



Neutral Citation Number: [2020] EWHC 3050 (Admin)

Case No: CO/1887/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2020

Before :

MR JUSTICE CHAMBERLAIN

Between:

THE QUEEN

on the application of

**THE INDEPENDENT WORKERS' UNION OF
GREAT BRITAIN**

versus

Claimant

**(1) THE SECRETARY OF STATE FOR WORK AND
PENSIONS**

**(2) THE SECRETARY OF STATE FOR BUSINESS,
ENERGY AND INDUSTRIAL STRATEGY**

Defendants

- and -

THE HEALTH AND SAFETY EXECUTIVE

**Interested
Party**

Ijeoma Omambala QC and Cyril Adjei

(instructed by Harrison Grant Solicitors) for the Claimant

Caspar Glyn QC and Tom Brown

(instructed by Government Legal Department) for the Defendants and Interested Party

Hearing dates: 21 and 22 October 2020

Approved Judgment

Mr Justice Chamberlain:

Introduction

- 1 The Independent Workers' Union of Great Britain is a trade union. It was founded in 2012 and has about 5,000 members, who are predominantly low-paid, migrant workers and workers in the "gig economy". By this claim it seeks declarations that the United Kingdom has failed properly to transpose into domestic law two EU Directives. The first is Council Directive 89/391/EC on the introduction of measures to encourage improvements in the health and safety of workers at work ("the Framework Directive"). The second was made under powers conferred by the Framework Directive and so is sometimes referred to as a "daughter Directive": Council Directive 89/656/EC on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace ("the PPE Directive").
- 2 The Claimant's central complaint is that the Directives require Member States to confer certain protections on "workers", whereas the domestic legislation by which the United Kingdom has sought to transpose the Directives protects only "employees". The Claimant says that this leaves those who are workers (within the meaning of the Directives), but not employees (as that term is understood in domestic law), without the protection EU law guarantees. This gap in protection has existed ever since the deadline for transposing the Directives, 31 December 1992, but the Claimant contends that the COVID-19 pandemic gives it a particular salience and significance. The workers whom the Claimant represents include taxi and private hire drivers and chauffeurs, bus and coach drivers, and van drivers. All these occupations have higher than average rates of death from COVID-19 and, the Claimant submits, particular needs for the kinds of health and safety measures the Directives require.
- 3 The Defendants are the Secretaries of State responsible for domestic legislation on health and safety at work. The Interested Party, the Health and Safety Executive, is the independent regulator for work-related health and safety in Great Britain. Together, the Defendants and Interested Party have two responses to the claim. First, they say that the Framework Directive contains a bespoke definition of "worker", which extends only to those who are "employed by an employer"; and that this concept was properly transposed into domestic law by imposing obligations to protect "employees". Second, they contend that even if this is wrong, the protections conferred by domestic law on workers who are not employees, though not identical to those conferred on employees, are sufficient to meet the minimum standards laid down by the Directives.
- 4 Permission to apply for judicial review was granted by Choudhury J on 19 June 2020. I heard oral argument from Ms Ijeoma Omambala QC for the Claimant and Mr Caspar Glyn QC for the Defendants and Interested Party at a remote hearing using video-conferencing on 21 and 22 October 2020. The arguments on both sides were presented with exemplary clarity.

The background to this claim

- 5 Between the beginning of March and 21 May 2020, the Claimant’s legal department received around 144 queries regarding COVID-19 issues. Its Couriers and Logistics Branch received over 50 requests for assistance raising issues such as the lack of PPE (many couriers working for delivery companies have not been provided with any), the failure to implement social distancing whilst waiting for collections inside and outside restaurants and the failure to package COVID-19 samples correctly so as to protect medical couriers. There is evidence that some of the Claimant’s members are scared by having to work without the PPE they consider they require.
- 6 The evidence includes a number of letters sent by the Claimant to businesses for whom its members work. There was a letter to a well-known private hire vehicle operator asking for sanitising and cleaning products and changes to the booking system and suggesting the provision of specially equipped vehicles with barriers between the front and rear seats; there was a request to a well-known courier business for regular cleaning or sanitising of vehicles; and there was a letter to a delivery business about contactless delivery and the need to provide gloves, hand sanitiser and masks.
- 7 A report by the Fairwork Project dated April 2020 entitled ‘The Gig Economy and COVID-19’, to which the Claimant contributed, made a number of recommendations including: regular, adequate, free provision of PPE – disinfectant, gloves and masks; installation of physical barriers between driver and passengers in all ride-hailing cars; contact free supply chains (both collection and delivery) for delivery workers; daily sanitisation of vehicles and upstream locations – warehouses, hubs et cetera; and free COVID-19 check-ups for workers and their families.
- 8 I mention all of this because it explains the importance, from the Claimant’s perspective, of the legal issue before me. It is, however, important to underscore that the question I have to determine in this case does not depend on whether individual businesses, or businesses in general, are doing enough to protect their workers. As Mr Glyn submits, it may be that some of the businesses concerned are not doing enough to comply with their existing obligations under domestic law. Alternatively, it may be that some of the protections which the Claimant seeks would not be effective to protect against infection, or are not necessary, and so would not be required even if the Directives apply. None of that is for me to decide. I am concerned solely with the question whether the UK has properly implemented the Directives. That is a pure question of law.

EU law

The applicability of EU law in the implementation period

- 9 European Union law had and has effect in the United Kingdom by virtue of the European Communities Act 1972 (“the ECA 1972”). That Act was prospectively repealed with effect from “exit day” by the European Union (Withdrawal) Act 2018. The United Kingdom left the EU on 31 January 2020. However, by the European Union (Withdrawal Agreement) Act 2020, the ECA 1972 continues to have effect, subject to immaterial modifications, during the “implementation period”, which ends on 31 December 2020. The parties agree that this means that the court retains the power to grant the declarations sought, as it would if the UK had remained a Member State.

Treaty provisions

10 Since the inception of the European Economic Community, the European Commission has been empowered to promote co-operation between Member States in matters relating to labour legislation and working conditions, protection against occupational accidents and diseases and industrial hygiene, among other matters: see Article 118 of the Treaty Establishing the European Economic Community (“EEC”). In 1986, the Single European Act inserted a new provision, Article 118a, paragraph (1) of which required Member States to “pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made”. In order to help achieve this objective, the Council was authorised by Article 118a(2) to adopt, by means of Directives, “minimum requirements for gradual implementation, having regard to the technical rules obtaining in each Member State”.

11 The conference at which the Single European Act was agreed made a number of declarations. One of them concerned Article 118a and was in these terms:

“The conference notes that in the discussions on article 118a(2) of the EEC Treaty it was agreed that the community does not intend, in laying down minimum requirements for the protection of the health and safety of employees, to discriminate in a manner unjustified by the circumstances against employees in small and medium-sized undertakings.”

12 In the French version of this text, “employees” is “*travailleurs*”.

13 The current version of Article 118a is in Title X of the Treaty on the Functioning of the EU (“TFEU”), headed “Social policy”. Title X begins with Article 151, which provides as follows:

“The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and

from the approximation of provisions laid down by law, regulation or administrative action.”

14 Article 153 provides in material part as follows:

“1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers’ health and safety;

(b) working conditions;

...

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.”

15 The EU Charter of Fundamental Rights (“the Charter”) now has the same legal value as the treaties: see Article 6(1) of the Treaty on European Union (“TEU”). Chapter IV of the Charter is headed “Solidarity”. In that chapter, Article 31 provides as follows:

“Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.”

16 Article 52(7) provides that the explanations drawn up by the Praesidium, the body that agreed the Charter, provide guidance in its interpretation and are to be given due regard by the courts of the Union and the Member States.

17 The explanation relating to Article 31(1) of the Charter makes clear that it is based on the Framework Directive. It also draws on Article 3 of the European Social Charter (“the

Social Charter”) and point 19 of the Community Charter on the rights of workers (“the Community Charter”) and, as regards dignity at work, on Article 26 of the revised Social Charter. Article 3 of the Social Charter provided that “[a]ll workers have the right to safe and healthy working conditions”. Point 19 of the Community Charter provided that “[e]very worker must enjoy satisfactory health and safety conditions in his working environment”. Article 26 of the revised Social Charter provided that “[a]ll workers have the right to dignity at work”.

The Directives

- 18 The Framework Directive was adopted under Article 188a EEC. Its recitals include these (with numbers added):

“[6] Whereas this Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member State being committed, under the Treaty, to encouraging improvements in conditions in this area and to harmonising conditions while maintaining the improvements made;

...

[8] Whereas, pursuant to article 118a of the treaty, such directives must avoid imposing administrative, financial and legal constraints which would hold back the creation and development of small and medium-sized undertakings;

...

[12] Whereas Member States had a responsibility to encourage improvements in the health and safety of workers on their territory; whereas taking measures to protect the health and safety of workers at work also helps, in certain cases, to preserve the health and possibly the safety of persons residing with them;

[13] Whereas Member States’ legislative systems covering safety and health at the work place differ widely and need to be improved; whereas national provisions on the subject, which often include technical specifications and/or self-regulatory standards, may result in different levels of safety and health protection and allow competition at the expense of safety and health.”

- 19 The object of the Framework Directive is set out in Article 1: “to introduce measures to encourage improvements in the safety and health of workers at work”. To that end, it contains “general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles”.
- 20 Article 2 deals with the Directive’s scope. Article 2(1) provides that the Directive is to apply to “all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.). Article 2(2)

provides that the Directive is not applicable where “characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it”.

