

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

Lord Justice Bean, Lady Justice Elisabeth Laing, and Lord Justice Edis

CA-2024-001900

B E T W E E N : -

WARREN AUGUSTINE

Appellant

-and-

DATA CARS LIMITED

Respondent

APPELLANT’S CASE

I. INTRODUCTION AND SUMMARY

(a) The issue

1. The issue in this appeal is whether, for a part-time worker to establish that he was treated less favourably than a full-time worker contrary to regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (“**PTWR**”), he must show that his part-time status was the sole reason for his less favourable treatment.
2. The Appellant’s case is that that is not part of the legal test. Regulation 5 of the PTWR applies if a worker’s less favourable treatment is (a) “on the ground that” he is a part-time worker, and (b) not justified on objective grounds. The phrase “on the ground that” is a well-known phrase in discrimination law, and it encompasses situations where a worker’s protected status is an effective cause, albeit not the sole cause, of the less favourable treatment. Where there are also *other* causes, those may be relevant to objective justification. Or, they may be relevant to the amount of compensation, which under PTWR

regulation 8 is to be awarded on the basis of what is just and equitable. The existence of other causal factors does not however mean that there is no less favourable treatment on the ground of part-time status in the first place.

3. The argument against the Appellant rests principally on the contention that, whilst the PTWR do not themselves refer to the “sole” reason for treatment, they ought to be read consistently with the Framework Agreement on part-time work, which Member States were required to give effect to by Directive 97/81/EC of 15 December 1997 (the “**Part-time Work Directive**”). The Framework Agreement says at clause 4 that part-time workers shall not be treated less favourably than full-time workers “*solely because they work part time unless different treatment is justified on objective grounds*”.

(b) How the issue arises in this case

4. The Appellant worked as a driver for the Respondent. He was required to pay a ‘circuit fee’ of £148 per week to access the Respondent’s booking dispatch system. The fee was set at the same level for all drivers, irrespective of the number of hours worked. The Appellant, who was a part-time worker, consequently paid a higher fee per hour to drive than a comparable full-time worker. Although the Employment Tribunal held that there was no less favourable treatment (on the basis that treating all workers the same is not discriminatory), that finding was overturned by the Employment Appeal Tribunal whose decision on that issue has not been appealed. It is therefore common ground that, applying the correct *pro rata* comparison, the higher per hour fee paid by the Appellant compared to his full-time comparator constituted less favourable treatment.
5. The remaining question is whether the less favourable treatment was “on the ground that [the Appellant was] a part-time worker” within PTWR regulation 5. The Appellant says that it is inherent in a provision which treats workers more or less favourably depending on the number of hours they work that it will treat a part-time worker less favourably than a full-time comparator. The less favourable treatment is therefore on the ground that he is a part-time worker.
6. All three courts below considered themselves bound to apply the “sole ground” test. One difficulty with that test is that it is of uncertain scope. Thus:
 - 6.1. The Employment Tribunal held (in the alternative to its erroneous primary finding that there was no less favourable treatment) that the less favourable treatment was

not solely because the Appellant worked part-time, but rather because the flat fee was the way the industry operated and was how the Respondent made money (at [63]). The Appellant's position on those other causal factors is that, if they are relevant at all, it would be as potential objective justifications for the less favourable treatment, in respect of which the Respondent would bear the burden. However, they were not put forward as objective justifications, and on the contrary the Respondent stated that it was not advancing an objective justification.

6.2. The Employment Appeal Tribunal adopted a different approach. They said, at [88], that although it might be said that the Appellant was treated less favourably because he worked part-time, the same could be said of many drivers who worked full-time (meaning, in this case, above 43.17 hours per week) but less than the chosen comparator (who worked over 90 hours per week). The Appellant's position on that topic is that it is correct to say that his part-time status is only a partial explanation of the less favourable treatment, and that if he had instead worked at the lower end of the full-time range then it is true to say that he still would have been treated less favourably (but not as less favourably) than his chosen comparator. The Appellant has previously conceded that that is a matter which may be taken into account by the Tribunal when determining the just and equitable compensation.

6.3. The Court of Appeal did not identify the other grounds for the less favourable treatment (apart from part-time status).

7. One unusual feature of this case is that both the EAT and the majority in the Court of Appeal considered the Appellant's legal submissions to be correct. However, they considered themselves to be under an obligation to follow a contrary decision of the Court of Session, on the basis of a Court of Appeal judgment on precedent which has itself since been overturned by the Supreme Court (*R. (on the application of Jwanczuk) v Secretary of State for Work and Pensions* [2023] EWCA Civ 1156; [2024] KB 275; Supreme Court decision at [2025] UKSC 42; [2025] 3 WLR 741). As such, the Court of Appeal granted permission to appeal to this Court so that the issue could be decided on a UK-wide basis.

II. LEGAL FRAMEWORK

(a) EU legislation and associated international agreements

8. Given the heavy emphasis which the case against the Appellant places on the Framework Agreement on part-time work, it is necessary to trace the development of the protections for part-time workers in the European and wider international context, with a particular focus on the debates surrounding the word “solely”.
9. Equality law in the European Union initially focused on gender equality. Article 157 of the Treaty on the Functioning of the European Union (“TFEU”), originally introduced in 1957,¹ established the principle that men and women should receive equal pay for equal work. In 1974, following the first enlargement of the (then) European Communities,² a Social Action Programme was launched in which the Council of the European Communities expressed a commitment to the “*undertaking of action to achieve equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay*”.³ Three directives on sex equality were subsequently adopted, covering equal pay for equal work;⁴ equality within the world of work, including as regards access and working conditions;⁵ and equality as regards statutory social security schemes.⁶ Each of those instruments prohibited discrimination “*on grounds*”⁷ or “*on ground*”⁸ of sex, in some instances expressly specifying that this included discrimination arising “*directly or indirectly*”.⁹ Additional directives, adopted in the 1980s, similarly recorded that “*the principle of equal treatment*” requires the absence of all “*discrimination on the basis of sex* [or “*on grounds of sex*”],

¹ As Article 119 of the Treaty establishing the European Economic Community; subsequently Article 141 of the Treaty establishing the European Community.

² The United Kingdom was among the countries which acceded to the European Communities in 1973.

³ Council Resolution of 21 January 1974 concerning a social action programme, OJ C 13, 12.2.1974, p. 1.

⁴ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

⁵ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

⁶ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

⁷ Article 1, Directive 75/117/EEC; Articles 2(1), 3(1), and 5(1), Directive 76/207/EEC.

⁸ Article 4(1), Directive 79/7/EEC.

⁹ Article 2(1), Directive 76/207/EEC; Article 4(1), Directive 79/7/EEC.

either directly or indirectly".¹⁰ These and subsequent equality directives were adopted under Articles 115 and/or 352 TFEU,¹¹ which allow for the promulgation of directives following unanimous support within the Council.

10. The European Communities also sought to regulate part-time work in the 1980s. These efforts commenced with a proposal for a directive submitted by the Commission to the Council in January 1982.¹² The recitals to the proposed directive recorded that the measure was "*designed to complement in the field of part-time work existing legislation on the realization of equal treatment for men and women*". Article 2 provided that: "*Part-time workers shall not be discriminated against as compared with full-time workers in respect of working conditions, rules governing dismissal, entitlement to participate actively or passively in bodies representing employees and access to vocational training, promotion, social facilities and medical care.*" That proposal was not adopted by the Council.
11. An amended version of the proposed directive was submitted in January 1983.¹³ The proposed Article 2 was replaced with text (Article 2(1)) which stated that: "*Part-time workers shall receive the same treatment as full-time workers in the same situation, except where the difference in hours of work itself objectively justifies differences in treatment*". This amended proposal thus provided for a possibility of justification. Article 2(2) of the proposed directive would also have provided that part-time status could not in any circumstances justify differences in treatment as regards a wide range of matters, including "*working conditions*", dismissal, vocational training, and access to social facilities. This proposal also failed to gain unanimous support from the members of the Council.
12. In 1990 another attempt was made to introduce a directive covering part-time work (as well as fixed-term work).¹⁴ This time, the proposal (at Article 3) was that "*Employees covered by this Directive shall be entitled to enjoy the same treatment as workers employed in full-time employment of an indefinite duration as regards benefits in cash and in kind granted under social assistance schemes or under non-contributory social security schemes*". The

¹⁰ Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, Article 5(1); Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, Article 3.

¹¹ Formerly Articles 94 and 308 of the Treaty establishing the European Community.

¹² OJ C 62/7 (12 March 1982).

¹³ OJ C 18/5 (22 January 1983).

¹⁴ COM(90) 228 final (8 September 1990).

scope of the proposed protection was therefore narrowed. The objective justification defence was also removed. Again, the proposal was not adopted by the Council.

