Service which resulted in lower pass rates for BAME candidates than white candidates. No-one knew why. In *Essop*, the Supreme Court made clear that if the PCP caused a particular disadvantage for those with a protected characteristic, it was not necessary for the court or tribunal to go further and identify why this is so. Baroness Hale gave the example that there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage (judgment, paragraph 24). However, Baroness Hale also made clear that the law of indirect discrimination was intended to prohibit PCPs which caused the particular disadvantage: see paragraph 26. At paragraph 25, Baroness Hale said that:

> "….the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect

> discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

149. In relation to the rate of SSP, there is no "hidden barrier". *Essop* is not authority for the proposition that something places those with protected characteristics at a particular disadvantage because their circumstances, unconnected with the PCP, are less favourable than those of others. In our judgment, the Defendant is right to submit the Claimants do not rely upon any disadvantage that is caused by the rate of SSP itself. Rather, they rely upon an alleged disadvantage, the absence of other financial resources, which is not caused or related to the rate of SSP in any way. This does not turn the rate of SSP into a PCP which places women or BAME employees at a particular disadvantage. In our view the EU law challenge to the rate of SSP is wholly unsustainable.

The other grounds of challenge

150. The other grounds of challenge in this case fit more closely with the classic type of indirect discrimination case. There are PCPs, namely that you must be taxed via PAYE to qualify for SSP, and that you must earn at least the LEL to qualify for SSP, which the Claimants contend place women and BAME workers at a particular disadvantage. This is because, the Claimants say, women and BAME workers are more likely than men and white workers to be limb b workers, outside the PAYE regime, and are more likely to be low earners and so to earn less than the LEL. There is a "barrier" to qualifying for these benefits, which the Claimants say is disproportionately more difficult for women and BAME workers to surmount.

151. In order to show that there is prima facie indirect discrimination which requires justification, the Claimants must show that these PCPs place women and BAME workers at a particular disadvantage. The burden of proof rests with the Claimants: *Nelson v Carillion Services Ltd* [2003] EWCA Civ 544; [2003] ICR 1256, at paragraphs 26-38. This is a question of evidence. There are two ways in which this is normally done. In most cases, as in *Essop***,** the court or tribunal is presented with statistical evidence which shows that the PCP places those with the protected characteristic at a particular disadvantage. However, statistical evidence is not necessary in every case: see *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; [2012] ICR 704, at paragraph14, and *Games v University of Kent* [2015] IRLR 202 (EAT). In other cases, the circumstances may be such that the court or tribunal can draw an inference that the PCP places those with a particular protected characteristic at a particular disadvantage, even without statistics. The clearest example of this latter type of case is a PCP which works to the disadvantage of part-time workers. In such cases, courts and tribunal often do not require statistical evidence: it will be taken as a "given" that something which disadvantages part-time workers will place women at a particular disadvantage, because it is recognised that child-care responsibilities tend to lie more heavily on women and so that they are more likely than men to be part-time workers.

The requirement that a person must earn the LEL in order to qualify for SSP

152. The Claimants rely upon a House of Commons Library briefing paper (No 8898, dated 20 April 2020), which states that the Women's Budget Group found that women

make up 69% of low earners, 54% of temporary employment, 54% of workers on sub-zero hours contracts, and 59% of part-time self-employment. In a report dated March 2020, entitled "Protecting Workers' Jobs and Livelihoods – The Economic response to coronavirus", the TUC said that women, those in insecure work and younger and older people are most likely to miss out on SSP because they earn less than the LEL of £120 per week.

153. The Defendant accepts that it is likely that a greater proportion of women than men earn below the LEL. Mr Angus Gray, Deputy Director of the Employers and Fuller Working Lives Unit in the DWP, who provided witness statements for the Defendant, said that 72% of the 1.8m people with at least one below-LEL job are women (albeit that it is likely that some of those women have other jobs in addition).

154. The Claimants also rely upon Government data which indicate that BAME people are more likely to live in houses with persistent low income. Also, the Joseph Rowntree Foundation in its March 2015 Report, "The effect of occupation upon poverty among ethnic minority groups", said that throughout the UK BAME community are less likely than white people to be paid the living wage. 57.2% of Bangladeshi males, 38.7% of Pakistani males, 36.5% of Bangladeshi women and 37% of Pakistani women were paid less than the minimum wage.

155. The Defendant disputes that a greater proportion of BAME employees earn below the LEL. DWP data, based upon the DWP Family Resources Survey 2018-19, indicates that there are around 1.8m people who have at least one job which pays below the LEL. Of these people, 14% are BAME, as compared to a figure of 13.5% BAME status across all UK employees. The Defendant states that this is not statistically significant.

156. In our judgment, it is clear from the evidence that the LEL for SSP places women at a particular disadvantage.

157. The position is, however, unclear in relation to BAME workers. We are conscious of the limitations of the figures relied upon by the Claimants in relation to BAME workers. They are not comprehensive. They do not deal precisely with the factual issue before us. Just to take one example, the fact that someone is paid less than the minimum wage per hour does not necessarily mean that they earn less than the LEL. The figures provided by DWP suggest that the exclusion of those who earn below the LEL does not place BAME employees at a particular disadvantage. The burden of proof is on the Claimants. However, we also recognise that the speed with which these proceedings had to be prepared meant that the Claimants' legal team only had a very limited time to seek relevant data. In the circumstances, we are prepared to assume, without deciding, that the LEL for SSP places BAME employees at a particular disadvantage, and will go on to consider justification on that basis.

158. Accordingly, it is necessary to go on to consider whether the PCP consisting of maintaining the LEL for SSP during the coronavirus pandemic is a proportionate means of achieving a legitimate aim.

The requirements that a worker must pay tax via PAYE in order to qualify for SSP

159. The Claimants' challenge on this issue is solely a race discrimination challenge. There is very little evidence on "particular disadvantage".

160. For the reasons given above, the fact that there are poorer outcomes for BAME workers in relation to coronavirus does not mean that the exclusion of most limb b workers from SSP places such workers at a particular disadvantage. The issue is whether the Claimants can show, by statistical or other means, that the requirement that workers pay tax via PAYE in order to qualify for SSP, is a requirement that is more difficult for BAME workers than for white workers to satisfy.

161. We were referred to a chart in the Office For National Statistics' "Study on Coronavirus and Self-Employment in the UK", dated 17 April 2020, which indicated that Pakistani, Bangladeshi and members of some other ethnic groups were more likely than white workers to be self-employed. However, the same chart showed that the same was not the case for Chinese, Black African/Caribbean/Black British workers, who were less likely to be self-employed, or those from any other Asian background, who were more or less exactly as likely as White workers to be self-employed.

162. As the Defendant has pointed out, the disadvantaged pool for these PCPs does not consist of all limb b workers, let alone all self-employed workers, because some limb b workers pay tax through PAYE. A large number of self-employed persons are not limb b workers. However, the evidence relating to self-employed persons is likely to be a rough and ready guide for the proportions of BAME persons, at least those of Pakistani or Bangladeshi origin, who are limb b workers and who do not pay tax through PAYE. Even so, the evidence is very thin indeed. There is no evidence for other BAME groups, apart from those of Pakistani and Bangladeshi origin. Nevertheless, we are prepared to draw the inference, for the purpose of this case, supported by such evidence as there is, that a PCP which excludes those who are limb b workers and who do not pay tax through PAYE is likely to put BAME workers at a particular disadvantage. We will go on to consider objective justification on this basis.