21 Article 3 contains definitions, two of which are critical to the argument in this case:

“(a) worker: any person employed by an employer, including trainees and apprentices but excluding domestic servants;

(b) employer: any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment”

22 The French version of these definitions is as follows:

“travailleur, toute personne employée par un employeur ainsi que les stagiaires et apprentis, à l’exclusion des domestiques;

employeur, toute personne physique ou morale qui est titulaire de la relation de travail avec le travailleur et qui a la responsabilité de l’entreprise et/ou de l’établissement”

23 Article 5 (headed “General provision”) provides that the employer has a duty “to ensure the safety and health of workers in every aspect related to the work”.

24 Article 6 imposes general obligations on employers. It provides materially as follows:

“1. Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organisation and means.

The employer shall be alert to the need to adjust these measures to take account to changing circumstances and aim to improve existing situations.

...

4. Without prejudice to the other provisions of this directive, where several undertakings share a workplace, the employers shall cooperate in implementing the safety, health and occupational hygiene provisions and, taking into account the nature of the activities, shall coordinate directions in matters of the protection and prevention of occupational risks, and shall inform one another and their respective workers and/or workers’ representatives of these risks.

5. Measures related to safety, hygiene and health at work may in no circumstances involve the workers in financial cost.”

25 Article 8 provides materially as follows:

“4. Workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national rules and/or practices.

5. The employer shall ensure that all workers are able, in the event of serious and imminent danger to their own safety and/or that of other persons, and where the immediate superior responsible cannot be contacted, to take the appropriate steps in the light of their knowledge and the technical means at their disposal to avoid the consequences of such danger.

Their actions shall not place them at any disadvantage, unless they acted carelessly or there was negligence on their part.”

26 Ms Omambala points out that there are a number of respects in which employers are obliged to do certain things “in accordance with national laws and/or practices” (see e.g. Article 8(4) – above; Article 10(1), (2) and (3) – worker information; Article 11(2) – consultation and participation of workers; and Article 12 *in fine* – training of workers). Yet the definitions in Article 3 are not framed in that way.

27 Article 16 requires the adoption of individual Directives in areas listed in the Annex (including personal protective equipment). Article 16(3) provides that “the provisions of the Directive are to apply in full to all the areas covered by the individual Directives, without prejudice to more stringent and/or specific provisions contained in these individual Directives”. Article 18 requires Member States to implement the Directive by 31 December 1992 and to communicate to the Commission the texts of the implementing provisions.

28 The PPE Directive was made under Article 16(1) of the Framework Directive. Article 1(1) provides that it lays down minimum requirements for personal protective equipment “used by workers at work”. Article 1(2) (echoing Article 16(3) of the Framework Directive) provides that the provisions of the framework directive are fully applicable to the whole scope referred to in paragraph 1, without prejudice to more restrictive and/or specific provisions contained in the PPE Directive.

29 Article 2 of the PPE Directive defines “personal protective equipment”, subject to exclusions in Article 2(2) which are not material, as “all equipment designed to be worn or held by the worker to protect him against one or more hazards likely to endanger his safety and health at work, and any addition or accessory designs to meet this objective”.

30 Article 3 contains a general rule in these terms:

“Personal protective equipment shall be used when the risks cannot be avoided or sufficiently limited by technical means of collective protection or by measures, methods or procedures of work organization.”

31 Article 4 provides materially as follows:

“3. The conditions of use of personal protective equipment, in particular the period for which it is worn, shall be determined on the basis of the seriousness of the risk, the frequency of exposure to the risk, the characteristics of the workstation of each worker and the performance of the personal protective equipment.

...

6. Personal protective equipment shall be provided free of charge by the employer, who shall ensure its good working order and satisfactory hygienic condition by means of the necessary maintenance, repairs and replacements.

However, Member States may provide, in accordance with their national practice, that the worker could be asked to contribute towards the cost of certain personal protective equipment in circumstances where use of the equipment is not exclusive to the workplace.”

32 Article 10 requires Member States to implement the Directive by 31 December 1992 and to communicate to the Commission the text of the implementing provisions.

The key case law

33 A large number of authorities were cited. I summarise here the ones which figured most prominently in the parties’ arguments.

34 In Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1987] ICR 483, the European Court of Justice (“ECJ”) considered the meaning of “worker” in what was then Article 48 EEC (now Article 45 TFEU), which guarantees the free movement of workers. In that context, “worker” is not defined. The court held at [16] that, since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term must have a unified meaning across the Member States and must be interpreted broadly. At [17], the ECJ said this:

“The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the person is concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”

35 In the French version of the judgment, the term “employment relationship” is “*relation de travail*”.

36 In Case C-256/01 *Allonby v Accrington & Rossendale College* Case C-428/09 [2004] ICR 1328, at [63], the ECJ had to consider the meaning of “worker” in a different context: what was then Article 141 EC, the treaty provision guaranteeing male and female workers equal pay for equal work or work of equal value. The ECJ said that “there is no single definition of worker in community law: it varies according to the area in which the

definition is to be applied”. However, given the centrality to the Community legal order of the promotion of equality between men and women, the term “worker” had to be given an autonomous Community meaning, namely, that adopted for the purposes of the treaty provisions on free movement in *Lawrie-Blum*: [65]-[67].

- 37 *Union Syndicale Solidaires Isère v Premier Ministre* [2011] IRLR 84 concerned Directive 2003/88/EC (“the Working Time Directive”). At [27], the court noted that the Working Time Directive made no reference either to the definition of “worker” in the Framework Directive or to the definition of “worker” in national legislation and/or practices. At [28], it said this:

“The consequence of that fact is that, for the purposes of applying Directive 2003/88, that concept may not be interpreted differently according to the law of member states but has an autonomous meaning specific to European Union law. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, by analogy, for the purposes of Article 39 EC, case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and also case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26).”

- 38 In the same vein, in Case C-393/10 *O’Brien v Ministry of Justice* [2012] ICR 955, Advocate General Kokott said this at [25]:

“All the parties have pointed out that there is no single definition of worker in European Union law... For example, in the field of equal treatment for male and female workers, the term ‘worker’ is an autonomous European Union law notion, which must be given a broad interpretation. In this connection civil servants may also be regarded as workers... In the field of the safeguarding of employees’ rights, the court has stressed, in connection with the Working Time Directive..., the need for an autonomous, uniform definition of working time in the European Union, even though here too the wording of the Directive referred to national law... With regard to the Directive on transfers of undertakings, however, it has ruled that in determining the scope regard must be had solely to the definition of worker laid down in national legislation...”

- 39 That case concerned part-time judges. For the purposes of Directive 97/81/EC (“the Part-time Work Directive”), “worker” was defined by reference to national law. Nonetheless, the discretion conferred on Member States to define the concepts was not unlimited. They must not “infringe the general principles and fundamental rights under the European Union law not remove that will certain categories of persons from the protection offered by those instruments and thereby impair the practical effect of the directive”: AG Kokott at [37]. The Court endorsed this reasoning at [34]-[36] of its judgment, holding that the distinction drawn by UK law between office holders and employees was permissible only if it was not arbitrary in the light of the aims of the directive: see at [40]-[43].

- 40 Case C-316/13 *Fenoll v Centre d'Aide par le Travail "La Jouvène"* EU:C:2015:2000 [2016] IRLR 67 was another case concerned with the Working Time Directive. At [29] of his Opinion, Advocate General Mengozzi said this:

“There is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied.”

He then cited [28] of *Union Syndicale*, before concluding as follows:

“The court therefore considers that the worker to whom [the Working Time Directive] is addressed is defined in the same way – save for one reservation which I shall set out below – as the worker to whom article 45 TFEU is addressed. Reference may therefore usefully be made in this opinion to the classic case law of the court in the field of freedom of movement for workers.”

- 41 The ECJ adopted this reasoning:

“24. In that connection, as regards [the Working Time Directive], it should be noted that, as the Advocate General maintains in point 29 of his opinion, that Directive makes no reference to the term “worker” as appearing in [the Framework Directive], or to the definition of that term in national legislation...

25. It follows that, as regards the application of [the Working Time Directive], the concept of a “worker” may not be interpreted differently according to the law of the member states but has an autonomous meaning specific to EU law...

26. As the Advocate General pointed out at point 26 of his opinion, that finding applies also with regard to the interpretation of the term “work” within the meaning of article 7 of [the Working Time Directive] and of Article 31(2) of the Charter, in order that the uniform scope of the rights of workers to paid leave *ratione personae* may be ensured.

27. In that context, it should be recalled that, according to the settled case law of the court, the term “worker” within the meaning of [the Working Time Directive] must be defined in accordance with objective criteria that distinguish the employment relationship by reference to the rights and duties of the person is concerned. So, any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration...”

- 42 In Case C-216/15 *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* EU:C:2016:883 [2017] IRLR 194, the ECJ had to consider the meaning of “worker” in Directive 2008/104 (“the Temporary Agency Workers Directive”). Article 3 of that Directive defined “worker” as “any person who, in the Member State concerned, is

protected as a worker under national employment law”. The ECJ noted the reference to national law, but held as follows:

27. In accordance with the settled case law of the Court, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard...

...

32. On the other hand, that provision cannot be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of that concept for the purposes of Directive 2008/104, and accordingly the scope *rationae personae* of that Directive. As follows from paragraphs 25 and 26 of this judgment, the EU legislature did not leave it to the Member States to define that concept unilaterally, but specified itself the contours thereof in Article 3(1)(a) of that Directive, as, moreover, it also specified the contours of the definition of ‘temporary agency worker’ in Article 3(1)(c) of that Directive.

