[2026] UKSC 30
On appeal from: [2025] EWCA Civ 658

JUDGMENT

Augustine (Appellant) *v* Data Cars Limited (Respondent)

before

Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt
Lord Richards
Lady Simler

JUDGMENT GIVEN ON
12 August 2026

Heard on 7 May 2026

Appellant
Tristan Jones KC
Aislinn Kelly-Lyth
(Instructed by A&O Shearman)

Respondent
Tom Mountford
Hugo Murphy
(Instructed by Mishcon de Reya LLP)

LADY SIMLER (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Richards agree):

1. Introduction

1. The question on this appeal concerns the scope of the protection from unlawful discrimination afforded to part-time workers under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the 2000 Regulations"). Regulation 5(1) of the 2000 Regulations gives a part-time worker the right not to be treated less favourably than the employer treats a comparable full-time worker. However, by regulation 5(2) this right 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." The question raised by the appeal is whether the right only applies where the part-time worker establishes that part-time status was the *sole* ground or reason for the less favourable treatment in question, rather than simply an effective cause of it.

2. The question arises in the following way. The appellant, Warren Augustine, was a private hire driver who worked for the respondent, a small business called Data Cars Ltd, as an employee in 2016. He worked fewer hours per week than typical full-time drivers. All drivers (whether full or part-time) were charged a weekly fee (described as a "circuit fee") to access the respondent's booking system. The circuit fee was set at a fixed rate for all drivers regardless of the number of hours they worked. Mr Augustine claimed that the application of the fixed circuit fee was less favourable treatment of him as a part-time driver contrary to regulation 5 because it had the effect that he paid a higher fee per hour to drive than a comparable full-time driver. The employment tribunal's primary finding (on two separate grounds which were overturned on appeal) was that Mr Augustine was not treated less favourably than a comparable full-time driver. In case that was wrong, the tribunal also considered whether that treatment was on the ground that Mr Augustine was a part-time worker. The tribunal dismissed the claim. It found that the reason Mr Augustine was charged a circuit fee was that it was necessary to enable the respondent to earn revenue from its business; it was not because he worked fewer hours than some of his colleagues. Even if there was less favourable treatment on the ground of part-time worker status, the claim would fail because the circuit fee was not charged on the "sole ground" that he was a part-time worker.

3. Mr Augustine appealed. On the question at the heart of the appeal, his case was and remains that the test set by the words "on the ground that" is a well-known causation test in discrimination law extending to cover situations where the protected status or characteristic is an effective cause but not the sole cause of the less favourable treatment complained about. The contrary argument rests principally on the fact that, although the 2000 Regulations do not themselves refer to the "sole" ground for treatment, they ought to be read consistently with the framework agreement on part-time work concluded on 6 June 1997 ("the Framework Agreement"), to which member states of the European Union

were required to give effect by Directive 97/81/EC of 15 December 1997 (the "Part-time Work Directive"). Clause 4.1 of the Framework Agreement provides 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" (emphasis added).

4. Both the Employment Appeal Tribunal (Eady P, Gemma Todd and Dr Gillian Smith), referred to below as "the EAT" ([2024] EAT 117; [2025] ICR 19) and the majority in the Court of Appeal (Bean and Edis LJJ, [2025] EWCA Civ 658; [2025] ICR 1404) agreed with the appellant's reasoning and would have concluded that it was an error to ask whether part-time status was the sole ground for the treatment. Both held nevertheless, that they were bound to follow a contrary decision of the Inner House of the Court of Session in Scotland (*McMenemy v Capita Business Services Ltd* [2007] CSIH 25; [2007] IRLR 400 ("*McMenemy*")). (The Court of Appeal's approach to precedent was based on a recent judgment in another case which treated as effectively binding a decision of a court of coordinate jurisdiction in another part of the United Kingdom, *R (Jwanczuk) v Secretary of State for Work and Pensions* [2023] EWCA Civ 1156; [2024] KB 275, which has since been disapproved by this court, [2025] UKSC 42; [2026] AC 699.) Applying *McMenemy*, the Court of Appeal dismissed the appeal as part-time status was not the sole ground for the less favourable treatment. The contrary argument was accepted by Elisabeth Laing LJ in the Court of Appeal. She held that the reasoning in *McMenemy* is correct in law and that regulation 5(1) of the 2000 Regulations only applies where the sole ground for the less favourable treatment is that the worker is part-time. The Court of Appeal granted permission to appeal to this court so that the causation issue could be resolved on a UK-wide basis.

5. I record the court's gratitude for the fact that both parties have had the benefit of pro bono representation in the Court of Appeal and in this court. Without it, it is possible that neither of these parties would have been in a position properly to advance the legal arguments necessary to resolve the issue of general public importance raised by the appeal.

2. The legislative framework

6. The 2000 Regulations were made under section 19 of the Employment Relations Act 1999 (the "1999 Act") to implement the Part-time Work Directive. In turn, the Part-time Work Directive was introduced to implement the Framework Agreement, to which member states were required to give effect, and which was annexed to it. It follows that the legislative starting point is the Framework Agreement and the Part-time Work Directive.

The Framework Agreement

7. The Framework Agreement was an agreement negotiated between the social partners, that is, two broad supranational groups representing organised labour and industry/employer representative bodies. As Mr Mountford (counsel for the respondent) explained, the protection of part-time workers was a contentious subject in Europe, and there were difficulties in reaching agreement about the form which any such protection should take. That is illustrated by the fact that the European Commission proposed nine draft Directives on atypical work between 1982 and 1990, only one of which (making limited provision about health and safety) was adopted. The British Government vetoed a further attempt at wider legislation in 1994. Against this background, the European Commission used a new procedure for making social policy, involving consultation with the European social partners, to regulate part-time work. That procedure was established by the Agreement on Social Policy concluded between the member states of the European Community with the exception of the United Kingdom ([1992] OJ C 191/91, the "Social Policy Agreement"), which was annexed to the Social Protocol contained in the Maastricht Treaty on European Union signed in 1992. The United Kingdom was not originally a signatory to the Social Policy Agreement but acceded to it in 1997. The Social Policy Agreement introduced a mandatory consultation process and also provided by article 4 that "management and labour" could enter into "dialogue ... at Community level", which "may lead to … 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. This enabled instruments to be adopted even if unanimity could not be reached within the Council.

8. In December 1997, having consulted the social partners, the Commission proposed and the Council adopted several Directives on the basis of the Social Protocol, including the Part-time Work Directive (extended to the United Kingdom by Directive 98/23/EC) and subsequently Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed term work (the "Fixed-term Work Directive"). Both Directives implemented framework agreements which had been concluded between the social partners in accordance with the Social Protocol and they are in materially similar terms.

