



13 October 2021

PRESS SUMMARY

Anwar (Appellant) v The Advocate General for Scotland (representing the Secretary of State for Business, Energy and Industrial Strategy) (Respondent) (Scotland)

[2021] UKSC 44

On appeal from: [2019] CSIH 43

JUSTICES: Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Briggs, Lord Leggatt, Lord Burrows

BACKGROUND TO THE APPEAL

Ms Anwar brought proceedings in the employment tribunal against her former employer and former line manager for workplace and work-related harassment on the grounds of her sex, race and religion, contrary to section 26 of the Equality Act 2010. She succeeded and was awarded £74,647.96. Ms Anwar has been unable to enforce the award in her favour because, she alleges, her former employer deliberately dissipated its assets to avoid paying her compensation. Ms Anwar maintains that she should have been able to obtain the interim remedy of an arrestment of funds on the dependence of her employment tribunal claim, which could have prevented the alleged dissipation of assets by freezing her former employer's bank account. It was not in dispute that the employment tribunal had exclusive jurisdiction to hear her claim but does not have the power to grant diligence on the dependence such as an arrestment of funds.

Ms Anwar issued a petition for judicial review against the Department for Business, Energy and Industrial Strategy. She argues that the UK Government has failed properly to implement two EU Directives, Council Directives 2000/43/EC and 2000/78/EC (together "**the Equality Directives**") by its failure to provide effective interim protection for successful workplace discrimination and harassment claims, in breach of EU law. She claims compensation for that failure.

The Outer House of the Court of Session dismissed Ms Anwar's petition and the Inner House of the Court of Session by majority dismissed her appeal. She now appeals to the UK Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Hodge gives the lead judgment, with which Lord Lloyd-Jones, Lord Briggs, Lord Leggatt and Lord Burrows agree.

REASONS FOR THE JUDGMENT

Under EU law, member states are obliged to provide effective remedies for the implementation of EU law-based rights. Those remedies must be equivalent to the remedies available for comparable claims that do not involve EU law (the "**principle of equivalence**") [2], and they must not render the exercise of EU law-based rights practically impossible or excessively difficult (the "**principle of effectiveness**") [3]. It was not disputed that the principle of effectiveness requires

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there to be an interim remedy available to claimants that safeguards their rights derived from the Equality Directives [4]. The employment tribunal in Scotland does not have the power to grant diligence on the dependence [11]. There were three main issues before the Court [12]:

- (i) Does the Court of Session or the sheriff court have power to grant a warrant for diligence on the dependence of an application to the employment tribunal by a worker who alleges unlawful work and workplace-related discrimination or harassment on the grounds of sex, race, religion or belief?
- (ii) If the answer to issue (i) is yes, does the requirement for an applicant in an employment tribunal claim to raise such court proceedings constitute a breach of EU law principles of effectiveness or effective remedy?
- (iii) If the answer to issue (i) is no, does this constitute a breach of EU law?

On issue (i), the Court holds that the Court of Session and the sheriff court have the power at common law to grant diligence on the dependence in support of a claim being pursued in another tribunal, such as arbitral proceedings [29-34]. That power does not depend on the court having jurisdiction to determine the merits of the dispute [33, 36]. Nor has it been removed by Part 1A of the Debtors (Scotland) Act 1987 [37-39]. Accordingly, if the criteria in Part 1A of the 1987 Act are met, the Court of Session or sheriff court may grant a warrant for diligence on the dependence of an ancillary action brought before the employment tribunal [40]. Issue (iii) therefore does not arise.

On issue (ii), the Court rejects the contention that EU law requires claimants vindicating EU rights to be provided with a “one stop shop”, by which the tribunal determining the merits of the claim is also authorised to grant interim measures [42-43]. The Court also rejects the argument that the courts’ jurisdiction to grant interim measures in support of employment tribunal proceedings must be expressly stated in legislation, and not case law, to be sufficiently clear and accessible to comply with the principle of effectiveness [44-56]. The Court then assesses the additional hurdles involved in making a separate application to court to obtain a warrant for diligence on the dependence, namely court fees, the preparation of additional documentation, and the potential exposure to adverse costs [57-64]. The Court acknowledges the benefits of the employment tribunal regime, especially to vulnerable employees who may recently have lost their jobs [65]. However, the Court concludes that the additional hurdles to raise proceedings in the sheriff court are a modest departure from the employment tribunal regime [60-62, 65], and are proportionate given the potential of diligence on the dependence to disrupt and even destroy the employer’s business by freezing its assets [65]. As such, the exercise of Ms Anwar’s EU law-based rights was not rendered practically impossible or excessively difficult.

Ms Anwar also asserted a breach of the principle of equivalence [71]. The Court holds that the correct comparator in this case is between an employment claim based on EU law-based rights and an employment claim based on domestic law rights, such as unfair dismissal [72]. As an employment tribunal cannot grant a warrant for diligence on the dependence for either claim, there is no breach of the principle of equivalence [72].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Committee’s decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: <https://www.supremecourt.uk/decided-cases/>