33. Accordingly, for the purposes of interpreting that Directive, that concept covers any person who has an employment relationship in the sense set out in paragraph 27 of this judgment and who is protected, in the Member State concerned, by virtue of the work that person carries out.

...

36. To restrict the concept of ‘worker’ as referred to in Directive 2008/104 to persons falling within the scope of that concept under national law, in particular, to those who have a contract of employment with the temporary-work agency, is liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that Directive by inordinately and unjustifiably restricting the scope of that Directive.

37. Indeed, such a restriction would permit the Member States or temporary-work agencies to exclude at their discretion certain categories of persons from the benefit of the protection intended by that Directive, in particular, from the application of the principle of equal treatment of temporary agency workers and staff employed directly by the user undertaking laid down in Article 5 of that Directive, even though the employment relationship between those persons and the temporary-work agency is not substantially different to the employment relationship between employees having the status of workers under national law and their employer.”

- 43 Case C-147/17 *Syndicatul Familia Constanta v Directia Generala de Asistenta Sociala si Protectia Copilului Constanta* EU:C:2018:926 [2019] ICR 211, the ECJ affirmed at [41] that, for the purposes of the Working Time Directive, the concept of “worker” had an autonomous meaning specific to EU law, defined by reference to objective criteria.

Domestic legislation relied upon as implementing the Directives

- 44 Mr Glyn submits that the United Kingdom has properly implemented the Directives through national legislation conferring protection on “employees”. There are other national provisions conferring protections on persons who are not employees, but Mr Glyn’s primary submission is that it is not necessary to consider these. At this stage, therefore, I set out the domestic provisions that protect employees.
- 45 The general obligations in Article 5(1) and 6(1) of the Framework Directive are said to be implemented principally by s. 2(1) of the Health and Safety at Work Act 1974 (“the HSWA 1974”), which provides:
- “It shall be the duty of every employer to ensure, in so far as is reasonably practicable, the health, safety and welfare at work of all his employees.”
- 46 “Employee” is defined for the purpose of the HSWA 1974 in s. 53 as “an individual who works under a contract of employment or is treated by section 51A as being an employee”. Related expressions are to be construed accordingly. (Section 51A extends the definition to those police personnel holding the office of constable or an appointment as a police cadet.)
- 47 This definition does not include so-called “limb (b) workers”, i.e. those who fall within the definition of “worker” in s. 230(3)(b) of the Employment Rights Act 1996 (“the ERA 1996”). Limb (b) workers are those who work under a contract other than a contract of employment “whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual”.
- 48 Next, there are obligations imposed by regulations made under the ECA 1972 and the HSWA 1974, the Management of Health and Safety at Work Regulations (SI 1999/3242: “the MHSW Regulations”). Regulation 3 imposes an obligation on every employer to undertake an assessment of “(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking”. Regulation 11 imposes additional obligations in cases where multiple employers share a workplace. Regulation 12(3) obliges employers to provide employees and other persons with information and instructions about risks to health and safety.
- 49 Further specific obligations are imposed by the Workplace (Health, Safety and Welfare) Regulations (SI 1992/3004: “the Workplace Regulations”). Regulation 6 requires employers to ensure suitable ventilation for employees and workers. Regulation 9 requires employers to keep the premises clean. Regulation 17 requires employers to ensure the safe circulation of pedestrians and traffic routes within the workplace. Regulation 21 requires employers to provide washing facilities if the nature of the work requires it.

- 50 Obligations are also imposed by regs 3-4 of the Provision and Use of Work Equipment Regulations (SI 1998/2306: “the Work Equipment Regulations”) on employers, self-employed persons and others who have control of work equipment or people who use it or the way in which it is used. The obligation is to ensure the suitability, maintenance and inspection of work equipment.
- 51 Finally, there are obligations imposed by the Carriage of Dangerous Goods and Use of Transport or Pressure Equipment Regulations 2009 (SI 2009/1348: “the Carriage Regulations”).
- 52 Article 8(4)-(5) of the Framework Directive are said to be implemented by regs 8(1) and (2) of the MHSW Regulations and ss. 44(1)(d)-(e) and 100 of the Employment Rights Act 1996.
- 53 So far as the PPE Directive is concerned, it is said that Article 3 is implemented by s. 2(1) of the HSWA 1974, reg. 4(1) of the Personal Protective Equipment at Work Regulations (SI 192/2966: “the PPE Regulations”) and, in certain specific cases, by regs 7(1)-(3) of the Control of Substances Hazardous to Health Regulations 2002 (SI 2002/2677: “the COSHH Regulations”).

Submissions on the meaning of “worker” in the Directives

The Claimant

- 54 Ms Omambala submits that a purposive approach must be applied to the interpretation of the Directives: see *Munkman on Employer’s Liability* (2019, 17th ed.) at §9.12. She relies on the decisions of the ECJ in Case C-84/94 *United Kingdom v Council* [1997] ICR 443 at [15] (where a broad interpretation was applied to the words “working environment”, “safety” and “health” in what was then Article 118a EEC) and Cases C-397/01 to 403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2005] ECR 1307 at [52] (where a broad interpretation was applied to the scope provision in Article 2 of the Framework Directive).
- 55 In any event, a close reading of the language used in Article 3 supports a broad construction of the term “worker”. She points to the use of the phrase “any worker employed by an employer” and notes that the definition contains only one specific exclusion, of domestic servants. She notes the absence of the term “employee” or “contract of employment”. These terms are used in other legislation, for example Directive 77/187 (“the Acquired Rights Directive”), the predecessor of Directive 2001/23/EC (“the Transfer of Undertakings Directive”). The definition of “worker” has to be read with the definition of “employer”, which is also broad. It covers anyone who has an “employment relationship” with the worker and has responsibility for the undertaking and/or establishment. The phrase “employment relationship” (in French, “*relation de travail*”) is itself broad.
- 56 This favours a reading of “worker” encompassing all who fall within the autonomous meaning of that term, according to the ECJ’s case law. Ms Omambala relies also on the decision of the Court of Appeal in *Governing Body of Clifton Middle School v Askev* [2000] ICR 286, where Peter Gibson LJ noted at 397C that “employment relationship” must be wider than “contract of employment”. It is right to point out, however, that this

conclusion was specifically anchored in the wording of the Acquired Rights Directive, which, unlike the Framework Directive, contained both terms.

- 57 Ms Omambala submits that EU Directives in the field of labour law adopt one of two approaches to the definition of “worker”: the first is to confine the scope of the term to those classified by national law as workers or as having an employment contract; the second involves no reference to national law and therefore should be interpreted as having a uniform meaning across the Member States, broadly in line with the meaning of “worker” in the treaty provisions on free movement. Ms Omambala says that this view has been advanced by Prof. Nicola Countouris, ‘The Concept of “Worker” in European Labour Law: Fragmentation, Autonomy and Scope’, (2018) 47 *Industrial Law Journal* 192.
- 58 An example of the first approach is the definition in the Transfer of Undertakings Directive, where “employee” is defined in Article 2(1) as “any person who, in the Member State concerned, is protected as an employee under national employment law”. Likewise, Directive 1999/70/EC (“the Fixed-term Work Directive”) gives effect to the Framework Agreement on Fixed-term Work, which applies to “workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State”. The Part-time Work Directive gives effect to the Framework Agreement on Part-time Work, in which the scope of application is defined in a materially similar way. Finally, Directive 2008/104/EC (“the Temporary Agency Work Directive”) defines “worker” in Article 1(a) as “any person who, in the Member State concerned, is protected as a worker under national employment law”.
- 59 Even in this first category, the case law of the ECJ shows that the Member State’s discretion is not wholly unfettered. Thus, for example, in *O’Brien*, the ECJ held that the exclusion of “office holders” was arbitrary in the light of the social aims of the Part-time Work Directive. Similarly, in the *Ruhrlandklinik* case, the ECJ held that the definition of “worker” in the Temporary Agency Directive, despite its express reference to national employment law, had to be read as applicable to anyone who “for a certain period of time... performs services for and under the direction of another person, in return for which he receives remuneration”: see at [27], [32]-[33] and [36]-[37]. Ms Omambala submits that authorities such as *O’Brien* and the *Ruhrlandklinik* case show that “there is a progressive convergence of approach” in the use of the autonomous EU law definition of worker, even in cases where the legislation contains express reference to “national law”.
- 60 The position is even clearer in cases where the legislative definition does not refer expressly to national law. For example, in *Allonby*, the ECJ applied its own autonomous definition to the legislation providing for equal pay for equal work by male and female workers. *Union Syndicale* is another example of a case where, in the absence of any reference to national law, the autonomous definition was applied. The Framework Directive contains a bespoke definition of “worker”, which expressly excludes domestic staff. Otherwise, however, the term means the same as in the Working Time Directive. Both Directives were made under Article 118a EEC and both concern occupational health and safety. Indeed, the Working Time Directive refers expressly to the Framework Directive: see recital 3 and Articles 3(3) and 4(3).

- 61 Ms Omambala relies additionally on Article 31 of the Charter, which uses the broad and undefined term “workers” and which the Praesidium’s Explanations show to have been based on the Framework Directive.
- 62 Finally, Ms Omambala submits that, even if the definition of “worker” in the Directives allows member states some discretion in defining the scope of their national implementing legislation, ECJ case law shows that this discretion is limited. In particular, national legislation cannot employ distinctions which are arbitrary. Whether a distinction is arbitrary must be considered in the light of the aims of the particular Directive in question. In this case, the distinction drawn by UK law between employees and limb (b) workers is arbitrary in the light of the aims of the Framework Directive.