Is the treatment justified as being a proportionate means of achieving a legitimate aim?

163. We will consider this in relation to the non-extension of SSP to those limb b workers who do not pay their tax via PAYE, and in relation to the LEL for SSP.

164. In the light of our conclusions in the preceding section of this judgment, we will not address objective justification for the rate of SSP in detail. For the reasons that we have given, the rate of SSP itself does not place women or BAME employees at a particular disadvantage. However, it is worth saying in passing that it is difficult to see how a court could say that a particular rate of SSP is not a proportionate means of achieving a legitimate aim, because it would imply that there is a minimum threshold level of SSP which is objectively justified. In other words, to say that the current rate of SSP is unlawful would require the court to decide what rate of SSP would be objectively justified. We do not see how judges are suited to, or capable of, resolving this issue. It is quintessentially a political decision. If the only issue in the case was the EU law challenge to the rate of SSP, we would have refused permission to apply for judicial review.

What is the test to be applied for objective justification in EU law?

165. The starting point is that this is not the standard case in which the operational or other benefits for an employer's business from the PCP are to be compared against the adverse impact of the PCP upon those with the particular protected characteristics (as in cases such as *Hardy and Hansons plc v Lax* [2005] EWCA Civ 846; [2005] ICR 1565, and *McCullough v ICI* [2008] ICR 1334 (EAT)). Rather, the PCPs under challenge are PCPs resulting from decisions which were taken by Government in relation to matters which concern questions of major political, economic and social importance.

166. There is a close parallel, in the subject-matter of this case, with the subject-matter of the *Seymour-Smith* case (a challenge to a statutory instrument which increased the two-year qualifying service period for unfair dismissal claims from one year to two years). In *Seymour-Smith (No 2)*, Lord Nicholls said:

> "The burden placed on the Government in this type of case is not as heavy as previously thought. Governments must be able to govern. They adopt general policies, and implement measures to carry out their policies. Governments must be able to take into account a wide range of social, economic and political factors. The Court of Justice has recognised these practical considerations. If their aim is legitimate, governments have a discretion when choosing the methods to achieve their aim. National courts, acting with hindsight, are not to impose an impracticable burden on governments which are proceeding in good faith. Generalised assumptions, lacking any factual foundation, are not good enough. But governments are to be afforded a broad measure of discretion. The onus is on the member state to show (1) that the allegedly discriminatory rule reflects a legitimate aim of its social policy, (2) that this aim is unrelated to any discrimination based on sex, and (3) that the member state could reasonably consider that the means chosen were suitable for attaining that aim."

167. In *Lord Chancellor v McCloud, Secretary of State for the Home Department v Sargeant* [2018] EWCA 2844; [2019] ICR 1489, at paragraph 71, the Court of Appeal said, referring to this passage:

> "This shows that in an appropriate case the Government is to be accorded a margin of discretion when it comes to assessing proportionate means. *Seymour-Smith* was a sex discrimination case, but in our view the same principle must be applied whatever the ground of discrimination relied upon."

168. In *Palacios de la Villa v Cortefiel Servicios SA (Case C-411/05)* [2009] ICR 1111; [2007] ECR I-8531, in which the question was whether a compulsory retirement age in a collective agreement (which Spanish courts, unlike the English courts, would regard as legally binding) infringed the Equality Directive, the Grand Chamber of the Court of Justice of the European Communities said:

> "68. It should be recalled in this context that, as Community law stands at present, the member states and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it: see, to that effect, *Mangold v Helm (Case C-144/04)* [2005] ECR I-9981 , para 63.
>
> 69. As is already clear from the wording, "specific provisions which may vary in accordance with the situation in member states", in recital 25 in the preamble to Directive 2000/78 , such is the case as regards the choice which the national authorities concerned may be led to make on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular member state, to prolong people's working life or, conversely, to provide for early retirement.
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> 70. Furthermore, the competent authorities at national, regional or sectoral level must have the possibility available of altering the means used to attain a legitimate aim of public interest, for example by adapting them to changing circumstances in the employment situation in the member state concerned. The fact that the compulsory retirement procedure was reintroduced in Spain after being repealed for several years is accordingly of no relevance.
>
> 71. It is, therefore, for the competent authorities of the member states to find the right balance between the different interests involved. However, it is important to ensure that the national measures laid down in that context do not go beyond what is appropriate and necessary to achieve the aim pursued by the member state concerned."

169. It is clear, therefore, that the CJEU recognised that decisions may have to take account of political, economic, social, demographic and budgetary considerations.

170. In *Rosenbladt v Oellerking Gebäudereinigungs GmbH (Case C-45/09)* [2010] ECR I-9391 , the Grand Chamber of the Court of Justice of the European Union cited *Palacios de la Villa* at para 58, and said, at para 69:

> "Accordingly, in the light of the wide discretion granted to the social partners at national level in choosing not only to pursue a given aim in the area of social policy but also in defining measures to implement it, it does not appear unreasonable for the social partners to take the view that [the measure in question] may be appropriate for achieving the aims set out above."

171. In *McCloud***,** having considered the CJEU and domestic authorities, including the leading authority of *Seldon v Clarkson, Wright and Jakes* [2012] ICR 716, the Court of Appeal summarised the position as follows:

> 85. …. it is axiomatic that the state or the Government (if it is employer) must be accorded some margin of discretion in relation to both aims and means. As Lord Nicholls said in *Seymour-Smith* [2000] ICR 244 , 260 governments must be able to govern. But it is for the tribunal in any particular case to determine what the appropriate margin is. This approach gives full force to Baroness Hale JSC's statement in para 62 of *Seldon* that the means of achieving any particular aim must be carefully scrutinised by the fact-finding tribunal. There is, in our judgment, no inconsistency between a tribunal carefully scrutinising a decision of government but nevertheless according government a margin of discretion when it comes to both aims and means. We do not see that *Lockwood* [2014] ICR 1257 is in any way inconsistent with this approach since no argument seems to have been addressed to the court in that case in any way similar to the arguments we have received in this case.
>
> 86. But, as Baroness Hale JSC said in para 59 of *Seldon*, establishing that an aim is capable of being a legitimate aim is only the beginning of the story. It is for the tribunal then, according an appropriate margin of discretion, to decide whether it is legitimate in the circumstances of the case. For this purpose, an aim must at least be rational and, if it is not, the employment tribunal is entitled to say so. Margin of discretion cannot rescue an aim that is irrational.
>
> 87. We would therefore hold that, where government has a legitimate interest in any issue which arises in a discrimination claim, it is to be afforded a margin of discretion but it is for the fact-finding tribunal to assess both whether the Government has such a legitimate interest and the amount of discretion it should be afforded and then the tribunal should decide the case itself in accordance with ordinary principles."

