FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 43
P249/17

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF

LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

ANELA ANWAR

Petitioner and Reclaimer

against

THE ADVOCATE GENERAL
(representing the Secretary of State for Business, Energy and Industrial Strategy)

Respondent

and

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Interveners

Petitioner and Reclaimer: O'Neill QC, Blair; Drummond Miller LLP (for McClure Collins, Glasgow)
Respondent: Crawford QC, Komorowski; Office of the Advocate General
Interveners: C O'Neill (sol adv); Solicitor to the Commission

2 August 2019

Introduction

[1] This reclaiming motion raises four questions. First, is there a power in either the

Court of Session or, more important, the Sheriff Court to grant a warrant for inhibition and arrestment on the dependence of an application to an Employment Tribunal for damages resulting from discrimination and harassment? Secondly, if there is, is the procedure involved "excessively difficult" such that it does not provide the applicant with an effective remedy as required by EU law? Thirdly, is the correct comparator for EU purposes those who make similar claims in the court system for damages arising out of the provision of services or those making other claims before an Employment Tribunal? Fourthly, is this a case in which the petitioner's identity should be anonymised in the opinion issued by the court?

1. The availability of an inhibition and arrestment on the dependence of a Tribunal application

[2] In the 45 years between the enactment of the Industrial Relations Act 1971, which created the Industrial (now Employment) Tribunals, and the submissions made by the respondent to the Lord Ordinary, it has not been considered competent to apply to a court for a warrant for diligence on the dependence of an application to a tribunal. That, of course, is not determinative of the issue. It may indicate a lack of imagination within the legal profession. The more likely reason, however, is that it has long been correctly recognised by generations of skilled lawyers not to be competent, except in cases in which the court has a concurrent jurisdiction in the claim made to the tribunal. It is of note that the wording of the relevant warrant is one on the dependence of an *action*.

[3] In relation to inhibitions, historically these were of two types. The first was inhibition "in security". This involved obtaining letters of inhibition based upon the existence of "a document of debt" in circumstances in which the debtor was *vergens ad*

inopiam or *in meditatione fugae*. A liquid document of debt was essential (Stewart: *Diligence* 537). This form of inhibition is not relevant in this case.

[4] The second type was inhibition "on the dependence" of an action (*ibid* 527, 530). This required a summons in which a warrant was craved by the words "This summons is warrant for inhibition". Once the summons passed the signet, the warrant was validated (*ibid* 537; originally Court of Session Act 1868, s 18). Only a Court of Session summons could contain a warrant of this nature. The inhibition process was exclusively a Court of Session one, albeit that letters could be obtained by presenting a Bill accompanied by a sheriff court initial writ (Stewart: *Diligence* 537).

[5] Arrestment on the dependence originally required separate letters of arrestment founding on the summons. In time the signet became the warrant (Debtors Act 1838, ss 17 and 18; Stewart: *Diligence* 17). In the sheriff court, a warrant for arrestment could be issued along with that for citation on presentation of the initial writ (Sheriff Court Act 1876, s 6; Stewart: *Diligence* 18). In either court, there had to be a summons or a writ with a monetary conclusion (1838 Act, s 16).

[6] There is no authority for the proposition that warrants for inhibition and/or arrestment on the dependence can be granted on the strength of any process, other than one in dependence before a court. The sheriff had no power to warrant inhibition. Where an action, in respect of the relevant subject matter can, and has been, raised in the Court of Session or the Sheriff Court, there is no difficulty with those courts granting a competent warrant. Thus, even if arbitration proceedings are ongoing, a concurrent action will be competent, albeit that it may require to be sisted pending the outcome of arbitration proceedings (*Motordrift* v *Trachem Co* 1982 SLT 127, Lord Ross at 128 citing *Hamlyn & Co* v *Talisker Distillery* (1894) 21 R (HL) 21, Lord Watson at 25). Equally, provided that there is

jurisdiction in Scotland, an action which mirrors one in another jurisdiction may be raised and warrants granted, although the action might then be sisted (*Hawkins* v *Wedderburn* (1842) 4D 924, Lord Mackenzie and others at 939-940; *Fordyce* v *Bridges* (1842) 4D 1334, LJC (Hope) at 1340).

[7] The law relating to diligence on the dependence was codified in part 1A of the Debtors (Scotland) Act 1987, which was inserted by the Bankruptcy and Diligence etc. (Scotland) Act 2007, following *Karl Construction* v *Palisade Properties* 2002 SC 270. Section 15A of the 1987 Act is as follows:

> "(1) ... the Court of Session or the sheriff may grant warrant for diligence by –
>
> (a) arrestment; or
>
> (b) inhibition,
>
> on the dependence of an action.
>
> (2) Warrant for –
>
> (a) arrestment on the dependence of an action is competent only where the action contains a conclusion for payment of a sum ...
>
> (b) inhibition on the dependence is competent only where the action contains –
>
> (i) such a conclusion ...".

The word "action" is defined as including a summary cause or application and a simple procedure case (s 15A(3)). There is provision to allow diligence on the dependence of a petition in the Court of Session where the prayer includes payment of a sum (s 15B). "Court" is defined as the court before which the action is depending (s 15C). All of this reflects the common law that diligence on the dependence can be granted by a court only in respect of an action before that court which claims payment. It follows that it cannot be granted on the basis of the existence of an application which is pending before a different court or any tribunal which is not a court. It is only available if the action is competently before the court. Were matters otherwise, there would be the potential for a conflict of

decision on, for example, whether a *prima facie* case in a given ET claim existed (cf 1987 Act, s 15F(3)(a) and Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 1237) Sch 1 rule 37(1)(a) (striking out)).

[8] Section 113 of the Equality Act 2010 provides that proceedings relating to a contravention of the Act must be brought in accordance with Part 9. This gives jurisdiction over some matters to the sheriff. In matters concerning discrimination or harassment in the context of "work" (Part 5), jurisdiction is given only to an Employment Tribunal. The petitioner's claims related to such matters. Neither the Court of Session nor the sheriff had jurisdiction to entertain such claims. An action raised in either court would be fundamentally incompetent. There is thus no power to grant a warrant for diligence on the dependence of such an Employment Tribunal matter. The Lord Ordinary was in error in determining otherwise. In so saying, if a respondent in a tribunal claim were to be *vergens ad inopiam* or *in meditatione fugae,* the courts could entertain an application to interdict the respondent from disposing of certain assets (cf in England *Amicus* v *Dynamex Friction* [2005] IRLR 724), but that is another matter.

2. Is the procedure involved "excessively difficult" such that it does not provide a claimant to a tribunal with an "effective remedy"?

[9] In *R (UNISON)* v *Lord Chancellor* [2017] ICR 1037, Lord Reed said:

> "106 EU law has long recognised the principle of effectiveness: that is to say, that the procedural requirements for domestic actions must not be 'liable to render practically impossible or excessively difficult' the exercise of rights conferred by EU law: see, for example Case C-268/06 *Impact* v *Minister for Agriculture and Food* [2009] All ER (EC) 306, para 46."

Lord Reed acknowledged the principle that a person whose rights require protection must have an effective remedy before a tribunal (*ibid* paras 106-107, citing the Charter of Fundamental Rights of the European Union, Art 47). Although this case is focused on EU law, domestic law enshrines the same idea in its requirement of access to justice. That common law principle would be breached if, despite a court or tribunal ruling, the system was such that securing a remedy would be "practically impossible or excessively difficult". In short, there is no need to invoke EU law in this area. The remedies available in the courts and tribunal systems must be effective.

[10] It is understandable that first tier tribunals do not generally have power to grant protective orders, such as diligence on the dependence. Many involve claims against the government or non-pecuniary applications. In the early days of the Industrial Tribunals, the cap on awards was such as would render most arrestments or inhibitions nimious. The limits were at such a level as would make it unlikely that an employer of even mild substance would be inclined to dissipate his assets with a view to avoiding payment. However, matters have moved on. Claims under the Equality Act 2010 can result, as they have in the petitioner's case, in substantial awards (here £75,000). In such a situation, the temptation of small businesses or individual employers to conceal or transfer assets is much greater. What has, in effect, happened, with the development of the Employment Tribunals in place of the ordinary courts as the forum for what are claims based on the employment contract, is that the imbalance between the economic powers of the employer and employee (*infra*) have been widened by the removal of the employees former ability to seek an effective form of diligence on the dependence from the courts.

[11] The figures in relation to the recovery of Employment Tribunal awards are concerning. The Department for Business, Innovation & Skills 2013 Study "*Payment of*

Tribunal Awards" sets out (chapter 6) the method of post award enforcement. In Scotland this involves obtaining a certificate of the award from the tribunal which can then be enforced, much like a court decree, by engaging sheriff officers. This method was used in Scotland by only 26% of those who had not been paid (*ibid* p 39). Whereas the overall use of enforcement increased the payment rate from 53% to 65% in England and Wales, the comparative figures for Scotland (*ibid* p 42) were 48% to 54%. Some 47% of those using sheriff officers obtained some payment. The reasons for non-payment were most commonly that the employing company no longer exists or the employer just refuses to pay.

[12] No comparative figures for court actions were produced. There will inevitably be cases in both the courts and the tribunal systems, where recovery proves impossible for reasons unconnected with any nefarious action on the part of the employer. Nevertheless, the information in the 2013 Study points to the need for the existence of such protective measures as are available in a court process when the circumstances merit their use. These would be where the claimant has a *prima facie* case and there is a real and substantial risk that enforcement would be defeated or prejudiced by reason of the insolvency of the employer (where a respondent is verging on insolvency) or where there is a likelihood of the employer removing, disposing of, burdening, concealing or otherwise dealing with all or some of his assets (see eg the 1987 Act, s 15E). There are reasons which would militate against tribunals having this power; notably the prospect of increasing tension between the parties in a system which was intended as an informal mechanism to resolve disputes "In Place of Strife" (1969; Cmnd 3888). However, once all considerations are taken into account, there appears to be no insurmountable obstacle either preventing the ET from having the power to grant warrants for diligence on the dependence or alternatively transferring potentially high value cases to the sheriff court.

[13] The question posed in this section is easily answered if it is accepted that there is no mechanism for securing effective protective measures either in the ET or the court pending the resolution of the claim. In a significant number of cases, the procedure simply does not exist to provide a claimant with an effective remedy; that is one that will secure the requisite damages. However, even if it were possible to seek such measures in the sheriff court, and this could, as noted above, be done by seeking an interdict prohibiting the defender from disposing or attempting to dispose of his assets, such a system is by its nature "excessively difficult" for many ET claimants.

[14] On the assumption that any claimant would, under the current regime, require to raise a court action in order to obtain the appropriate protection, whether by way of *interim* interdict or a warrant for diligence, a number of factors are in play. As was recognised in *R (UNISON)* v *Lord Chancellor* (*supra*, Lord Reed):

> "6. Relationships between employers and employees are generally characterised by an imbalance of economic power. ...
>
> ...
>
> 8. ETs are intended to provide a forum for the enforcement of employment rights by employees and workers, including the low paid, those who have recently lost their jobs, and those who are vulnerable to long term unemployment. ...".