The Defendants and Interested Party

- 63 Mr Glyn submits that there are three, not two, approaches to the definition of “worker” in EU law: first, there are contexts in which “worker” has an autonomous EU law meaning; second, there are contexts in which the scope of protection depends on the Member State’s domestic law (provided only that the law does not rely on arbitrary distinctions or render the Directive’s protections ineffective); third, there are cases, of which the Framework Directive is one, where “worker” has a bespoke, express definition.
- 64 The first category includes treaty provisions referring to workers. The application by the ECJ in *Lawrie-Blum* and *Allonby* of an autonomous EU meaning to such provisions is not surprising: the treaty provisions contain no definition of “worker” and have to be given a uniform meaning across all Member States. In *Union Syndicale* (and other cases on the Working Time Directive), the ECJ was similarly dealing with an undefined term. That was crucial to the conclusion that an autonomous meaning applied.
- 65 The second category includes Directive 2001/23/EC (“the Acquired Rights Directive”) in addition to the examples given by Ms Omambala. Mr Glyn accepts that neither of the Directives in issue here falls into this category.
- 66 The existence of the third category can be seen from the reasoning in *Union Syndicale*, at [27], where the ECJ noted that the Working Time Directive made no reference either to the definition in the Framework Directive or to national law and, for that reason, had the autonomous EU law meaning. The same contrast between the undefined term in the Working Time Directive and the concept as defined in the Framework Directive can be seen in the reasoning of Advocate General Mengozzi at [24]-[25] of his Opinion in *Fenoll*.
- 67 Mr Glyn relies on a footnote in Prof. Countouris’ article in which he says that the *obiter dicta* in [27] of the ECJ’s judgment in Case C-116/06 *Kiiskis* “suggest that the court is aware that for instance the letter of [the Framework Directive] suggests ‘the definition of a worker to be derived from national legislation and/or practices’”. Mr Glyn tells me that he has checked with the author, who confirms the reference should have been to [27] of *Union Syndicale*. This supports the proposition that the Framework Directive’s express definition leaves no room for the operation of an autonomous EU law definition.
- 68 The Framework Directive’s bespoke definition ensures that duties are to be imposed on employers only in respect of workers “employed by” them and only when they have

responsibility for the undertaking in question. Transposing the obligations into national law using the concept of employment addresses both limbs of the Directive's definition: an employer, in the sense in which UK law defines that term, has sufficient control over an employee to meet the Directive's test of "responsibility for the undertaking and/or establishment".

69 The decision to implement the Directives by placing obligations on employers (in the domestic law sense) was lawful. The words "employed by" in the Directive connote employment under a contract of employment and do not include the domestic category of limb (b) workers. The declaration which accompanied the Single European Act supports this interpretation.

70 Mr Glyn stresses the breadth of the domestic law definition of "employee". In his seminal judgment in *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515C-D, McKenna J identified three conditions that must be satisfied for a contract of service (or employment contract) to exist:

"(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

71 McKenna J's first criterion has come to be understood to encompass two requirements: personal service and mutuality of obligation. The House of Lords affirmed that the latter is an essential feature of the contract of employment in *Carmichael v National Power plc* [1999] ICR 1226. In that case, which concerned casual workers, there was mutuality of obligation while the work was being done, but not in between jobs. That meant that the workers did not have protection from unfair dismissal (because they did not have necessary continuity of service) but during the period while they were working they remained employees to whom duties would be owed under domestic health and safety legislation. See, to similar effect, *Stephenson v Delphi Diesel Systems* [2003] ICR 471 at [13] (Elias LJ). Thus, while working, many of the Claimant's members may well be employees for the purposes of health and safety law: see also *Lane v Shire Roofing Co. (Oxford) Ltd* [1995] IRLR 493. Mr Glyn points out that the need for protection by health and safety law arises only while the employee is actually working.

72 In response to the charge that the distinction between employees and limb (b) workers is arbitrary in the context of the objectives of the Framework Directive, Mr Glyn points out that the distinction is of long standing. More importantly, unlike the distinction between employees and office holders, which the ECJ in *O'Brien* held to be arbitrary, it is "grounded in objective fact, reason and principle".

73 Mr Glyn submits that the EU Commission has accepted that implementing the Directives' obligations to protect "workers" by imposing obligations in domestic law to protect "employees" is in principle permissible. This, he says, means that his case is "confirmed beyond doubt (and *acte clair*)". He invites me to infer the Commission's view from a series of communications and events between 1992 and 1997. On 16 October 1995, the Commission asked the United Kingdom government how the concept of "employer" and

“worker” were transposed into domestic law. The United Kingdom responded on 26 March 1996 indicating that these concepts were transposed by reference to the domestic concept of “employer” and “employee”. On 29 September 1997, the Commission formally indicated “doubts” about the “precision” of these definitions. The United Kingdom made further representations on 30 December 1997, explaining the meaning of the concept of “employee” in domestic law. The Commission took no further action in this respect. It did, however, go on to issue a reasoned opinion and then brought infraction proceedings against the UK in respect of other aspects of the implementation of the Framework Directive. Those proceedings were ultimately unsuccessful: Case C-127/05 *Commission v United Kingdom* [2007] ICR 1393.

- 74 Mr Glyn relies on what he says is the Commission’s view that the UK had properly transposed the scope of the Directives by legislation conferring protection on employees. Given that the Commission enquired about the definition of “employee” in UK law and that it took action about other aspects of the transposition, the “irresistible inference” is that it was satisfied with the United Kingdom’s explanation as to domestic implementation of personal scope by the domestic concepts of employer and employee.
- 75 Mr Glyn notes that there is no common position within the EU as to the mode of transposition of the Directives. He relies in particular on the law of the Republic of Ireland. By s. 23 of its Industrial Relations Act 1990, Ireland recognises a class equivalent to limb (b) workers. Nonetheless, its Safety, Health and Welfare at Work Act 2005, like the 1974 Act in the UK, utilises a bipartite distinction between employees and self-employed, with no intermediate provision for its equivalent of limb (b) workers.
- 76 Mr Glyn draws attention to an EU Commission Staff Working Document, *Ex-post evaluation of the European Union occupational safety and health Directives*, published on 10 January 2017, which contains the following passage on p. 29:

“In the changing labour market with the emergence of new forms of work and increasing uncertainty of the status of workers and self-employed, the question of application of health and safety rules to all becomes even more important to prevent accidents and occupational diseases. Considering the recommendations from the NIRs [sc. national reports on the practical implementation of the Directives], the conclusions of the external evaluation study, the development of the caselaw of the ECJ on the definition of work are in EU law and the treatment of self-employed under construction site and fishing vessel directives, promoting inclusion of **self-employed** and in particular those **self-employed working alongside workers** might be considered as a possible action in the context of future proofing the [occupational safety and health] framework.” (Emphasis in original.)

- 77 This passage, Mr Glyn submits, does not suggest that the Commission thought that the problems created by new forms of working could be addressed through the current legislative regime.

Discussion on the meaning of “worker” in the Directives

- 78 At the permission stage, Choudhury J noted the “vintage” of the provisions under challenge. When considering the arguability of a challenge of this kind, it was relevant

to note that the transposition deadline for the Directives passed nearly 28 years ago. If the Claimant's argument is correct, it might perhaps be thought surprising that no question has arisen to date as to whether the UK has properly implemented the Directives.

- 79 The significance of this point at this stage in the proceedings should not, however, be overstated. It is not unknown in the field of EU law for an argument that national law is contrary to EU law to arise many years after the relevant EU law came into force. To take one well known example, it was not until 1994 that the House of Lords, in *R v Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 AC 1, declared the provisions of the Employment Protection (Consolidation) Act 1978 incompatible with Article 119 EEC (a provision in the original Treaty of Rome) and Directive 75/117/EEC (which had to be transposed by 1976). In any event, this claim has now passed the permission threshold. If the Claimant's argument is a good one, the fact that no-one else has advanced before it is of little relevance.
- 80 Nor can much be drawn from the Commission's failure to bring infraction proceedings in respect of this particular aspect of the UK's implementation of the Framework Directive. A reasoned view from the Commission on a question of EU law will often be persuasive, though never determinative. An unreasoned statement of the law, however, is unlikely to carry much weight. Here, there is no positive statement of the Commission's view at all, let alone a reasoned one. This means that there is no way of knowing whether, as Mr Glyn invites me to infer, the Commission agreed with the UK's position or whether it decided for other reasons not to bring infraction proceedings. Even if it did agree with the UK's position, there is nothing to indicate any consideration of the issue after the late 1990s or, at the very latest, 2005, when infraction proceedings were commenced raising other points. Much of the case law relied upon by Ms Omambala came after that. The passage set out at [76] above from the Commission's 2017 Staff Working Document is directed to a different point: the possible future inclusion in the EU's occupational safety and health framework of the *self-employed*, a category which does not include the limb (b) workers at issue here.
- 81 Likewise, it would not assist Mr Glyn if, as he says, one other Member State (Ireland) has transposed the Directives in a way which appears similar to the UK's. It was not suggested that the issue raised in this case has been considered by the Irish courts, nor was reference made to any reasoned consideration of it by the Irish government. In those circumstances, the existence of similar provisions in another Member State is of little moment.
- 82 In my judgment, it is possible to draw the following conclusions from the language of Article 3 of the Framework Directive, the various other provisions in which the term "worker" is used, and the case law:
- (a) There is no single definition of worker in EU law: it varies according to the area in which the definition is to be applied: see *Allonby*, [63], *O'Brien* (Opinion of AG Kokott at [25]) and *Fenoll* (Opinion of AG Mengozzi at [24]).
 - (b) It follows that the use of the term "worker" in Article 3 of the Framework Directive does not, in and of itself, indicate an intention that the scope of application of the Directives should be identical to that of the treaty provisions on free movement (as explained in *Lawrie-Blum*) or equal pay (as explained in *Allonby*).