172. In *McCloud***,** the challenge was to transitional provisions for a new pension scheme, which were less favourable to younger scheme members than to those nearing retirement age. The Court of Appeal held that the Employment Judge was entitled to conclude that the aim that was relied upon in that case, namely to give special protection to those closer to retirement, was not rational, because the older scheme members needed protection less than their younger colleagues (see judgment, paragraph 91).

173. It is important that the court assesses the legitimacy of the aim and the proportionality of the means by reference to the aim actually pursued by the Defendant, and not a different one. In *Harrod v Chief Constable of West Midlands Police* [2017] EWCA Civ 191; [2017] ICR 869, Underhill LJ said:

> 41. In adopting that reasoning the ET in my view fell into the error identified in the decisions in *Barry v Midland Bank plc* [1999] ICR 319, *Chief Constable of the West Midlands v Blackburn* [2008] EWCA Civ 1208, [2009] IRLR 135 and *HM Land Registry v Benson* UKEAT/0197/11, [2012] ICR 627. It is not open to an employment tribunal to reject a justification case on the basis that the respondent should have pursued a different aim which would have had a less discriminatory impact."

174. In *Blackburn***,** the Court of Appeal said, at paragraph 25, that it is the other means of achieving the employer's legitimate aim which are relevant, not means of achieving other aims.

The application of this test to the issues in this case

175. The Court of Appeal in *McCloud* made clear that it is for the tribunal or court in the particular case to determine what the appropriate margin of discretion is.

176. In our judgment, in the present case, the Defendant had a broad margin of discretion. The Government had to respond, with almost unprecedented speed, to a national emergency which threatened the health and livelihoods of millions of workers, and the economic security of hundreds of thousands, if not millions, of businesses. It had to decide what to do, in relation to a very wide range of problems, and then to work out how to achieve what it had decided to do, within a very few days. In so doing, the Government had to balance a very wide range of economic, social and political considerations. So, for example, the Government sought to find a way to provide for as much financial support for workers as possible, without imposing financial burdens that would undermine the future viability of the businesses that employed them. The Government also had to take account of the state of the public finances and the level of debt that could be taken on. The Government had to do so at a time when the duration and scale of the pandemic were not known.

177. To use the language of the CJEU in *Palacios de la Villa*, the Government had to make choices, at very short notice, on the basis of political, economic, social, demographic and budgetary considerations. As the CJEU went on to say, it is for the competent authorities of the state to find the right balance between the different interests involved. Nonetheless, the aims and means must be carefully scrutinised by the Court.

178. In our judgment, the circumstances of this case give rise to the widest margin of discretion available to Government and public authorities under EU law, but this does not mean that there must be no scrutiny at all. The aims must be "at least rational" (*McCloud*) and it must be reasonable to take the view that the means adopted may be appropriate to achieve the aims (*Rosenbladt*). But this does not entitle a court to substitute its own view of what the aims and means should have been in the particular circumstances. Allowances must be made for the fact that it is for Government to make these political and economic choices, and for the speed with which the Government had to act.

179. In applying the appropriate test, with the appropriate margin of discretion, it is helpful to identify the aims of the measures in question, to see if they were legitimate, and

then to look to see if the means adopted were appropriate to those aims, and were proportionate. It is often difficult to work out where aims end and means begin and it has been stressed repeatedly that courts and tribunals do not have to "cudgel their brains" about this (*Harrod*, at, para 24), but it is nevertheless a useful exercise in a case such as this.

a) Exclusion of limb b workers from eligibility for SSP

180. The Claimants do not challenge the lawfulness of excluding limb b workers from eligibility for SSP in normal times. They contend that the introduction of amendments to the SSP scheme in response to the pandemic which did not extend SSP to all limb b workers was not a proportionate means of achieving a legitimate aim.

181. The Government's aim in making changes to SSP in response to the coronavirus pandemic, such as the temporary removal of the 3-day waiting period, the extension of SSP to those who were self-isolating or shielding, and providing a subsidy for SMEs for the first two weeks of SSP resulting from the pandemic, was plainly legitimate. The aim was to provide extra assistance within the SSP scheme for those who are covered by the SSP scheme and who are unable to work because they had coronavirus or were self-isolating or shielding. It was also to encourage those within the SSP scheme to stay away from work when they were suffering from coronavirus, self-isolating or shielding, by ensuring that they received the financial support of SSP whilst they did so.

182. In our judgment, there is a fundamental difficulty with the Claimants' argument that the means adopted was not a proportionate means of achieving a legitimate aim. This is that the Claimants are inviting the Court to evaluate the means by reference to a different aim altogether. The Claimants' case is based on the proposition that the Government should have adopted the different aim of widening the scope of SSP so that it covered a different group of workers who had never hitherto have been within is scope. This was not the aim that the Government was pursuing in relation to the SSP amendments, and so it cannot be criticised for failing to adopt a means which did not achieve that legitimate aim.

183. In our judgment, this is the answer to the justification issue in relation to the non-extension of SSP to limb b workers.

184. In any event, however, even if the Government's aim is characterised as being the broader aim of making changes to SSP in response to coronavirus, the failure to extend SSP temporarily to cover limb b workers was not disproportionate.

185. The Claimants emphasise that a main aim of the SSP changes was to encourage people to stay at home if they were ill or at risk of contracting coronavirus, by ensuring that they had some funding whilst they did so. They say that it makes no sense to encourage those who were already within the SSP regime to stay at home, but not to use the same means to encourage those workers who were outside the SSP regime to stay at home. It was as important that limb b workers who were ill, or potentially infectious, stayed away from the workforce as those workers who paid tax by PAYE.

186. We do not accept that this means that the failure to extend SSP to all limb b workers was not a proportionate means of achieving a legitimate aim. There were other measures put in place to provide financial assistance to limb b workers who were unable to work, such as SEISS, Bounce Back loans, UC, and delays in tax payments. These measures served to encourage limb b workers who were unwell or at risk of infection to stay away from work. We have noted at paragraph 98 above the arguments on justification which we accepted for the purposes of the Article 14/A1P1 claim; they apply also to the EU law claim on the same subject.

187. In light of these reasons, it is clear that the Government's decision not to extend SSP to limb b workers cannot validly be criticised on the basis that it was not a proportionate means of achieving a legitimate aim. The Government was entitled to take the view that the interests of the self-employed, including limb b workers, in relation to the pandemic, were better addressed in other ways.

Failure to remove the lower earnings limit

188. The argument of the Claimants, in essence, is that the amendments to SSP were not a proportionate means of achieving a legitimate aim, because the Government failed to include the removal of the LEL within the package of measures. The Claimants' argument is limited to the contention that the LEL should have been removed for the duration of the coronavirus pandemic. The Claimants do not contend that the Government should have removed the LEL permanently.

189. This is an aspect in which respect must be given to the broad margin of discretion available to the Government in these matters. The Government had to decide, at very short notice, what changes to make to the SSP scheme in response to the coronavirus pandemic. Each of the changes, and other potential changes, gave rise to political, economic and budgetary considerations, which Government, rather than the courts, is best suited to resolve.

190. The general aim of making changes to SSP to assist employees who might have recourse to it during the pandemic is plainly a legitimate aim. The real crux of the Claimants' challenge is that the means adopted were not proportionate, because they did not include removal of the LEL.