9. The Framework Agreement (on part-time work) made clear that it sought to promote part-time work on a basis acceptable to both employers and workers and to establish a framework for eliminating discrimination between part-time workers and full-time workers (see the Preamble).

10. Clause 3 defined "part-time worker" and "comparable full-time worker". The latter is defined as a full-time worker in the same establishment, with a similar contract and engaged in similar work (with due regard being given to other considerations such as seniority, qualifications and skills). If there is no comparable full-time worker in the same establishment, "the comparison shall be made by reference" to other listed matters, which

include that the comparison can be "in accordance with national law, collective agreements or practice".

11. Clause 4.1 is central to the argument on this appeal. Clause 4 is headed "Principle of non-discrimination" and reads (with emphasis added):

> "1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers <u>solely because</u> they work part time unless different treatment is justified on objective grounds.
>
> 2. Where appropriate, the principle of pro rata temporis shall apply.
>
> 3. The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice.
>
> 4. Where justified by objective reasons, Member States after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification. Qualifications relating to access by part-time workers to particular conditions of employment should be reviewed periodically having regard to the principle of non-discrimination as expressed in Clause 4.1."

12. Clause 6.1 provides that member states and/or social partners "may maintain or introduce more favourable provisions than set out in this agreement". In other words, a minimum floor of rights was established, but domestic enactments could legislate on a wider basis than the Framework Agreement afforded. It was also possible for the minimum requirements to be spelled out more clearly in domestic legislation given that the Framework Agreement was a negotiated instrument whereas the domestic legislation was not.

The Part-time Work Directive

13. The Directive itself is short. Its stated purpose in article 1 is to implement the Framework Agreement. Article 2 required member states to "bring into force the laws, regulations and administrative provisions" necessary to comply with it. Articles 3 and 4 were formal provisions.

14. The parties to the appeal emphasised certain recitals to the Part-time Work Directive including the following:

> Recital (10) records the view of the Council that "management and labour" are as a rule "closer to social reality and social problems".
>
> Recital (11) records that in relation to the Framework Agreement, "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".
>
> Recital (14) records that the Directive "binds the Member States as to the result to be achieved, whilst leaving national authorities the choice of form and methods".
>
> Recital (15) makes clear that the Directive "does not go beyond what is necessary for the attainment of [its] objectives".
>
> Recital (16) records "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 … providing that the said definitions respect the content of the Framework Agreement."
>
> Recital (18) records that the European Commission had drafted its proposal for a Directive on part-time work, "in compliance

> with Article 2(2) of the Agreement on social policy which provides that Directives in the social policy domain 'shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'".
>
> Recital (23) refers to the "Community Charter of the Fundamental Social Rights of Workers" which "recognises the importance of the fight against all forms of discrimination …"
>
> Recital (24) refers to the European Convention on Human Rights.

The 2000 Regulations

15. Section 19(1) of the 1999 Act required the Secretary of State to make regulations to secure 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." That is a wide regulation-making power. Expressly without prejudice to that broad general objective, the regulations were also to comply with the United Kingdom's obligations under the Part-time Work Directive requiring member states to implement the Framework Agreement (section 19(4)(a)).

16. In principle, the Part-time Work Directive could have been implemented directly under section 2(2) of the European Communities Act 1972. But that would have excluded pay protection from the regulation of part-time working conditions as a matter of vires because Directives implementing framework agreements cannot as a matter of EU Treaty provisions extend to cover pay. It was therefore necessary to give an enabling power to go further than the Part-time Work Directive if the intention was to include pay protection.

17. The Consolidated Explanatory Notes to the Bill which became the 1999 Act confirm this (para 170), explaining that the section 19 enabling power was necessary given this limitation and explaining that "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 Notes continued (para 171):

> "The regulations will primarily address discrimination in non-statutory terms and conditions, as statutory employment rights in the UK do not discriminate against part-time workers. The

> powers are widely drawn and the Government intends to consult fully on how they should be used, by publishing draft regulations for comment. The Government's current expectation is that the regulations will draw on precedents under current legislation relating to employment rights and non-discrimination. Clause 33 provides that the regulations will be subject to affirmative resolution procedure."

18. The consultation indicated in para 171 took place and draft regulations were published for consultation and comment prior to the enactment of the 2000 Regulations.

19. The 2000 Regulations are directed at prohibiting less favourable treatment as regards the terms of a part-time worker's contract compared with a full-time worker and prohibiting other detriments (regulation 5(1)). The basic scheme is that the claimant must first identify a comparable full-time worker; he or she must then establish less favourable treatment and satisfy the tribunal that this treatment is on the ground that the worker is a part-time worker. If these elements are established, the onus shifts to the employer to show that there is an objectively justifiable reason for the less favourable treatment.

20. Regulation 2 defines "full-time" and "part-time" workers. A worker is a comparable full-time worker in relation to a part-time worker if, at the time of the alleged less favourable treatment, "both workers are (i) employed by the same employer under the same type of contract, and (ii) engaged in the same or broadly similar work" having regard to qualification, skills and experience; and they work or are based at the same establishment (unless there is no such full-time worker working or based at the part-time worker's establishment, in which case the otherwise qualifying full-time worker can work or be based at a different establishment) (regulation 2(4)).

21. Apart from two limited exceptions in regulations 3 and 4 (where additional protection is given to workers changing from part-time to full-time status or the reverse and a hypothetical comparator must be used), regulation 2 thus makes clear that in general a claimant must rely on an actual comparator and cannot rely on a hypothetical one.

22. The right given to part-time workers by regulation 5 covers direct discrimination only. Unusually for direct discrimination, a defence of objective justification is available. It is defined as follows:

> "5.— *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) [special provision excluding overtime rates]."

23. Accordingly, the protection in regulation 5 extends to contractual pay and other terms and conditions (though not overtime), including, for example, contractual sick pay, access to occupational pension schemes, training and annual leave entitlement. Part-time workers must generally receive the same treatment in this regard (on a pro rata basis) as comparable full-time workers and the "pro rata principle" is the presumptive means of determining whether there has been less favourable treatment and must be applied unless it is inappropriate. It is defined by regulation 1(2) to mean 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".

24. Part-time workers who believe that they have suffered less favourable treatment may make a written request of the employer for a written statement of the reasons for the less favourable treatment (regulation 6). The employer must respond within 21 days of the request. The statement is admissible in proceedings; and the tribunal may in certain circumstances draw appropriate inferences from the failure to provide such a statement.