- (c) Indeed, the fact that it contains bespoke definitions of “worker” and “employer” is a powerful indicator that a different meaning was intended.
- (d) But that tells us very little about the *extent* of the intended differences. There are at least two that are obvious from the text of the definitions: domestic servants are excluded; and the “employer” must have responsibility for the undertaking and/or establishment. The real question in this case is whether any *other* differences in meaning were intended.
- (e) There is no magic, one way or the other, in the use of the words “employed”, “employer” and “employment relationship” in Article 3 of the Framework Directive. The French text speaks of a “*relation de travail*”, exactly the same term used in the French version of the judgments in *Lawrie-Blum* and *Allonby* to describe the relationship between a worker and the person for whom and under whose direction he or she performs services. This shows that the term “employment relationship” *can* be used in contexts where the autonomous EU law meaning of “worker” is intended.
- (f) For the same reason, the use of the word “employees” in the declaration in relation to Article 118a(2) EEC is not an indicator that the latter covers only those whom UK law would regard as employees. The equivalent French term is “*travailleurs*”. More importantly, it is now well established that some of the Directives adopted under Article 118a EEC protect all workers who fall within the autonomous EU law definition: see, in relation to the Working Time Directive, *Union Syndicale* and *Fenoll*. That would not be possible if “worker” in Article 118a (interpreted in accordance with the declaration) had a narrower meaning.
- (g) The reason why, in *Union Syndicale* and *Fenoll*, “worker” in the Working Time Directive was held to have the autonomous EU law meaning was that that Directive referred *neither* to the definition in Article 3 of the Framework Directive *nor* to the definition in national law. This shows that the definition of “worker” in Article 3 of the Framework Directive differs from the autonomous EU law meaning. It does not, however, show that it differs in the way Mr Glyn submits.
- (h) It is significant that Article 3 of the Framework Directive lacks any reference to definitions deriving from national law and practice. This is so not only because of the contrast with the other instruments referred to in [57] above but also because of the contrast with other provisions in the Framework Directive itself – e.g. Articles 8(4), 10(1), (2) and (3), 11(2) and 12 *in fine* – all of which refer expressly to national law and practice. This suggests that “worker” in Article 3 of the Framework Directive was intended to have a single meaning applicable in all Member States.
- (i) To the extent that Prof. Countouris suggests the contrary, I do not agree. If there were no single meaning of “worker”, individual Member States would be free to cut down the category of persons benefitting from the Directive’s protections, thereby resulting in “different levels of safety and health protection” as between Member States and “competition at the expense of safety and health” – precisely the unsatisfactory situation which, according to the 13th recital, the Directive was

intended to address. The objectives of the Framework Directive suggest a scope fixed by reference to a single EU-wide meaning.

- (j) *United Kingdom v Council and Pfeiffer* establish that it is necessary to apply a broad interpretation of Article 2 of the Directive. That does not *necessarily* mean the same is true of Article 3. However, one of the reasons given in [52] of *Pfeiffer* for the breadth of the Directive's scope was its purpose, as evident from Article 1 – encouraging the improvement of the health and safety of workers at work. That purpose would be as likely to be undermined by a narrow interpretation of the term “worker” as by a narrow interpretation of the sectors of economic activity to which the Directive applies, or too expansive an interpretation of the exceptions in Article 2(2).
- (k) Contrary to Mr Glyn's submission, the requirement that the “employer” must have “responsibility for the undertaking and/or establishment” does not point in the direction of a narrow interpretation of the term “worker” as something akin to “employee” in UK law. The “responsibility” which the employer must have is responsibility *for the undertaking or establishment*. Once that responsibility is established, the “employer” then owes duties to everyone in that undertaking or establishment with whom he/she/it has an employment relationship (*relation de travail*).
- (l) Once it is understood that the terms “employed”, “employer” and “employment relationship” are neutral (see sub-para. (e) above), the natural reading of Article 3 is that limb (a) excludes domestic servants and limb (b) provides that the person with whom the worker has an employment relationship must have “responsibility for the undertaking and/or establishment”. But subject to these points, in the absence of any reference to national law and/or practice, “worker” includes anyone who would fall within the autonomous EU law definition.
- (m) This broad reading is more consistent than Mr Glyn's alternative with what Ms Omambala aptly described as the “progressive convergence of approach” seen in the jurisprudence of the ECJ to the term “worker” in various different contexts. It is noteworthy that the ECJ has settled on the same autonomous definition in a variety of different contexts: the treaty provisions on free movement (*Lawrie-Blum*) and equal pay (*Allonby*), the Working Time Directive (*Union Syndicale, Fenoll, Sindicatul Familia Constanta*) and the Temporary Agency Directive (*Ruhrlandklinik*). The latter case is a particularly striking example of the use of purposive interpretation to apply the autonomous definition in circumstances where the plain language of the Directive being construed might have suggested something else.
- (n) The broad reading is also supported by Article 31 of the Charter. I accept that the Charter is no more than an interpretive aid. It could not, for example, be used to override the express exclusion of domestic servants. But the fact that the drafters, drawing on the Framework Directive, chose to confer the right to “working conditions which respect his or her health, safety and dignity” on “every worker”, without seeking to confine the application of that term, seems to me to support as broad an interpretation as possible of the term when used in the Framework Directive.

- 83 I therefore reject Mr Glyn’s submission that the obligations in the Framework Directive and PPE Directive are properly transposed by domestic legislation conferring protection on those with contracts of employment. In my judgment, the “workers” protected by the Directives include all who fall within the autonomous EU law definition applicable for the purposes of the treaty provisions on free movement and equal pay, with the exception of domestic servants. “Employers” are those for whom and under whose direction workers perform services and who have responsibility for the undertaking and/or establishment.
- 84 This makes it necessary to consider Mr Glyn’s second and alternative response to the claim, that other provisions of domestic law confer protections on those who are workers for the purposes of the Directives but not employees for the purposes of domestic law; and that these protections are sufficient to implement the Directives.

Are there sufficient equivalent protections in domestic law?

The proper approach to the parties’ written submissions

- 85 Ms Omambala set out in her skeleton argument the respects in which she says the United Kingdom has failed to transpose the Directives as regards limb (b) workers. Mr Glyn responded by identifying certain provisions of domestic law which he says provide the necessary protection. At my invitation, the parties produced a table summarising the parties’ submissions. Ms Omambala pointed out that some of the provisions relied upon by Mr Glyn in the table are not referred to in his skeleton argument. Mr Glyn responded that in some cases the provisions now identified were referred to in evidence if not in the skeleton argument; and that in others reliance on these provisions was “obviously implicit”.
- 86 Whether the United Kingdom has properly implemented the obligations imposed by the Directives is a question of law. It is a question which may have significant effects on many thousands of workers, as well those responsible for the undertakings and establishments in which they work. It would not be appropriate to leave out of account provisions of domestic law said by the Defendants and Interested Party to be relevant on the basis of a minute analysis of the pleadings and skeleton arguments. That would only lead to more litigation. I have therefore considered all of the provisions referred to by Mr Glyn in the table produced by the parties.
- 87 The provisions of the Directives which Ms Omambala says have not been properly implemented with respect to limb (b) workers are:
- (a) the general obligations in Articles 5(1) and 6(1) of the Framework Directive;
 - (b) Article 8(4) and (5) of the Framework Directive; and
 - (c) Article 3 of the PPE Directive.
- 88 I consider these in turn.

(a) *The general obligations in Article 5(1) and 6(1) of the Framework Directive*

Submissions for the Defendants and Interested Party

89 Mr Glyn submits that the general obligations in Articles 5(1) and 6(1) of the Framework Directive are implemented as regards limb (b) workers by a combination of provisions conferring protections on a wider category of individuals than employees.

90 Section 2 of the HSWA 1974 on its face imposes a duty on employers to protect employees, but Mr Glyn points out that in many cases, to comply with this duty, it will often be necessary to take steps to protect others, including limb (b) workers. He relies on *R v Swan Hunter Shipbuilders Ltd* [1981] ICR 831, in which the Court of Appeal dismissed an appeal by an employer against its conviction for failing to warn a subcontractor's employees of the risk of a fire.

91 Section 3 of the 1974 Act provides as follows:

“(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

(2) It shall be the duty of every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety.”

92 Mr Glyn submits that the effect of s. 3 is to extend the duty imposed by s. 2(1) to those who are not employees. The textual distinctions between the duties imposed by ss. 2 and 3 do not reflect a difference in the substance or scope of the duties (at least so far as concerns health and safety: welfare, which is referred to in s. 2, but not s. 3, is in any event not covered by the Directives). In each case, if there is a risk to health and safety, the employer is under a duty to ensure, so far as is reasonably practicable, that the employee or other person (necessarily including a worker) is not exposed to that risk. Mr Glyn relies on *R v Associated Octel Co. Ltd* [1996] 1 WLR 1543, *R v Tangerine Confectionery Ltd* [2011] EWCA Crim 2015 and *R v Charget* [2009] ICR 263. Duties under ss. 2 and 3 will also be owed by third party businesses, for example for a work visit to the premises of such a business.