A typical claimant in an ET claim will not normally have the services of a law agent. Legal aid for ET cases is very limited. He or she may be a party litigant or be represented by a non-lawyer. If the claimant requires to apply to a court for protection, he or she will need to move from the relative informality, and (now) relatively fee free atmosphere, of an ET to the contrasting formality of the court. He or she will almost certainly require to instruct a law agent to advise on protective measures, to draft the appropriate initial writ and to frame and appear at the motion for a warrant or other measure. Court fees of in excess of £175 will be due. Once in the court system, there is a potential for the claimant to be liable not only for

his or her own legal expenses, but also those of the employer should the motion be opposed and lost, at first instance or on appeal, or in the event of a successful motion for recall. All of this moves the level of cost, accessibility and convenience into another dimension in comparison with what could be just a form filling exercise before the ET. For that reason the exercise in securing an effective remedy is practically impossible or excessively difficult for a large number of claimants.

3. Is the correct comparator for EU purposes those who make similar claims in the court system for damages arising from the provision of services or those making other claims before an Employment Tribunal?

[15] For reasons given by Lord Drummond Young, the correct comparator is with other claims before an ET.

4. Is this a case in which the petitioner's identity should be anonymised in the opinion issued by the court?

[16] *MH* v *Mental Health Tribunal for Scotland* 2019 SLT 411 emphasised the importance of the principle of open justice in facilitating public confidence in the civil justice system. Unless the circumstances are life threatening or might result in the party being subjected to inhuman or degrading treatment, it is for the court to balance the competing rights of respect for privacy and open justice/transparency. The presumption is for open justice. It is not enough for anonymization to be convenient or even desirable. It must be "a matter of necessity in order to avoid the subordination of the ends of justice to the means" (*ibid*, LP (Carloway) at para [27] citing *A* v *Secretary of State for the Home Department* 2014 SC (UKSC) 151, Lord Reed at para 30).

[17] The petitioner's argument in favour of anonymity states that there is no clear public interest in the findings of the ET and the underlying evidential material being linked to the petitioner as a named individual. The petitioner is concerned that she may be the subject of further harassment by the respondents in the ET process, their agents or certain elements in the Muslim community, should she be named as petitioner. Such conduct may affect her mental health. An affidavit from the petitioner explaining her position was produced and past incidents referred to.

[18] The nature and outcome of the ET proceedings are already known to the respondents in the ET process and, no doubt, those connected to them. The present petition and the opinion are concerned with matters of law. There is no information relative to any harassment or discriminatory action taken against the petitioner. There is no basis for granting anonymity or a contempt of court order in these circumstances. The interlocutor of the Lord Ordinary dated 29 March 2017 should accordingly be recalled, in that regard.

Conclusion

[19] The reclaiming motion should be allowed and the Lord Ordinary's interlocutor of 1 June 2018 recalled. Thereafter, the petitioner's first and second pleas-in-law ought to be repelled and her third and fourth pleas sustained. The respondent's third and fourth pleas ought to be repelled. The matter should be remitted to the Lord Ordinary to deal with the petitioner's fifth and sixth pleas and the respondent's fifth to seventh pleas.

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2 August 2019

Introduction

[20] In proceedings before the employment tribunal in Glasgow the petitioner obtained a substantial award in her favour against her former employer and her former line manager. She has been unable so far to implement that award. She alleges that while the proceedings

in the employment tribunal were taking place the respondents in those proceedings had adequate funds to meet such an award, but that those funds are no longer available and that in consequence she is unlikely to be able to enforce her award to more than a minimal extent. The award was based on Community law, in particular on the breach of EU directives governing sexual, racial and religious discrimination at work. Under principles of EU law, member states are obliged to provide effective remedies for the implementation of Community-based rights (the principle of effectiveness), and in doing so must provide remedies that are equivalent to those available for comparable claims that do not involve Community law (the principle of equivalence). The petitioner has raised proceedings for judicial review against the respondent, the Secretary of State for Business, Energy and Industrial Strategy, on the ground that Scots law does not provide an effective remedy to secure the implementation of an award made by an employment tribunal under provisions of EU law. In failing to provide such a remedy, it is alleged that the respondent has failed to give effect to the principles of effectiveness and equivalence, and is thus in breach of EU law.

[21] Specifically, the petitioner claims that in order to provide an effective remedy a legal system must make available provisional and protective measures as litigation proceeds, in order to provide interim security against the possible insolvency of the defender or respondent. In Scots law the standard provisional and protective measures take the form of diligence on the dependence of an action, by way of inhibition and arrestment. The petitioner advances two main arguments relating to the availability of diligence on the dependence in employment tribunal proceedings. First, it is said that diligence on the dependence is not available in respect of employment tribunal proceedings, and that there is accordingly no effective remedy. Secondly, it is said that even if diligence on the dependence is available in respect of such proceedings, it is not available through an application to the

tribunal itself, but instead requires separate proceedings to be raised in, normally, the sheriff court, in order that diligence can be done on the dependence of those proceedings. The need to raise two sets of proceedings, it is said, is an obstacle to the effective enforcement of tribunal awards, and is thus a breach of the EU law principle of effectiveness. A third argument is presented based on the EU law principle of equivalence. This is essentially that in proceedings for discrimination on the grounds of sex, race or religion that are governed by domestic rather than EU law (for example claims relating to discrimination in the supply of goods or services), the proceedings are raised in a court and diligence on the dependence is available in the ordinary way. On that basis, it is said, there is a breach of the equivalence principle as a result of the different remedies available in claims based on EU law and those based on domestic law.

[22] The petition for judicial review came before the Lord Ordinary, who held that there had been no contravention of either the principle of effectiveness or the principle of equivalence. He accordingly refused the prayer of the petition. The petitioner has now reclaimed against that decision. Before considering the issues involved, I will set out the factual background to the petitioner's claim and summarize the Lord Ordinary's decision. I will then consider the merits of the arguments presented, first in relation to the availability of diligence on the dependence in respect of employment tribunal proceedings, which is a matter of domestic Scots law, secondly in relation to the principle of effectiveness in EU law, and thirdly in relation to the principle of equivalence in EU law. In each case I will set out the relevant legislation, both in the United Kingdom in relation to the availability of diligence in Scots law and in the form of European Directives and other instruments in relation to the EU law claims based on the principles of effectiveness and equivalence.

Background

[23] The petitioner raised proceedings in the employment tribunal in Glasgow against her former employer and her former line manager in which she alleged harassment on the grounds of her sex, race and religion. In August 2016 the tribunal made a series of findings in the petitioner's favour and subsequently ordered the respondents in the tribunal proceedings, namely her former employer and line manager, to make payment to her of a sum of approximately £75,000 plus interest and expenses in respect of loss and damage that she had suffered. That included psychological damage. The respondents in the tribunal proceedings were found liable to make payment on a joint and several basis.

[24] Following the issue of the judgment, but before any payment had been received, the petitioner's legal adviser obtained information to the effect that those in charge of the petitioner's former employer intended to close down the existing business and transfer its funds to another entity, so as to avoid having to make payment to the petitioner. The petitioner sought and was granted an *interim* interdict at Glasgow Sheriff Court to prevent the dissipation of funds, but by October 2016 the sum at credit of the employer's bank account had fallen to approximately £4,000. The petitioner has not, to date, received any payment in respect of her tribunal award from either her former employer or her former line manager.

[25] Before the Lord Ordinary, the petitioner argued that this situation would have been avoided if she had been able to effect arrestment on the dependence against her former employer at the time of raising her claim in the employment tribunal. She argued that the absence of any power on the part of an employment tribunal judge to grant such an application constituted a breach of the EU law principles of effectiveness and equivalence. She maintained that the respondent ought to have implemented those principles by

ensuring that a litigant before an employment tribunal in Scotland would have a right to arrest on the dependence of the tribunal claim, and she sought *inter alia* an award of compensation for the respondent's apparent failure to implement EU law. The Commission for Equality and Human Rights was represented as an intervening party.

[26] The petitioner now reclaims against the decision of the Lord Ordinary on four grounds. It is said that he: (i) erred in finding that it is possible to arrest on the dependence of a claim before the employment tribunal; (ii) *esto* such an application is possible, erred in finding that such a procedure provided an effective remedy to the petitioner; (iii) erred in his choice of comparator for the purpose of the application of the EU law principle of equal treatment or equivalence; and (iv) misdirected himself in law on the approach to be taken by the court in assessing a direct challenge to the proper implementation in national law of provisions of EU directives.

The Lord Ordinary's reasoning

[27] In relation to the principle of effectiveness, the Lord Ordinary accepted that the principle would be breached if there were no mechanism, such as diligence on the dependence, to protect an employment tribunal claimant's right to compensation from the risk of a respondent's failure to meet an award. In so holding he relied on the decision of the European Court of Justice in *R* v *Secretary of Transport, ex parte Factortame (No 2)*, [1991] 1 AC 603. The critical question for the Court was whether such a mechanism existed in Scots law whereby the claimant in the employment tribunal could obtain interim security for a possible financial award through the use of diligence on the dependence pending the outcome of the claim. If that were possible, the Court then had to determine whether that mechanism was such as to render the exercise of those rights "practically impossible or

excessively difficult"; that test was derived from the Court of Justice in *Impact* v *Minister for Agriculture and Food*, [2008] 2 CMLR 47, at paragraph 46.

[28] The Lord Ordinary noted that it had been held competent to raise an action in the Court of Session for the sole purpose of obtaining diligence on the dependence pending the outcome of proceedings in a foreign court; such an action was not to be dismissed on the ground of *lis alibi pendens*, and it was immaterial that the Scottish court had no jurisdiction to determine the merits of the action. In so holding he relied on the decisions of the Court of Session in *Hawkins* v *Wedderburn*, 1842, 4 D 924, and *Fordyce* v *Bridges*, 1842, 4 D 1334. Neither of those cases had been the subject of subsequent detailed judicial comment, and the Lord Ordinary give consideration to two further cases in Scotland, *Atkinson & Wood* v *Mackintosh*, 1905, 7 F 598, and *Motordrift A/S* v *Trachem Co Ltd*, 1982 SLT 127, and to the English case of *Amicus* v *Dynamex Friction Ltd*, (2005) IRLR 724. Although the present case was not on all fours with any of those authorities, in *Fordyce* and *Motordrift* it was envisaged that Scottish court proceedings might be used in the future as a means of ensuring enforcement of an order of another forum even where the Scottish courts had no jurisdiction in respect of the merits of the action giving rise to the order.