25. Regulation 7 gives employees and workers protection against victimisation in relation to the 2000 Regulations. It does so by treating as unfairly dismissed (for the purposes of Part X of the Employment Rights Act 1996) an employee who is dismissed "if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3)" and by giving similar protection to workers in relation to detrimental treatment (excluding dismissal, see regulation 7(5)). Regulation 7(3) provides that the "reasons or, as the case may be, grounds are …" various acts done to enforce the 2000 Regulations, including alleging an infringement, bringing proceedings, giving evidence, and requesting a written statement of reasons.

26. Regulation 8 is headed "Complaints to employment tribunals etc" and establishes a right for a worker to present a complaint to the employment tribunal that his employer has infringed regulations 5 or 7(2) (though this is subject to the exclusion in regulation 7(5)). If a worker presents a complaint under regulation 8, "it is for the employer to identify the ground for the less favourable treatment or detriment" (regulation 8(6)).

27. Where an employment tribunal finds a complaint to be well founded, it may take any of the steps set out in regulation 8(7) as it considers just and equitable, including ordering the employer to pay compensation (regulation 8(7)(b)) in such sum as it considers just and equitable in all the circumstances having regard to the infringement and any loss attributable to the infringement (regulation 8(9)). There are other provisions governing the assessment of compensation in regulation 8(10)–(14) but it is unnecessary to set these out.

28. It will be plain from the above that regulation 5(2)(a) of the 2000 Regulations does not include the word sole or solely in setting the test for causation in the right not to be treated less favourably than a comparable full-time worker. Nonetheless, the case against the appellant is that the causation test in the 2000 Regulations should be interpreted narrowly, consistently with the Part-time Work Directive and clause 4.1 of the Framework Agreement as requiring that part-time status be the sole or exclusive cause of the impugned less favourable treatment.

3. The factual background and decisions below

29. The employment tribunal found that Mr Augustine's work pattern as a driver for the respondent was to work on average 34.8 hours per week. The tribunal (Employment Judge Mary Siddall) made no finding as to what constituted full-time hours for this business but found that drivers were working over 43 hours per week on average, with some drivers working 60 or more hours. On this basis the tribunal found that the appellant was a part-time worker. His chosen comparator worked an average of over 90 hours per week, and although this was described as at the upper end of the range, the tribunal did not find this comparator inappropriate.

30. The fact that all drivers were required to pay the fixed circuit fee (fixed at £148 per week) to access the respondent's booking dispatch system irrespective of the number of hours worked meant that the circuit fee had a harsher impact on those working fewer hours who paid a higher fee per hour to drive than a comparable full-time worker and accordingly took home less pay per hour than the full-time driver. The employment tribunal held, however, 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 EAT whose decision on this point has (correctly) not been challenged.

31. Alternatively, the employment tribunal held that any less favourable treatment was not "solely" because Mr Augustine worked part time. Rather, this was the way private hire companies like the respondent operated to earn revenue from the business. The tribunal also accepted that, at the material time, the respondent may not have had access to the type of software operated by others which allowed for a commission type arrangement rather than charging drivers a fixed fee and that it had only been able to move to such a system after Mr Augustine left its employment. Even if there was less favourable treatment on the ground of part-time worker status, the tribunal concluded accordingly that the differential impact of the fixed circuit fee was not on the sole ground that Mr Augustine was a part-time worker and, applying the decision in *McMenemy*, the claim failed.

32. The EAT applied the pro rata principle and held that failure to apply a circuit fee that took into account hours worked was less favourable treatment. The EAT accepted that Mr Augustine was, at least in part, treated less favourably because he worked part-time but the same could be said of many drivers who worked full time (meaning, in this case, more than 43.17 hours per week) but less hours than the chosen comparator (who worked over 90 hours per week). The imposition of the fixed circuit fee would still have involved less favourable treatment in those other cases. The EAT could not therefore say that part-time status was the sole ground for the less favourable treatment and, regarding itself bound by *McMenemy*, thought the claim under regulation 5 must inevitably fail on that basis, and dismissed the appeal.

33. I agree with the EAT that, applying the pro rata principle, it was inherent in the higher per hour fee paid by Mr Augustine to work as a driver compared to his full-time comparator that there was at least some less favourable treatment on the ground of part-time worker status. He inevitably took home a lower proportion of his earnings than a comparable full-time driver. If he had instead worked full-time (taking 43.17 hours or more per week as full-time), he would still have been disadvantaged by the fixed fee system when compared with his comparator (working an average of over 90 hours a week), albeit not to as great an extent. Nonetheless, 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. Accordingly, his less favourable treatment compared with a person working 43.17 hours per week is attributable to his lower working hours or part-time status and this less favourable

treatment at least is properly characterised as "on the ground" that he was a part-time worker. As for the chosen comparator's hours worked over and above 43.17 hours per week, this is a matter that might properly be considered at the stage of determining what if any compensation should be awarded on a just and equitable basis (as Mr Jones KC, counsel for Mr Augustine, has previously conceded).

34. The EAT gave Mr Augustine permission to appeal because it regarded the reasoning in *McMenemy* on this point as wrong in law. In its view, regulation 5 applies if a worker's part-time status is *an effective* cause of the less favourable treatment; the claimant does not need to show that his part-time status was the *sole* cause of the less favourable treatment.

35. As I have said, the Court of Appeal was divided on this question. Edis LJ (giving the lead judgment for the majority) said (para 40) that the correct construction of the plain words of the 2000 Regulations extends the remedy for part-time 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. He endorsed the reasoning of the EAT below (and an earlier Employment Appeal Tribunal decision in *Sharma v Manchester City Council* [2008] ICR 623 ("*Sharma*")) and considered that the decision in *McMenemy* was wrong. Edis LJ nevertheless dismissed the appellant's appeal on the basis that the Court of Appeal was (as he understood the position at that time) bound to follow *McMenemy* in the interests of consistency between Scotland and England and Wales. Bean LJ gave a separate concurring judgment to which I return below.