13. Following those various unsuccessful attempts at the European level, there were discussions at a wider international level resulting in the Part Time Work Convention 1994 (ILO Convention No. 175) and the accompanying ILO Recommendation 182.¹⁵ Article 5 of ILO Convention No. 175 provides that: “*Measures appropriate to national law and practice shall be taken to ensure that part-time workers do not, solely because they work part time, receive a basic wage which, calculated proportionately on an hourly, performance-related, or piece-rate basis, is lower than the basic wage of comparable full-time workers, calculated according to the same method*”. The United Kingdom is not a signatory to the said Convention, but the debates concerning the word “solely” in that context are relevant to the meaning of the text which later comes to be included in the Framework Agreement.
14. The *travaux préparatoires* for the ILO Convention No. 175 and Recommendation 182 demonstrate that the inclusion of the word “solely” was intended to clarify that where differences in pay reflected genuine differences in the work done, that would not contravene the Convention. That was an important point given that the Convention does not otherwise contain any provision allowing for less favourable treatment to be justified. In particular:
 - 14.1. At the first discussion in relation to the proposed Convention (the ILO’s 80th Session, in 1993), the Workers’ members had submitted text stating that “*Measures should be taken to ensure that part-time workers receive remuneration at least equivalent to that of full-time workers performing the same work or work of equal value, in particular with regard to unit wage rates.*”¹⁶ Several European Government members proposed that the text instead state that: “*Measures appropriate to national custom and practice should be taken to ensure that part-time workers do not receive lower pay than comparable full-time workers performing the same work or substantially the same work, solely because they work part-time*”.¹⁷ The Government member of the Netherlands explained that the addition of the underlined words was

¹⁵ ILO Convention No. 175 and Recommendation 182.

¹⁶ Report of the Committee on Part-Time Work, Provisional Record 27, International Labour Conference, 80th Session (1993), ¶136.

¹⁷ *ibid*, ¶137, emphasis added.

intended to “cover situations, such as the recognition of seniority rights, in which there were good grounds for wage differentials, while at the same time eliminating differentials which were based solely on the hours worked”.¹⁸ Following extensive debate on this and other amendments, an amended version of the Government members’ proposed text, which retained the words “solely because”, was agreed upon at that first stage of discussions.¹⁹

14.2. The text adopted at the first discussion was subsequently revised for clarity by the ILO Office, although no change was proposed to the “solely because” wording.²⁰ Governments and organisations of member States were invited to submit observations on the proposed revised text. The only observation on the “solely because” language came from Canada, which reiterated the position that had been reached at the first discussion: “It should also be made clear that the phrase ‘solely because they work part time’ should be interpreted so as not to preclude wage differentials based on seniority rights, merit systems or shift premiums”.²¹

14.3. At the second discussion (the ILO’s 81st Session, in 1994), the Workers’ members submitted an amendment to replace the entire text of Article 5, which among other things removed the word “solely”.²² In the Report of the Committee on Part-Time Work (¶68), the sequence of events following that proposal is recorded as follows (emphasis added):

“The Employers’ Vice-Chairperson also referred to the previous discussions in the Committee on this point and commended the Workers’ members on their efforts to produce a more easily understandable text. The amendment would be acceptable to the Employers’ members if it could be subamended by the inclusion of the word ‘solely’ before the words ‘because they work’ in the second line. This would add certainty to the text and express the possibility that there might be valid reasons for differential treatment. [...] The Government member of Canada could support the text as subamended, provided it was clearly understood that the basic wage did not

¹⁸ *ibid.*

¹⁹ *ibid.*, ¶¶145-146.

²⁰ Report IV(1), International Labour Conference, 81st Session, 1994, *Part-time work*, Fourth item on the agenda (Geneva, ILO, 1993), p. 3.

²¹ Report IV(2A), International Labour Conference, 81st Session, 1994, *Part-time work: Replies received and commentaries*, Fourth item on the agenda (Geneva, ILO, 1994) (“**Report IV(2A)**”), Observations on Article 5, p. 31.

²² Report of the Committee on Part-Time Work, Provisional Record 23, International Labour Conference, 81st Session (1994), ¶67. The Workers’ members’ proposed text read: “*Measures appropriate to national law and practice shall be taken to ensure that part-time workers do not, because they work part-time, receive a basic wage which, calculated proportionately on an hourly, performance-related, or piece-rate basis, is lower than the basic wage of comparable full-time workers calculated on an hourly, performance-related or piece-rate basis.*”

*include seniority bonuses, merit systems or shift premiums. The Workers' members agreed to accept the subamendment offered by the Employers' members to insert the word 'solely'.*²³

14.4. On that basis, the text as revised was accepted by various Government members and ultimately adopted.²⁴ In the plenary discussion relating to the Committee's report, the Employers' Vice-Chairperson explained that (emphasis added):²⁵

“Article 5 of the proposed Convention states in essence that, subject to proportionality, the basic wage of a part-time worker shall not be lower than the basic wage of a comparable full-time worker if the sole reason for the difference is the fact that the worker is a part-time worker. This approach which the Committee took allows the differences to exist if there is a reason based on other factors such as the way in which the work is carried out, and the reference to performance-related pay in the text is important in this respect.”

15. In the ILO Convention, the words “*solely because*” thus carried the weight of allowing for wage differences which are justified for other reasons.
16. At the European level, the Maastricht version of the Treaty on European Union (“**TEU**”) was signed in 1993. The Treaty contained a Social Protocol (the “**Social Chapter**”), and an annexed Agreement on Social Policy. The Agreement introduced a mandatory consultation process to draw the social partners more fully into European policymaking, and also provided by Article 4 that that “*management and labour*” could enter into “*dialogue... at Community level*”, which “*may lead to contractual relations, including agreements*” that could in turn be “*implemented... at the joint request of the signatory parties, by a Council decision on a proposal from the Commission,*” in which case the Council would act by qualified majority.²⁶ The Social Protocol therefore enabled instruments to be adopted even if unanimity could not be reached within the Council. The United Kingdom did not sign on to the Social Protocol and Agreement until 1997, following a change in government.²⁷
17. The directives adopted on the basis of the Protocol included Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work (the “**Part-time**

²³ *ibid*, ¶¶67-68.

²⁴ *ibid*, ¶70.

²⁵ Provisional Record 27, International Labour Conference, 81st Session, 1994 (Second discussion), speech of the Employers' Vice-Chairperson (Mr Noakes), p. 27/17.

²⁶ Article 4, Agreement on social policy annexed to the Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community.

²⁷ See the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Articles 117-119.

Work Directive”) (which was extended to the United Kingdom by Directive 98/23/EC) and Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work (the “**Fixed-term Work Directive**”).²⁸ Both of these directives implemented framework agreements which had been concluded between the social partners in accordance with the Protocol.

18. Article 1 of the Part-time Work Directive accordingly provides that “[t]he purpose of this Directive is to implement the Framework Agreement on part-time work concluded on 6 June 1997 between the general cross-industry organizations (UNICE, CEEP and the ETUC) annexed hereto.” The recitals to the Directive include the following:

“(11) Whereas the signatory parties wished to conclude a framework agreement on part-time work setting out the general principles and minimum requirements for part-time working; whereas they have demonstrated their desire to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike [...]

(16) Whereas, with regard to terms used in the Framework Agreement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that the said definitions respect the content of the Framework Agreement [...]

19. The Framework Agreement annexed to the Part-time Work Directive contains the following provisions:

“Clause 1: Purpose

The purpose of this Framework Agreement is:

(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;

(b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers.

[...]

Clause 3: Definitions

²⁸ The other two directives adopted on the basis of the Protocol were Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave, and Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

For the purpose of this agreement:

1. The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

2. The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.

Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

Clause 4: Principle of non-discrimination

1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of pro rata temporis shall apply. [...]"

20. The language of clause 4 of the Framework Directive does not precisely correspond to the language of Article 5 of ILO Convention No. 175. However, unlike the previous proposals at a European level, clause 4 of the Framework Agreement requires that the less favourable treatment be “*solely because they work part time*”, and that language and the reasoning for it does reflect both the language and (so far as can be ascertained from the available preparatory materials) the rationale of Article 5 of the ILO Convention. In particular:

20.1. The European Commission published a background paper on 26 September 1995, “*Flexibility in working time and security for workers: Background paper for first-stage consultations with the social partners*”.²⁹ The paper emphasised the growing importance of part-time work and of the need to make it attractive to workers. It noted on page 4 that the ILO Convention and Recommendation had been adopted in June 1994. It sought views from the social partners on the desirability of regulating part-time work.