[29] The Lord Ordinary accepted that proceedings in an employment tribunal were different, in that by virtue of section 15 of the Employment Tribunals Act 1996 an order of the tribunal is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff. Nevertheless he did not consider that that rendered an action raised purely to obtain diligence on the dependence incompetent. He could find no rule of law to that effect. Section 15A of the Debtors (Scotland) Act 1987 was in general terms, and section 15C of that Act specifically provides that it is competent to grant diligence on the dependence of a contingent debt. There was no requirement that the contingency be

resolvable in the action in which the warrant is granted. A plea of *lis alibi pendens* would not be available in such circumstances, by reference to *Hawkins* and *Fordyce*.

[30] The Lord Ordinary further considered that, even if a rule did exist in Scotland which precluded diligence on the dependence from being sought in relation to claims in the employment tribunal, then, under reference to *Factortame*, the principle of effectiveness would require that rule to be set aside. He saw no reason to distinguish between the powers of the sheriff court and the Court of Session in this respect. The Debtors (Scotland) Act 1987 made no such distinction. The intervener, the Commission for Equality and Human Rights, had submitted that they were unaware of such an application ever having been made by an employment tribunal claimant. The Lord Ordinary considered, however, that a number of potential reasons might exist for that, and it was impossible to draw any conclusion from the absence of prior cases.

[31] On the question of whether the need to raise protective proceedings in a separate action rendered the exercise of the petitioner's EU law rights practically impossible or excessively difficult, the Lord Ordinary found that it did not. He placed reliance on the decision in *Impact* v *Minister for Agriculture and Food* (*supra*), in holding that the question was not whether there was an adequate policy justification for requiring protective proceedings in the sheriff court. That requirement did not constitute a limitation on the exercise of a community law right in the sense discussed in *R (UNISON)* v *Lord Chancellor* [2017] 3 WLR 409. There was no obligation on states to provide an ideal solution. The additional expense and inconvenience of having to raise a separate action in the sheriff court was likely to be modest and the cost of the application itself was likely to be the same regardless of the forum. The standard of practical impossibility was a high one.

[32] In relation to the argument that there had been a breach of the EU law principle of equivalence, the Lord Ordinary again found that there had been no such breach. Having determined that an application to the sheriff court for interim diligence was open to the petitioner, then it made no difference what domestic action her claim was compared with, as interim protection was available one way or another in all cases. In any event, the Lord Ordinary considered that the appropriate comparator would have been with employment law rights not derived from community law. It was appropriate to focus on the employment law context standing that it was central to the purpose of the relevant Directives in securing equal treatment. There was no difference between a community law based claim for discrimination and a domestic law based claim for unfair dismissal. There was, accordingly, no breach of the principle of equivalence.

[33] Finally the Lord Ordinary dealt with two subsidiary issues. Arguments had been presented related to the European Convention on Human Rights. On these, he found that the case law of the European Court of Human Rights took matters no further than the community law principles. The intervener had presented an argument based on Article 21 of the European Charter of Fundamental Rights, and this was also ill-founded. There was no reason why a member state should not adopt different regimes for different types of interaction where discrimination might take place, provided that the principle of non-discrimination was promoted in each regime.

The availability of diligence in Scots law

[34] The first ground of appeal for the petitioner and reclaimer is that the Lord Ordinary was in error in finding that it was possible for a claimant before an employment tribunal to arrest on the dependence of those proceedings. The Lord Ordinary's decision on this matter

was based on case law, in the form of the decisions in *Hawkins* v *Wedderburn*, *supra*, *Fordyce* v *Bridges*, *supra*, and *Motordrift A/S* v *Trachem Co Ltd*, *supra*. It was submitted for the petitioner that the jurisdiction and power of the courts to grant diligence on the dependence was now wholly circumscribed by statute, in the form of sections 15A-15N of the Debtors (Scotland) Act 1987, as amended by the Bankruptcy and Diligence etc (Scotland) Act 2007. Consequently the older case law had been superseded by what amounted to a legislative code. Under that code, it was submitted, there was no provision for raising an action in the Court of Session or sheriff court in order to do diligence in support of a claim made in another court or tribunal. It was further submitted that section 113 of the Equality Act 2010 provides that proceedings for a contravention of that Act must be brought in accordance with Part 9 of the Act, and section 120 of the same Act provides that a tribunal has jurisdiction to determine complaints relating to any contravention of Part 5 of the Act, dealing with work-based discrimination. On that basis, it was said, the jurisdiction of the courts to entertain an action for payment for the purpose of granting diligence on the dependence in support of an employment tribunal claim for work-based discrimination was excluded.

[35] I will consider each of these arguments in turn. First, however, it is necessary to set out the established law relating to the availability of diligence on the dependence in respect of proceedings that are not before the court granting diligence but before another court or tribunal.

The law prior to 2007

[36] Diligence, in the form of inhibition or arrestment, has been available on the dependence of an action containing a conclusion for payment in both the Court of Session

and sheriff court for many years, and the procedure has been used with great frequency. It is also competent, however, to raise proceedings in the Court of Session and, it would appear, the sheriff court for the purpose of obtaining diligence by way of interim security in respect of a claim that is pursued elsewhere. The earliest recorded case where this was done appears to be *Hawkins* v *Wedderburn*, *supra*. In that case a suit had been brought in Chancery in England for payment of a debt allegedly due by parties domiciled in England. Those parties had estates in Scotland, and the plaintiff in the English proceedings raised an action in the Court of Session against the same parties for payment of the same debt with a view to obtaining diligence against the defenders. This course was held competent by a majority of the whole Court. The effect of the decision was summed up by the Lord Justice-Clerk as follows (at 4 D 944-945):

> "I go distinctly on the principle, that I think a party is entitled to raise and keep up an action for the very purpose of securing himself by ultimate payment, although he may not be in a condition… to follow out the action at the time, but must wait the decision of another tribunal.…[A]n action may be raised and will be sustained for the purpose of security ...".

[37] *Hawkins* was followed shortly afterwards by *Fordyce* v *Bridges*, *supra* another case where an action in the Court of Session was used for the purpose of obtaining diligence against heritable property in Scotland as security for proceedings in England; those proceedings, once again in Chancery, related to the will of a person domiciled in England. The Second Division followed *Hawkins*, and held diligence to be competent. The Lord Justice-Clerk gave a rather fuller account of the underlying principle (at 4 D 1343):

> "I do not think the competency of such an action as the present depends at all on the enquiry, whether this Court has jurisdiction to try the question on the merits between the parties. The principle which I stated in Wedderburn, on which I apprehend that judgment rests, was this: – A party has a suit in England in which he may obtain decree, and he finds that his debtor has property in Scotland which it may be necessary for him to secure, in order to meet and satisfy the decree, if he

> obtains it in England. He comes into this Court with a summons narrating the English suit, averring, of course, that he will obtain decree. He sets forth *that* as his interest and civil right to us who have jurisdiction over the property of his adversary, and he raises his action here to secure property to make that decree effectual; and, on obtaining that decree, asks for judgment and execution in terms of it".

In my opinion three important points appear from this formulation of the principle. First, the action may be raised in a Scottish court notwithstanding that it has no jurisdiction to hear the merits of the dispute. Secondly, in such a case, the purpose of the Scottish action is to obtain diligence on the dependence as a form of interim security as the other litigation proceeds. Thirdly, the basis for the Scottish action is the existence of proceedings in another court; the pursuer's "interest and civil right" was in *Fordyce* the English suit together with an averment that the pursuer would obtain decree. These features are in my opinion important, because they make it clear that the primary purpose of the Scottish proceedings is to obtain diligence as interim security, and that the merits of the dispute and jurisdiction to determine those merits have no bearing on the competency of the Scottish proceedings.

[38] More recently, the competency of this procedure was upheld in relation to arbitral proceedings in *Motordrift A/S* v *Trachem Co Ltd*, *supra*, the third of the cases founded on by the Lord Ordinary. In that case Lord Ross in the Outer House held the proceedings competent notwithstanding that the parties had agreed to arbitration of their dispute in England and that the Scottish court could not at any time determine the merits of that dispute. The principle recognized in that decision has been followed repeatedly: see, for example, *Svenska Petroleum AB* v *HOR Ltd*, 1986 SLT 513; *Mendok BV* v *Cumberland Maritime Corp*, 1989 SLT 192; and *Rippin Group Ltd* v *ITP Interpipe SA*, 1995 SCLR 352. Subject to the limitations that are now contained in the Bankruptcy and Diligence (Scotland) Act 2007, it remains standard practice in Scottish arbitrations for parallel proceedings to be raised in court in order to obtain diligence on the dependence. Apart from the statutory provisions

governing claims before the employment tribunal, there can be little doubt in my opinion that the same procedure could be followed in relation to those claims. Before I consider that aspect of the case, however, I must deal with the legislation of 2007 governing the use of diligence. The petitioner's submission is that that legislation wholly circumscribes the jurisdiction and power of the courts to grant diligence on the dependence. Consequently diligence is no longer regulated by case law, and as a result, it is said, the courts lack jurisdiction to consider any claims related to workplace-related disputes under the Equality Act, even for the purpose of granting diligence.

The legislation governing diligence

Debtors (Scotland) Act 1987 as amended by the Bankruptcy and Diligence etc (Scotland) Act 2007

[39] The procedural aspects of diligence on the dependence of an action had been the subject of criticism for many years prior to 2007, on the ground that it was too easy to obtain. It was not necessary for a pursuer who sought diligence on the dependence to demonstrate even a *prima facie* case on the merits of the action. Nor was it necessary for the pursuer to demonstrate a need for diligence; warrant for diligence was granted automatically. The law in this area was considered at length by the Scottish Law Commission in their Report on Diligence on the Dependence and Admiralty Arrestments (Scots Law Com No. 164), published in March 1998, and extensive proposals for reform were made. The criticisms were summarized in *Karl Construction Ltd* v *Palisade Properties PLC*, 2002 SC 270, at paragraphs [32]-[66]. It was also apparent that Scots law was significantly out of step with other legal systems in its willingness to grant diligence automatically as a matter of right. It was in response to the criticisms of the existing law that section 169 of the Bankruptcy and Diligence etc (Scotland) Act 2007 was enacted. This added Part IA to the Debtors (Scotland)

Act 1987. I would emphasise, however, that this was designed specifically to deal with the problems that had been identified by the Scottish Law Commission and in *Karl Construction* and subsequent cases. It was concerned principally with what is required to obtain diligence on the dependence. It does not deal with the consequences of the grant of diligence.