36. Elisabeth Laing LJ, on the other hand, held (para 68) that the right conferred by regulation 5(1) "applies *only* if (a) the treatment is *on the ground that* the worker is a part-time worker" (regulation 5(2), her emphasis). She said that the regulations refer to "the reasons for the treatment" (regulation 6(1)) and distinguish between the formula "the reason (or if more than one, the principal reason)" (regulation 7(1)) and the formula in regulation 5(2) ("on the ground that"), and between that formula and the formula used in regulation 7(2) (done "on a ground" specified in sub-paragraph (3)). The draftsman knew that there could be more than one reason, or ground for, treatment, and chose to refer to one ground in the singular in regulation 5(2), and to use the phrase "only if". She held that for those reasons, the test for causation in the 2000 Regulations is the same narrow test as the test in clause 4.1 of the Framework Agreement. She said that even if that were not clear, there is no sign in the language of regulation 5(2) that the draftsman intended the test for causation to be less strict than the test in clause 4.1. Since *McMenemy* adopted that approach, she agreed with its reasoning about the test for causation in the 2000 Regulations and would have dismissed the appeal.

37. The Court of Appeal did not identify any other ground for the less favourable treatment apart from Mr Augustine's part-time status. Mr Mountford maintains that even

in relation to the difference between Mr Augustine's treatment as a part-time worker and an average full-time driver (working 43.17 hours per week), part-time status was not the sole ground for his less favourable treatment. He submits that charging a fixed fee was standard in the industry for businesses of this kind to generate revenue and the software system may not have allowed for a different arrangement. The first point seems to me to be no more than an argument that everybody was discriminating. The second appears to be speculative (and the employment tribunal itself put the point no higher). In any event, while I recognise that there can be an overlap between the reasons for less favourable treatment and the objective justification for that treatment, it does seem to me that these factors are better viewed as potential objective justifications for less favourable treatment. No doubt a fee of some kind had to be charged to generate revenue from the respondent's drivers, but not necessarily a fixed fee that had no regard to the number of hours worked. Nor did the employment tribunal find as a fact that limitations in the respondent's software system were the reason for charging a fixed fee without some form of rebate or adjustment to mitigate the effect of lower working hours. These are points that might have explained why it was reasonable and justified to charge a fixed circuit fee, but they were not advanced as objective justification and, on the contrary, the respondent made clear before the employment tribunal that, if there was prohibited less favourable treatment, it was not seeking to justify it. Nonetheless, I proceed on the basis, as did the courts below, that part-time status was not the sole ground for the less favourable treatment in this case.

4. The general approach to causation in claims of direct discrimination

38. Before addressing the meaning of the causation test imposed by the 2000 Regulations, it is helpful to contextualise the phrase "on the ground that" (and "on the grounds of"). Both are well-established in equality law at both European and domestic level.

39. In Europe, three Directives on sex equality were initially adopted by the EU member states in the 1970s following a Social Action Programme launched by the Council of the European Communities. They were Council Directive 75/117/EEC of 10 February 1975 addressing the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women in employment and training; and Council Directive 79/7/EEC of 19 December 1978 on equal treatment for men and women in social security. Each prohibited direct discrimination "on grounds" (see article 1 of Directive 75/117/EEC; articles 2(1), 3(1), and 5(1) of Directive 76/207/EEC) or "on ground" (article 4(1) of Directive 79/7/EEC) of sex. Later Directives adopted in the 1980s onwards used similar words. Likewise, section 1(1) of the now-repealed Sex Discrimination Act 1975 defined unlawful direct sex discrimination as involving less favourable treatment "on the ground" of sex and section 1(1)(a) of the now-repealed Race Relations Act 1976 defined unlawful direct race discrimination as occurring where less favourable treatment was "on racial grounds" (ie "colour, race, nationality or ethnic or national origins", see section 3).

40. In a direct discrimination case this requirement makes it necessary to ask why the complainant received the less favourable treatment complained of (ie what was the reason for the treatment in question). Generally, treatment will be on the ground of a protected characteristic (sex, race, etc) if the characteristic consciously or subconsciously influenced the treatment, or if the basis for the treatment was inherently tied to the protected characteristic (see *R (E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 AC 728 (per Lord Mance, para 78)). Motive, intention, or purpose are irrelevant, so that, for example, a criterion of state pensionable age when the age is different for men and women is inherently discriminatory on the basis of sex, the subjective reason for the differential treatment being irrelevant (see *R v Birmingham City Council Ex p Equal Opportunities Commission (No 1)* [1989] AC 1155, per Lord Goff, p1194D and *James v Eastleigh Borough Council* [1990] 2 AC 751, per Lord Goff, p772D–E).

41. In *Nagarajan v London Regional Transport* [2000] 1 AC 501, Lord Nicholls (with whom Lords Hutton and Hobhouse agreed) said (p 511A): "This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?" Lord Nicholls acknowledged (pp 512H–513B):

> "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."

42. No new principle was being established in this case. The significant influence or effective cause test had been referred to in many earlier cases, as Lord Nicholls made clear in the passage just cited. Among these was *O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School* [1997] ICR 33, where the EAT (Mummery J) held that a "condition of liability in the expression 'on the ground of her sex' is an objective test of causal connection" and not intentions, motives, beliefs or subjective purposes. He continued (p 43G) that the basic question is: "what, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" Further, as he explained (p 43G–H):

> "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… 'It is enough if it is *an* effective cause…'"

43. The test developed in the context of direct discrimination has also since been applied in other situations where domestic law uses the phrase "on the ground that". For example, the words "on the ground that" remain a standard part of the test applied in detriment cases under the Employment Rights Act 1996 (see, for example, section 47B which 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"). Mr Mountford suggested that at the time the 2000 Regulations were introduced, this protection was *not* understood to be subject to a test of effective causation. He relied on *Aspinall v MSI Mech Forge Ltd* EAT/891/01 (heard on 5 July 2002, with judgment delivered on 25 July 2002), in which the Employment Appeal Tribunal held (para 14) that "For there to be detriment under section 47B 'on the ground that the worker has made a protected disclosure' the protected disclosure has to be causative in the sense of being 'the real reason, the core reason, the causa causans, the motive for the treatment complained of'". Leaving aside the fact that *Aspinall* does not appear to say that the protected disclosure must be the sole or exclusive reason for the detrimental treatment, *Aspinall* was decided in 2002, two years after the 2000 Regulations were introduced. In any event, that reasoning (based on the sole or exclusive ground) was shown to be wrong in *Fecitt v NHS Manchester* [2011] EWCA Civ 1190; [2012] ICR 372, also a case about whistleblowing protection, where 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" (para 38). The Court of Appeal disagreed, holding (albeit obiter, para 43) that "liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act". In other words, consistently with the well-established approach to the "on the ground that" test, it need not be the sole factor or reason for the impugned decision or treatment.

44. What follows from this discussion is that, by the time the 2000 Regulations were introduced, the meaning of the test imposed by the words "on the ground (or grounds) of" in an anti-discrimination context was clear and authoritatively established. It meant that if the prohibited ground had a significant or substantial influence on or was an effective cause of the impugned treatment or outcome, direct discrimination would be made out. The prohibited ground did not have to be the main ground, still less the sole ground or reason for the treatment.