191. We do not accept this submission. The Defendant has put forward three main explanations for why the Government chose not to remove the LEL (on a temporary basis), and why it was proportionate not to do so. The first is that the Government wished to avoid excessive financial burdens on employers, or on the state (which is subsidising SSP, to an extent, at the moment). In April 2020, HMRC cash receipts fell by 42% as compared to April 2019, central government spending went up by 52%, and public sector net borrowing totalled £62.1 billion. The measures that were introduced imposed an extra financial burden on employers and the state, and in our judgment it was proportionate for the Government to decide that it was not appropriate to increase the burdens still further, at this difficult time, by removing the LEL, especially as this would involve major surgery to the structure of SSP. The second was to avoid the perverse incentive of people being better off sick than at work. Again, in our judgment this is a legitimate and proportionate consideration, even in the time of coronavirus. Third, employees who are below the LEL threshold

are protected because they qualify for UC and other benefits. Yet again, we consider this contributes towards making the decision proportionate.

192. As Mr Milford QC pointed out, on behalf of the Defendant, the removal of the LEL would require employers to calculate SSP in a different manner, adjust payroll software and would impose new financial burdens on businesses. Such a complex and costly process was ill-suited to a pandemic, particularly when the Government has made available alternative welfare provision for workers who fall below the LEL.

193. Standing back, there was an almost infinite range of measures that the Government might have introduced to cope with the pandemic. The aims of the measures under challenge were legitimate, since they were rational and were all directed towards providing assistance to employers and employees in response to the crisis, and the means adopted were appropriate to achieve the aims that were selected.

Conclusion on EU law challenges

194. For these reasons, the Claimants' challenges based on EU law are rejected.

COMPLIANCE WITH THE PUBLIC SECTOR EQUALITY DUTY

195. The Public Sector Equality Duty ("PSED") is imposed by s 149 of the Equality Act 2010 ("EA 2010"). In general terms, s 149 imposes a duty upon public authorities, including Government departments, to have due regard to equalities considerations in the exercise of their functions. The Claimants contend that the Government failed to comply with its PSED in relation to each of the decisions which form the subject-matter of these proceedings, namely the decisions (1) not to extend SSP to limb b workers; (2) not to increase the rate of SSP; (3) not to remove the LEL from SSP; and (4) not to include limb b workers within the scope of the JRS.

196. The Defendant contends that it has complied with the PSED in relation these decisions.

197. In any event, Mr Milford QC, on behalf of the Defendant, submits that the PSED does not apply to the decision in relation to the LEL for SSP, because it would have required primary legislation to remove the LEL, and the PSED does not apply to the process of drafting and presenting a bill to Parliament. Moreover, he submits that the PSED does not apply to the decision concerning whether SSP should be extended to limb b workers, and the decision about the rate of SSP, because those are matters that would have to be set out in delegated legislation, and the PSED does not apply to the process of laying Regulations or an Order before Parliament and subjecting them to the affirmative or negative resolution procedure. In each case, Mr Milford QC says, these are functions that are carried out by the relevant Minister *qua* Member of Parliament, in connection with proceedings in Parliament. Mr Milford QC accepts that the PSED applies to the decision about the scope of the JRS, because the JRS was not introduced by legislation, but by means of a Treasury Direction issued to HMRC which was made on 15 April 2020 and then revised in a Further Direction issued on 20 May 2020.

198. In addition, there is a further disagreement between the parties as regards the scope of the PSED duty. The Defendant says that s 149 imposes a duty to have regard to

equalities considerations in relation to the impact of the decision that is actually taken: there is no obligation to comply with the PSED in relation to other potential decisions, which were never in the active contemplation of the Defendant. Therefore, since the Government never actively considered extending SSP and the JRS to limb b workers, for example, there was no obligation to comply with the PSED in relation to these options. The Claimant submits that this is to under-state the breadth of the PSED obligations. A decision to introduce the JRS for those who pay tax by PAYE only, for example, necessarily involves a decision not to extend it to the generality of limb b workers. Furthermore, the duty to comply with the PSED applies to all of a Government department's functions, including its general policy-making powers, not just the specific decisions which are ultimately made.

199. Against this background, there are four main issues that we have to deal with. These are:

1) Does the PSED apply to decisions that are given effect by delegated legislation?;

2) Does the PSED apply to decisions that are given effect by primary legislation?;

3) Does the PSED duty mean that the public authority has a duty only to have regard to the equalities implications of the decision that it is actually taken, not other decisions that might have been taken instead?;

4) In the present case, on the facts, did the Defendant breach the PSED in relation to changes to SSP or the JRS?

200. We will first set out the relevant terms of section 149, and summarise the effect of the leading authorities. We will then deal with the four issues in turn.

Section 149 and the leading authorities

201. Section 149 of the EA 2010 provides, in relevant part:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> >
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> >
> > (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
> >
> > (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
> >
> > ….
>
> (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> > (a) tackle prejudice, and
> >
> > (b) promote understanding.
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are— ….race …. sex …….
>
> (9) Schedule 18 (exceptions) has effect."

202. Section 150(1) provides that a public authority is a person who is specified in Schedule 19. Under Part 1 of Schedule 19, a "public authority" includes a Minister of the Crown and a Government Department (subject to irrelevant exceptions).

203. The importance of full compliance with the PSED as an essential preliminary to public decision making has been emphasised many times by the courts. See, for example, *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012]

EWHC 201 (Admin); [2012] HRLR 13, at paragraph 70 (CA), per Elias LJ; see, too, *R (Elias) v Secretary of State for the Home Department* [2006] EWCA Civ 1293; 1 WLR 3213 (CA), paragraph 274, per Arden LJ; *R (BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, paragraphs 2-3, per Sedley LJ; *R (C) v Secretary of State for the Home Department* [2008] EWCA Civ 882; [2009] QB 657, paragraph 49, per Buxton LJ; and *Bracking and Others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, paragraph 26. A useful summary of the key principles can be found in *Bracking***,** at paragraph 25, which is it not necessary to set out here.

204. It is common ground between the parties that the PSED is concerned with procedure, not with outcome. In *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809 (CA) at paragraph 31, Dyson LJ said:

> "In my judgment, it is important to emphasise that [the PSED] is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals"

205. Due regard means that which is "appropriate in all the circumstances": *Baker* at paragraph 31.

206. In *R (Williams and others) v Surrey County Council* [2012] EWHC 867 (QB), at paragraph 16, Wilkie J said that "The clear purpose of section 149 is to require public bodies to give advance consideration to the issue of (race) discrimination before making any policy decisions that may be affected by such an issue", and "What observance of the [s149] duty requires of decision makers is fact sensitive and varies considerably from situation to situation and from time to time and stage to stage." He also said, "Councils cannot be expected to speculate, or to investigate, or to explore, such matters *ad infinitum* …."