[40] The material provisions of Part 1A are as follows:

> "15A **Diligence on the dependence of action**
>
> (1) Subject to subsection (2) below and to sections 15C to 15F of this Act, the Court of Session or the sheriff may grant warrant for diligence by-
>
> (a) arrestment; or
>
> (b) inhibition,
>
> on the dependence of an action.
>
> (2) Warrant for-
>
> (a) arrestment on the dependence of an action is competent only where the action contains a conclusion for payment of a sum other than by way of expenses; and
>
> (b) inhibition on the dependence is competent only where the action contains-
>
> (i) such a conclusion; or
>
> (ii) a conclusion for specific implement of an obligation to convey heritable property to the creditor or to grant in the creditor's favour a real right in security, or some other right, over such property.
>
> (3) In this Part of this Act, 'action' includes, in the sheriff court-
>
> (a) a summary cause;
>
> (b) a simple procedure case (within the meaning of section 72(9) of the Courts Reform (Scotland) Act 2014); and
>
> (c) a summary application,
>
> and references to "summons", "conclusion" and to cognate expressions shall be construed accordingly.
>
> …
>
> 15C **Diligence on the dependence to secure future or contingent debts**
>
> (1) It shall be competent for the court to grant warrant for diligence on the dependence where the sum concluded for is a future or contingent debt.
>
> (2) In this section and in sections 15D to 15M of this Act, the 'court' means the court before which the action is depending.

15D **Application for diligence on the dependence**

(1) A creditor may, at any time during which an action is in dependence, apply to the court for warrant for diligence by -

(a) arrestment; or

(b) inhibition,

on the dependence of the action.

(2) An application under subsection (1) above shall -

(a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;

(b) subject to subsection (3) below, be intimated to and provide details of—

(i) the debtor; and

(ii) any other person having an interest;

(c) state whether the creditor is seeking the grant, under section 15E(1) of this Act, of warrant for diligence on the dependence in advance of a hearing on the application under section 15F of this Act; and

(d) contain such other information as the Scottish Ministers may by regulations prescribe.

(3) An application under subsection (1) above need not be intimated where the creditor is seeking the grant, under section 15E(1) of this Act, of warrant in advance of a hearing on the application under section 15F of this Act.

(4) The court, on receiving an application under subsection (1) above, shall—

(a) subject to section 15E of this Act, fix a date for a hearing on the application under section 15F of this Act; and

(b) order the creditor to intimate that date to—

(i) the debtor; and

(ii) any other person appearing to the court to have an interest.

15E **Grant of warrant without a hearing**

(1) The court may, if satisfied as to the matters mentioned in subsection (2) below, make an order granting warrant for diligence on the dependence without a hearing on the application under section 15F of this Act.

(2) The matters referred to in subsection (1) above are -

(a) that the creditor has a *prima facie* case on the merits of the action;

(b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of -

(i) the debtor being insolvent or verging on insolvency; or

(ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets,

were warrant for diligence on the dependence not granted in advance of such a hearing; and

(c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so.

(3) The onus shall be on the creditor to satisfy the court that the order granting warrant should be made.

(4) Where the court makes an order granting warrant for diligence on the dependence without a hearing on the application under section 15F of this Act, the court shall -

(a) fix a date for a hearing under section 15K of this Act; and

(b) order the creditor to intimate that date to -

(i) the debtor; and

(ii) any other person appearing to the court to have an interest.

(5) Where a hearing is fixed under subsection (4)(a) above, section 15K of this Act shall apply as if an application had been made to the court for an order under that section.

(6) Where the court refuses to make an order granting a warrant without a hearing under section 15F of this Act and the creditor insists in the application, the court shall -

(a) fix a date for such a hearing on the application; and

(b) order the creditor to intimate that date to -

(i) the debtor; and

(ii) any other person appearing to the court to have an interest.

15F **Hearing on application**

(1) At the hearing on an application for warrant for diligence on the dependence, the court shall not make any order without first giving -

(a) any person to whom intimation of the date of the hearing was made; and

(b) any other person the court is satisfied has an interest,

an opportunity to be heard.

(2) The court may, if satisfied as to the matters mentioned in subsection (3) below, make an order granting warrant for diligence on the dependence.

(3) The matters referred to in subsection (2) above are -

(a) that the creditor has a *prima facie* case on the merits of the action;

(b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of -

(i) the debtor being insolvent or verging on insolvency; or

(ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets,

were warrant for diligence on the dependence not granted; and

(c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so.

(4) The onus shall be on the creditor to satisfy the court that the order granting warrant should be made.

(5) Where the court makes an order granting or, as the case may be, refusing warrant for diligence on the dependence, the court shall order the creditor to intimate that order to -

(a) the debtor; and

(b) any other person appearing to the court to have an interest.

(6) Where the court makes an order refusing warrant for diligence on the dependence, the court may impose such conditions (if any) as it thinks fit.

(7) Without prejudice to the generality of subsection (6) above, those conditions may require the debtor -

(a) to consign into court such sum; or

(b) to find caution or to give such other security,

as the court thinks fit".

The effect of legislation on the availability of diligence

[41] In my opinion the legislation of 2007 has no bearing on the competency of the procedure found in *Hawkins* v *Wedderburn*, *Fordyce* v *Bridges* and *Motordrift AS* v *Trachem Co Ltd*: that is to say, the competency of raising proceedings in a Scottish court that are ancillary to proceedings in another court or tribunal for the purpose of doing diligence and thus obtaining interim security in respect of Scottish property. For the petitioner it was argued that the provisions of sections 15A-15N of the Debtors (Scotland) Act 1987, as amended in 2007, amounted in effect to a legislative code that governed every aspect of diligence on the

dependence. That is manifestly not the case. At a very elementary level, those sections, which I have quoted at length, do not define what the diligence is, or what arrestment is, or what inhibition is. Nor do they define the precise effect that diligence has on property, nor how it is treated in an insolvency. Those sections are concerned with aspects of court procedure and the matters that the pursuer must establish in order to obtain diligence. Substantial parts of the law remain unaffected, and are therefore still governed by the common law.

[42] That applies in particular to the use of diligence in an action that is ancillary to proceedings before another court or tribunal. An action used in this manner will invariably contain a conclusion for payment, normally the sum claimed in the principal proceedings. That satisfies an essential requirement at common law in any action that does not relate to heritable property, and that requirement is repeated in section 15A(2). Sections 15D-15F govern the grant of diligence. These sections impose requirements that innovate on the common law and require, in summary, that the pursuer suing for payment must have a *prima facie* case on the merits of the action, that there must be a substantial risk that enforcement of a decree would be defeated or prejudiced by reason of insolvency or the disposal or concealment of assets, and that it is reasonable in all the circumstances to grant warrant for diligence. These are designed to address the problems with the European Convention on Human Rights that were identified in *Karl Construction*. They govern the requirements for the grant of diligence, but they do not affect the substance of the parties' rights. For present purposes, what is important is that there is nothing in the provisions of sections 15A-15N that interferes with the use of diligence in ancillary proceedings. As already mentioned, diligence on the dependence is regularly used in ancillary proceedings, and it would be remarkable if legislation aimed at imposing stricter controls on the

requirements for the grant of diligence had the effect of rendering such procedure incompetent. It has never so far as I am aware been suggested that the use of diligence in that manner could be incompatible with the European Convention on Human Rights, and I find it quite impossible to see how any such argument could be constructed following the reforms of 2007.

[43] The employment tribunal is a tribunal that functions outwith the court system, and is subject to its own legislation. I will now discuss that legislation. Before doing so, however, I observe that so far as the requirements at common law for obtaining diligence are concerned there is no reason that the employment tribunal should be treated differently from any other form of tribunal outside the main system of Scottish courts. In this respect they are in exactly the same position, functionally, as an arbitrator or a court in another jurisdiction.

The effect of legislation governing employment law and the employment tribunal

Employment Tribunals Act 1996

[44] The petitioner's claim was made in an employment tribunal, and certain provisions of the legislation governing such tribunals are material for present purposes. Section 15 of the Employment Tribunals Act 1996 deals with orders for payment made by such tribunals. Subsection (2) of that section provides as follows:

> "(2) Any order for the payment of any sum made by an employment tribunal in Scotland (or any copy of such an order certified by the Secretary of the Tribunals) may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland."

Equality Act 2010

[45] The petitioner's claim before the employment tribunal was based on the Equality Act 2010, and in particular provisions in that Act that have their origins in European Union

legislation. The provisions of the Act that are material for present purposes are found in Part 9 (Enforcement), and are as follows:

"113 **Proceedings**

(1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.

(2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.

(3) Subsection (1) does not prevent –

(a) a claim for judicial review;

(b) proceedings under the Immigration Acts;

(c) proceedings under the Special Immigration Appeals Commission Act 1997;

(d) in Scotland, an application to the supervisory jurisdiction of the Court of Session.

(4) This section is subject to any express provision of this Act conferring jurisdiction on a court or tribunal.

(5) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(6) Chapters 2 and 3 do not apply to proceedings relating to an equality clause or rule except in so far as Chapter 4 provides for that.

(7) This section does not apply to –

(a) proceedings for an offence under this Act; or

(b) proceedings relating to a penalty under Part 12 (disabled persons: transport).

114 **Jurisdiction**

(1) The county court or, in Scotland, the sheriff has jurisdiction to determine a claim relating to –

(a) a contravention of Part 3 (services and public functions);

(b) a contravention of Part 4 (premises);

(c) a contravention of Part 6 (education);

(d) a contravention of Part 7 (associations);

(e) a contravention of section 108 , 111 or 112 that relates to Part 3, 4 , 6 or 7.

(2) Subsection (1)(a) does not apply to a claim within section 115.

(3) Subsection (1)(c) does not apply to a claim within section 116.

(4) Subsection (1)(d) does not apply to a contravention of section 106.

…

120 **Jurisdiction**

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);

(b) a contravention of section 108 , 111 or 112 that relates to Part 5.

(2) An employment tribunal has jurisdiction to determine an application by a responsible person (as defined by section 61) for a declaration as to the rights of that person and a worker in relation to a dispute about the effect of a non-discrimination rule.

(3) An employment tribunal also has jurisdiction to determine an application by the trustees or managers of an occupational pension scheme for a declaration as to their rights and those of a member in relation to a dispute about the effect of a non-discrimination rule.

(4) An employment tribunal also has jurisdiction to determine a question that—

(a) relates to a non-discrimination rule, and

(b) is referred to the tribunal by virtue of section 122.

(5) In proceedings before an employment tribunal on a complaint relating to a breach of a non-discrimination rule, the employer—

(a) is to be treated as a party, and

(b) is accordingly entitled to appear and be heard.

(6) Nothing in this section affects such jurisdiction as the High Court, the county court , the Court of Session or the sheriff has in relation to a non-discrimination rule.

(7) Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.

(8) In subsection (1), the references to Part 5 do not include a reference to section 60(1).

The effect of employment legislation on the availability of diligence

[46] In my opinion the foregoing provisions make no difference to the existing law on the availability of diligence in respect of employment tribunal proceedings. As under the earlier law, I am of opinion that such diligence is competent through the use of an ancillary action containing a conclusion for payment of the sum sought in the employment tribunal

proceedings. Provided that that is done, I consider that the law remains as laid down in cases such as *Fordyce* v *Bridges* and *Motordrift A/S* v *Trachem Co Ltd*.