5. The EU and domestic caselaw concerning the Part-time Work Directive

45. The court was referred to several decisions of the European Court of Justice/Court of Justice of the European Union ("the CJEU") concerning the interpretation and application of the Part-time Work Directive and clause 4.1. Though none of these cases addresses the specific point in issue in this appeal, both sides seek to draw assistance from these decisions for their respective cases on causation.

46. Mr Mountford submitted that the sole causation test in clause 4.1 (which excludes multiple cause scenarios from the ambit of protection as a threshold issue) has been repeatedly stated by the CJEU. He relied on several cases, principal among them being *Wippel v Peek & Cloppenburg GmbH & Co KG* (Case C-313/02) [2005] 1 CMLR 9 ("*Wippel*"), a decision of the Grand Chamber of the CJEU on a reference for a preliminary ruling, where the core complaint of less favourable treatment was that the part-time worker was on a zero hours contract whereas others (both part-time and full-time workers) were offered rostered (or fixed) hours contracts. In two paragraphs of the judgment the CJEU stated the effect of clause 4.1 of the Framework Agreement as follows: "part-time workers are not to be treated less favourably as regards employment conditions than comparable full-time workers on the sole ground that they work part time unless different treatment is warranted on objective grounds" (para 42, and para 54 is in very similar terms).

47. It is true that the CJEU restated rather than recited the statutory language but that restatement does not suggest an approach which attempts to isolate a sole cause for the differential treatment, not least because this was not a case in which it was even suggested that there was another independent cause for the differential treatment, and there was simply no discussion by the CJEU of that issue. In fact, the CJEU 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" (para 56) and said nothing to suggest that the words "solely because" should lead to a departure from ordinary EU equality law principles when interpreting the Part-time Work Directive. The case actually turned on the question of comparability (see paras 57–62) with the CJEU ultimately concluding that no full-time worker had the same type of contract or employment relationship as Ms Wippel and it followed that there was no less favourable treatment within the meaning of clause 4 of the Framework Agreement.

48. In several subsequent decisions drawn to our attention, the CJEU simply reiterated its restatement (as per paras 42 and 54 of *Wippel)* without any discussion of the words "solely because" or their effect. I cannot see that any of these cases take the matter further.

49. Mr Jones relied on *MK v Lufthansa CityLine GmbH* (Case C-660/20) [2024] IRLR 74, where a part-time pilot complained that his employer's approach of calculating

additional salary by reference to uniform thresholds of monthly flying hours constituted discrimination against him as a part-time worker. The CJEU was asked whether a provision requiring employees to reach the same threshold of flying hours to be entitled to an increased rate of salary constituted discrimination against part-time workers. At paras 36–38 the CJEU explained the approach to interpreting clause 4.1 of the Framework Agreement as follows*:*

> "[the Framework Agreement] seeks both to promote part-time work and eliminate discrimination between part-time workers and full-time workers … 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 … 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)."

50. Having concluded that the applicant was in a position comparable to that of a full-time worker (para 46) the CJEU then considered whether the treatment of part-time workers was less favourable, reasoning that it was, essentially because: "... 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" (para 47).

51. Mr Jones submitted that the CJEU heard argument in this case that the reasons for adopting the uniform thresholds on working hours were the need to compensate pilots for particularly heavy workload levels, and to dissuade them from excessive overworking (paras 20 and 59). That is true. But these reasons were not advanced as independent reasons or grounds for the differential treatment (ie other than the pilot's part-time status), and the CJEU did not engage with any argument to that effect. Instead, the other reasons were treated as potential objective justification for the otherwise discriminatory treatment (paras 59–67) and ultimately rejected on this basis.

52. A second case on which Mr Jones placed particular reliance as a clear case where there was more than one ground for the differential treatment is *ZT v Ministero dell'Istruzione e del Merito* (Case C-268/24) ECLI:EU:C:2025:526 ("*Lalfi*"). This was a ruling on a preliminary reference concerning clause 4.1 of the Fixed-Term Work Directive (which is in materially identical terms). The applicant in *Lalfi* was a non-tenured teacher who held short-term supply teaching posts and was refused an annual allowance

to support in-service training in circumstances where national legislation reserved the benefit to tenured teachers and to non-tenured teachers who held supply teaching posts for the whole academic year. Mr Jones submitted that if one asks the question, why was the teacher denied the benefit, the answer would be that it was both because she was employed as a fixed-term worker and 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 worker. That argument was rejected by the CJEU. Mr Jones relied on a passage at paras 49–50 stating:

> "… 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."

53. He submitted that the fact that only some fixed-term workers were treated adversely suggests that some other reason must have been in play. However, the CJEU simply examined whether the non-tenured teachers holding short-term supply teaching posts were in a comparable situation to tenured teachers and, having held in principle that they were (para 56), concluded that the difference in treatment did not appear to be objectively justified (albeit leaving the final decision to the referring court).

54. In *Lalfi* the practice in question necessarily and inherently imposed a greater burden on part-time workers than on full-time workers because it afforded higher pay to those who worked more hours and was therefore prima facie discriminatory. It is true, as Mr Jones submitted, that nobody thought it mattered what the reason or rationale for the rule was until after that first step was established; the rationale or explanatory reason fell to be considered at the objective justification stage and did not alter the fact of the inherently discriminatory treatment. However, the CJEU did not focus on the words "solely because" nor did it recognise or address the possibility that this was a case with more than one possible cause of the less favourable treatment alleged. Instead, as it seems to me, the court was simply looking at two categories of fixed-term workers to see if there was less favourable treatment between them and their comparators.

55. The parties also referred the court to several domestic decisions of the Employment Appeal Tribunal and to *McMenemy* in the Inner House. It is sufficient for the purpose of this appeal to refer just to *McMenemy* and *Sharma* to identify the two conflicting approaches.

56. *McMenemy* concerned a part-time worker who worked on Wednesday, Thursday and Friday each week and complained that he did not receive the benefit of public holidays, unlike full-time workers. The tribunal 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 and that a part-time worker who worked Monday to Wednesday, rather than Wednesday to Friday, would get the benefit. It was agreed that this involved less favourable treatment, but both the tribunal and appeal tribunal in that case held that the reason had nothing to do with part-time status and depended on the fact that he did not work on the day the public holidays fell. The Court of Session upheld the decision. I do not agree with its reasoning on the need to consider the employer's intention in determining the reason for the treatment. That reasoning is plainly wrong. But it is not material to the point in issue in our case, and I consider that the result reached in *McMenemy* is in any event correct on the facts.