93 Section 4 of the 1974 Act provides as follows:

“(1) This section has effect for imposing on persons duties in relation to those who—

(a) are not their employees; but

(b) use non-domestic premises made available to them as a place of work or as a place where they may use plant or substances provided for

their use there, and applies to premises so made available and other non-domestic premises used in connection with them.

(2) It shall be the duty of each person who has, to any extent, control of premises to which this section applies or of the means of access thereto or egress therefrom or of any plant or substance in such premises to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises, all means of access thereto or egress therefrom available for use by persons using the premises, and any plant or substance in the premises or, as the case may be, provided for use there, is or are safe and without risks to health.”

94 This, Mr Glyn points out, imposes obligations on a broad range of persons, including those who are not employers, and protects a broad range of workers and others, including those who are not employees.

95 Next, there are the more specific obligations imposed by the MHSW Regulations. Regulation 3 provides as follows:

“(1) Every employer shall make a suitable and sufficient assessment of—

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking, for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

(2) Every relevant self-employed person shall make a suitable and sufficient assessment of—

(a) the risks to his own health and safety to which he is exposed whilst he is at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking, for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

...

(3A) in this regulation ‘relevant self-employed person’ means a self-employed person who conducts an undertaking of a prescribed description for the purposes of section 3(2) of the Health and Safety at Work etc. Act 1974.”

- 96 Mr Glyn submits that, by reg. 3(1)(b) and 3(2)(b), the requirement to assess risks includes risks to workers (among others). He relies also on regs 11 and 12(3): see [47] above.
- 97 Finally, Mr Glyn relies on the provisions of the Workplace Regulations, the Work Equipment Regulations (see [49]-[50] above) and the Carriage Regulations (see [51] above), which protect anyone handling dangerous goods. All of these protect a wider category of persons than employees.

Submissions for the Claimant

- 98 Ms Omambala accepts that s. 2 of the HSWA 1974 may confer protection on workers when working alongside employees in a shared workspace. This protection, however, is incidental or “parasitic” on a duty which, on its face, is owed to employees only. It does not assist many of the Claimant’s members, who more often than not work on their own or with other limb (b) workers, rather than alongside employees.
- 99 Ms Omambala relies on *Tangerine Confectionery*, at [8], for the proposition that s. 3 is narrower than s. 2 in that it does not include any duty to ensure “welfare”. In this connection, she points out that welfare is a long-standing aspect of UK occupational health and safety law. For example, the Factories Act 1961 contained a Part entitled “Welfare (General Provisions)”, which made provision for matters such as the supply of drinking water (s. 57), washing facilities (s. 58), accommodation for clothing (s. 59) and sitting facilities (s. 60). The HSE has produced a guide, *Workplace health, safety and welfare: A short guide for managers* INDG 244 (rev 2) (“the HSE Guide for Managers”), which contains separate sections on health, safety and welfare. The latter (at pp. 6-7) covers topics such as sanitary conveniences and washing facilities, drinking water, accommodation for clothing and facilities for changing and facilities for rest and to eat meals.
- 100 The lack of any obligation to ensure the welfare of limb (b) workers is not cured, Ms Omambala submits, by the Workplace Regulations, because they apply only to workplaces, which are defined in reg. 2(1) as applying to premises controlled by the employer.
- 101 As to s. 4 of the 1974 Act, this too applies to those who have, to any extent, control over premises. It would not, for example, impose duties with respect to the private vehicles some of the Claimant’s members use.
- 102 Regulation 3(1) of the MHSW Regulations applies only where there is at least one person who is an employee within the undertaking. Ms Omambala says that many of the Claimant’s members work for undertakings which have no employees.
- 103 Ms Omambala accepts that the obligation to provide information in reg. 12(3) of the MHSW Regulations applies to those who are not employees, including limb (b) workers. She submits, however, that this does not provide protection equivalent to that provided to employees under s. 2 of the HSWA 1974, because the latter duty goes well beyond the provision of instructions and information.
- 104 In the same vein, Ms Omambala submits that the Work Equipment Regulations do not provide protection equivalent to s. 2 of the HSWA 1974, because the health and safety

risks faced by the Claimant's members are not addressed by "work equipment". This is defined in reg. 2(1) of those Regulations as "any machinery, appliance, apparatus, or installation for use at work (whether exclusively or not)".

Discussion

- 105 Article 5(1) of the Framework Directive imposes an obligation on the employer "to ensure safety and health of workers in every aspect related to the work". Article 6(1) requires the employer to "take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organisation and means". These are broadly drawn, general obligations. As regards employees, they are implemented primarily by a statutory provision, s. 2(1) of the HSWA 1974, which is similarly broadly drawn and general. (The ECJ held in Case C-127/05 *Commission v UK* that the insertion of the words "so far as reasonably practicable" was permissible.) That provision is supported by the risk assessment and co-operation obligations in regs 3, 11 and 12(3) of the MHSW Regulations and by a series of more specific obligations (regs 6, 9, 17 and 21 of the Workplace Regulations, regs 4-6 of the Work Equipment Regulations and the Carriage Regulations), which apply in certain situations only.
- 106 It has not been suggested that these provisions of secondary legislation would have been sufficient on their own, without the general duty in s. 2(1) of the HSWA 1974, to implement the UK's obligations as regards employees. Any such suggestion would have been misconceived. The MHSW Regulations impose duties to assess risks, co-operate with other employers and provide information and instructions; they do not impose general duties of the kind required by Articles 5(1) and 6(1). The Workplace Regulations apply to workplaces in "premises" other than domestic premises which are made available to any person as a place of work: reg. 2. "Premises" are not defined in the Regulations and so must have the same broad meaning as in s. 53 of the 1974 Act (including "any vehicle, vessel, aircraft or hovercraft"), subject to the exceptions in reg. 3. But this does not help those who (like many of the Claimant's members) work in their own vehicles. The Work Equipment Regulations impose duties only in relation to "work equipment" as defined. The Carriage Regulations apply only to one very specific kind of activity.
- 107 If a broadly drawn and general duty like that imposed by s. 2 of the HSWA 1974 is required to implement Article 5(1) and 6(1) of the Framework Directive in relation to employees, then an equivalently broadly drawn and general provision must surely be required to implement the same provisions of the Directive in relation to limb (b) workers. Section 2 of the 1974 Act itself protects *some* limb (b) workers (those who work alongside employees), but not others. Likewise, s. 4 protects *some* limb (b) workers (those who work in premises under the control of the employer – and then only in respect of certain risks), but not others. The provisions of secondary legislation relied upon, though they confer valuable protections in cases where they apply, would not – even taken together – be sufficient to implement the general duties in Articles 5(1) and 6(1) of the Directives as regards limb (b) workers any more than they would in relation to employees.
- 108 It follows that this part of Mr Glyn's case depends on s. 3 of the HSWA 1974, which imposes obligations that can certainly be described as broad and general. The obligations

apply to “every employer” (s. 3(1)) and “every self-employed person” (s. 3(2)). If there were any doubt that one or other of these obligations applies to every person falling within the definition of “employer” in the Framework Directive, it would be resolved by applying the strong obligation to interpret domestic legislation conformably with the Directive it implements: Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135. Equally, there is no doubt that the persons to whom the duties under s. 3 are owed include, among others, everyone who is a “worker” within the meaning of the Framework Directive.

- 109 The scope of the duty under s. 3 was authoritatively stated by Hughes LJ in the *Tangerine Confectionery* case:

“7. The difference between the two sections lies in the persons to whom the obligation is owed. As is apparent, section 2 creates an obligation towards employees and section 3 creates an obligation towards non-employees. To the question ‘which non-employees?’, section 3 returns the answer: ‘those who may be affected thereby’. The section makes it clear that the word ‘thereby’, which appears twice, relates back the defendant’s undertaking. Thus the test is whether there is a non-employee who may be affected by the undertaking being carried on (or ‘conducted’). If there is, then the employer commits an offence if he does not ensure, so far as reasonably practicable, that such a person is not exposed to a risk ‘thereby’ – i.e. that the conduct of his undertaking does not expose the non-employee to risk. The non-employees who are relevant under section 3 to the obligation, and to the offence of non-compliance with it, may be in a wide variety of positions. Some may be other people working alongside the employees of the defendant (such as agency workers, or the employees of independent contractors or of collaborators in the operation). Some may be visitors to the premises operated by the defendant (such as, for example, the child visitor to the defendants’ swimming pool in *R v Upper Bay Ltd* [2010] EWCA Crim 495). Sometimes they may simply be members of the public generally (such as, for example, those who might breathe in the legionnaires’ disease bacteria in *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171).

8. The obligation in respect of employees under section 2(1) is somewhat wider than that towards non-employees under section 3(1) because the former extends to ensuring the welfare of the employee at work. But so far as safety and health are concerned the sections create similar obligations and similar offences. For the purpose of what follows we refer for convenience to ‘safety’, but the same applies, *mutatis mutandis* to ‘health’ and, in relation to section 2 and employees only, to ‘welfare’.”

- 110 This passage provides authority for what is in any event apparent from the language of ss. 2 and 3: save for the omission of “welfare” the substance of the duty in s. 3 is the same as that under s. 2. This, no doubt, is why Ms Omambala places such emphasis on the omission of “welfare”. But there is a fundamental difficulty with this argument. The Framework Directive requires employers to ensure the safety and health of workers, not their welfare. Insofar as s. 2 imposes a duty to ensure the welfare of employees, it goes beyond what the Directive requires. The words used in s. 3 (“health” and “safety”) are

the same as those used in the Directive. Applying *Marleasing*, their scope must be at least as wide.