207. The PSED does not require a detailed analysis of the sort that might be undertaken by leading counsel in the course of submissions in legal proceedings (see *Williams***,** paragraph 16). In *R (SG) v Secretary of State for the Home Department* [2016] EWHC 2639 (Admin), at paragraph 329, Flaux J said that:

> "… what is required is a realistic and proportionate approach to evidence of compliance with the PSED, not micro-management or a detailed forensic analysis by the court …. the PSED, despite its importance, is concerned with process not outcome, and the court should only interfere in circumstances where the approach adopted by the relevant public authority is unreasonable or perverse."

208. To like effect, in *R (Unison) v Lord Chancellor* [2015] EWCA Civ 935; [2016] ICR 1, the Court of Appeal said, at paragraph 116:

> "…..the Court should go no further in its review than to identify whether the essential questions have been

> conscientiously considered and that any conclusions reached are not irrational. Inessential errors or misjudgments cannot constitute or evidence a breach of the duty."

209. There must be some reason to think that the exercise of the functions might in some way relate to a particular aspect of the PSED, in order for any obligation for consideration to arise. It cannot be the case that the decision-maker has to focus on equalities considerations in relation to the exercise of functions which simply will not engage the equalities duties; *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201, [2012] HRLR 13, at paragraph 95. If it is plain and obvious that a particular exercise of a function could have no adverse effect on those with a protected characteristic, "due regard" may mean "no regard": *R (Bailey) v London Borough of Brent* [2011] EWCA Civ 1586, at paragraph 91.

210. In *Parkin v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin), Elisabeth Laing J said that s149 implies a duty to make reasonable enquiries into the obvious equality impacts of a decision, and it requires a decision maker to understand the obvious equality impacts of a decision before adopting a policy. Elisabeth Laing J also stressed that it is not a box-ticking exercise.

211. There is no obligation for a public authority to demonstrate compliance with the PSED by means of an Equality Impact Assessment ("EIA") or similar written record, or to mention specifically the PSED in carrying out the particular function where it has to have due regard to the needs set out in section 149, though it is good practice to do so: *R (Brown) v Secretary of State for Work and Pensions and others* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, at paragraphs 93 and 96, per Aikens LJ.

212. The PSED duty is a continuing one: *Bracking***,** paragraph 25(5)(v).

Does the PSED apply to decisions that are given effect by delegated legislation?

213. This question arises in relation to the extension of SSP to all limb b workers, and to the rate of SSP. The power to expand entitlement to SSP beyond employees may only be exercised by means of Regulations (s.163(1)(a) of the Social Security Contributions and Benefits Act 1992, "SSCBA 1992"), which can only enter into force having been placed before Parliament and been subject to the negative resolution procedure: s.176(3) SSCBA 1992. The power to amend the rate of SSP may only be exercised by means of an Order (s.157(2) SSCBA 1992), which can only enter into force having been placed before Parliament and been subject to the affirmative resolution procedure: s.176(1)(c) SSCBA 1992. Similarly, the changes that were made to SSP in response to the coronavirus pandemic were made by statutory instrument (see below).

214. As we have said, Mr Milford QC submits that the PSED does not apply to the laying of Regulations or an Order before Parliament and subjecting them to the affirmative or negative resolution procedure, because these are functions that are carried out by the relevant Minister *qua* Member of Parliament, in connection with proceedings in Parliament. He says that to give the Courts a power to review, oversee, or critique these functions would be to trespass on Parliamentary Sovereignty and to infringe Article 9 of the Bill of Rights.

215. Mr Milford QC drew our attention to Schedule 18 of the EA 2010, which sets out the exceptions to section 149. Paragraph 4 of Schedule 18 states, in relevant part:

> "(1) Section 149(2) (application of section 149(1) to persons who are not public authorities but by whom public functions are exercisable does not apply to –
>
> (a) A person listed in sub-paragraph (2);
>
> (b) The exercise of a function listed in sub-paragraph (3).
>
> (2) Those persons are -
>
> (a) the House of Commons;
>
> (b) the House of Lords; ….
>
> (3) Those functions are –
>
> (a) a function in connection with proceedings in the House of Commons or the House of Lords; …."

216. We do not accept Mr Milford QC's submission in relation to delegated legislation. Indeed, we are bound by Court of Appeal authority to reject it. There have been at least two cases in which the Court of Appeal has proceeded on the basis that the PSED applies to the decision-making process by Government departments which led to the making of delegated legislation.

217. The first such case is *R (C) v Secretary of State for the Home Department* (above). In this case, the Claimant sought to quash the Secure Training Centre (Amendment) Rules 2007, which had been laid before Parliament by the Secretary of State, on the basis, inter alia, that there had been a breach of section 71 of the Race Relations Act 1976. Section 71 was a predecessor section to s 149 of the EA 2010, and imposed a similar obligation upon public authorities to have regard, in carrying out their functions, to the need to eliminate unlawful racial discrimination and to promote equality of opportunity amongst persons of different racial groups. The 2007 Rules were concerned with the types of physical restraints which could imposed on persons who were detained in Secure Training Centres. The Claimant contended that the Secretary of State had failed to take account of the impact on the new regulations on BAME trainees.

218. The Court of Appeal in *C* accepted that the Secretary of State had failed to have regard to the relevant matters and had failed to carry out a Race Equality Impact Assessment, before making the Regulations, thereby breaching s 17 (judgment, para 39). The Court of Appeal quashed the Regulations.

219. The Divisional Court had declined to quash the Regulations, on the basis that they had been specifically approved by Parliament, under the negative resolution procedure. The Court of Appeal held that the Regulations should be quashed, and said:

> 45….The legal obligation to take certain steps before laying legislation before Parliament is that of the executive. It is not

> Parliament's role to control that obligation: that is the function of the courts. Rather, the function of Parliament is simply to approve or disapprove the Amendment Rules as laid. Its failure to disapprove the Amendment Rules cannot supply the executive's failure to perform the legal obligations that it bears before laying the Amendment Rules in the first place.
>
> 46. The importance of these distinctions has recently been reiterated in this court in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365. At para 104 of his judgment Waller LJ reminded us of the observation of Taylor LJ in *R v Secretary of State for Health, Ex p United States Tobacco International Inc* [1992] QB 353:
>
> > "Although the Regulations were subject to annulment by negative resolution of the House of Commons but were not so annulled, Parliament would be concerned only with the objects of the Regulations and would be unaware of any procedural impropriety. It is therefore to courts, by way of judicial review, that recourse must be had to seek a remedy."
>
> Nor is this important constitutional distinction confined to cases where Parliament has simply failed to disapprove subordinate legislation. I venture to cite an observation from *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, one of the fundamental cases on the courts' control of delegated legislation. Lord Cross of Chelsea said, at p 372:
>
> > "… I am not, any more than my noble and learned friend Lord Diplock, prepared to agree with the view apparently expressed by Lord Denning MR that an order made by statutory instrument acquires the status of an Act of Parliament if it is approved by resolutions of both Houses of Parliament."

220. In our judgment, it is clear from the *C* case, and the authorities cited by the Court of Appeal, that the public functions exercised by the Defendant which are covered by s149 include the steps which are taken before delegated legislation is laid before Parliament. As the Court of Appeal made clear in *C*, the function of taking those preparatory steps is distinguishable from the function of Parliament, which is to approve and disapprove the rules as laid down. It follows that there is no inconsistency with constitutional principle for Parliament to have decided, through s 149, to give the courts a role in reviewing the process followed by a Government Department before laying a statutory instrument before Parliament.