57. On causation, it was common ground between the parties in *McMenemy* that the 2000 Regulations should be construed consistently with the Part-time Work Directive (para 5) and neither side suggested that the 2000 Regulations went further than the Part-time Work Directive in conferring protection on part-time workers or were intended to do more than to bring UK law into line with EU law (para 6).

58. As for the word "solely" in clause 4.1 of the Framework Agreement, the Inner House referred to para 54 of the CJEU's judgment in *Wippel* (see above, para 46) which said: "clause 4 of the Framework Agreement annexed to Directive 97/81, in regard to employment conditions, precludes part-time workers from being treated less favourably than comparable full-time workers on the sole ground that they work part-time unless different treatment is warranted on objective grounds." Lord Nimmo Smith explained (para 6):

> "In our opinion, the language of clause 4.1 of the Directive connotes the need to consider whether there is a causative connection between the discrimination complained of by the worker and the part-time nature of the worker's employment. As we have said, the prohibition is against less favourable treatment of part-time workers, than comparable full-time workers, for the reason that they work part-time and for that reason alone. …"

59. Having referred to an earlier case, *Gibson v Scottish Ambulance Service* EATS/0052/04, 16 December 2004 ("*Gibson*") where a sole ground test was adopted (para 11, *Gibson*), Lord Nimmo Smith agreed and continued:

> "… The 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 (see the passage in *Wippel* quoted). Additional reasons for construing the word 'solely' in this way are that, as counsel for the respondents pointed out, there is, first, no reference in the Directive to indirect discrimination and, secondly, different treatment, if established, may nevertheless be 'justified on objective grounds'."

60. *McMenemy* was not cited in *Sharma* though *Gibson* was. *Sharma*, in essentials, concerned cuts made to the working hours of part-time lecturers on a particular part-time contract while no cuts were made to the hours worked by full-time and other part-time lecturers whose contracts did not allow for any cuts to be made. The employment tribunal dismissed the claim, regarding itself as bound by *Gibson*, and holding that the treatment was not on the ground of part-time status per se but was because the claimants were a particular type of part-timer. The Employment Appeal Tribunal (Elias P sitting with members) held that the tribunal had erred in law (paras 48–51):

> "48. 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.
>
> 49. 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?

> 50. 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.
>
> 51. 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."

61. On that basis, the appeal tribunal upheld the claimants' appeal. In any event, it considered that the employment tribunal had been wrong to characterise the less favourable treatment in that case as being for more than one reason - properly analysed, it was only because the claimants were part-timers. Finally, Elias P added that, in any event, it was "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" (para 53).

6. The meaning of "solely because" in clause 4.1 of the Framework Agreement

62. It is unclear why the word "solely" was included in clause 4.1 of the Framework Agreement and what it was intended to achieve. There are two possibilities. The first is that it was intended to rule out cases involving multiple causes for differential treatment as the respondent contends and Elisabeth Laing LJ held. The other possibility is that the word "solely" was simply making clear that claims based on treatment which is effectively caused by independent reasons, with part-time status merely being a background factor or happenstance, are excluded.

63. On the one hand I consider that these are strong words and that there is force in para 66 of Elisabeth Laing LJ's judgment where she said:

> "In my judgment it is clear that the test for causation in clause 4.1 is a narrow test. The important words are 'solely because'. That phrase could not be clearer. That phrase is also used in

> [the fixed-term work Directive 99/70/EC], which has a similar provenance, but that phrase is not used in other instruments about discrimination in employment, as my summary of the relevant provisions of [the race discrimination Directive 2000/43/EC, the equal treatment Directive 2000/78/EC and the burden of proof Directive 97/80/EC] show. That clear meaning is not displaced by appeals to the reference in recital (11) to 'eliminating discrimination against part-time workers'. That reference must be read in its full context, which I have quoted in para 51, above. Recital (11) does not support the idea that the social partners had agreed specific measures which would *eliminate* such discrimination. But even if it did, the reader does not know what specific measures have been agreed without considering the actual words of those measures, and, in particular, the words of clause 4.1. Given the apparent difficulty of reaching agreement, and the context, which is fully described in the Preamble to the Framework Agreement, there is every reason to give those words their natural meaning. They represent a compromise between competing factors, agreed by the social partners, after balancing their different interests." (Emphasis in original.)

64. It is true that the other Directives referred to, addressing unlawful discrimination in employment, concern what are described as "suspect grounds" (that is, sex, race, religion or belief, disability, age or sexual orientation) and define the principle of equal treatment as meaning that "there shall be no discrimination whatsoever" based on any of the grounds referred to, "either directly or indirectly". The point has less force than it otherwise might, however, because the Framework Agreement is a negotiated instrument that reflects a compromise, and is not the product of an ordinary legislative process. Caution is therefore necessary before concluding that the principle of non-discrimination was intended to be differently understood in this context.

65. Nonetheless, it is true that the extent of the protection afforded to part-time workers is carefully calibrated: this is clear from the absence of any protection for indirect discrimination which given the segregated nature of a lot of part-time work may have a disproportionately significant effect, the fact that an actual comparator is generally required, and that objective justification of direct discrimination is available. The broad protective purpose referred to and relied on by Elias P in *Sharma* cannot be taken too far in these circumstances.

66. On the other hand, we were not shown any judgment of the CJEU addressing the meaning and effect of the words "solely because". Decisions by employers (and others) are frequently reached for more than one reason and, in this context particularly, it is easy to think of situations where an employer might point to budgetary (or other) constraints

as another reason for the treatment if that would avoid the protection afforded by the Part-time Work Directive (and therefore avoid any need for objective justification). But the authorities we were shown (eg *Wippel*) simply recite the same "sole" ground phrase without saying what it means or indeed ruling out the possibility of a case being established despite the fact of more than one cause for the treatment alleged. It seems that the CJEU has not been invited to, and has not, decided any of these cases by pointing to some reason for the adoption of an impugned rule or treatment which is additional to part-time status, or by seeking to isolate a "sole" reason for differential treatment when considering discrimination against part-time workers.

67. The CJEU jurisprudence does, as Mr Jones submitted, contain some examples of treatment being found to require objective justification even where there may have been other reasons relied on to explain it: see, for example, *MK* (ensuring that heavier workloads were properly compensated). But, as he acknowledged, they are mainly cases where the competing cause of the less favourable treatment was not clearly independent but was more in the nature of an underlying motive or rationale. The cases do not address the situation said to arise in our case where there are said to be two (or more) wholly distinct causes for the less favourable treatment. So, the most that can be said is that the point has simply not been decided.