20.2. The European Commission published a further background paper on 19 April 1996, “*Second phase of consultations with social partners on flexibility in working time*

²⁹ European Commission background paper: Flexibility in working time and security for workers: Background paper for first-stage consultations with the social partners

and security for workers.”³⁰ That document reported that, at the first stage of consultation, there was widespread support for the basic guiding principle of non-discrimination.³¹ It identified three ‘sensitive issues’ one of which was, “*the limits and conditions (e.g. proportionality) for applying the principle of equal treatment*”.³² It expressed the Commission’s view that, “*the basic principle should be that employees in new types of flexible work should not be discriminated against and should therefore receive treatment which is comparable to that given to full-time employees with a permanent contract*” and that, “[t]his means that different treatment cannot be justified solely on the grounds of having a flexible working pattern.”³³ The Commission sought views on how the issue should be taken forward, including whether it ought to be done under Article 4 of the Agreement on Social Policy.

20.3. The history thereafter can be taken from Recitals 8 and 9 of the Directive on Part-Time Work, which record that employer and workers’ organisations approached the Commission with a request that they be able to follow the procedure provided for under Article 4 of the Agreement on Social Policy, such discussions resulting in the Framework Agreement on 6 June 1997.

20.4. Many parts of the Framework Agreement are clearly modelled on ILO Convention No. 175 and the accompanying ILO Recommendation 182.³⁴ That is unsurprising, in circumstances where representatives of workers, employers and governments had only recently agreed on that language.

21. The Appellant submits that in the circumstances it is clear that the words “*solely because they work part time*” in the Framework Agreement are intended, as with the same words in the ILO Convention, to make clear that differential treatment attributable to some other factor (e.g. seniority or performance) should not be considered as discrimination.

³⁰ Counsel’s translation. The document title is: “*Deuxieme phase de consultation des partenaires sociaux sur la flexibility du temps de travail et la securite des travailleurs.*”

³¹ Paragraph 4, p.2.

³² Paragraph 7, p.2.

³³ Paragraph 11, p.5.

³⁴ As noted by Mark Jeffery, ‘Not Really Going to Work? Of the Directive on Part-time Work, ‘Atypical Work’ and Attempts to Regulate It’ (1998) 27(3) ILJ 193, 200. Compare, for example clause 3 of the Framework and Article 1 of the Convention; clause 5(2) of the Framework and clause 19 of the Recommendation; clause 5(3)(1)-(c) of the Framework and clause 18 of the Convention.

(b) Domestic legislation

22. After the Part-time Work Directive was adopted, it would have been possible for the UK to implement it by regulations under section 2(2) of the European Communities Act 1972. However, the PTWR were instead introduced in reliance on section 19 of the Employment Relations Act 1999, which provides that the Secretary of State “*shall make regulations for the purpose of securing that persons in part-time employment are treated, for such purposes and to such extent as the regulations may specify, no less favourably than persons in full-time employment*”. This language was intentionally broad, as the Explanatory Notes to the Act explain at ¶¶215-217:

“[...] This provision gives the Secretary of State the powers to ensure that all aspects of the Directive and the Framework Agreement are fully implemented, together with related matters.

This power is necessary because Directives which implement Framework Agreements cannot, by the terms of the Agreement on Social Policy (now incorporated into the Treaty of Amsterdam), cover pay. However, in relation to part-timers, the Government believes pay should be covered at the same time as other employment conditions. The powers under the European Communities Act 1972 which are usually used to implement EU Directives are not sufficiently wide to go beyond the scope of the Directive in this way, so the section provides powers to do this.

The regulations will primarily address less favourable treatment in non-statutory terms and conditions, as statutory employment rights in the UK do not treat part timers less favourably than their full-time equivalents. The powers are widely drawn and the Government intends to consult fully on how they should be used, by discussing with interested parties and publishing draft regulations for comment. Section 42 provides that the regulations will be subject to the affirmative resolution procedure.”

23. In the Court of Appeal, the Respondent submitted that section 19 of the Act had been framed in the way that it was only in order to “*give the legislator power to go further than the Directive in respect of pay, because pay was not covered by the Directive*” ([2025] EWCA Civ 658; [2025] ICR 1404, [57]). That submission is incompatible with the Government’s express intention to consult on how the “*widely drawn powers [...] should be used*”, and the fact that it did indeed carry out such consultation (which directly informed the scope of the PTWR, and even resulted in their being delayed).³⁵
24. Regulation 5 PWTR provides as follows:

³⁵ Julia Louri, *Part-time Work: Research Paper 00/50* (House of Commons, 15 May 2000), pp. 13-26; see in particular p. 25 identifying the changes made following the consultation.

“Less favourable treatment of part-time workers

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker–

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if–

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime.”

25. The “pro rata principle” referred to in regulation 5(3) above is explained in regulation 1(2) as meaning that “where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker [...]”.

26. If an Employment Tribunal finds that a complaint under the PTWR is well-founded, it may, if it considers it just and equitable, order the employer to pay compensation to the claimant (regulation 8(7)). Regulation 8(9) then provides that:

“[...] the amount of compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances, having regard to –

[...]

(b) any loss which is attributable to the infringement having regard, in the case of an infringement of the right conferred by regulation 5, to the pro rata principle except where it is inappropriate to do so.”

(c) Causation in direct discrimination

27. The language “*on the ground that*”, used at regulation 5(2)(a), reflects the language used in relation to direct discrimination under EU and UK equality law. Direct discrimination, under EU and UK equality law, occurs where a decision is made on grounds of, or because of, a protected characteristic. It has long been established that such discrimination may occur despite the purported discriminator’s ability to point to benign reasons for the impugned differential treatment. The treatment will be on grounds of a protected characteristic if the characteristic consciously or subconsciously influenced the treatment, or if the basis for the treatment was inherently tied to the protected characteristic (R. (on the application of E) v JFS Governing Body [2009] UKSC 15; [2010] 2 AC 728, [78]).
28. The possibility that treatment may be inherently tied to a protected characteristic has been clear since the early EU jurisprudence on direct discrimination. In Case C-177/88 Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus ECLI:EU:C:1990:383, a job applicant was rejected on the basis that she was pregnant and the employer’s insurance would not reimburse it for the payments made during her period of maternity leave. As a result, the employer would be unable to employ a replacement during her absence and would end up being short-staffed (at [3]). Pregnancy was not a protected characteristic under EU law at the time, but the Court of Justice of the EU (“CJEU”) held that the employer had directly discriminated against the applicant on grounds of her sex (at [10]-[13], emphasis added):

“Consideration must be given to the question whether a refusal of employment in the circumstances to which the national court has referred may be regarded as direct discrimination on grounds of sex for the purposes of the Directive. The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.

The reason given by the employer for refusing to appoint Mrs Dekker is basically that it could not have obtained reimbursement from the [insurer] of the daily benefits which it would have had to pay her for the duration of her absence due to pregnancy, and yet at the same time it would have been obliged to employ a replacement. [...]

In that regard it should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. [...]”

29. The employer argued that all of the job applicants had been female, and submitted that it was therefore obvious that its decision had been guided not by sex but by “*other considerations of a financial or administrative nature*” (at [16]). The Court rejected this argument (at [17]). It put the point simply: “*If [the] reason [for the treatment] is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate [and...] the absence of male candidates cannot affect the answer.*”
30. The same approach was also being adopted in domestic caselaw in the UK at that time. In *R. v Birmingham City Council Ex p. Equal Opportunities Commission (No.1)* [1989] AC 1155 (“***Birmingham City Council***”), the House of Lords considered the implications of Birmingham having five boys’ grammar schools (admitting a total of 542 boys) but only three girls’ grammar schools (admitting a total of 360 girls). The reason for the difference was historic – almost all of the grammar schools in the area were of ancient foundation, and there was no suggestion that the council had any policy of discriminating between the sexes. But the result of the difference in grammar school availability was that in order to be accepted, applicants to the girls’ schools had to attain a higher minimum mark than applicants to the boys’ schools. The House of Lords held that this constituted direct sex discrimination. Lord Goff’s judgment, given on behalf of a unanimous Court, explained as follows (at 1194A-D):
- “*There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate [...] is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex [...] if the council's submission were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present case, whatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975.*”
31. *Birmingham City Council* was quickly followed by *James v Eastleigh Borough Council* [1990] 2 AC 751 (“***James***”), which was concerned with a situation where the right to free admission to a Council’s leisure pools depended on whether a person had reached the state pension age. At the time this was 60 for women and 65 for men. The Court of Appeal had held that this was not direct discrimination, explaining that “[t]he Council's reason for giving free swimming to those of pensionable age was to give benefits to those whose

resources would be likely to have been reduced by retirement. The aim was to aid the needy, whether male or female, not to give preference to one sex over the other" ([1990] 1 QB 6, 73D-E). The House of Lords overturned that decision and held that direct discrimination had occurred. The criterion of pensionable age was inherently discriminatory on the basis of sex, and so the "*subjective reason for the differential treatment*" was irrelevant (at 765G). Lord Goff, concurring, explained that (at 772D-E, emphasis added):

"Of course, there may be cases where the defendant's reason for his action may bring the case within the subsection, as when the defendant is motivated by an animus against persons of the complainant's sex, or otherwise selects the complainant for the relevant treatment because of his or her sex. But it does not follow that the words 'on the ground of sex' refer only to cases where the defendant's reason for his action is the sex of the complainant; and, in my opinion, the application by the defendant to the complainant of a gender-based criterion which favours the opposite sex is just as much a case of unfavourable treatment on the ground of sex. Such a conclusion seems to me to be consistent with the policy of the Act, which is the active promotion of equal treatment of men and women."