221. This is also consistent with the way in which delegated legislation is treated in public law generally. If there are public law grounds for challenging a statutory instrument, including procedural impropriety, then it may be set aside. This does not impinge on

the sovereignty of Parliament. The position is all the clearer where, as here, the Court's power of review comes from statute, rather than the common law.

222. So far as we can find, there was no equivalent of Schedule 18 to the EA 2010 in the Race Relations Act. However, in our judgment this does not affect the position. Paragraph 4 of Schedule 18 means that s 149 does not apply to the House of Commons and the House of Lords in respect of functions in connection with proceedings in the two Houses of Parliament. But the Claimants' challenge, in relation to the delegated legislation, is not to what happened in Parliament, but to what happened before, when the relevant statutory instruments were being prepared and were then laid before Parliament by the relevant Minister. In our judgment also, it does not accord with reality to state that the Minister who lays such delegated legislation before Parliament is acting in his or her own personal capacity as a Member of Parliament: he or she is acting on behalf of the Department of which s/he is a Minister.

223. The other relevant Court of Appeal authority is *R (Unison) v Lord Chancellor* [2015] EWCA Civ 935; [2016] ICR 1. This was the Court of Appeal stage of the well-known challenge to fees in Employment Tribunals. The fees were introduced by means of a statutory instrument, the Courts and Tribunals Fee Remissions Order 2013 ("the Fees Order"). The Court of Appeal in the *Unison* case addressed and rejected a PSED challenge to the Fees Order. This challenge was not renewed when the case was further appealed to the Supreme Court [2017] UKSC 51; [2017] ICR 1037, and so the Supreme Court did not consider the argument relating to the PSED.

224. Though the Court of Appeal rejected the PSED challenge to the Fees Order on the facts in the *Unison* case, the Court of Appeal did not suggest that there was a simple and straightforward answer to this part of the Claimant's claim, namely that s 149 did not apply to delegated legislation: see judgment at paragraphs 110-125.

225. The Defendant relies on *R (H-S) v Secretary of State for Justice* [2017] EWHC 1948 (Admin). This was a judicial review challenge on the basis that the Defendant had acted unlawfully by failing to lay an Order before Parliament to relax the release test for prisoners who were subject to imprisonment for public protection, and/or by failing to consult before deciding not to do so. The Defendant had said in Parliament that he intended to consult, but then did not do so. Lang J dismissed the challenge, on the basis that to require the Defendant to lay an order before Parliament, pursuant to a statutory power laid down in s 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2010, or to hold that he was under a legal obligation to consult before doing so, would be a breach of Parliamentary privilege and the constitutional principle of the separation of powers.

226. In our judgment, the *H-S* case can be distinguished. In that case, as Lang J pointed out (at paragraph 51), there was no statutory duty to consult: rather, the Claimant alleged that such a duty had come into existence as a result of a statement made by a Minister in the House of Commons. If the claim had succeeded, the consequence would have been either to compel Parliament to have considered an order to relax the release test, or to prohibit Parliament from considering such an order in draft unless and until consultation had taken place. Either way, one can readily see that this would have trespassed upon Parliamentary sovereignty, by in effect creating a cause of action based on statements made by a Minister at the despatch box. The position is

different where, as here, the allegation is that the Minister has acted in breach of a requirement of an Act of Parliament by failing to have regard to equalities considerations before preparing a statutory instrument and bringing it to Parliament. Such a case is akin to the cases in which a court had held that delegated legislation is unlawful because the procedures laid down by the relevant enabling legislation have not been properly followed (see, eg, *R v Secretary of State for Health, ex parte United States Tobacco International Inc* [1992] QB 353 (DC); and *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623; [2003] ICR 405).

227. Although the relief sought by the Claimants consists of declaratory relief, rather than a quashing order, in essence, in the PSED challenge, the Claimants are inviting the Court to find that the relevant delegated legislation was ultra vires because of procedural impropriety, in that the Defendant failed to comply with the statutory procedural requirement laid down in s149 before laying the regulations before Parliament. It is trite law that a court can find, in an appropriate case, that delegated legislation is ultra vires.

228. Accordingly, in our judgment, a challenge can be advanced under the PSED to the processes followed by a Government Department in preparing to lay before Parliament a statutory instrument. It follows that the Claimants are able to challenge the decisions concerning whether SSP should be extended to limb b workers, and about the rate of SSP.

Does the PSED apply to decisions that are given effect by primary legislation?

229. This question arises in relation to the LEL. The current position, namely that SSP is payable only where an employee earns over the LEL, is set out in primary legislation: s.153 and para.2(c) of sch.11 of the SSCBA 1992. Its removal would, therefore, necessitate an amendment to primary legislation.

230. In our judgment, the position is different where the challenge is to a decision to invite Parliament to amend primary legislation. The making of primary legislation is the quintessential Parliamentary function. In our, view it would be a breach of Parliamentary privilege and the constitutional separation of powers for a court to hold that the procedure that led to legislation being enacted was unlawful. The consequence of this would be that the legislation itself would be *ultra vires* and void (even though the Claimants in this stage seek declaratory relief only). The court has no power to declare primary legislation void on a basis such as this.

231. Article 9 of the 1689 Bill of Rights provides:

> "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."

232. In *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) , the Divisional Court dismissed the claimant's claim that the Prime Minister was bound by a promise made in Parliament, and repeated outside Parliament, that the people would be consulted, by means of a referendum, on whether to ratify the Lisbon Treaty.

233. At paragraph 49, Richards LJ said:

> "49. In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament. It is governed by the Standing Orders of the House of Commons (see, in particular, standing order 57(1)). It is done by a Member of Parliament in his capacity as such, not in any capacity he may have as a Secretary of State or other member of the government. Prebble (cited above) supports the view that the introduction of legislation into Parliament forms part the legislative process protected by Parliamentary privilege. To order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament. Nor can the point be met by the grant of a declaration, as sought by the claimant, instead of a mandatory order. A declaration tailored to give effect to the claimant's case would necessarily involve some indication by the court that the defendants were under a public law duty to introduce a Bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order even if, in accordance with long-standing convention, it relied on the executive to respect and give effect to the decision of the court without the need for compulsion."

234. In *R (UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin), at paragraph 9, Mitting J said that:

> "The courts cannot question the legitimacy of an Act of Parliament or the means by which its enactment was procured: see *British Railways Board v Pickin* [1974] AC 765, and as to proceedings in Parliament, Article 9 of the Bill of Rights)."

235. The starting point, therefore, is that the courts cannot question the legitimacy of an Act of Parliament (or an amendment to an Act of Parliament). It is against this background that the scope of s149 must be examined.

