Michaelmas Term
[2021] UKSC 44
On appeal from: [2019] CSIH 43

JUDGMENT

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

before

Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Briggs
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON
13 October 2021

Heard on 25 February 2021

Appellant
Aidan O'Neill QC
Scott Blair
(Instructed by Drummond Miller LLP (Edinburgh))

Respondent
David Johnston QC
John MacGregor QC
(Instructed by Office of the Advocate General for Scotland)

Intervener
(Equality and Human Rights Commission)
Christine O'Neill QC
(Instructed by Equality and Human Rights Commission)

LORD HODGE: (with whom Lord Lloyd-Jones, Lord Briggs, Lord Leggatt and Lord Burrows agree)

1. This appeal from the Inner House of the Court of Session in Scotland concerns proceedings for judicial review by the appellant ("Ms Anwar"). So far as is now relevant, she claims compensation from the United Kingdom Government for an alleged failure properly to implement Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (together "the Equality Directives"). Her claim, which is directed against the Secretary of State for Business, Energy and Industrial Strategy, is that the United Kingdom failed to provide an effective remedy for the harassment which she suffered at the hands of her former employer on the grounds of sex, race and religion. As explained below, Ms Anwar asserts that that failure is the failure to enact a legislative provision to enable an employment tribunal in Scotland to grant a warrant for the interim remedy of arrestment on the dependence. Ms Anwar argues that she should have been able to obtain such a warrant against her former employer at or after the commencement of the tribunal proceedings, thereby giving her the ability to freeze her former employer's bank account and thus prevent the alleged dissipation of the funds which otherwise would have been available to meet her financial claim.

2. As explained by Lord Drummond Young, who wrote the majority judgment in the Inner House ([2019] CSIH 43; 2020 SC 95), under EU law, member states are obliged to provide effective remedies for the implementation of EU law-based rights ("the principle of effectiveness") and in so doing must provide remedies that are equivalent to those available for comparable claims that do not involve EU law ("the principle of equivalence") (see the judgment of the Grand Chamber of the Court of Justice of the European Union ("CJEU") in *Impact v Minister for Agriculture and Food* (Case C-268/06) EU:C:2008:223; [2009] All ER (EC) 306; [2008] ECR I-2483. The principle of effectiveness is articulated in the Treaty on European Union (2012/C 326/13) ("the TEU") itself in article 19(1), which states:

> "Member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

Similarly, article 47 of the Charter of the Fundamental Rights of the European Union (2012/C 326/02) ("the Charter") recognises the general principle of EU law of effective judicial protection by providing:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article."

Article 52(1) of the Charter addresses the scope of the rights which the Charter recognises:

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

3. As the CJEU observed in *Impact* (paras 44-45) and in many other cases, in the absence of EU law rules governing the matter, it is for the domestic system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, but a member state is responsible for ensuring that those rights are effectively protected in each case. Effective protection means that the procedural rules must not render the exercise of those rights practically impossible or excessively difficult: *Impact* para 46. That statement remains good law. (See for example *ENEFI Energiahatekonysagi Nyrt v Directia Generală Regională a Finantelor Publice Braşov (DGRFP)* (Case C-212/15) EU:C:2016:841; [2017] ILPr 10, para 30; *ML v Aktiva Finants OŰ* (Case C-433/18) EU:C:2019:1074; [2020] ILPr 9, para 29; *SL v Vueling Airlines SA* (Case C-86/19) EU:C:2020:538; [2021] 1 WLR 2479, para 39 and the cases cited therein, and the judgment of this Court in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2)* [2017] UKSC 51; [2020] AC 869, para 106.)

4. It is not in dispute that the principle of effectiveness mandates that there be an interim measures procedure available to a claimant in an action that safeguards his or her rights derived from the Equality Directives. In my view counsel were correct so to agree. The CJEU in *R v Secretary of State for Transport, Ex p Factortame (No 2)* (Case C-213/89) EU:C:1990:257; [1991] 1 AC 603 ruled that the full effectiveness of EU law would be impaired if a rule of national law were to prevent a court seised of a dispute governed by EU law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law (para 21). The CJEU made a similar statement in *Unibet (London) Ltd v*

Justitiekanslern (Case C-432/05) EU:C:2007:163; [2007] ECR I-2271, para 67. Further, in *Križan v Slovenská inšpekcia životného prostredia* (Case C-416/10) EU:C:2013:8; [2013] Env LR 28, which concerned the prevention and control of pollution under Council Directive 96/61/EC, the CJEU held (paras 107-109) that the right to bring a legal action under article 15a of that Directive included a right to seek interim relief pending the determination of the lawfulness of a permit.