[47] The provisions primarily founded on by counsel for the petitioner are sections 113 and 120 of the Equality Act 2010. Part of the background is obviously that, under section 15 of the Employment Tribunals Act 1996 an order for payment of a sum that is made by an employment tribunal may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued in the sheriff court. This demonstrates that employment tribunals are treated for the purposes of enforcement as if they conducted a form of arbitration. That is entirely consistent with the view that I have suggested, that no distinction can be drawn between employment tribunals and ordinary arbitration proceedings.

[48] Section 113 of the Equality Act 2010, however, provides that proceedings relating to a contravention of the Act must be brought in accordance with the provisions of Part 9 of the Act, subject to a number of exceptions, which include claims for judicial review and applications to the supervisory jurisdiction of the Court of Session. Section 120 provides that an employment tribunal has jurisdiction to determine a complaint relating to contraventions of Part 5 of the Act, relating to work. It is that Part that is relevant to the petitioner's claim in the employment tribunal. Those two provisions have the effect that any claim brought under Part 5 of the Act must be brought in an employment tribunal, and not before the ordinary courts, subject to the exceptions for judicial review and the supervisory jurisdiction of the Court.

[49] Nevertheless, this does not in my opinion have any bearing on proceedings brought in the Court of Session or a sheriff court for the purpose of obtaining diligence on the dependence. As already indicated (paragraph [37] above, founding on the formulation of

principle by the Lord Justice-Clerk in *Fordyce* v *Bridges*), the purpose of such proceedings in a court is to obtain diligence as interim security, and not to resolve the substantive dispute between the parties. Normally the court will have no jurisdiction to decide the substantive dispute. That is plainly the case if that dispute is before a foreign court or an arbiter. In my opinion no distinction can be drawn between those situations and the jurisdiction of the employment tribunal to decide the merits of a dispute under Part 5 of the Equality Act 2010. The fact that the jurisdiction of the Court of Session or sheriff court is excluded is irrelevant; the proceedings in those courts are concerned with obtaining security and not with deciding a claim under Part 5 of the Act. The basis for the action in court is the existence of proceedings in another court or tribunal, and in this respect too I am of opinion that no distinction can be drawn between the employment tribunal and an arbiter or a court in another jurisdiction. For the foregoing reasons I would reject the petitioner's first ground of appeal, that the courts have no jurisdiction to grant diligence on the dependence in respect of proceedings before an employment tribunal.

The requirements of EU law: an effective remedy

[50] That leads on to the relevance of EU law. The second ground of appeal is that, even if a procedure for arrestment on the dependence were available in respect of employment tribunal proceedings, the Lord Ordinary erred in finding that such a procedure provided an effective remedy to the petitioner. The fact primarily founded on in this respect was that a separate protective action required to be raised before the ordinary courts. That, it was said, breached the EU law principle of effectiveness. For this purpose, it is not in dispute that the rights claimed by the petitioner before the employment tribunal were founded on EU law,

and in particular on directives aimed at ensuring equal treatment in, *inter alia*, the area of employment law.

[51] The principle of effectiveness has been discussed in a substantial number of cases before the Court of Justice of the European Union, and I will consider that line of authority shortly. Before doing so, however, I should make a number of preliminary observations in relation to the fundamental principle of effectiveness and the utility of provisional and protective measures in securing an effective remedy.

[52] First, the main purpose of the principle of effectiveness is to ensure the proper enforcement of rights that arise under Community law. That is not an objective that is confined to the law of the EU. It is encapsulated in the maxim *ubi jus ibi remedium*, which has been adopted in Scots law, English law and many other legal systems. It is obvious that if a legal right exists a remedy must be devised to permit its enforcement; otherwise the right is ineffectual. This extends not merely to the existence of a notional remedy but to ensuring that the remedy produces practical results. The principle of effectiveness is accordingly one that is not peculiar to EU law but is close to principles that are an integral part of most rational legal systems, and are in particular an integral part of Scots law.

[53] Secondly, diligence is an example of a provisional and protective measure, made available during the course of litigation in order to avoid so far as possible the risks of the defender's insolvency or of the defender's "removing, disposing of, burdening, concealing or otherwise dealing with" its assets (see section 15E(2)(b)(ii) of the 1987 Act as amended). Most other legal systems also allow for provisional or protective measures, although they take a wide range of different forms; in relation to the main European legal systems, these are usefully set out on a country-by-country basis in Layton and Mercer, European Civil Practice, volume 2. By way of example, English law permits the granting of an interlocutory

injunction to prevent the disposal of assets as litigation proceeds (the so-called *Mareva* injunction, exemplified by *Amicus* v *Dynamex Friction Ltd* (*supra*), a case cited by the Lord Ordinary which involved the grant of such an injunction in the course of proceedings before an employment tribunal). The Scottish law of diligence appears to have been borrowed from France in the late mediaeval or early modern period. Despite the very marked differences of form, diligence and the injunctions used in England and Wales can be said to be functionally equivalent. The same applies, as I have noted, to all other main European legal systems. For present purposes, two important points emerge. In the first place, in relation to provisional and protective measures, the underlying requirements of EU law are already recognized and given effect by most legal systems, including Scots law. In the second place, those systems make use of different forms of provisional and protective measure. For that reason it cannot be said that the EU principle of effectiveness requires any one particular form of procedure. Any form of measure will suffice provided that it is, objectively, reasonably effective in providing security.

[54] Thirdly, in cases such as the present, the reason that legal systems put in place provisional and protective measures is to protect against the possible insolvency of the defender or the alienation or dissipation of the defender's assets. Insolvency and the dissipation of assets are an inevitable risk both in litigation and in the commercial world generally. Provisional and protective measures during litigation are only one means of dealing with that risk. Other remedies may exist after assets have been disposed of. In Scots law, for example, if insolvency occurs procedures exist to permit a trustee in sequestration or liquidator to challenge gratuitous alienations, where assets are given away for no or inadequate consideration. This is possible at common law and also under statutory provisions, which are now found in section 98 of the Bankruptcy (Scotland) Act 2016 and

section 242 of the Insolvency Act 1986. Likewise, procedures exist to permit a trustee or liquidator to challenge unfair preferences, where assets are used to give preference to one creditor rather than another without legal justification; these exist both at common law and under section 99 of the Bankruptcy (Scotland) Act 2016 and section 243 of the Insolvency Act 1986. (It is perhaps worth noting that the foregoing statutory grounds of challenge are of some antiquity, being largely modelled on the Bankruptcy Acts of 1621 and 1696). Further steps can be taken in a formal insolvency process, for example to recover funds that have been paid in breach of trust or fiduciary duty. The essential point for present purposes is that diligence is merely one remedy among a substantial number that can be used to enforce the effective payment of debts owed to successful litigants. In considering the principle of effectiveness, it is necessary in my opinion to have regard to the totality of remedies that are available.

[55] Fourthly, although procedures exist to protect against insolvency or the dissipation of assets, they are not always successful. Insolvency means that debts are not paid in full, or frequently are not paid at all, and there are inevitable limits to the practical utility of any remedy in that situation. There are likewise inevitable limits to the practical utility of diligence on the dependence. On occasion diligence can be very successful in securing a debt, as where inhibition is used against a unencumbered heritable property, or where arrestment is used in respect of major items of industrial equipment, such as installations used in the oil industry (as in the cases cited in paragraph [38] above). In other cases, however, arrestment may be of very limited utility, not because of any deficiency in the procedure itself but because of the nature of the assets arrested. In relation to the arrestment of a bank account, for example, the effect will be to freeze the credit balance in the account at that moment. If the account is overdrawn nothing is secured. Even if a credit balance is

secured by arrestment, there is an obvious risk that the defender will divert future payments to another bank account which is not subject to arrestment and in that way defeat the diligence. Furthermore, in relation to payments passing through bank accounts, if the defender carries on business the payments will typically come from its trade debtors and will be required to pay its trade creditors, its employees, HMRC and others. A trader requires liquidity in order to continue to pay its creditors, which it must do in order to carry on business. In these circumstances there is an inevitable limitation on the efficacy of arrestment. The same is broadly true of other remedies such as an interdict or injunction prohibiting the disposal of funds; if the effect of such a remedy is to prevent a defender from carrying on business it may be held disproportionate. For the purposes of the principle of effectiveness, the important point is that provisional and protective measures are not invariably successful, and indeed cannot be.

[56] In the present case the Court was provided with a number of financial documents from the charity that was the petitioner's employer, notably bank statements from its account covering the period from August to October 2016. While that is a very limited period, those statements give an indication as to the manner in which the charity's activities were carried on. Payments out of the account covered principally salaries of employees, but also expenses, generally of a fairly modest nature. They also included payments to what appear to be a training organisation, to an entity described as "Engage ESF", to consultants and to HMRC. The only significant payments into the account were payments of grants, of relatively modest amounts in relation to the total outgoings. The result was that during the period from 1 August to 10 October 2016 the credit balance in the account fell from £61,663.81 to £3,965 46. It is obviously impossible to say whether that period is typical of the

employer's financial activities. In the result, the arrestment that was ultimately used by the pursuer on 28 October 2016 attached funds amounting to £2,967.32.

[57] Nevertheless, the transactions during that period indicate two important features of the employer's activities. The first is the need to make regular payments of salary, expenses and other outgoings. The second is the limited and potentially erratic nature of payments to the charity. Indeed, it is obvious that, if the charity is ordered by a tribunal to pay a large financial award to an employee, it is possible that donors on which it depends may reduce or stop the payments that they make. This is not necessarily remediable in law, as those payments may be the result of voluntary donations decided from time to time, without future commitment. Once again, it is impossible to decide whether the outgoings and receipts disclosed in the bank statements are typical. The fundamental point is that a charity is frequently dependent on voluntary donations, which may be withheld if it is thought that they are not going to be used to advance its charitable purposes but to pay compensation to a former employee. It is very difficult to see how the law can do anything about that. For this reason, there is a serious question as to whether in the present case arrestment would have the effect of arresting any significant funds. Inhibition does not appear to be possible, as there is no indication that the charity owned any heritable property. If, of course, it made gratuitous alienations or accorded unfair preferences, legal remedies exist to deal with them, but these have nothing to do with diligence on the dependence.

The relevant EU legislation

[58] In the argument for the petitioner on the principle of effectiveness, reliance was placed on important legislation governing the operation of the European Union, and also on the EU legislation prohibiting discrimination. The important legislation is as follows.

Treaty on European Union (TEU)

[59] Article 19 of the TEU provides:

> "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
>
> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

This provision gives statutory effect to the principle of effectiveness.

The Charter of Fundamental Rights (the Charter)

[60] Article 21 of the Charter deals with a range of categories of discrimination, which include those relied on by the petitioner. It provides:

> "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited".

Article 47 of the Charter repeats the principle of effectiveness; it provides:

> "Right to an effective remedy and to a fair trial
>
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

[61] Article 52 of the Charter provides, *inter alia*:

> "Scope and interpretation of rights and principles

> 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. …".