68. Nor do I find much assistance in the provisions of the Part-Time Work Convention 1994 (International Labour Organisation ("ILO") Convention No 175) and the accompanying ILO Recommendation 182 relied on by Mr Jones as a pre-existing instrument from which the words "solely because" were lifted. In its finally agreed form, article 5 of the ILO Convention provides:

> "Measures appropriate to national law and practice shall be taken to ensure that part-time workers do not, <u>solely because</u> 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" (Emphasis added.)

69. I do not consider that the debates reflected in the travaux préparatoires concerning the word "solely" in that context are relevant to the meaning of the text which later came to be included in the Framework Agreement. The language of clause 4.1 of the Framework Agreement does not correspond precisely to the language of article 5, and though it is possible that this is the origin of the wording adopted in clause 4.1, it does not help in understanding why that wording was adopted or what it was intended to achieve. It seems to me that the link is too tenuous.

70. Moreover, the fact that there is (and was) no defence of objective justification in article 5 may explain the language of "solely because" as being aimed at clarifying that where differences in pay reflect genuine differences in the way work is organised or done (for example by reference to seniority rights, merit systems or shift premiums), these would not amount to contraventions of the prohibition. In other words, the words "solely because" allowed for wage differences etc which are justified for reasons other than part-time status. But it is hard to see how that assists in understanding the use of the same language in the Framework Agreement, in a clause making a defence of objective justification expressly available to address underlying or additional reasons or rationales for the impugned treatment yet still retaining the word "solely".

71. Ultimately, for the reasons I shall explain below, I have concluded that it is not necessary to decide which of the alternative meanings of the words "solely because" in clause 4.1 is correct. I turn to those reasons now.

7. A conforming construction is not necessary

72. Even if the test for causation in clause 4.1 of the Framework Agreement annexed to the Part-time Work Directive is the narrow test contended for by the respondent, it is common ground that the Secretary of State could, in the 2000 Regulations, have relaxed that test and given more favourable protection than the Part-time Work Directive requires. In that case, there would be no need (nor any justification) to read the limitations in clause 4.1 into the 2000 Regulations.

73. This point was made clear by Lord Mance (giving the judgment for the majority) in *United States of America v Nolan* [2015] UKSC 63; [2016] AC 463 at para 14:

> "… it is a cardinal principle of European Union and domestic law that domestic courts should construe domestic legislation intended to give effect to a European Directive so far as possible (or so far as they can do so without going against the 'grain' of the domestic legislation) consistently with that Directive: *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, *Vodafone 2 v Revenue and Customs Comrs* [2010] Ch 77, paras 37-38 and *Swift [trading as A Swift Move) v Robertson* [2014] 1 WLR 3438, paras 20-21. But that means avoiding so far as possible a construction which would have the effect that domestic implementing legislation did not fully satisfy the United Kingdom's European obligations. Where a Directive offers a member state a choice, there can be no imperative to construe domestic legislation as having any

> particular effect, so long as it lies within the scope of the permitted. Where a Directive allows a member state to go further than the Directive requires, there is again no imperative to achieve a 'conforming' interpretation. It may in a particular case be possible to infer that the domestic legislature did not, by a domestic formulation or reformulation, intend to go further in substance than the European requirement or minimum. *R (Risk Management Partners Ltd) v Brent London Borough Council* [2011] 2 AC 34, considered below, is a case where the Supreme Court implied into apparently unqualified wording of domestic Regulations a limitation paralleling in scope that which had been implied by the Court of Justice into general wording of the Directive to which the Regulations were giving effect: see *Teckal Srl v Comune di Viano* (Case C-107/98) [1999] ECR I–8121. It concluded that the two had been intended to be effectively back-to-back. A reformulation may also have been aimed at using concepts or tools familiar in a domestic legal context, rather than altering the substantive scope or effect of the domestic measure from that at the European level. But that is as far as it goes."

(See also *Matthews v Kent and Medway Towns Fire Authority* [2006] UKHL 8; [2006] 2 All ER 171, paras 24 and 37 per Lady Hale.)

74. Plainly, if regulations were made which apparently failed to enshrine in UK law the minimum standards required by a Directive, the courts would endeavour to construe the regulations so that those minimum standards were protected consistently with the UK's international obligations. However, there was nothing to prevent the United Kingdom from providing protection which goes beyond those minimum standards. In the case of the 2000 Regulations, there is no doubt that the minimum requirements set by the Part-time Work Directive were satisfied. There is also no doubt that the Part-time Work Directive left open to member states the choice as to how the protection should be implemented and the possibility of introducing more favourable protection in doing so (see, for example, clause 6.1, para 12 above).

75. Further, section 19(1) of the 1999 Act is a broad enabling power not limited to implementing the terms of the Part-time Work Directive. Rather, it gave free-standing power to the Secretary of State to secure in domestic law 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". In other words, neither the purposes nor the extent of the protection was fixed. Moreover, the government made clear its intention to consult fully on "how [the regulations] should be used, by discussing with interested parties and publishing draft regulations for comment", demonstrating that wider protection was contemplated (Explanatory Notes, para 217). A consultation was in

fact carried out and this directly informed the scope of the 2000 Regulations, as discussed by Julia Lourie in Part-time Work: Research Paper 00/50, House of Commons, 15 May 2000 which identifies the changes made following consultation. That is inconsistent with the respondent's contention that section 19 was framed widely only in order to give the Secretary of State power to go further than the Part-time Work Directive in respect of pay because pay was not covered by it.

76. Having been given significant leeway by section 19(1), it is striking that the Secretary of State did not adopt the "solely because" language in clause 4.1 by way of the causation test to be applied but instead adopted language in the 2000 Regulations that comes directly from pre-existing equality legislation and which had been the subject of authoritative treatment by the courts. The obvious implication is that this was deliberate and that the "effective cause" jurisprudence was to be followed. Contrariwise, in replacing the "solely because" test in clause 4.1 with the "on the ground of" test the meaning of which was well-established by then, there is no indication that the courts were meant instead to depart from the jurisprudence which dealt with that pre-existing legislation and made clear that the protected characteristic had to be an effective or substantial cause, but not the sole cause, of the asserted discriminatory treatment. Like Edis LJ, 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 a deliberate decision to omit it was necessarily taken (para 40 of the Court of Appeal judgment).