5. The remedy which Ms Anwar seeks is compensation in the form of damages. A member state may incur liability to a person under Community law where three conditions are satisfied. Those conditions are that (1) the rule of EU law is intended to confer rights on individuals; (2) the breach is sufficiently serious, and in particular that there was manifest and grave disregard by the member state of its discretion; and (3) there is a direct causal link between the breach of the obligation resting on the member state and the damage sustained by the injured party. This summary of the decisions of the CJEU in *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) EU:C:1991:428; [1991] ECR I-5357; [1995] ICR 722 and *Brasserie du Pêcheur SA v Federal Republic of Germany* (Joined Cases C-46/93 and C-48/90) EU:C:1996:79; [1996] QB 404; [1996] ECR I-1029 by Sir Andrew Morritt V-C in *Phonographic Performance Ltd v Department of Trade and Industry* [2004] 1 WLR 2893, para 11 was approved by this court in *Nuclear Decommissioning Authority v EnergySolutions EU Ltd* [2017] UKSC 34; [2017] 1 WLR 1373, para 38 in the judgment of Lord Mance with whom the other Justices agreed.

FACTUAL BACKGROUND

6. Ms Anwar was employed by the charity, "Roshni", a company limited by guarantee, which received public funding to protect children and young adults within ethnic minority communities against abuse. In September 2015 Ms Anwar commenced proceedings in the employment tribunal in Glasgow against her former employer and her former line manager, who was the executive chairman of Roshni, Mr Ali Khan. Her complaint was that she had been subjected to workplace and work-related harassment on the grounds of her sex, her race and her religion contrary to section 26 of the Equality Act 2010 ("the 2010 Act"). The employment tribunal upheld her claims for harassment against both her former employer and Mr Khan in an oral judgment in May 2016 and a written judgment dated 15 July 2016. The tribunal then proceeded to a remedies hearing followed by a judgment dated 24 August 2016 in which it made an award of £74,647.96 against both respondents on a joint and several basis.

7. Ms Anwar's solicitor, Mr McGrade, who represented her in the tribunal proceedings, has stated in an affidavit that Ms Anwar had expressed her concerns that Roshni would try to prevent her from receiving compensation which the tribunal might

award and that following the tribunal's oral judgment on the merits in May 2016 he had checked Roshni's abbreviated financial statements for the year to 30 June 2015 which appeared to show that the charity had sufficient funds to meet her claim. Nonetheless, after the tribunal issued its judgment on the remedy, Ms Anwar told Mr McGrade that she had received information that those who controlled Roshni proposed to close down the existing charity and transfer its funds to a new charity. This appeared to be an attempt to avoid paying the award in her favour. On 28 September 2016 Mr McGrade obtained an interim interdict from the sheriff court at Glasgow which prohibited Roshni or anyone acting on its behalf from disposing of or transferring any funds held by it to a third party other than in payment of any salaries or debts legally incurred. Mr McGrade did not seek to obtain a warrant to arrest on the dependence in the sheriff court as he did not consider it appropriate to pursue a monetary claim before the 42-day time limit for an appeal against the tribunal's decision as to remedy expired on 5 October 2016. Thereafter, he obtained an extract of the tribunal's order and instructed sheriff officers to serve an arrestment in execution of the award on the Co-operative Bank, which was Roshni's bank. He was later informed that the arrestment had attached only £2967.32.

8. Mr McGrade later obtained statements from the Co-operative Bank which disclosed that Roshni had over £68,000 to its credit in its account on 1 August 2016 and had received further grant funding of £22,000 but that by 7 October 2016 the sum in its account had fallen to about £4,000. Ms Anwar believes that Roshni deliberately dissipated its funds in order to defeat her claim. The majority of the outgoings listed in the bank statements do not appear to support that belief. Those bank statements disclosed that most of the outgoings were payments of salaries to employees and expenses of a relatively modest nature but there was one payment of £11,000 to an entity described as "Engage ESF", which may be a reference to the new charity, "Engage Me" to which Ms Anwar alleges that funds were transferred. But it is clear that the outgoings were not matched by income in those months. It is not clear whether further grants or donations were diverted from Roshni to the new charity, but they may have been.

9. Mr McGrade also explained that he had acted for a number of clients who had succeeded in obtaining awards from the employment tribunal but had discovered that the respondent against whom they had claimed had been unable to pay the awards.

10. The Commission for Equality and Human Rights ("EHRC") has intervened in the Outer House, the Inner House and in this court and has provided helpful reports concerning the many difficulties which claimants experience in the United Kingdom in securing payment of awards made by the employment tribunal. I discuss its intervention in paras 62-69 below.