This amounts in effect to a restatement of the general principle of legality, that limitations on rights and freedoms must be the subject of legal provision, and the general principle of proportionality, that any such limitation should be necessary and aimed in a proportionate manner at objectives of general interest. These are very general features of EU law, and have also generally been adopted in the interpretation of the European Convention on Human Rights, which is of course the basis for the Charter.

Council Directive 2000/78/EC

[62] Council Directive 2000/78/EC lays down a general framework for countering discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation in order to give effect to the EU law principle of "equal treatment". Article 9 (Defence of rights) provides, *inter alia*:

> "1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

Article 17 (Sanctions) provides:

> "Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. …"

The foregoing provisions can be regarded as a more specific restatement of the general principle of effectiveness, including the provision of an effective remedy.

Council Directive 2000/43/EC

[63] Council Directive 2000/43/EC has as its aim the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin. It contains provisions which can be regarded as restating the principle of effectiveness, including the provision of an effective remedy. Thus article 7 (Defence of rights) provides, *inter alia*:

> "1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

Article 15 (Sanctions) provides:

> "Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. …".

Council Directive 2006/54/EC

[64] Council Directive 2006/54/EC deals with the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. In a recast form, it provides, at Article 17 (Defence of rights):

> "1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

Article 18 (Compensation or reparation) provides:

> "Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration".

Once again these can be regarded as a restatement of the general principles of effectiveness and provision of an effective remedy.

The EU case law

[65] Founding on the foregoing EU legislation, counsel for the petitioner advanced detailed submissions on the correct approach that a national court should adopt towards the principles of effectiveness and the provision of an effective remedy. He submitted that the law in this area had developed since the early years of the European Economic Community, and was now to be interpreted in a stricter manner than previously. In particular, the Lord Ordinary had relied on the decision of the Court of Justice in *Impact* v *Minister for Agriculture and Food*, *supra*, decided in 2008, but it was submitted that the law had moved on substantially since then, following a line of development that had been apparent for some time previously.

[66] The primary submission for the petitioner was that three strands could be seen in the development of the law by the Court of Justice. The first of these, dating from cases decided in the 1960s, was that Community directives had "direct effect", a translation of the French "*effet utile*", which meant that the directive should have full force and effect within the territory of member states. The second strand, which derived from cases decided in the 1980s, involved respect for the procedural autonomy of member states. Community law did

not impose new remedies, but relied on member states to adapt their existing remedies to ensure the effectiveness of Community law. This was made subject to an important limitation, namely that national procedures were not to be applied in a manner that made it "practically impossible or excessively difficult" to enforce Community law. That test, as explained in cases such as *Impact* v *Minister for Agriculture and Food*, *supra*, was used by the Lord Ordinary. It was submitted, however, that the law had developed since then, to create a third strand in the development of the law. The Lisbon Treaty had come into effect in 2004, and article 19(1) of the TEU (see paragraph [59] above) required that member states should provide remedies sufficient to ensure effective legal protection in fields covered by EU law. That, it was submitted, replaced the existing principle that EU law did not require states to create new remedies. A similar result was required by articles 21 and 47 of the Charter (see paragraph [60] above). Thus it was said that there was now a general right to an effective remedy, unconstrained by existing procedures available in a member state.

[67] In *Impact* v *Minister for Agriculture and Food*, *supra*, the substantive question was whether "unestablished" civil servants in Ireland were entitled, in terms of the relevant directive, to equal treatment in respect of pay and pension rights with established civil servants. Under Irish law, the claims were presented initially to an official known as a Rights Commissioner, and the question arose as to whether the Rights Commissioner had jurisdiction to apply EU law in cases where it was inconsistent with national law. The Grand Chamber of the Court of Justice held (at paragraphs 44-46) that it was for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derived from Community law. It was the responsibility of the member states to ensure that those rights are "effectively protected" in each case (paragraph 45). The detailed

rules governing actions derived from Community law rights "must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)" (paragraph 46). Thus the Irish legislature was entitled to confer jurisdiction on a person such as the Rights Commissioner to determine the claims, but the Court further held that the principle of effectiveness would be contravened if such a requirement would result in procedural disadvantages for the claimants in terms of cost, duration of proceedings or the rules governing representation, such as to render "excessively difficult" the exercise of rights arising from the directive.

[68] It is clear from the opinion of the Court in *Impact* that the primary test is whether procedural requirements render "excessively difficult" the enforcement of a Community right. The expression "practically impossible" is used, but it seems obvious, as a matter of language, that anything that was practically impossible would fall foul of the test of excessive difficulty. The test of excessive difficulty clearly involves evaluation, or a form of proportionality. It is not the case that an additional procedural requirement to obtain an effective remedy will automatically contravene the principle of effectiveness. The question is rather whether the difficulty and cost of complying with that requirement is excessive, which is a matter of judgment. If that test is applied in the present case, the critical question is whether the requirement to raise proceedings in the sheriff court, in addition to the claim made before the employment tribunal, makes an effective remedy excessively difficult for claimants such as the present petitioner.

[69] In the present proceedings, reference was made to a number of more recent cases in which the Court of Justice discussed the principle of effectiveness. I do not think that these add a great deal to the modern statements of the principle of effectiveness found in article 19

of the TEU and article 47 of the Charter. Nevertheless, because considerable reliance was placed on them by counsel, I will comment briefly on the more important of them. Perhaps pre-eminent among them was the very recent decision in Case C-193/17, *Cresco Investigation GmbH* v *Achatzi*, [2019] IRLR 380. In that case, Austrian legislation permitting days off work for church members on religious holidays was said to have discriminated against persons who were not members of the churches concerned. For present purposes, the most significant issue was what ought to be done if the legislation were held to be discriminatory in terms of EU law before the legislature adopted a new non-discriminatory regime. The Advocate General recommended that the remedy was to disapply or set aside the national provision that was in breach of EU law, but that would not confer any immediate benefit on the employee, who was seeking payment of additional holiday pay from his employer. The Court of Justice held that the prohibition on discrimination on grounds of religion or belief, laid down in article 21 of the Charter (paragraph [60] above), was sufficient to confer on individuals a right on which they might rely in disputes in a field covered by EU law. On that basis, article 21 of the Charter was no different in principle from provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derived from contracts between individuals (paragraph 76-77).

[70] The Court concluded that in such a case observance of the principle of equality could be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, and that in such a case the national court should set aside the offending provision and then allow the disadvantaged group the same arrangements as those enjoyed by the favoured group (paragraphs 79-80). For the present petitioner it was argued that that supported the proposition that a "third strand" has emerged in relation to the principle of effectiveness, to

the effect that an individual should have a direct remedy against persons who discriminated against them, even where such discrimination is lawful in terms of national law. In my opinion that goes beyond what was actually decided. The effect of the case is that the Court of Justice allows individuals a direct remedy against persons who discriminate against them, even when such discrimination is lawful in terms of national law. That, however, appears to amount to nothing more than the basic principle of the primacy of EU law, taking into account the obligation incumbent on member states under article 19 of the TEU to provide effective remedies. That is not a "third strand", but rather a restatement of the legal principles found in earlier cases, including *Impact*, the primary authority founded on by the Lord Ordinary.

[71] The petitioner also founded on another recent case before the Court of Justice, Case C-378/17, *Minister for Justice and Equality, Commissioner of An Garda Síochána* v *Workplace Relations Commission*, 4 December 2018. This was said to vouch the proposition that, if it is necessary to take the additional step of going to another court to obtain a remedy, that of itself made the remedy "less effective". In *An Garda Síochána* it was claimed that certain age limits imposed by Irish legislation for police recruits amounted to discrimination contrary to Community law. The claim was presented to the statutory body responsible under national law for deciding such cases, the Equality Tribunal (which became the Workplace Relations Commission), but the relevant Minister argued that that Tribunal lacked jurisdiction because it had no power to disapply the provision of Irish law that laid down the upper age limit; only a court could do so. The issue, as interpreted by the Court of Justice, was accordingly whether the primacy of EU law precluded national legislation which had the result that a national body established to ensure enforcement of EU law in a particular area had no jurisdiction to disapply a rule of national law that was contrary to EU law. The Court drew a

distinction between on one hand the power to disapply in a particular case a provision of national law that was contrary to EU law, and on the other hand the power to strike down such a provision so that the provision of national law was no longer valid for any purpose (paragraph 33). In the case under consideration, as the WRC was the body established in the purpose of satisfying Ireland's obligations under Directive 2000/78, it must be capable of disapplying if necessary any provision of national legislation contrary to the Directive (paragraphs 45-46). The Court concluded (at paragraph 50):

> "It follows from the principle of primacy of EU law… that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means".

[72] The petitioner relied on this case as supporting the principle that, if a member state sets up a specialist court to hear claims based on discrimination contrary to EU law, it must provide those courts with all the remedies that are necessary to ensure the "full effectiveness" of EU law. Thus it was said that an employment tribunal in the United Kingdom requires to have power to grant provisional and protective remedies such as diligence on the dependence in order that EU law might be fully effective. While some of the statements made by the Court of Justice, notably that at paragraph 50, may be construed as indicating that a tribunal charged with applying EU law must have every form of enforcement remedy available to it, it is important in my opinion to take the statements made in *An Garda Síochána* in context. That context is that the case was concerned with the ability of a tribunal to disapply national law provisions that run directly contrary to discrimination provisions in an EU Directive. That was what the WRC was prohibited from

doing by the Irish constitution. In the present case, by contrast, the question is not whether the rules of EU discrimination law, as laid down in Directives, are to be applied by the employment tribunal. It is quite clear that the tribunal must apply those rules, as the tribunal did in the present case. What is in issue is not the primary question of the supremacy of EU law over national law, but the availability of remedies designed to provide security during litigation and effective enforcement of a financial award following the end of such litigation. That is a wholly different issue. It involves a wide range of remedies, which go beyond provisional and protective measures during litigation and include formal insolvency proceedings and the remedies that are available in such proceedings. In my opinion nothing in *An Garda Síochána* can be construed as suggesting that remedies of that nature must be available in an employment tribunal. These are in effect secondary remedies, designed to enforce an award. The primary remedy, the making of the award itself, is clearly competent, and that is all that is required in terms of the decision of the Court of Justice in *An Garda Síochána*.