236. In our judgment, it is clear that the "functions" of a public authority, referred to in s149(1), do not include the preparation and promotion of an Act of Parliament or an amendment to an Act of Parliament. The making of primary legislation is a matter for Parliament and not the Executive. The passage from the Court of Appeal judgment in the *C* case, set out at paragraph insert above, makes clear that there is a difference between delegated or secondary legislation, on the one hand, and primary legislation, on the other, in terms of the scope for challenge. Whilst the actions of a Government Department leading up to the making of delegated legislation are separate from the proceedings of Parliament itself, and so may be the subject of a challenge on procedural impropriety grounds, the same does not apply to the actions of a Government Department leading up to an amendment to primary legislation: the responsibility for the primary legislation rests with Parliament itself, and so any

procedural impropriety in the lead-up to the amendment does not render ultra vires or invalidate the amended legislation.

237. Another way of arriving at the same conclusion is that paragraph 14 of Schedule 18 to the EA 2010 excludes decisions relating to primary legislation from the scope of s149, because they are part of a function in connection with proceedings in the House of Commons or the House of Lords.

238. Accordingly, the PSED does not apply to the decision not to remove the LEL from SSP, as this was a matter that required amendment of primary legislation.

Does the PSED duty mean that the public authority has a duty only to have regard to the equalities implications of the decision that it is actually taken, not other decisions that might have been taken instead?

239. The central (though not the only) complaint by the Claimants in relation to the PSED is that the Defendant failed to consider other options which would have been more beneficial for women and BAME workers, such as extending SSP and the JRS to all limb b workers, or increasing the rate of SSP, which would have benefited low paid women and BAME workers. The Claimants say that this should have been part and parcel of the process of conducting PSED analysis for the decisions that were taken, because a decision, for example, to continue to limit SSP to those who paid income tax through PAYE inevitably involved a decision not to broaden out SSP to cover others, such as limb b workers. The Claimants say that the Defendant did not have sufficient regard to the equalities implications of what amounted to a decision to exclude most limb b workers.

240. The Claimants further submit that the "functions" of the Defendant that are under consideration for PSED purposes are not just the specific decisions that were ultimately taken, but consist, rather, of the introduction of measures to address the workplace consequences of the pandemic. Looked at in this broad way, the "functions" encompassed thinking about other options which would have been more beneficial to women and BAME workers.

241. The Defendant contends that the Claimants' complaints, in relation to the PSED, are not really complaints about failures in relation to the PSED in respect of the decisions that were actually taken. Rather, the Defendant says, the Claimants are complaining that the Defendant did not have regard to the equalities consequences of other decisions which were not taken, and which were never even in his contemplation. So, the Defendant contends, in relation to the restriction of SSP and the JRS to those whose income tax is paid via PAYE, the real complaint of the Claimants is that the Defendant did not take a different decision, to extend SSP and the JRS to all limb b workers.

242. In our judgment, the Defendant's submission is correct. The "exercise of the [public authority's] functions" for the purposes of s149(1) consists of the implementation of the measures that the public authority decides upon. In the present case, these were the steps that were taken to change the rule relating to SSP, and to introduce the JRS, in order to combat the effects of the coronavirus pandemic. A public authority must have regard to the equalities implications of the steps that it intends to take. It need not have regard to the equalities implications of other steps, which it is not taking, and

is not even considering. Otherwise, the PSED would indeed go on ad infinitum. A public authority would not only have to comply with the PSED in relation to the decision which it takes, but also in relation to the infinite spectrum of other decisions which it might have taken instead.

243. The fact that the PSED duty is ongoing does not mean that public authorities have constantly to conduct EIAs in relation to a wide range of other options that they might have adopted instead of the option that the authority did adopt.

244. There is support for this conclusion in the authorities. The *Williams* and *Parkin* cases, referred to above, make clear that the focus is on the process leading up to the decision that is taken. It is not upon other decisions that might have been taken. In *Hurley and Moore***,** at paragraph 95, the Court of Appeal said:

> "It will always be possible to tag onto any legislation a provision, for example, giving greater grants to disabled students. But possibilities of that kind do not need to be canvassed in order to satisfy the equality duty."

245. Also, the courts have made it clear that the form that the "having regard" takes is a matter for the public authority, provided that it acts reasonably and does not act perversely (see *Williams* and *SG*). In some cases, a public authority may decide to "sense check" a particular course of action by comparing it with the equalities implications of a different course of action, but that does not mean that this is obligatory.

246. It follows that the Defendant did not act in breach of the PSED because it did not conduct an equalities impact assessment or similar of the effects of the extension of SSP and/or JRS to all limb b workers, or the effects of an increase in the rate of SSP. Section 149 did not impose a requirement to have regard to the equalities consequences of taking these steps, as they were not at any stage in the serious contemplation of the Defendant. By the same token, there was no requirement to have regard to the equalities consequences of not taking those steps. Rather, the question for consideration is whether the Defendant complied with its PSED obligations in relation to the steps which it did take.

In the present case, on the facts, did the Defendant breach the PSED in relation to changes to SSP or the JRS?

(1) SSP

247. As explained above, the PSED challenge in relation to the LEL falls at the outset because the PSED does not apply to changes that would have to be made in primary legislation. For the reasons given in the preceding section of this judgment, the focus in relation to the PSED and the changes to SSP must be by reference to the changes that were actually proposed and implemented, not by reference to the changes that the Claimants would have liked to have been made, namely the extension of SSP to all limb b workers, and an increase in the rate of SSP.

248. The Claimants have made clear that they do not mount a challenge to SSP rules as they were prior to the coronavirus pandemic. Their complaint is that the Government should have done more in response to the pandemic.

249. As explained above, the fact such a change would have had to be made by way of a statutory instrument, and that the changes that were made were implemented by way of delegated legislation, does not mean that this is outside the scope of the PSED.

250. The Government made three main changes to the SSP scheme in response to the pandemic:

1) The SSP scheme was amended so that it is payable not only to those who are actually sick, but also to employees who are unable to work because they are self-isolating or shielding in accordance with Government guidance. This was implemented by means of the Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 (SI 2020/287) and by a second and third set of Amendment Regulations (SIs 2020/304 and 427);

2) The Government removed the limitation that provided that SSP cannot be paid for the first three qualifying days if the absence relates to coronavirus, and also specifying the circumstances in which a person self-isolating by reason of coronavirus is deemed to be incapable of work (Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020 (SI 2020/374); and

3) The Government provided for SSP rebates for SME employers for up to two weeks of SSP payments made to employees as a result of coronavirus (Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) Regulations (SI 2020/512).

251. As explained above, these were part of a wider package of measures.

252. The Government prepared two EIAs for the changes at (1) and (2) above. These are the "Equality Analysis for Statutory Sick Pay (General) (Coronavirus Amendment) Regulations", dated 11 March 2020, and the "Equality Analysis for regulations extending Statutory Sick Pay to extremely vulnerable "shielding group", dated 14 March 2020. Both EIAs are in the papers before us. Each of them states in terms that it records the analysis undertaken by the Department to enable Ministers to fulfil the requirements placed on them by s149 of the EA 2010. They also say that the Department has taken account of the United Nations Convention on the Rights of Persons with Disabilities and the United Nations Convention on the Rights of the Child.