32. Similarly, in *O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School* [1997] ICR 33; [1996] IRLR 372, Mummery P held that (emphasis added):

*"It is established by the authority of the House of Lords that the test to be applied in determining whether treatment is directly discriminatory on the ground of sex is not one of subjective mental processes of the respondents ie, as to their intentions, motives, beliefs or subjective purposes. Those considerations may be relevant to remedies for discrimination, but they are not relevant to liability. A condition of liability in the expression "on the ground of her sex" is an objective test of causal connection. According to the ruling of the House of Lords on the similarly worded Race Relations Act the relevant question is "Would the applicant have received the same treatment but for her sex?" See *James v. Eastleigh Borough Council* [1990] ICR 554 at 568A, 572 C-E and 576 C-E.*

*In answering that causation question regard must be had to the well established and uncontroversial legal principles recently discussed by the Court of Appeal in *Banque Bruxelles Lambert S.A v. Eagle Star Insurance Co Ltd* [1995] Q.B. 375, 406.³⁶ Although that case was not cited in argument on the appeal, there can be no doubt that the principles discussed in that passage are beyond controversy at this level of decision. The relevant principles are these -*

(i) The Tribunal's approach to the question of causation should be "...simple, pragmatic and commonsensical."

(ii) The question of causation has to be answered in the context of a decision to attribute liability for the acts complained of. It is not simply a matter of a factual, scientific or historical explanation of a sequence of events, let alone a matter for philosophical

³⁶ This was case relating to economic loss following professional negligence. The Court of Appeal's judgment was overturned in relation to the issue of foreseeability limiting recoverable loss, but Mummery P's comments in *O'Neill* have not been doubted.

speculation. The basic question is: what, out of the whole complex of facts before the Tribunal, is the “effective and predominant cause” or the “real and efficient cause” of the act complained of? As a matter of common sense not all the factors present in a situation are equally entitled to be treated as a cause of the crucial event for the purpose of attributing legal liability for consequences.

(iii) The approach to causation is further qualified by the principle that the event or factor alleged to be causative of the matter complained of need not be the only or even the main cause of the result complained of (though it must provide more than just the occasion for the result complained of). “...It is enough if it is an effective cause” (p.621C).”

33. In *Nagarajan v London Regional Transport* [2000] 1 AC 501, the House of Lords (Lord Nicholls giving a speech with which Lords Hutton and Hobhouse agreed) repeated that there was no need to establish a consciously racial motive in order for direct discrimination on grounds of race to be made out: “[a]ll human beings have preconceptions, beliefs, attitudes and prejudices on many subjects”, and that an employer “may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race” (at 511H-512B). It is the task of the courts to identify what the reason for the less favourable treatment really was: the key question is “why did the complainant receive less favourable treatment” (at 512E). He went on to explain (at 512H-513B, emphasis supplied):

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”

34. This test of “significant influence” means that not all treatment which would not have occurred “but for” the protected characteristic is discriminatory. In particular, if a protected characteristic is merely “a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it”, that does not necessarily mean that it formed part of the ground, or reason, for that treatment (*Ahmed v Amnesty International* [2009] ICR 1450, [37]). If the treatment is made on a basis which is inherently and necessarily linked to a protected characteristic, however, the characteristic will be an effective cause and direct discrimination will occur.
35. The test developed in the context of direct discrimination has notably also been applied in other instances where domestic law uses the word “on ground that”. In particular, section

47B of the Employment Rights Act 1996 provides that a “*worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*”. In *Fecitt v NHS Manchester* [2011] EWCA Civ 1190; [2012] ICR 372, it was argued that the “*proper test in this context is not whether the decision was materially (in the sense of more than trivially) influenced by the proscribed reason but [...] whether the proscribed reason was the sole or principal reason for the action taken*” (at [38]). The Court of Appeal disagreed, holding (*obiter*) that “*liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act*”, and that even though the legislation did not implement any EU law, “*the reasoning which has informed the EU analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing*” (at [43]).

(d) EU caselaw on the Part-time Work Directive

36. As above, the prohibition in clause 4 of the Framework Agreement states that “*part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds*”. The words “*solely because*” are slightly different from the words “*on ground*” or “*on grounds*”. That is perhaps unsurprising, in circumstances where the Directive was the product of a negotiation and adopted the language of a pre-existing ILO Convention as described above. What is clear, however, is that the CJEU has never suggested that a different approach – that is, an approach which attempts to isolate a ‘sole’ cause for differential treatment – should be adopted when considering discrimination against part-time workers. On the contrary, the CJEU has repeatedly emphasised that the prohibition on discrimination against part-time workers is “*merely a particular expression of a fundamental principle of Community law, namely the general principle of equality*” (Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG* ECLI:EU:C:2004:308 [56]), and has adopted an approach in relation to the Part-time Work Directive which is on

all fours with its treatment of other forms of discrimination.³⁷ Most importantly, the Court has never suggested that an employer can avoid the application of the Directive (and therefore avoid any need for objective justification) merely by pointing to some reason for the adoption of the rule which are unrelated to part-time status.

37. In Case C-354/16, Ute Kleinsteuber v Mars GmbH ECLI:EU:C:2017:539, for example, a claimant employee alleged that a particular method for calculating pensions was less favourable for part-time workers and therefore discriminated against them. The Court accepted the Respondent's submission that the purpose of the formula was to "*reflect at the age of retirement, if possible in a full and proportionate way, the standard of living which the employee enjoyed during his employment*" (at [32]). That was the 'reason' for the differential treatment, in much the same way that the reason for the treatment in James was to aid the needy. But the Court did not suggest that this took the situation outside the scope of the Directive. Instead, it considered the asserted rationale for the formula at the objective justification stage of the test. It concluded that the formula did indeed seek only to "*take account of the difference of cover needs*", and was therefore justified (at [38]-[39]). The key point is that the Court did not suggest that, because a 'reason' for the policy was to 'take account of differences in cover needs', that meant that part-time status was not the 'sole' reason for the treatment (such that the need to justify the treatment by reference to that rationale could be avoided).
38. Similarly, in Case C-660/20 MK v Lufthansa CityLine GmbH ECLI:EU:C:2023:789 ("MK"), a part-time pilot complained that his employer's approach of calculating remuneration by reference to uniform thresholds of monthly flying hours constituted discrimination against him as a part-time worker. The Court was asked whether a provision requiring employees to reach the same threshold of flying duty hours to be entitled to an increased rate of salary constituted discrimination against part-time workers. In its

³⁷ Peers notes that the CJEU jurisprudence demonstrates that "*concepts from other fields of EU anti-discrimination law have been 'borrowed'*" when applying the non-discrimination principle in the Part-time Work Directive, and notes that "*this borrowing of basic legal concepts can only be encouraged in the interests of avoiding the complications that would otherwise undoubtedly result from applying fundamentally different concepts of non-discrimination at the same time*" (in circumstances where, for example, cases frequently raise allegations of both discrimination against part-time workers and (indirectly) against women); Steve Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU Law?' (2013) 32(1) Yearbook of European Law 30, 54-55.

judgment, the Court commenced by reciting the principles which would guide its interpretation (at [36]-[38]):

“... for the purposes of interpreting Clause 4 of the Framework Agreement, it should be noted that the agreement seeks both to promote part-time work and eliminate discrimination between part-time workers and full-time workers (judgment of 5 May 2022, Universiteit Antwerpen and Others, C-265/20, EU:C:2022:361, paragraph 41 and the case-law cited).

The prohibition of discrimination laid down in Clause 4.1 of that framework agreement is simply a specific expression of one of the fundamental principles of EU law, namely the general principle of equality (judgment of 5 May 2022, Universiteit Antwerpen and Others, C-265/20, EU:C:2022:361, paragraph 42 and the case-law cited).

In the light of those objectives, that clause must be interpreted as articulating a principle of EU social law which cannot be interpreted restrictively (judgment of 7 July 2022, Zone de secours Hainaut-Centre, C-377/21, EU:C:2022:530, paragraph 43 and the case-law cited).”

39. Having confirmed that remuneration formed part of the claimant’s “*employment conditions*”, the Court proceeded directly to consider whether, “*in the light of a number of factors, such as the nature of the work, training requirements and working conditions*”, the claimant was in a position comparable to that of a full-time worker (at [44]). The Court held that he was, since part-time and full-time pilots performed the same duties (at [46]).
40. The Court then considered whether the treatment of part-time workers was less favourable (at [47]-[49], emphasis supplied):

“... a part-time pilot must complete the same number of flying duty hours as a full-time pilot to be entitled to that remuneration, without that threshold being lowered in a manner proportionate to the length of his or her individual working time. Under those circumstances, part-time pilots do not reach the trigger thresholds required to be entitled to additional remuneration, or are much less likely to do so than full-time pilots.