[73] Reliance was placed on another recent case before the Court of Justice, Case C-73/16, *Puškár* v *Finančné riaditiel'stvo Slovenskej republiky*, [2017] 4 WLR 209. This case was said to lay down the test for determining whether the requirement that the national legal system should provide effective remedies had been met in accordance with the "third strand" of approaches to effectiveness. In that case the appellant had sought to prevent his name from being included on a list held by the state of suspected "front men" for companies involved in tax evasion. Under national law persons such as the appellant were obliged to exhaust administrative procedures before a complaint could be brought before a court that the relevant national legal provision was in breach of EU law. The Court of Justice relied on article 47 of the Charter, and held that a requirement that administrative remedies should be

exhausted prior to raising judicial proceedings could only be justified if the procedure was provided by law, respected the essence of the right enshrined in article 47 and, in accordance with the principle of proportionality, was necessary and genuinely met objectives of general interest recognized by the European Union, or met the need to protect the rights and freedoms of others (paragraph 62). If those requirements were satisfied, however, it was permissible for national legislation to make the exercise of a judicial remedy subject to the prior exhaustion of available administrative remedies. That was subject to the requirement that this did not lead to a substantial delay or involve excessive costs (paragraph 76). In my opinion there is nothing in this decision that suggests that it is contrary to the principle of effectiveness to require a separate application to a court for provisional or protective measures, provided that such an application does not involve substantial delay or involve excessive expense.

[74] Finally, although it is a decision of the United Kingdom Supreme Court rather than the Court of Justice, I should mention that some reliance was placed on the recent decision in *R (UNISON)* v *Lord Chancellor*, [2017] 3 WLR 409. The decision is concerned principally with the right of access to justice at common law, although there is some discussion of the EU principles of effectiveness and effective judicial protection. The case involved a successful judicial challenge to the level of fees specified in a new Fees Order applicable to employment tribunals. It is important to note that the UK Supreme Court had considerably more information about the financial impact of the Order than was available in the present case, where the information about the likely expenses involved in making a subsidiary application to the sheriff court to obtain diligence on the dependence was almost entirely lacking in specification. The court concluded that fees had been set at a level where there

was a real risk that access to justice was being denied. The evidence for this was a sharp and substantial fall in claims made in employment tribunals (paragraph 91).

[75] Many of the rights enforceable in employment tribunals are derived from EU directives, and consequently the UK Supreme Court gave some consideration to the requirements of EU law (paragraphs 105 *et seq*). The court referred to the principle of effectiveness, and adopted the test stated in *Impact*, namely that "the procedural requirements for domestic actions must not be 'liable to render practically impossible or excessively difficult' the exercise of rights conferred by EU law". That is of course the test that was used by the Lord Ordinary in the present case. The court in *UNISON* further referred to the EU principle of effective judicial protection, as stated in articles 6 and 13 of the European Convention on Human Rights and as reaffirmed by article 47 of the Charter. In relation to the cost of litigation, the court concluded (paragraph 107) that the imposition of a financial restriction on access to a remedy required that there should be a reasonable relationship of proportionality between the means employed and the legitimate aims sought to be achieved. The burden lay on the state to establish that restrictions by way of expenses were proportionate where such restrictions were liable to jeopardize the implementation of the aims pursued by EU Directives.

[76] In my opinion the discussion in *UNISON* largely reaffirms the approach of the Court of Justice in *Impact*. The result is that the critical test is whether particular procedural requirements can be said to be "excessively difficult", bearing in mind the aims that the relevant provision of EU law seeks to achieve. That essentially involves a proportionality exercise; it is a matter of judgment for the court. The court in *UNISON* refers to the principle of effective judicial protection, a principle that is contained in the European Convention on Human Rights and is based ultimately on rights of access to the courts in domestic law. So

far as the present case is concerned, it is quite clear that a claimant before an employment tribunal has a right of access to the judicial system. The employment tribunals are specialist courts designed to deal with disputes relating to contracts of employment, and there is a right of appeal from them to the Employment Appeal Tribunal and from there in appropriate cases to the general courts. The question for present purposes is accordingly whether the requirement to seek diligence on the dependence from a court rather than the employment tribunal renders the obtaining of interim security excessively difficult in all the circumstances.

[77] The argument for the petitioner made reference to a number of other cases before the Court of Justice, but for present purposes I do not think that it is necessary to refer to these. The fundamental point is that, as a matter of EU law, it is essential that the national authorities confer an effective remedy on any person who asserts a right based on EU law. For this purpose, in my opinion, the "three strands" approach suggested on behalf of the petitioner is not of great assistance. It is clear from a line of Luxembourg authorities that if obtaining a remedy is "excessively difficult" the remedy will not be effective; that is the clear result of cases such as *Impact*. The ultimate question, however, is whether an "effective remedy" has been provided. That is the wording used in article 19 of the TEU and article 47 of the Charter, and I can see little advantage in attempting to provide an elaborate gloss on the wording used in the main EU treaties. Conceptually the notion of an effective remedy is relatively straightforward. The difficulty arises in applying the test in the circumstances of individual cases. On that question, I am of opinion that the court must consider what remedy is required in the particular case to obtain recognition of the right that exists under EU law, and what remedy is required to ensure that that remedy is implemented at a practical level. To the extent that procedural steps have to be taken, or fees have to be paid,

to achieve either recognition of the primary right or a remedy to secure practical implementation of that right, the court must embark on what is essentially a proportionality exercise: are the procedural steps required, or the fees, disproportionate in all the circumstances? That is the exercise that must be performed in relation to protective remedies in employment tribunal proceedings in Scotland.

Whether Scots law provides an effective remedy for the purposes of EU law

[78] In the circumstances of the present case, the important question is not whether rights accorded to employees by EU Directives are recognized by Scots law through judicial determination. The rights of the petitioner under the relevant Directives have been recognized by the employment tribunal, and it has been held that the petitioner's rights have been infringed. The critical question is the availability of financial redress for the infringement of those rights. Once again, the entitlement to financial redress has been recognized. The dispute relates rather to the means whereby that redress is provided, in the concrete form of payment of compensation.

[79] For reasons already set out, at paragraphs [41]-[43] and [46]-[49] above, I am of opinion that diligence on the dependence is available in employment tribunal proceedings by means of a subsidiary action in either the sheriff court or the Court of Session. That obviously involves an additional procedural step, and a certain amount of expense. Nevertheless, the procedural step is relatively straightforward. All that is required is a court action in which the pursuer concludes for the amount sought in the employment tribunal proceedings. The condescendence should be very short, narrating the existence of the claim in the employment tribunal and averring that the pursuer will obtain decree in that tribunal. Those are the requirements referred to by the Lord Justice-Clerk in *Fordyce* v *Bridges* (see

paragraph [37] above), and they represent a procedure that has regularly been followed in relation to arbitration. The summons must obviously contain a warrant for arrestment and inhibition on the dependence, but that is essentially a formality. It is likely that a hearing will be required in relation to the financial situation of the defender, the employer, and any risk that there may be of dissipation of assets. Nevertheless, that would be required even if it were possible to obtain a warrant for diligence on the dependence in employment tribunal proceedings. The extra requirement under the current Scottish procedure is simply that a parallel writ or summons must be drafted, lodged and served. The contents of that writ or summons, however, can and should be very brief indeed.

[80] In my opinion the foregoing procedures do not contravene the principle of effectiveness, or an effective remedy, under EU law. The additional writ or summons that is required will be short and simple and should be inexpensive. If the test is that an effective remedy should not be "excessively difficult" (the *Impact* test), I consider it very clear that the straightforward procedures required in the sheriff court are not excessively difficult. Even if a more straightforward test of effectiveness, or an effective remedy (the wording of article 47 of the Charter), is followed, I am of opinion that the existing law of diligence provides an effective remedy. Diligence on the dependence of an action permits the pursuer to use a protective remedy during the course of litigation against both moveable and immoveable property. It operates to reduce so far as possible the risks of the defender's insolvency or of the defender's "removing, disposing of, burdening, concealing or otherwise dealing with" its assets. That is as much as can be expected of a provisional measure during litigation. Clearly it cannot be effective in every case, because insolvency may supervene, or assets may have been alienated before the available procedure is made effective, or it may be used against fluctuating assets such as a bank account. It is impossible to provide a guarantee

against insolvency, for very obvious reasons: see paragraph [55] above. It is equally impossible to provide a completely certain remedy against fluctuating assets simply because of the nature of such assets.

[81] Apart from the relatively straightforward nature of the proceedings required in court, relying on the ordinary courts to deal with diligence has certain practical advantages. The purpose of setting up the employment tribunal to deal with employment-related claims is that it provides an informal and cost-free procedure before a specialist tribunal. That procedure is, however, aimed at employment law, and the members of the employment tribunals are experts in that area. Diligence, by contrast, raises a range of legal issues that are not related to employment law. They are rather concerned with property and insolvency law: issues such as the threat of insolvency, or the alienation or dissipation of assets. They also concern the limitations on the availability of the remedy of diligence that were introduced by sections 15A-15F of the Bankruptcy and Diligence etc (Scotland) Act 2007. Those limitations were introduced to deal with the human rights concerns that had been raised by the Scottish Law Commission and in the case of *Karl Construction Ltd* v *Palisade Properties Ltd*, *supra*. In view of the range of legal issues that are liable to be raised by diligence, there are likely to be practical advantages in having those matters heard before an ordinary court, which will deal with other property- or insolvency-related issues. For the foregoing reasons, the requirement that diligence should be obtained through ancillary court proceedings appears to me to be a proportionate response to the question of how provisional and protective measures may be obtained in the course of litigation relating to a contract of employment.

[82] Furthermore, other remedies may be available. For example, it is competent in appropriate cases for the pursuer to obtain an *interim* interdict against the disposal or

dissipation of assets; that appears to have occurred in the present case, although it was not effective in practice owing to the insolvency of the petitioner's employer and line manager. Further remedies are available through insolvency procedures, for example through the reduction of gratuitous alienations or the recovery of assets alienated in breach of trust or breach of fiduciary duty. In the present case is not clear how effective such remedies might be. A large part of the difficulty confronting the petitioner appears to have been the nature of the economic activities of the petitioner's employer, which I have discussed at paragraphs [56] and [57] above. The fundamental problem was that the petitioner's employer lacked a sound asset base, largely because it was dependent on charitable donations. If assets are not available, an effective remedy for payment of compensation is unlikely to be available, but that is not for any reasons inherent in the legal system. It follows that the fact that payment of compensation was not achieved does not indicate that the legal system does not provide an effective remedy; the inability to recover funds may be due to financial and economic factors rather than legal shortcomings. In all the circumstances, therefore, I conclude that Scots law does provide an effective remedy for the purposes of EU law, and article 19 of the TEU and article 47 of the Charter in particular.

[83] Before I leave the question of an effective remedy, I should mention three further matters. First, the fact that the Scottish remedy takes a different form from those used in other EU jurisdictions is clearly immaterial. Different jurisdictions within the EU adopt different procedural systems, which often differ markedly; this is well illustrated by the differences in procedure between Scots law, where the procedures tend to have civilian or in some cases (including diligence) early modern French origins, and the law of England and Wales, where the various procedures available at common law and in equity have indigenous origins and differ sharply from the procedures found in continental Europe.

What EU law requires is an effective remedy; the precise procedures must be a matter for national legal systems.