77. Elisabeth Laing LJ (supported by Mr Mountford) considered it necessary for there to be a clear indication in the 2000 Regulations that the "unusually strict test for causation in clause 4.1" (para 67) had been relaxed and she therefore looked to see whether there was language in the 2000 Regulations showing that the Secretary of State had that deliberate intention, concluding that there was absolutely no sign in the language of regulation 5(2) that the test for causation was intended to be less strict than the test in clause 4.1. I disagree with that approach. As Lord Mance made clear in *Nolan*, it may in a particular case be possible to infer that the domestic legislature did not, by a domestic formulation or reformulation, intend to go further in substance than the European requirement or minimum; but it is not necessary to show a deliberate intention to do so. In my judgment there is nothing to suggest that Parliament did not intend to go further than the Part-time Work Directive here. Indeed, the reverse is true. Moreover, it does not matter whether there was a deliberate intention to widen the causation test, or whether the causation test adopted simply reflected what the Part-time Work Directive was understood to mean or require. What matters is what was intended by the language used in the 2000 Regulations themselves.

78. Accordingly, there is no imperative to achieve a conforming interpretation in this case. The common ground position adopted in *McMenemy* was wrong to say otherwise (paras 5 and 6 referred to above at para 57). The only question that remains to be answered is what the causation test in regulation 5(2) means and requires.

8. The meaning of the causation test set by regulation 5(2)(a)

79. To recap, the right conferred by regulation 5(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" (regulation 5(2)). The words "solely because" do not appear in the 2000 Regulations.

80. Contrary to the arguments advanced by Mr Mountford, the word "only" and the use of a singular "ground" do not support any particular causation test.

81. First, the word "only" is undoubtedly similar to the word "solely", but this does not mean that regulation 5(2)(a) is to be construed as if it read "the treatment is solely because the worker is a part-time worker". The word "only" in regulation 5(2) limits the scope of the right to protection by requiring the less favourable treatment to be both "on the ground" of part-time status and not justified on objective grounds. So, it qualifies both conditions and not just the first (in sub-paragraph (2)(a)). Put another way, it emphasises that both conditions must be satisfied. The word "only" does not otherwise qualify the necessary causal link between the treatment and the status – it is in the wrong place as a matter of grammar to do that. Had this been the intention, words clearly to that effect could have been used in regulation 5(2)(a), for example by indicating that the right to protection arises where the treatment "is *only* on the ground that the worker is a part-time worker." Moreover, if the Part-time Work Directive does impose a sole ground test, it is striking that different words were used. As Bean LJ explained (para 99), it would have been easy enough to have used the words "solely because" in sub-paragraph (2)(a) of the 2000 Regulations if the intention was simply to reproduce the wording of clause 4.1. That was not done, and there is no warrant for rewriting the regulation.

82. Secondly, I disagree with the reasoning of Elisabeth Laing LJ that the use in regulation 5(2)(a) of the word "ground" in the singular suggests that the treatment should be found to be on one ground only for the right to protection to arise. Regulations 6 and 7 do not support this conclusion and are directed at different issues. Regulation 6 refers to "the reasons for the treatment" because it concerns a pre-action stage when the employee does not know why he or she received treatment perceived to be less favourable on part-time worker grounds and enables such information to be requested from the employer. Regulation 7(1) adopts the well-established formula "the reason (or, if more than one, the principal reason)" from the unfair dismissal provisions in Part X of the Employment Rights Act 1996 since it concerns protection for unfair dismissal. Rather, regulation 5(2)(a) is directed at a single protected ground, namely part-time status; the word ground is therefore in the singular (as it was in relation to the single ground of sex, but not race which encompasses several different sub-grounds—nationality, ethnicity, etc). I cannot see that the different use of the words "reason", "reasons" and "ground" in

these regulations tells one anything about the meaning of the word "ground" in the singular in sub-paragraph (2)(a).

83. Nor does the fact that the protection afforded by the 2000 Regulations is more narrowly confined than other equality legislation help in determining the scope of the causation test to be applied. It is true that in various ways the 2000 Regulations are structurally different in their approach and narrower than other legislative protection given to those with protected characteristics. But it does not follow in any way that the approach to causation is of a piece with those limitations and must be read as requiring a sole ground only.

84. On the contrary, the focus must be on the words of regulation 5(2)(a), read in context and having regard to its particular purpose: see among many authorities on the proper approach to statutory interpretation, *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29–31; *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594 ("*PACCAR*"), paras 40–42.

85. In my view, to require that the claimant'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, is consistent both with the clear language of regulation 5(2) and with the protective purpose of this regulation. To hold otherwise is inconsistent with the approach standardly taken to questions of causation in discrimination cases and risks uncertainty and unreasonable outcomes. Although the examples of perverse outcomes given by Elias P in *Sharma* (para 49) were criticised as unsustainable by Elisabeth Laing LJ and Mr Mountford, it does seem to me that there is force in his conclusion to this effect. The EAT in this case (para 72) referred to their collective industrial experience of issues relating to part-time work, and to the fact that discrimination against part-timers often takes place because of factors associated with part-time status so that limiting the protection to less favourable treatment solely on the ground of part-time work risks excluding many cases where the part-time nature of the work might be the effective, but not the sole, reason for that treatment. An imaginary hypothetical example illustrates the unreasonableness: an employer who denies a particular benefit to all "women over 6 feet tall" will mean that a tall woman who suffers the disadvantage does so for two reasons: her sex and her height. Under anti-discrimination law as it has developed, there would clearly be discrimination on the ground of sex because sex is an effective cause of the treatment, albeit not the sole cause. If the employer instead refused a benefit to "part-time workers over 6 feet tall", it is hard to see why the same analysis should not apply, especially where a defence of objective justification is available to the employer. It seems to be counter to even the limited purpose of the 2000 Regulations to construe them as avoiding protection for treatment which inherently and necessarily disadvantages part-time workers (unless that treatment can be justified). The fact that not all part-timers are treated adversely should not mean that those who are cannot take proceedings for discrimination if being part-time is an effective cause (or reason) for their adverse treatment.

86. The existence of other causes of the treatment may be relevant to the question whether the treatment is justified on objective grounds or to the amount of compensation to be awarded for the unlawful treatment on a just and equitable basis. But the existence of other causes should not and, in my judgment, does not mean that the right not to be treated less favourably on the ground of part-time status for the purposes of regulation 5(1) does not arise.

9. Conclusion

87. For these reasons (which are essentially the same as those given by the Court of Appeal majority), I would allow the appeal. The 2000 Regulations prohibit less favourable treatment of part-time workers where their part-time status is an effective cause of the impugned treatment. It need not be the sole cause.