Although the remuneration per flying hour for the two categories of pilots appears to be equal up to those trigger thresholds, it should be noted that those identical thresholds represent, for part-time pilots, a longer flight-hour duty than for full-time pilots in relation to their total working time and, consequently, a greater burden than for full-time pilots (see, by analogy, judgment of 27 May 2004, Elsner-Lakeberg, C-285/02, EU:C:2004:320, paragraph 17). That situation therefore has a negative impact for part-time pilots in terms of the relationship between the service provided and the consideration for it.

Since part-time workers thus satisfy much more rarely the conditions for entitlement to additional remuneration, a part-time pilot, such as the applicant in the main proceedings, must be regarded as subject to a difference in treatment compared with comparable full-time pilots, prohibited by Clause 4.1 of the Framework Agreement, unless it is justified on ‘objective grounds’ within the meaning of that clause.

Having regard to the foregoing, the answer to the first question is that Clause 4.1 of the Framework Agreement must be interpreted as meaning that national legislation which makes the payment of additional remuneration for part-time workers and comparable full-time workers uniformly contingent on the same number of working hours being exceeded in a given activity, such as a pilot's flight duty, must be regarded as a 'less favourable' treatment of part-time workers within the meaning of that provision."

41. The Court heard argument that the reasons for adopting the uniform thresholds on working hours were the need to compensate pilots for particularly heavy workload levels, and the need to dissuade excessive overworking of pilots (at [20], [59]). The presentation of these reasons did not lead the Court to conclude that the conduct fell outside the scope of the Part-time Work Directive (because there were 'reasons' for the treatment other than the pilot's part-time status). Instead, these were considered to be justifications and were assessed at that stage of the exercise ([59]-[67]).
42. In each of these cases, the practice in question necessarily and inherently imposed a greater burden on part-time workers than on full-time workers, because it afforded more favourable treatment (better pensions, higher pay) to those who worked more hours. It did not matter what the rationale or justification for the rule was, once that first step was established: rationales, or explanatory reasons, fall to be considered at the objective justification stage. They do not change the fact of the inherently discriminatory treatment.
43. For completeness, while this Court is not technically bound by CJEU decisions which post-date 31 January 2020, it may have regard to them when interpreting the PTWR pursuant to section 6 of the European Union (Withdrawal) Act 2018. When identifying the minimum protections set by the Directive, it is suggested that the CJEU jurisprudence is plainly directly relevant and should be considered highly persuasive.

(e) EU caselaw on the Fixed-term Work Directive

44. The cases discussed above, concerning the Part-time Work Directive, are mainly cases where the competing causes of the less favourable treatment may be described as being (i) the part-time status itself, or (ii) the underlying motive or rationale. They do not address the position where there may be said to be two (or more) wholly distinct causes for the less favourable treatment.
45. In that regard, the Fixed-term Work Directive is of interest. That Directive was negotiated in the same way as the Part-time Work Directive, and is materially identical to the Part-

time Work Directive in relevant part. It too refers to a framework agreement, clause 4(1) of which provides that: *“In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.”*

46. In Case C-268/24 *ZT v Ministero dell’Istruzione e del Merito* ECLI:EU:C:2025:526 (*“Lalfi”*), a €500 professional development fund was provided to all permanent teachers, as well as fixed-term substitutes whose contracts covered the entire school year. The complainant teacher had three short, fixed-term substitute positions at three different schools, and was denied the benefit. If one asks the question, why was the teacher denied the benefit, the answer would be that it was because she was (i) fixed-term; and (ii) on contracts which covered less than the full academic year. The Italian Government accordingly argued that any difference in treatment was not between fixed-term and permanent workers, but rather between two categories of fixed-term workers. That argument was rejected by the CJEU, which explained at [49]-[50] that:

“[...] it follows from the wording of clause 4(1) of the Framework Agreement that it is sufficient for the fixed-term workers in question to be treated in a less favourable manner than permanent workers in a comparable situation in order for those fixed-term workers to claim the benefit of that clause [...] It follows that a difference in treatment for the purposes of clause 4(1) of the Framework Agreement cannot be excluded on the sole ground that that difference in treatment affects only some of the fixed-term workers, since otherwise the scope of protection against discrimination conferred by that provision, which must apply to all fixed-term workers [...] would be unjustly reduced.”

47. The Court went on to hold that the relevant short-term supply teachers were in a comparable situation to the permanent teachers, and then that the difference in treatment did not appear to be objectively justified (albeit leaving the final decision to the referring court).
48. The Appellant says the CJEU’s judgment in *Lalfi* is significant because it shows that for a worker to prove less favourable treatment *“solely because”* of a fixed-term contract does not require him to prove that the fixed-term contract was the *sole* cause of the treatment. Rather, there may in principle be multiple causes of the less favourable treatment. The Appellant says the same is true in the part-time work context. What the word *“solely”* conveys is that, where the cause (or one of the causes) of the less favourable treatment is fixed-term or part-time status, the treatment will not be discriminatory if it is justified for other reasons.

(f) Domestic caselaw on the PTWR

49. The Part-time Work Directive set a minimum floor of rights, but clause 6(1) of the Framework provided that “*Member States and/or social partners may maintain or introduce more favourable provisions than set out in this agreement.*” As explained above, the PTWR were introduced on the basis of a statutory provision which was intentionally widely drawn with a view to permitting wider protections than the Framework afforded. It was also possible for the minimum requirements to be spelled out more clearly in the domestic transposition, given that the Framework was a negotiated instrument whereas the domestic legislation was not.
50. Against that backdrop, it is striking that in the PTWR the domestic legislator eschewed the language of “*solely because*” and reverted to language which was at that time well-established in the context of discrimination law: the question posed by the PTWR is whether treatment is “*on the ground that the worker is a part-time worker*”. By the year 2000 (when the PTWR were adopted), cases like Birmingham City Council and James had made clear that treatment could be “*on the ground*” of a protected characteristic even in the absence of any intentionality (as set out above).
51. Despite (i) the CJEU never suggesting that the words “*solely because*” should lead to a departure from ordinary EU equality law principles when interpreting the Part-time Work Directive, and (ii) the domestic legislator removing any doubt in that regard by using traditional equality law language in the PTWR, the inclusion of the word “*solely*” within the Framework has given rise to several conflicting decisions.
52. The starting point is the decision of the Employment Appeal Tribunal (“EAT”) in Gibson v Scottish Ambulance Service EATS/0052/04 (“Gibson”). The case was about the number of standby hours which part-time workers were required to keep, as compared with full-time workers: the position was that the proportion of on-duty and standby hours differed as between the two categories of workers. The Employment Tribunal had held that the “*subjective approach*” adopted in Nagarajan fell to be applied, and that it was therefore necessary to inspect the “*reason or motive*” of the ambulance service in adopting this approach (at [5]). The evidence suggested that there was “*no single determinant*”; indeed, it was unlikely that one could ever identify a “*sole or single reason in the circumstances of a case like this*” (*ibid*). The Employment Tribunal further held that in circumstances where the Framework used the word “*solely*”, and regulation 5 of the PTWR used the language

“*the ground*” in the singular, it was to be understood that discrimination arose only if the treatment had been based “*on one ground only*”, and that ground was part-time status (*ibid*). In circumstances where it was not possible to say that the treatment was based exclusively on the complainant’s part-time status, discrimination was not made out.

53. The Employment Tribunal’s reasoning exhibited multiple errors:

53.1. The Tribunal only acknowledged the form of direct discrimination which involves a protected characteristic consciously or subconsciously influencing the treatment. It ignored the possibility of treatment being inherently tied to a protected characteristic, without any mental process involving the characteristic being required.

53.2. The Tribunal failed to recognise that the Framework set a floor for rights, which it was open to domestic law to exceed, such that there was no basis for reading down the PTWR by reference to the Framework.

53.3. The suggestion that the word “*ground*” in the singular required a departure from the standard approach to causation was incorrect in circumstances where equality legislation refers to “*ground*” and “*grounds*” interchangeably.³⁸

54. The EAT nonetheless upheld the first-instance decision in a very short judgment. It held that it is “*necessary to look at the intention behind the decision... the real reason was the issue of demand in the local area which means that the appellant was not being discriminated against on the ground that he was a part-time worker per se*” (at [11]). The EAT thus erroneously focused on the purported discriminator’s intention. Moreover, the issue of demand in the local area was an issue which is relevant to justification, not to the prior question of less favourable treatment.