- 111 The point can be put another way, by reference to the matters which Ms Omambala submitted fall within “welfare” (as that concept has been understood in the UK): for example, the supply of drinking water, washing facilities, accommodation for clothing and sitting facilities. Either these matters fall within the purview of “safety” and “health” (as those terms are used in the Framework Directive) or they do not. If they do, they must also fall within s. 3 of the HSWA 1974. If not, their omission from the scope of s. 3 cannot be a breach of the UK’s obligations under the Directive.
- 112 It may be noted in passing that all the matters listed in the HSE’s Guide for Managers as falling under the “welfare” heading (sanitary conveniences and washing facilities, drinking water, accommodation for clothing and facilities for changing, facilities for rest and eating meals) are addressed in the Workplace Regulations: see regs 20-25. Those regulations impose duties in respect of limb (b) workers as well as employees.
- 113 For these reasons, the general obligations in Articles 5(1) and 6(1) of the Framework Directive are, in my judgment, properly implemented as regards limb (b) workers by s. 3 of the HSWA 1974, taken together with the other provisions relied upon by Mr Glyn.

Article 8(4) and (5) of the Framework Directive

Submissions for the Defendants and Interested Party

- 114 Mr Glyn says that Article 8(4) and (5) of the Framework Directive are implemented in UK law by ss. 44(1)(d)-(e) and 100 of the ERA 1996 (in relation to employees) and by s. 47B of the ERA 1996 (in relation to limb (b) workers), read with reg. 8(1) and (2) of the MHSW Regulations (which apply in relation to both employees and limb (b) workers).
- 115 Section 44 of the ERA 1996 is headed “Health and safety cases”. Section 44(1) confers on employees the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on specified grounds. Two of these are:
- “(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
- (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.”
- 116 Section 100 (also headed “Health and safety cases”) provides that an employee is to be regarded as unfairly dismissed if either of these are the reason or principal reason for dismissal.

117 Section 47B is headed “Protected disclosure”. Unlike ss. 44 and 100, it confers a right not only on employees, but also on limb (b) workers. Section 47B(1) provides that a worker has the right “not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure”. A “protected disclosure” is a “qualifying disclosure” made by a worker in accordance with ss. 43C-43H: s. 43A. A “qualifying disclosure” is any disclosure of information which, in the reasonable belief of the worker making the disclosure, made in the public interest and tends to show one or more specified things: s. 43B(1). These include:

“(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

...

(d) that the health or safety of any individual has been, is being or is likely to be endangered”.

118 Section 103A (also headed “Protected disclosure”) provides that an employee is to be regarded as unfairly dismissed if the reason or a principal reason for his dismissal is his having made a protected disclosure.

119 Reg 8(1) and (2) of the MHSW Regulations apply in relation to limb (b) workers just as they apply in relation to employees. They provide as follows:

“(1) Every employer shall—

(a) establish and where necessary give effect to appropriate procedures to be followed in the event of serious and imminent danger to persons at work in his undertaking;

(b) nominate a sufficient number of competent persons to implement those procedures in so far as they relate to the evacuation from premises of persons at work in his undertaking; and

(c) ensure that none of his employees has access to any area occupied by him to which it is necessary to restrict access on grounds of health and safety unless the employee concerned has received adequate health and safety instruction.

(2) Without prejudice to the generality of paragraph (1)(a), the procedures referred to in that sub-paragraph shall—

(a) so far as is practicable, require any persons at work who are exposed to serious and imminent danger to be informed of the nature of the hazard and of the steps taken or to be taken to protect them from it;

(b) enable the persons concerned (if necessary by taking appropriate steps in the absence of guidance or instruction and in the light of their knowledge and the technical means at their disposal) to stop work and immediately proceed to a place of safety in the event of their being exposed to serious, imminent and unavoidable danger; and

(c) save in exceptional cases for reasons duly substantiated (which cases and reasons shall be specified in those procedures), require the persons concerned to be prevented from resuming work in any situation where there is still a serious and imminent danger.”

- 120 Mr Glyn submits that, if an employer failed to establish and give effect to a procedure to enable a worker to stop work and immediately proceed to a place of safety in the event of being exposed to serious, imminent and unavoidable danger, the undertaking would be in breach of duty and would have committed a criminal offence. If, in such circumstances, a worker disclosed to the employer information which tended to show endangerment of health and safety, that worker would be protected against being subjected to a detriment as a result of that disclosure. Thus, Mr Glyn submits that, taken together, reg. 8(1) and (2) of the MHSW Regulations and s. 47B of the ERA 1996 properly implement Articles 8(4) and (5) of the Framework Directive in relation to limb (b) workers. The reason why there is no analogue of the protection in s. 100 of the ERA 1996 for unfair dismissal on protected grounds is because, the scheme of UK employment law provides no protection at all from unfair dismissal to limb (b) workers.

Submissions for the Claimant

- 121 Ms Omambala submits that the effect of Article 8(4) and (5) of the Framework Directive is that workers who take steps to protect themselves in the face of health and safety risks must be protected from detrimental action for having taken such steps.
- 122 Regulation 8 of the MHSW Regulations contains nothing to protect a worker from such detrimental action. The whistleblowing provisions in s. 47B of the ERA 1996 are no substitute for the protection afforded to employees under ss. 44 and 100 because they require the worker to have made a protected disclosure. There is no such requirement under ss. 44 and 100.

Discussion

- 123 Articles 8(4) and (5) impose two separate requirements. The first, logically, is the requirement in the first paragraph of Article 8(5) that the employer ensures that all workers are able, in the event of serious and imminent danger to their own safety and/or that of other persons, and where the immediate superior responsible cannot be contacted, to take the appropriate steps in the light of their knowledge of the technical means at their disposal, to avoid the consequences of such danger. That requirement is properly transposed into domestic law by reg. 8 of the MHSW Regulations, which applies both in relation to employees and in relation to limb (b) workers.
- 124 The second requirement, in Article 8(4) and the second paragraph of Article 8(5), may be summarised as a requirement that workers who take the appropriate steps in response to serious and imminent danger are not to be disadvantaged for doing so, unless they act

carelessly or negligently. This requirement is properly transposed as regards employees by ss. 44 and 100 of the ERA 1996. There is no analogue of s. 44 for limb (b) workers. On the face of it, that suggests a gap in the protection which the Framework Directive requires.

- 125 Mr Glyn submits that this gap is theoretical rather than real, because a worker who leaves his or her workstation or takes appropriate steps in response to a serious and imminent danger to his or her safety is, in practical terms, likely to have made a protected disclosure before he or she suffers a disadvantage, and would therefore be protected as a whistleblower by s. 47B of the ERA 1996.
- 126 I do not accept this argument. A worker who takes the steps envisaged by Article 8(4) and (5) may or may not make a protected disclosure. It is perfectly possible to imagine a case where such a worker makes no disclosure at all. The Framework Directive nonetheless requires that she be protected from disadvantage for having taken the steps required to protect herself or others. Sections 44 and 100 of the ERA 1996 provide that protection, but only if the worker is an employee. Section 47B, which applies to limb (b) workers as well, is concerned with something else: disadvantages visited on workers because of what they have said, not because of what they have done. It does not provide protection equivalent to s. 44. In this respect, the UK has failed properly to implement the Framework Directive as respects limb (b) workers.
- 127 I have not overlooked the words at the end of Article 8(4) of the Framework Directive: “in accordance with national laws and/or practices”. In my judgment, these words mean that the mode or mechanism by which Member States are to confer the protection required on workers may vary according to national laws and/or practices; but the existence of such protection for all whom the Framework Directive regards as “workers” is a requirement that applies to every Member State. It would be perfectly possible to confer the necessary protection on limb (b) workers by extending the protections conferred on employees by s. 44 to cover them without undermining the structure of UK employment law – just as the ambit of the whistleblowing provisions has been extended to limb (b) workers by s. 47B.
- 128 The absence of protection for limb (b) workers against unfair dismissal is, by contrast, a structural feature of UK employment law. Nothing in Article 8(4) or (5) requires Member States to confer protection from unfair dismissal on persons who, under national law, enjoy no such protection.

Article 3 of the PPE Directive

Submissions for the Defendants and Interested Party

- 129 Article 3 of the PPE Directive requires PPE to be used in certain circumstances: when risks cannot be avoided or sufficiently limited by technical means of collective protection open measures, methods or procedures of work organisation. Mr Glyn emphasises that the provision of PPE is therefore a measure of last resort, to be used only when the risks cannot be avoided by other measures. He makes the point that in many of the factual scenarios identified by Ms Omambala, PPE would not be regarded as necessary or appropriate.

- 130 Mr Glyn submits that Article 3 of the PPE Directive is implemented as regards employers by s. 2(1) of the HSWA 1974, taken together with reg. 4(1) of the PPE Regulations and, in certain circumstances, by the COSHH Regulations. He notes that the latter would apply only “if a person was working with SARS-CoV-2 as a biological agent in a laboratory setting”.
- 131 Mr Glyn accepts that reg. 4(1) of the PPE Regulations imposes no duties in respect of workers who are not employees while at work. He submits, however, that the obligations in Article 3(1) of the PPE Directive are given effect in the UK as respects limb (b) workers by s. 2(1) and 3(1) of the HSWA 1974 and, in those cases where it applies, by reg. 3(1) of the COSHH Regulations.