[84] Secondly, the intervener, the Commission for Equality and Human Rights, stated that they were unaware of any case where a claimant in proceedings before an employment tribunal had used diligence on the dependence through the means of a parallel court action. Nevertheless, the lack of any known cases may be explained by various reasons. An obvious explanation is that lawyers who act for claimants before employment tribunals are unaware of the procedures that are used in, for example, arbitration proceedings to obtain diligence on the dependence through the use of an ancillary court action. Another is that in many cases the employer's assets may not be well suited to the use of diligence. If, for example, the employer does not own any heritable property inhibition will be largely pointless, and the effectiveness of arrestment against assets such as sums in bank accounts is inevitably limited.

[85] Thirdly, the intervener provided research material that suggested that significant numbers of successful claimants in employment tribunal proceedings receive none of, or only part of, the awards made in their favour. The statistics related principally to England and Wales, but a number of reports suggested low rates of recovery. A 2009 Ministry of Justice report indicated that 39% of successful claimants had not received any payment and 8% had been paid only part of the award. In a further report in 2013 the corresponding figures were 35% and 16% respectively. Even "after the event" enforcement action for recovery of employment tribunal awards was not always successful. In the 2013 study commissioned by the UK Government into the payment of tribunal awards 46% of Scottish claimants reported that they continued, post-enforcement, not to have received any payment; the corresponding figure for England and Wales was 35%. Those figures are

clearly disappointing, but the fundamental problem may well be that of insolvency: at the very least, it is impossible to draw the conclusion that Scots law does not provide an effective remedy on the basis of such statistical evidence alone. As I have already stated, for obvious reasons it is impossible to provide a guarantee against insolvency.

The requirements of EU law: equivalence

[86] In addition to the principle of effectiveness, the argument for the petitioner founded to some extent on the EU law principle of equivalence. This principle requires that a person who wishes to enforce a right derived from EU law must be accorded substantially the same remedy as a person who wishes to enforce an equivalent right derived solely from domestic law. That obviously raises the question of what amounts to equivalence of rights. For this purpose, it is essential to determine the correct comparator. In the present case, the petitioner seeks to enforce rights derived from EU law that apply in an employment relationship in litigation before the employment tribunal, which is responsible for legal questions that arise in relation to employment contracts. For the respondent, it is contended that the appropriate comparator is found in other employment-related proceedings before the employment tribunal which are based on domestic law. An example would be a straightforward claim for unfair dismissal. It is not in dispute that the remedies available to the present petitioner by way of diligence are the same as those that would apply to a claimant before the employment tribunal whose claim was based on unfair dismissal.

[69] For the petitioner, by contrast, it is contended that the appropriate comparator is not found in other proceedings before the employment tribunal but in proceedings for discrimination prohibited under EU law that are brought before the ordinary courts. An example would be a claim for discrimination prohibited by EU Directives in relation to a

contract for the sale of goods or supply of services; for example where a trader refused to deal with a potential customer because of his or her ethnic background. In cases of that sort, brought before the ordinary courts, diligence would be available without the need to raise ancillary proceedings before another court or tribunal.

[87] The Lord Ordinary held that there had been no breach of the EU law principle of equivalence. He had decided that an application for interim diligence by means of sheriff court proceedings was open to the petitioner. On that basis it made no difference what the comparable domestic proceedings were, since effective interim protection was available by means of an ancillary action. The Lord Ordinary further held that the appropriate comparator was an employment law claim not derived from EU law. The essential focus was on the fact that the claim related to rights under a contract of employment. Claims based on a contract of employment were comparable, whether derived from EU law or from domestic law. Claims based on a contract for the supply of goods or services, by contrast, were not comparable with employment-based claims; they related to a wholly different type of legal relationship.

[88] In my opinion the Lord Ordinary was correct in so holding. The appropriate comparator is another employment-related claim, and not a claim based on EU directives that prohibit discrimination across a range of sectors. The essence of the comparison is that the claim is employment-based. Claims come before the employment tribunal because they are based on contracts of employment. That tribunal provides a specialized forum for such claims where they can be litigated at minimal expense. The obvious comparator is between claims in that forum that are based on EU law and those that are based on domestic law. In my opinion this represents common sense. The comparators suggested by the petitioner, by contrast, focus not on the general nature of the claim, one that is employment-related, but on

the legislation that underlies the claim. The EU legislation in question, however, applies across a wide range of different situations in which discrimination may occur. Against that background, comparison based on the origins of the parties' legal rights and obligations appears artificial. Perhaps more importantly, it would have the result that a claim based on EU-derived rights could never be compared against a claim based on domestic rights. If that is so, it is difficult to see what the principle of equivalence could ever add to the principle of effectiveness.

[89] Furthermore, in agreement with the Lord Ordinary, I consider that there is no reason why domestic law should not adopt different types of procedure for different categories of claim. In the present case, the distinction is between claims based on contracts of employment, where the regime based on the system of employment tribunals is applicable, and other forms of claim, for example relating to the supply of goods or services, which come before the ordinary courts. The underlying EU principle of non-discrimination must be pursued under both of those regimes, but that is clearly possible.

Case law

[90] In the course of argument reference was made to certain decided cases that were said to have a bearing on the principle of equivalence. *Totel Ltd* v *Revenue and Customs Commissioners*, [2018] 1 WLR 4053, concerned equivalence between value added tax, which is a tax based on EU law, and wholly domestic taxes such as income tax, capital gains tax and stamp duty land tax. Under the VAT legislation, a UK-registered taxpayer was required to make payment of disputed VAT before an appeal to the First-tier Tribunal could be entertained. The case proceeded ultimately to the United Kingdom Supreme Court, which found that the principle of equivalence required that the procedural rules of member states

applicable to claims based on EU law should be no less favourable than those governing similar wholly domestic claims. The principle of equivalence was essentially comparative; what was required for the principle to be engaged was the identification of one or more similar procedures for the enforcement of claims arising in domestic law (paragraph 7). That required determination of an appropriate comparator, and in choosing a comparator regard must be had to context (paragraph 8). Furthermore, member states were entitled to treat different claims differently where the differences were "attributable to, or connected with, differences in the underlying claims" (paragraph 11). This was described as a matter of common sense, a view with which I agree. When context was considered, the court held that none of the wholly domestic taxes cited was a true comparator. The fundamental point was that VAT ultimately falls on the final consumer, but at each stage of the process leading to the sale to the final consumer the trader collects tax from its customer and pays it to HMRC (paragraph 23). From that tax the trader deducts the tax that it has paid to its supplier. On that basis, the paradigm trader was essentially a tax collector, who collected VAT from its customers and accounted for it to HMRC (paragraph 26). In that context, it was proportionate to require the trader to account for the VAT that it had collected as a condition of pursuing an appeal.

[91] When that reasoning is applied to the present case, I am of opinion that it strongly supports the view that the appropriate comparators for claims based on discrimination at work are other employment-related claims, brought against an employer, and not claims brought against persons such as traders who supply goods or services. The contract of employment provides the overall context for all claims brought against an employer, whether based on EU law or purely domestic law. A supplier of goods or services, however, enters into a different type of contract, whose detailed rules deal with different problems

from those that arise in employment law. Furthermore, the general legislation that provides the background for the two categories of case, employment on one hand and the supply of goods or services on the other, is quite different. I accordingly consider that those two types of contract do not form an appropriate comparator. It follows that the petitioner's claim based on the principle of equivalence must fail.

Certainty and settled law

[92] The final ground of appeal related to the requirements for transposition of EU-derived rights into national law. It was submitted, on the authority of Case C-456/08, *Commission v Ireland*, [2010] ECR I-859, that in transposing EU directives into national law the legislation in context should be sufficiently clear and precise to enable the parties concerned to be fully informed of their rights so that they could, if necessary, avail themselves of those rights before the national courts. Reliance was also placed on an earlier case, Case C-392/96, *Commission* v *Ireland*, [1999] ECR I-5901, where it was held that in considering whether the transposition of a directive was inadequate, it was not necessary to establish the actual effects of the legislation that purported to effect such transposition; instead the wording of the legislation itself revealed the insufficiencies or defects of transposition. It was argued that, on this basis, the legislation transposing the EU directives relating to work-based discrimination were inadequate, so far as Scotland is concerned, because they did not provide fully effective interim remedies.

[93] In my opinion this argument must be rejected. My primary reason for so holding is that, on a proper analysis of the existing law governing diligence, it is apparent that an adequate remedy is available to provide interim protection during litigation. Moreover, what is involved in this context is not the transposition of the rights created by a directive

into national law. That exercise normally involves taking the wording of the directive and providing a national equivalent, sometimes using the same wording but on occasion altering that wording. It is in cases of the latter sort that the problem of transposition arises. The present case, by comparison, does not involve the transposition of directives. It rather concerns aspects of procedure that apply not only to the directives in question but to a wide range of other remedies. Those procedures are governed primarily by rules of domestic law, and the critical question is whether they apply to EU-derived claims in such a way as to confer an effective, or equivalent, remedy. The issue that arose in the two *Commission* v *Ireland* cases cited in the last paragraph therefore does not arise.

Anonymity

[94] There remains the question of whether in this case the petitioner's identity should be anonymised in the court's opinions. On this matter I am in complete agreement with your Lordship in the chair that there is no basis for granting anonymity.

Conclusion

[95] For the foregoing reasons I am of opinion that the Lord Ordinary reached the correct conclusion for the correct reasons. This reclaiming motion must accordingly fail.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 43
P249/17

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF LORD MALCOLM

in the Reclaiming Motion by

ANELA ANWAR

Petitioner and Reclaimer

against

THE ADVOCATE GENERAL
(representing the Secretary of State for Business, Energy and Industrial Strategy)

Respondent

and

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Interveners

Petitioner and Reclaimer: O'Neill QC, Blair; Drummond Miller LLP (for McClure Collins, Glasgow)
Respondent: Crawford QC, Komorowski; Office of the Advocate General
Interveners: C O'Neill (sol adv); Solicitor to the Commission

2 August 2019

[96] On the main issues in the case I agree with the opinion of Lord Drummond Young.

On the matter of anonymity I agree with your Lordship in the chair.

[97] As to interim diligence granted by a sheriff, the warrant would be based on a competent action, albeit one in which the merits of the parties' dispute are not in issue. This latter element avoids any conflict with the terms of the Equality Act 2010 concerning employment claims.

[98] An argument can be made that the powers of the employment tribunal should be extended to include the grant of interim protection in security of a claim. (Equally, as explained by Lord Drummond Young, there are cogent reasons for retaining the exclusive jurisdiction of the court system.) However it does not follow that in the meantime there is a breach of EU law, which recognises a wide degree of national procedural autonomy. The test for lack of an effective remedy is one of practical impossibility or excessive difficulty. I am not persuaded that it has been met.

[99] I would refuse the reclaiming motion, and recall those parts of the interlocutor of 29 March 2017 which granted anonymity and imposed reporting restrictions.