³⁸ For example, section 1 of the Sex Discrimination Act 1975 prohibited discrimination against a woman “*on the ground of her sex*”. Similarly, Article 4(1) of Directive 79/7/EEC provides that “*there shall be no discrimination whatsoever on ground of sex*”. Moreover, in *Nagarajan*, the House of Lords considered section 2 of the Race Relations Act 1976, which provided that a person would discriminate against another person “*if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised [did a protected act]*”. Lord Nicholls (at 510H) and Lord Steyn (at 521H), giving the lead speeches, each considered that this provision had to be read in the context of section 1(1)(a) of the Act, which prohibited direct discrimination, i.e. where a person “*on racial grounds [...] treats [an] other less favourably than he treats or would treat other persons*”. As noted at ¶27 above Lord Nicholls went on to state that “*[d]ecisions are frequently reached for more than one reason*.” There was no suggestion that this truism did not matter for section 2 of the Act because of the use of the singular rather than the plural.

55. The EAT's erroneous approach in Gibson was followed by the Scottish Court of Session in McMenemy v Capita Business Services Ltd [2007] CSIH 25, [2007] IRLR 400 ("McMenemy"). The facts were that a part-time worker who did not work on Mondays complained that he consequently did not receive the benefit of public holidays, unlike full-time workers. The Employment Tribunal had found that any full-time worker who worked a five-day week which did not include Mondays also did not get the benefit of public holidays. Conversely, if a part-time worker worked Monday to Wednesday, rather than Wednesday to Friday, they *would* get the benefit.
56. The Court of Session quoted the judgment in Gibson and added that: "[t]he part-time worker who complains that his employer is treating him less favourably than he does a comparable full-time worker in breach of the legislation must therefore establish that the employer intends to treat him less favourably on the sole ground that he is a part-time worker" (at [6]). Applying that test, the Court held that "*the reason why the appellant received less favourable treatment than did a comparable full-time worker was through the accident of his having agreed with the respondents that he would not work for them on Mondays or Tuesdays*" (at [14]). The Court declined to make a preliminary reference to the CJEU (at [16]).
57. Whilst the reasoning was wrong, the Appellant agrees that the outcome in McMenemy was correct. Given that, on the facts as found, both full and part-time workers were in principle able to work Mondays and thereby obtain the benefit of public holidays, the fact that Mr McMenemy did not obtain the benefit of public holidays was neither intended to reflect, nor inherent in, his part-time status. It may be that the employer's policy was *indirectly* discriminatory towards part-time workers, but the PTWR does not outlaw indirect discrimination.
58. Shortly after the Court of Session had decided McMenemy, the EAT gave judgment in Sharma v Manchester City Council [2008] ICR 623 ("Sharma"). McMenemy was apparently not cited to it, but it did consider Gibson. In Sharma, the position was that part-time workers on a particular type of part-time contract had had their hours cut. A similar cut was not possible in respect of full-time workers or other categories of part-time workers, because their contracts did not allow for it. The Employment Tribunal had considered itself to be bound by Gibson and had therefore held that "*the treatment was not on the ground that the lecturers were part-time per se but that they were a particular type*

of part-timer” (at [33], emphasis added). The EAT held that this reasoning was wrong (at [48]-[51]):

“In our judgment, the reference to “solely” in Directive 97/81 is simply intending to focus upon the fact that the discrimination against a part-timer must be because he or she is a part-timer and not for some other independent reason.

To take a simple example, if the employer decided to discriminate against all part-timers over the age of 30 it could be said that there were two reasons for the discrimination: being a part-timer, and being of a certain age. Similarly, if the employer deliberately discriminates against all his part-timers in factory A but not those with identical full-time comparators in factory B, can it really be said that, because only some part-timers are selected for the less favourable treatment, the Directive (and by extension the Regulations) are not intended to be applicable?

In our judgment it is inconceivable that the Directive was not intended to outlaw such treatment (subject to justification) and we have no doubt whatsoever that it would inevitably be construed by the European Court of Justice to do so. Any other conclusion would wholly undermine the very purpose of the Directive. The fact that not all part-timers are treated adversely does not mean that those who are cannot take proceedings for discrimination if being part-time is a reason for their adverse treatment.

In our judgment, once it is found that the part-timer is treated less favourably than a comparator full-timer and being part-time is one of the reasons, that will suffice to trigger the Regulations.”

59. The EAT in *Sharma* additionally held that “in any event, it is open to a member state to give more favourable protection than the Directive affords, and accordingly in our judgment there is no need to read limitations in the Directive into the Regulations. In this connection it is to be noted that the Regulations were made under section 19 of the Employment Relations Act 1999, which confers a broad enabling power not just limited to implementing the terms of the Directive” (at [53]). The EAT was correct in that statement: as explained above, section 19 was intentionally widely drawn.
60. These two conflicting authorities – *McMenemy* and *Sharma* – were variously cited, with opposing results, in subsequent caselaw.
 - 60.1. In 2009, the EAT in *Carl v University of Sheffield* [2009] 3 CMLR 21; [2009] ICR 1286 cited *O'Neill* for the proposition that it is “enough if [the worker’s] part-time worker status is an effective cause, albeit not the sole cause, of the less favourable treatment of which complaint is made”, and held that the Employment Tribunal had erred by assessing whether “the reason in the mind of the employer for the difference of treatment between a part-timer and full-time worker was that the part-timer was

a part-time worker” (at [28]). The EAT noted that the PTWR had exceeded the minimum protection requirements imposed by the Part-time Worker Directive, by providing additional protection for workers changing from part-time to full-time status, or the reverse (at [35]). Having considered the various conflicting authorities, the EAT held (at [42]) that:

“[...] The expression ‘on the ground that’ or ‘on the grounds of’ frequently appears in our domestic legislation. [...] we agree with the President in Sharma that whereas domestic legislation must provide the protection contained in the Directive, it is not limited to such protection. ‘On the ground that’ in reg. 5(2)(a) means what Mummery P said the similar expression in the SDA meant [in O’Neill]. Part-time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause.

60.2. In 2016, the EAT in Engel v Ministry of Justice [2017] ICR 277 commented that:

“The PTWD was concerned to provide a remedy for those who were treated in a less favourable manner than comparable full-time workers “solely because they work part-time”. While the language of the 2000 Regulations is wider, their purpose is the same” (at [18]). Neither Sharma nor McMenemy appear to have been cited to the EAT in that case.

60.3. In 2021, the EAT decided the case of Forth Valley Health v Campbell (EA-2020-SCO-000093-SH), in which a part-time worker complained that he did not receive breaks, whereas full-time workers did. The breaks were only available after six hours of working, and the complainant worked four-hour shifts. Part-time workers who worked shifts of six hours or more did receive breaks, including the complainant on particular days. The EAT reasoned that the applicability of breaks depended on shift patterns, which did not in turn depend on part-time work status (at [12]-[13]). The EAT cited McMenemy to reach that conclusion, but it did not need to: the correct reasoning would have been if (as was the case) shift patterns at that particular employer were not inherently linked to full-time or part-time work status, differential treatment on grounds of shift patterns was not discrimination on grounds of part-time status.

III. THE DECISIONS IN THE PRESENT CASE

61. The present case came before the Tribunal against the backdrop of these conflicting authorities. The Employment Tribunal at first instance found³⁹ that the evidence of the Respondent was that a model of charging a universal ‘circuit fee’ to all drivers, irrespective of work hours, was a “*well-established*” practice in the industry prior to the arrival of Uber on the market (at [59]). The Tribunal considered that the “*reason why the Claimant was charged a circuit fee is because this is the way in which private hire companies such as the Respondent were operating. It is the way in which the Respondent earned a revenue from the business*” (at [63], emphasis added). The Tribunal commented that the Appellant was not “*charged the fee because he was working fewer hours than his fellow drivers*” (at [63], emphasis original). The Tribunal later identified a slightly different reason: “*the reason why he was charged the fee was so that he could obtain access to bookings through the Respondent’s systems in the same way as any other driver*” (at [66], emphasis added). The ‘reasons’ for the treatment identified in the judgment thus essentially amount to the point that the treatment was simply the way the Respondent operated and made money.
62. It is immediately obvious that the Tribunal’s reasoning and conclusion was starkly different from that of the CJEU in the cases referred to at ¶¶37-40 above. In *MK*, for example, the employer submitted that a uniform working hour threshold for additional compensation had been adopted because of the need to compensate pilots for particularly heavy workload levels and dissuade excessive overworking of pilots. The CJEU nonetheless held that in circumstances where “*those identical thresholds represent, for part-time pilots, a longer flight-hour duty than for full-time pilots in relation to their total working time and, consequently, a greater burden than for full-time pilots*”, the first limb of the test had been passed. The employer’s arguments could be deployed only at the objective justification stage. By contrast, in the present case, a general assertion that uniform thresholds were just ‘how the employer does business’ was, in the view of the Employment Tribunal, sufficient to find against the Appellant, without even any need to consider whether the approach was objectively justified. The divergence between the reasoning of the Employment Tribunal and that of the CJEU demonstrates the ‘sole reason’ approach – which invites a focus on the rationale or explanation for a rule or practice – is liable to very frequently result in

³⁹ Although this part of the judgment was in the alternative to the Tribunal’s primary that the Appellant had not been treated less favourably than a full-time comparator in the first place (at [42]-[55]). The EAT held that the Tribunal had erred in that finding (at [33]).

incorrect outcomes. The justification for a rule must be considered at the objective justification stage and not earlier, as the CJEU jurisprudence demonstrates.