Submissions for the Claimant

- 132 Ms Omambala accepts that PPE may indeed be a measure of last resort, but submits that, in many contexts relevant to the Claimant’s members, there is no other way of reducing the transmission of COVID-19. The driver of a private hire vehicle, for example, may not be able to ensure that she does not touch passenger doors and remains in the driver’s seat at all times. In those circumstances, she submits that PPE may well be required.
- 133 Ms Omambala notes that reg. 4(1) of the PPE Regulations apply only to “employees”, not limb (b) workers. She submits that the general obligations in ss. 2(1) and 3(1) of the HSWA 1974 are not sufficient to implement the specific requirements of the PPE Directive. She relies on the Defendants’ and Interested Party’s concession that the COSHH Regulations apply only in very limited circumstances, a concession which she contends is consistent with the HSE’s Approved Code of Practice accompanying those Regulations. This says that the COSHH regime “applies to incidental exposure to, and deliberate work with, biological agents”, but “does not cover a situation where, for example, one employee catches a respiratory infection from another”.

Discussion

- 134 It is important at this stage to re-emphasise, as noted at [8] above, that it is no part of the court’s function in resolving this claim to decide whether couriers, taxi or private hire drivers or others should be provided with PPE to protect them against the risk of contracting COVID-19. Decisions about whether PPE is required in particular situations are likely to be intensely fact-specific. If and when they have to be determined by a court in the context of an individual complaint, expert evidence is likely to be required. This claim does not raise any individual complaint. It involves legal issues at a much higher level of generality, which are not specific to the particular risks to which the Claimant’s members are exposed by the current pandemic.
- 135 In assessing the arguments on this part of the claim, it is important to recall the structure of the two Directives in issue. Article 16(1) of the Framework Directive required the Council, acting on a proposal from the Commission, to adopt individual Directives in certain listed areas, including PPE. The PPE Directive contains, in relation to PPE, requirements more specific than those in the Framework Directive. By its Article 10, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the PPE Directive by 31 December 1992.

- 136 This structure is a familiar feature of EU legislation: a framework directive imposes general requirements but it also authorises the legislator to adopt specific directives in areas where it is considered that they are necessary. The adoption of this structure generally reflects the legislator's view that the general requirement, taken on its own, would leave too much discretion to the national authorities tasked with enforcing it; and that consistency of approach within Member States and across the EU demands that the requirement be fleshed out with greater particularity. The enactment of more specific legislation also helps to provide legal certainty and thus to ensure that those subject to the requirements know what they must do.
- 137 The PPE Directive reflects the legislator's view that the general obligations in the Framework Directive would not be sufficient to achieve the degree of harmonisation thought desirable. Article 10 of that Directive would have been unnecessary if Member States could simply rely on the legislation giving effect to the Framework Directive. The UK recognised the need to enact specific domestic legislation, the PPE Regulations, to give effect to the specific obligations imposed on it by the PPE Directive. That legislation properly implements the Directive's obligations as regards employees, but leaves, in principle, a gap in protection as regards limb (b) workers.
- 138 It may be, as Mr Glyn suggests, that in some or even most cases, a failure to provide PPE to limb (b) workers would give rise to a breach of s. 3 of the HSWA 1974, which could be the subject of criminal proceedings. But given the structure of the EU legislation, and the express obligation to enact implementing measures giving effect to the more specific requirements of the PPE Directive, the general obligations imposed by s. 3 are in my judgment insufficient to discharge the UK's obligations in this regard.
- 139 In certain very specific cases, the gap in protection may be filled by other specific domestic legislation, such as regs 3 and 7 of the COSHH Regulations. But, as Mr Glyn accepts, those Regulations only apply in very narrow circumstances. In other cases, domestic legislation imposes no specific duty to provide PPE to limb (b) workers in cases where it is required.
- 140 It follows, and I conclude, that the UK has failed properly to implement Article 3 of the PPE Directive as regards limb (b) workers.

Conclusion

- 141 For these reasons, this claim succeeds in part. The Claimant has established that, in the respects detailed in this judgment, the UK has failed properly to implement Article 8(4) and (5) of the Framework Directive and Article 3 of the PPE Directive with respect to limb (b) workers.

Relief and ancillary matters

- 142 A draft of the preceding parts of this judgment was circulated to the parties in advance of the date set for handing down. The parties made written submissions on three ancillary issues, which I can therefore deal with in this final version of the judgment.

- 143 The first is a very narrow issue concerning the form of declaratory relief. All parties agree that a declaration is in principle appropriate. Ms Omambala’s version (with minor amendments which do not affect the substance) is as follows:

“The UK Government has failed properly to implement in UK law:

- (a) Article 8(4) and the second paragraph of Article 8(5) of Council Directive 89/391/EC on the introduction of measures to encourage improvements in the health and safety of workers at work (“the Framework Directive”); and
- (b) Article 3 of Council Directive 89/656/EC on the introduction of minimum health and safety requirements for use by workers of personal protective equipment at the workplace (“the PPE Directive”)

by reason that in UK law those obligations have not been extended to workers as defined in section 230(3)(b) of the Employment Rights Act 1996, whereas the definition of “worker” in Article 3 of the Framework Directive (which also applies to the PPE Directive) includes such workers.”

- 144 Mr Glyn accepts that a declaration in (substantially) those terms reflects the conclusions I have reached in the judgment, but submits that the word “includes” should be replaced by “applies to”, since the Claimant’s case as to non-implementation of the Directives was advanced only “as regards” or “in respect of” limb (b) workers.

- 145 It is important that the declaration should reflect as precisely as possible the conclusions reached in the judgment. The Claimant’s argument was, as Mr Glyn says, that the UK has failed to implement the Directive as regards limb (b) workers. I have accepted that argument in two respects. I have not considered any alleged failure to implement the Directives as regards any category other than limb (b) workers. Nonetheless, I consider that the word “includes” better reflects my conclusions, because (on any view) “worker” as used in the Directives applies to some people who are not limb (b) workers, viz. employees.

- 146 The second ancillary matter concerns the timetable for any application for permission to appeal. Mr Glyn invites me to allow the Defendants and Interested Party until 27 November 2020 to file a written application for permission to appeal, with a response from the Claimant by 4 December 2020 and a decision on the papers thereafter. Ms Omambala seeks a shorter timetable. I recognise the Claimant’s and its members’ desire for certainty about the result of these proceedings as soon as possible. However, the Defendants and Interested Party have co-operated responsibly in agreeing (subject to the narrow issue described above) the terms of the declaration flowing from the judgment. No application has been made to suspend its operation or effect pending appeal. In those circumstances, it is appropriate to allow the time Mr Glyn seeks. The matters considered in this judgment are of potentially wide significance. Any decision about whether to seek permission to appeal is bound to require input from officials and Ministers in more than one department and from staff members of the Interested Party. It is in everyone’s interests for that decision to be properly informed. The Order will reflect this.

- 147 Finally, there is the question of costs. Ms Omambala says that the Claimant should have its costs, subject to the cap of £30,000 imposed by Choudhury J, and that this cap should not include VAT. Mr Glyn submits that the Claimant should have only 60% of the £30,000, because it was unsuccessful in its contention that the UK had failed to implement the general obligation in Articles 5(1) and 6(1) of the Framework Directive as regards limb (b) workers. Mr Glyn submits that the capped costs should include VAT.
- 148 In my judgment, the correct order in this case is that the Defendants pay the Claimant's costs, to be subject to detailed assessment if not agreed, subject to a cap of £30,000 including VAT; and that there should be an interim payment of £20,000 including VAT. My reasons are these:
- (a) There is no doubt, and indeed no dispute, that the Claimant is the "successful party". In those circumstances, the general rule is that the Claimant should have its costs: CPR r. 44.2(2)(a).
 - (b) This is not a case in which it is appropriate to make an issue-based costs order. The bulk of the argument was concerned with the meaning of "worker" as that term is used in the Directives. The Claimant succeeded on that argument. It also succeeded in showing that there was a failure to implement the Directives in two of the three respects alleged. The argument on the one point on which it lost occupied a small proportion of the time taken to argue this case. In any event, even if that argument had not been advanced, it would have been necessary to consider most or many of the materials relevant to it to understand the structure of the UK legislation by which it was said the UK had implemented the Directives. This is not, therefore, a case in which the issues can be neatly separated in such a way as to make an issue-based costs order appropriate.
 - (c) The question whether the costs cap includes VAT turns on the proper interpretation of Choudhury J's order. That does not specify one way or the other whether the cap includes VAT. However, the purpose of a cost-capping order is to provide certainty to a claimant which would otherwise be exposed to open-ended liability. In most cases, including this one, a reciprocal cap is imposed on the costs which the party making the application can recover if it wins. When making the application for the order in this case, the Claimant filed evidence in support of its application for a cap of £4,500 on the costs which it might be ordered to pay. Choudhury J understood this to be "all the Claimant says it can afford". If it had lost, the Defendants would not have been able to claim for VAT on services rendered by their own staff (see CPR 44PD, para. 2.13), but they could have claimed VAT on other aspects of costs, such as counsel's fees. I read Choudhury J's order as setting a cap on the *total* liability of the Claimant – i.e. as limiting the total costs the Claimant could be ordered to pay to £4,500 *including* VAT. The reciprocal cap should be read in the same way. It follows that the Claimant's recoverable costs are capped at £30,000 including VAT.
 - (d) I have not seen any bill or schedule of costs, but it seems very likely that the Claimant's costs (inclusive of VAT) will substantially exceed the cap imposed by Choudhury J. That makes the interim payment sought by the Claimant appropriate.