253. The first Equality Analysis stated that:

> "Provision of income replacement recognises and addresses that loss of earnings due to isolation is likely to affect people with protected characteristics disproportionately. Young people, women, disabled people, and ethnic minorities include people who are likely to be vulnerable to short-term income loss and people with lower financial resilience who are likely to

> be particularly affected. Provision of support at Statutory Sick Pay rates provides the same level of support as they would receive if they were absent from work. There is no evidence that there would be particular impacts on other protected characteristics. Providing payments to all who isolate provides fairness to all people with protected characteristics and supports achievement of high levels of isolation where necessary to avoid spread of the virus."

254. The second Equality Analysis stated that:

> "Financial support for people who have been asked to remain at home reduces the incentive for them to take actions such as engaging in work, where they could become infected. Providing income replacement helps individuals to maintain their personal and family wellbeing during a period of self-isolation. This is intended as a safety net for individuals, in cases where their employer chooses not to furlough them under the Coronavirus Job Retention Scheme and does not have other suitable policies in place (e.g. the ability to work from home, or the provision of special leave).
>
> This will ensure that SSP is available to anyone who is advised to stay at home but unable to work for whatever length of time is necessary, regardless of protected characteristics. In particular, disabled employees and older employees are more likely to be at high risk and therefore be required to "shield" for up to 12 weeks. Extension of eligibility of SSP to employees "shielding" also recognises and addresses that loss of earnings due to isolation is likely to affect people with protected characteristics disproportionately. Young people, women, disabled people, and ethnic minorities include people who are likely to be vulnerable to income loss and people with lower financial resilience who are likely to be particularly affected. For example, younger adults (16 to 44 years) are four times more likely to have run out of money by the end of the week or month within the last year (16%) than those aged 65 years and over (4%)."

255. In addition to these EIAs, Annex C on submission on the Coronavirus Bill set out the Government's consideration of the equality impact of removing the three-day waiting period for SSP. Annex C stated:

> "28% of all employers pay OSP [Occupational Sick Pay]. We do not know directly the equalities characteristics of those that currently receive OSP, and therefore are not likely to benefit from the measure. However, we know that SMEs are less likely to offer OSP (26% of small firms, 47% of medium firms and 77% of large firms) and therefore employees of small employers are likely to benefit more from the measure. Half (50 per cent) of all employed disabled people work in small

> workplaces, compared to just under half of non-disabled people (47 per cent). A further 22 per cent of disabled people work in medium sized workplaces (between 50 and 250 staff), compared with 23 per cent of non-disabled people. Similar to non-disabled people, around a quarter of disabled people work in large workplaces (over 250 staff) (26 and 25 per cent respectively).
>
> This suggests that there will be a small benefit towards disabled people because they are disproportionately represented in the set of employers that are likely to, for the first time, not require waiting days.
>
> We do not have data readily available on other equalities characteristics of employees in SMEs."

256. It is clear from these passages that the Defendant and Ministers had in mind the particular vulnerability of women and BAME workers, amongst others, because they were more likely to be lowly paid and vulnerable to income loss, and to have lower financial resilience than others. In our judgment, this shows that the Defendant had regard to PSED considerations in relation to the SSP changes that were proposed. The weight to be given to these considerations was a matter for the Defendant, subject only to rationality limits.

257. Change (3), the reimbursement of the first two weeks of sick pay for SME, was not a change that directly affected workers. It was a provision which benefited employers. However, it was obvious the knock-on effect of the change could only be beneficial for all the workers it affected, regardless of protected characteristics.

258. Applying a realistic and proportionate approach to evidence of compliance, and bearing in mind, in particular, the extreme urgency with which the Defendant had to act in response to the pandemic, we take the view that there has been compliance with the PSED in relation to the changes to SSP. Even if we are wrong that the PSED challenge to the LEL cannot proceed because it would require a change to primary legislation, therefore, the challenge would fail in any event on the merits.

(2) The JRS

259. Once again, the JRS was part of a wider package of measures, including the SEISS and several loan schemes, designed to help the self-employed and businesses.

260. Consideration of the equalities implications was set out in the ministerial submissions to the Chancellor dated 20 and 24 March 2020.

261. The 20 March submission included the following:

> "Equalities:
>
> 32. We have considered potential equalities impacts of this measure, including the interactions with the parental pay and leave system and the National Living Wage (NLW). Most

> women on maternity leave will be able to claim Statutory Maternity Pay as normal if they are furloughed, however the proposal could result in low earning pregnant women falling below the Lower Earnings Level and not qualifying for SMP. They should be eligible to apply for Maternity Allowance, however they would lose access to the first 6 weeks at 90% of average earnings. The design of the scheme and interaction with employment law might also mean that NLW workers are more likely to be furloughed. This might have a disproportionate negative impact on women as they are more likely than men to earn the NLW.
>
> 33. There could also be an indirect equalities impact as there is a risk that employers could discriminate against those with protected characteristics when choosing which workers to furlough,for example on the basis of age. We are considering whether legal protection against discrimination can be applied when furloughing workers, as is the case with redundancies."

262. The 24 March submission included the following:

> "Equalities:
>
> 29. We have considered potential equalities impacts of this measure, including the interactions with the parental pay and leave system. Most women on maternity leave will be able to claim Statutory Maternity Pay as normal if they are furloughed. A few will lose entitlement due to the LEL but this is replicated across the social security system and does not treat women less favourably. Past earnings are relevant to eligibility for SMP and the level of payment. If this period covers furloughed earnings or SSP then women will be worse off than they would have been before CV19. We are working with DWP to establish how many women are affected and coming up with a solution to this problem. We want to ensure women on maternity leave who expect to benefit from enhanced maternity pay have access to furlough to prevent them being treated less favourably to their colleagues.
>
> 30. There could also be an indirect equalities impact as there is a risk that employers could discriminate against those with protected characteristics when choosing which workers to furlough, for example on the basis of age. If furloughed, the employee will maintain rights against unfair dismissal, to redundancy payments etc during the period of furlough."

263. Once again, in our judgment, these documents demonstrate that the Defendant had sufficient regard to equalities issues in relation to the JRS to satisfy its obligation under s 149. They are not a "tick-box" exercise, as the Claimants submit. The fact that the submissions did not specifically mention race (and some other protected characteristics) does not mean, of course, that the Defendant failed to have regard to

race. Indeed, the fact that the Defendant had the impact on race in mind is made clear by the submission, also dated 24 March 2020, relating to SEISS, which said, inter alia:

> "49. Pakistani and Bangladeshi individuals are more likely to be self-employed than the general population. However, we do not think that this gives rise to an equalities issue. This is because although this scheme is less generous than the CJRS in some respects (there is an income cap) it is more generous in other respects (you can receive it even if you are still working). Additionally, as the self-employed population work in a very different way to employees, it is defensible that the schemes is less generous in some respects."

264. For these reasons, the Claimants' challenge under the PSED is rejected.

Conclusion

265. We grant permission to the Claimants to apply for judicial review in the light of the public importance of the issues raised but, for the reasons set out above, we dismiss the application for judicial review.

266. We wish to record our gratitude to both leading counsel for their clear and concise oral advocacy, which enabled this "rolled-up" hearing to be concluded within the one day for which it was listed; and to them and their juniors and solicitors for the high quality of the pleadings and skeleton arguments.