63. On appeal ([2024] EAT 117; [2025] ICR 19), the EAT (Eady P, Mrs Gemma Todd, and Dr Gillian Smith MBE) noted that the PTWR prohibit less favourable treatment “*on ground of*” part-time status, unless objectively justified, and – having reviewed the caselaw dealing with the phrase “*on ground of*” (including that set out above) – stated at [67] that:

“If we were approaching regulation 5 PTWR absent any prior judicial consideration, we would not hesitate to adopt the same approach [as that adopted in relation to direct discrimination and protected disclosures]. To require that the complainant’s status as a part-time worker be an effective cause of the less favourable treatment, even if not the sole cause of that treatment, seems to us to be entirely consistent both with the language of regulation 5(2) and with the protective purpose of the legislation. To hold otherwise would seem to us to be inconsistent with the approach standardly taken to questions of causation (see per Mummery P in O’Neill), and to risk the obviously perverse outcomes hypothesised by Elias P at paragraph 49 of Sharma.”

64. The EAT further explained (at [72]) that:

“[...] we are unable to see any basis for inserting the word ‘solely’ (per Gibson, Engel, and Forth Valley) or the phrase ‘if and only if’ (per Engel) into regulation 5(2)(a) PTWR. Equally, acknowledging that clause 4.1 of the Framework Agreement includes the word ‘solely’ [...] we do not consider this gives rise to an obligation to construe domestic legislation as requiring that the protection afforded to part-time workers be limited to cases where the less favourable treatment is solely due to their status as such. Indeed, having regard to our collective practical experience of issues relating to part-time work, we are mindful that discrimination against part-timers will often take place because of factors associated with their part-time status; limiting the protection to less favourable treatment solely on the ground of part-time work risks excluding such cases, where the part-time nature of the work might be the effective, but not the sole, reason for that treatment. As that would seem counter to the purpose of the Framework Agreement, we share the view expressed at paragraph 49 of Sharma that it seems unlikely that this is how clause 4.1 ought to be construed. Even if we are wrong about that, however, we cannot see why that minimum requirement should limit a wider protection allowed under domestic law [...]”

65. Notwithstanding their unanimous conclusions on these matters, the members of the EAT considered that it was necessary to follow the decision in McMenemy, in order to avoid conflicting approaches in England and Wales as compared with Scotland (at [82]).
66. The EAT also considered the Employment Tribunal to have erred insofar as it had considered the employer’s intention to be relevant (at [73]). In circumstances where the Supreme Court’s decision in JFS had made clear that intentionality is not a necessary part of the test of discrimination, the EAT considered itself able to uphold the Appellant’s

appeal on that point (at [87]). That is welcome but it leaves the *McMenemy* line of cases in a very unsatisfactory position. Those cases place considerable emphasis on intention, as part and parcel of the ‘sole ground’ approach.

67. The Appellant appealed the EAT’s decision to the Court of Appeal ([2025] EWCA Civ 658; [2025] ICR 1404), where each of Edis LJ, Bean LJ and Laing LJ gave a speech.
68. Laing LJ (in the minority) considered that the test for causation under the Part-time Work Directive is a “*narrow test*”, and that the words “*solely because [...] could not be clearer*” (at [66]). She further noted that the phrase “*solely because*” is used in the Part-time Work Directive and the Fixed-term Work Directive, but not in other EU equality directives, and considered that this must be because the words represented a “*compromise between competing factors, agreed by the Social Partners, after balancing their different interests*” (*ibid*).
69. Laing LJ additionally noted that (i) there is no distinct protection against indirect discrimination with the Part-time Work Directive, (ii) there is no scope for a hypothetical comparator to be constructed, and (iii) discrimination against part-time workers can be justified, whereas some other forms of direct discrimination cannot (at [93]). Laing LJ considered that these factors militated against a reading of the causation test under the Directive which would include circumstances where part-time status was an effective (even if not the sole) cause of the treatment. As to those points:
 - 69.1. The absence of separate protection in relation to indirect discrimination does not advance the analysis. It was a political choice by the ‘Social Partners’ to limit the scope of the protection to direct discrimination. But it does not follow that the test ought to be narrower (or broader) than the usual direct discrimination test.
 - 69.2. The absence of scope for a hypothetical comparator in the Part-time Work Directive is very much a product of the time of its adoption. The Directive was, as noted above, adopted in the 1990s. Express legislative recognition of a hypothetical comparator was not adopted until 2000, with Directive 2000/43/EC prohibiting (at Article 2(2)(a)) discrimination where “*another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin*”, and the same language being used in relation to discrimination in the employment context in Directive 2000/78 (at Article 2(2)(a)). The sex equality directive was subsequently amended to

equivalent effect by Directive 2002/73/EC (Article 1(2)). In the 1990s, none of the existing equality directives expressly permitted a hypothetical comparator; and indeed the CJEU had held in the context of equal pay that such comparators were not permitted (in Case 129/79 *Macarthy Ltd v Wendy Smith* ECLI:EU:C:1980:103 at [14]-[15]). As such, nothing can be read into the need for an actual comparator under the Directive.

69.3. The fact that less favourable treatment of part-time workers can be objectively justified is also not relevant. The same is true of direct discrimination on grounds of age, but that does not affect the causation test in respect of that characteristic.

70. All three judges considered whether the PTWR provided enhanced protection if the test in the Directive was indeed narrow. As to this:

70.1. Edis LJ took the view that the construction of the PTWR should start with the provision under which they were made, *viz* section 19 of the Employment Relations Act 1999 (at [33]). He explained that:

“This created a free-standing statutory duty on the Secretary of State as a matter of UK domestic law. The words “for such purposes and to such extent as the regulations may specify” mean that neither the purposes nor the extent of the restriction on less favourable treatment were fixed. The Secretary of State has a range of options in that regard. If regulations were made which apparently failed to enshrine in UK law the minimum standards required by the Directive, the courts would endeavour to construe them so that those standards were protected. However, if and to the extent that the regulation provided protection which went beyond those minimum standards it would not be ultra vires.”

70.2. Edis LJ noted that while the Act and the PTWR do fully implement the Part-time Work Directive and Framework, the Act did not restrict the scope of the power to make regulations, and in fact the Explanatory Notes to the Act explained that the powers were “*widely drawn*” and that the Government intended to “*consult fully on how they should be used, by discussing with interested parties and publishing draft regulations for comment*” (at [36]). The PTWR did not contain the word “*solely*”, and there was no canon of construction which would support the Court reading that word in: indeed, “[*a purposive construction would lead to the broader, rather than the narrower class of potential beneficiaries of the new remedy*” (at [37]). Edis LJ concluded (at [40]):

“I find it hard to think of any good reason why the 2000 Regulations should be construed as if they incorporated the word ‘solely’ from clause 4.1 of the Framework Agreement when it must have been a deliberate decision to omit it. On the other hand, the construction of the plain words of the 2000 Regulations which I consider to be correct extends the remedy for discrimination to cases where the necessary causal link can be found applying the usual approach to causation in UK law. The less favourable treatment must be substantially caused by the part time status of the person affected by it. This appears to advance the purpose of the 1999 Act and the 2000 Regulations.”

70.3. Laing LJ, on the other hand, accepted that the PTWR “*could have*” relaxed the test set by clause 4 of the Framework, in accordance with section 19 of the Act (at [67]). However, she considered that there would have to be a “*clear indication*” that the “*unusually strict test for causation in clause 4.1 has been relaxed*” (*ibid*). She considered that it had not, on the basis that words like “*the reasons*” and “*the reason (or if more than one, the principal reason*” had been used elsewhere in the PTWR, and regulation 5 stipulated that it applied “*only if (a) the treatment is on the ground that*” (at [68]).

70.4. Bean LJ agreed with Edis LJ, but commented on Laing LJ’s reliance on the words “*only if*” in regulation 5. He noted that “[t]he positioning of the word “only” in subparagraph (2) means that in order for the right not to be treated less favourably than a comparable full-time worker to apply, both the conditions set out in subparagraphs (2)(a) and (b) must be satisfied. One of these is that the treatment is “on the ground that” the worker is a part-time worker; the other is that the treatment is not justified on objective grounds” (at [98]). For that reason, the word “only” did not support any particular causation test.

70.5. Bean LJ further pointed out (at [99]) that:

“It would have been easy enough for the draftsman of the 2000 Regulations to have used the words “solely because” in subparagraph (2)(a) if the intention was simply to reproduce verbatim the wording of Directive 97/81/EC, but that is not what was done. On the contrary, the draftsman used the phrase “on the ground that”. The phrases ‘on the ground that’ or ‘on the ground of’ were already established in discrimination law by the time the 2000 Regulations were made: see the EAT decision in O’Neill [...] Mummery P said that for a discrimination claim to succeed the claimant’s sex had to be the “effective and predominant cause”, or the “real and efficient” cause, of the less favourable treatment complained of; it need not be the only cause. This important decision is not mentioned, and presumably was not cited, in Gibson v Scottish Ambulance Service nor in McMenemy itself. On the contrary: in Gibson the majority opinion of the EAT, delivered by Lord Johnston, states that

"as Regulation 5(2)(a) uses the word "ground" in the singular, it suggests that the treatment should be found to be on one ground only (whatever that ground may be)". A greater contrast with O'Neill would be hard to imagine."

71. Edis LJ and Bean LJ therefore both considered the decision in McMenemy to have been wrong, and would have allowed the appeal had it not been for the Court of Appeal's decision in relation to precedent in Jwanczuk (which has since been overturned by this Court) (see [42], [101]).

IV. SUBMISSIONS

72. The EAT, and the majority of the Court of Appeal, were correct that the PTWR prohibit less favourable treatment of part-time workers where the effective cause of the treatment is their part-time status. That is the minimum level of protection provided by the Part-time Work Directive; and in any event is the level of protection provided by the PTWR.

(a) The floor set by the Part-time Work Directive

73. That the Framework Agreement prohibits treatment which inherently and necessarily disadvantages part-time workers (unless that treatment can be justified) is clear from the CJEU caselaw. The CJEU jurisprudence contains examples of treatment being found to require justification even where there are clear and well-explained reasons for it which have nothing to do with part-time status. The cases show that the correct question is whether the treatment is either (i) subjectively discriminatory, in that the worker's part-time status operated on the employer's mental processes (consciously or subconsciously), or (ii) inherently discriminatory, in that the treatment necessarily and inherently disadvantages part-time workers (rather than just disadvantaging them because of background societal factors⁴⁰). If either form of discrimination arises, it is for the employer to objectively justify it, including that the difference in treatment pursues a legitimate aim, is suitable for achieving the objective, and is reasonably necessary.⁴¹ That is the logical

⁴⁰ For example, prior to the introduction of the PTWR, cases of discrimination against part-time workers were often framed as cases of indirect discrimination against women. Conduct which inherently disadvantages part-time workers (such as the conduct in this case) do not inherently disadvantage women. They only disadvantage women if the majority of part-time workers happen to be women, this being a background societal fact (and there not being anything inherently gendered about part-time work). Unless justified, such conduct is therefore direct discrimination against part-time workers (as it disadvantages them on grounds of their part-time status) and indirect discrimination against women (as it is apparently neutral vis-à-vis them, but happens to put them at a particular disadvantage).

⁴¹ O'Brien v Ministry of Justice [2013] UKSC 6, [2013] ICR 499 at [44]-[46].

and simple reading of the legislation, which is borne out by the caselaw and accords with common sense.

74. Unlike other equality law instruments, the Framework Agreement is not the product of a draftsman's pen. As Jeffery puts it, "*had the Agreement been subject to the scrutiny of those who usually draft European legislation then it might not have been so complicated or so vague*".⁴² However, contrary to the findings of Laing LJ in the Court of Appeal, the negotiated nature of the Framework Agreement is not a factor which weighs in favour of an overly legalistic reading of the word 'solely'. Indeed, on the contrary, it would be a mistake to place heavy emphasis on individual words in a document negotiated in this way. As explained in *Sharma*, the obvious purpose of that word is to exclude treatment which is effectively caused by wholly independent reasons, and where part-time status is only a background factor: see similarly *Ahmed v Amnesty International*, cited at ¶34 above. That reading is also directly supported by the fact that the words "*solely because*" were lifted from a pre-existing ILO instrument, where they were intended to reflect the fact that differences in treatment may be unrelated to part-time status and instead arise from matters such as seniority.
75. Indeed, had the Social Partners meant to exclude from protection any and all cases where part-time work was an effective but not the *only* cause of the less favourable treatment, one might reasonably expect that such a decision would have been made clear. It was, and is, obvious that employers very often will have some reason for treating part-time workers poorly other than their part-time status *per se*. As the House of Lords put it in *Nagarajan*, decisions are frequently reached for more than one reason. For example, it was clear at the time that the PTWR that employers might try to point to budgetary reasons as 'another reason' or the 'real reason' for the treatment in order to avoid the effect of the PTWR, and consideration was given to whether that could constitute an objective justification or not.⁴³ Employers cannot point to such budgetary issues, or other such reasons, to say that part-time status was not the 'sole' reason for the treatment. The same point applies to 'reasons' like 'ensuring that heavier workloads are properly compensated' (as in *MK*), or 'dealing with demand' (as in *Gibson*). Such rationales fall to be deployed as objective justifications: that is why the defence exists.

⁴² n 34 above.

⁴³ See Louri, n 35 above, p. 13.

76. The same point applies to cases where there are multiple *independent* reasons for the less favourable treatment, similar to the position of fixed-term employees on short contracts considered in Lalfi. Take, for the sake of argument, an employer who denies a particular benefit to all “*women over 6 feet tall*”. A very tall woman who suffers the disadvantage does so for two reasons: her sex and her height. Under discrimination law as it has developed in Europe, there would clearly be discrimination on grounds of sex: sex is an effective cause of the treatment. But it is impossible to say that sex is the *sole reason* for the treatment. If the employer instead refused a benefit to “*part-time workers over 6 feet tall*”, the same analysis must apply. The Framework Agreement is intended to capture such treatment, and it then falls to the employer to justify it. On the Respondent’s interpretation, however, the treatment would not fall within scope of the directive, because part-time status would not be the ‘sole’ cause of the treatment.

(b) The PTWR

77. Moreover, if there *were* any doubt about the minimum floor set by the Framework Agreement, the domestic legislator cleared it up when adopting the PTWR. In those Regulations, the Secretary of State – having been given significant leeway by the empowering Act – decided to adopt language directly from existing equality legislation which had been the subject of authoritative treatment by the courts. The obvious implication is that this decision was made so that the courts would know that the existing jurisprudence was to be followed. There is no reason to think that the legislator, in replacing the text from the Framework Agreement with text from pre-existing legislation, intended the courts not to follow – and instead to depart from – the jurisprudence which dealt with that pre-existing legislation. There is also no reason to consider that the legislator intended the caselaw on that pre-existing legislation to be *read down* when applied to the PTWR on the basis of purportedly narrow language in the Framework Agreement, in circumstances where the Secretary of State expressly and intentionally exercised powers enabling domestic protections which *exceeded* the Framework Agreement.
78. It is notable, in that context, that the Court of Session in McMenemy did not understand itself to be departing from the existing jurisprudence on equality law. On the contrary, the Court in McMenemy was faced with a situation where counsel for the complainant conceded that the PTWR did not go beyond the Framework Agreement, and then followed the reasoning in Gibson in relation to the interpretation of the Framework Agreement itself

(where the EAT had misunderstood the test for causation in discrimination law as requiring evidence of intention).

79. Accordingly, the approach taken in *McMenemy* was wrong. The Court of Session began with an erroneously narrow reading of the Part-time Work Directive which was contrary to the purpose of the instrument, and thereafter assumed that the PTWR go no wider than the Directive. The majority of the Court of Appeal agreed with the Appellant on these points: Bean LJ considered that a “*greater contrast*” between existing discrimination law and the reasoning in *Gibson* is “*hard to imagine*” (at [99]), and Edis LJ found it “*hard to think of any good reason why the 2000 Regulations should be construed as if they incorporated the word ‘solely’ from clause 4.1 of the Framework Agreement when it must have been a deliberate decision to omit it*” (at [40]).
80. For those reasons, the Court is invited to find that the majority of the Court of Appeal were correct in finding that the test for causation under regulation 5 of the PTWR is established if part-time status was an effective cause of the treatment, and overturn the Court of Appeal’s decision insofar as it felt compelled to follow the incorrect conclusion reached to the contrary in *McMenemy*.

V. CONCLUSION

81. The Court is respectfully requested to allow the appeal for the following reasons:
- 81.1. The Part-time Work Directive prohibits less favourable treatment of part-time workers where their part-time status is an effective cause of the treatment, and the Court of Appeal erred in finding otherwise; and
- 81.2. In any event, the PTWR prohibit less favourable treatment of part-time workers where their part-time status is an effective cause of the treatment, and the Court of Appeal erred in finding otherwise.

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