THE THREE LEGAL ISSUES ON THIS APPEAL

11. The employment tribunal in Scotland does not have power to authorise diligence on the dependence of a claim before it to provide interim security for the pecuniary claim. As discussed below diligence can take the form of freezing a defender's bank account (by arrestment) or prohibiting the defender from dealing with its immoveable property (by inhibition). It is common ground that an employment tribunal has no such power. But the parties to this appeal disagree on whether a claimant/pursuer can competently raise proceedings in the sheriff court or the Court of Session for the purpose of obtaining diligence on the dependence as a protective measure for a claim pursued in the employment tribunal. If such proceedings were competent, the parties disagree as to whether they amount to an effective remedy in EU law.

12. Three principal legal issues must therefore be addressed:

(i) Does the Court of Session or the sheriff court have power to grant a warrant for inhibition and arrestment 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 that those courts have such a power, 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? and

(iii) If the answer to issue (i) is that the courts do not have such a power, does this constitute a breach of EU law?

Ms Anwar also alleges that the United Kingdom Government has breached the principle of equivalence.

DOMESTIC LAW

(i) The jurisdiction of the Employment Tribunal

13. Part 9 of the 2010 Act, which is concerned with enforcement, divides jurisdiction over complaints of discrimination or harassment because of protected characteristics between the sheriff court and the employment tribunal. In Scotland sections 113 and 114 confer jurisdiction on the sheriff court in relation to a wide range of claims, including those relating to services and public functions (Part 3), premises (Part 4), education (Part 6) and associations (Part 7). Separate provision, which addresses discrimination and harassment in the context of work, is made for claims by, among others, employees and applicants for employment in Part 5 of the Act. Section 120 of the Act confers jurisdiction on an employment tribunal to determine a complaint relating to a contravention of Part 5. It follows that while a claimant/pursuer advancing a complaint of discrimination or harassment in the sheriff court can apply to the sheriff in that process for a warrant for diligence on the dependence, a claimant/pursuer pursuing such a claim in an employment tribunal would have to raise a separate court action, if that were competent, to obtain such an interim remedy.

(ii) The enforcement of an Employment Tribunal's judgment

14. Section 15(2) of the Employment Tribunals Act 1996 ("the 1996 Act") provides:

> "Any order for the payment of any sum made by an employment tribunal in Scotland … may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland"

The employment tribunal's order for payment is equated with a decree arbitral which has become directly enforceable by having obtained from the sheriff a warrant for its execution. The employment tribunal's order can therefore be enforced without the need to apply to the court for such a warrant or to raise a court action for payment of the sum awarded in the order for payment.

(iii) Diligence on the dependence

15. Historically, Scots law allowed a claimant/pursuer to obtain the interim remedy of diligence on the dependence automatically where the claimant/pursuer was asserting a right to the payment of a debt that was alleged to be currently due. The claimant/pursuer did not have to persuade the court that he or she had a prima facie case on the merits of the action or to establish that there was a need for the diligence. Only where the action was for the payment of a future or contingent debt did a claimant/pursuer have to demonstrate special circumstances to support the grant of a warrant for the diligence. Those special circumstances were that the defender was at significant risk of insolvency or was contemplating flight from the country (vergens ad inopiam or in meditatione fugae). In the overwhelming majority of cases the claimant/pursuer sought diligence on the dependence in an action in which the court granting the warrant for such diligence would thereafter adjudicate on the merits of his claim for payment if the claim were not settled by agreement. But there is also case law of high authority which supports the view that it is competent to raise an action for payment in the Scottish courts for the purpose of obtaining diligence on the dependence of the action as interim security in respect of a claim that is pursued in another forum.

16. The earliest reported case in which the Court of Session upheld the competency of this ancillary protective jurisdiction appears to be *Hawkins v Wedderburn* (1842) 4 D 924, which was followed in *Fordyce v Bridges* (1842) 4 D 1334, both of which concerned the provision of interim security in support of legal proceedings being conducted in England. More recently, there has been a repeated recognition by the Scottish courts of the competency of the practice in Scottish arbitrations of raising parallel proceedings in court to obtain diligence on the dependence while the arbitral tribunal determines the merits of the parties' dispute (see, for example, *Motordrift A/S v Trachem Co Ltd* 1982 SLT 127). I discuss those cases in paras 34-36 below.

17. The availability of diligence on the dependence as of right and without any judicial assessment of the merits of the pursuer's claim or of the necessity for the diligence was for many years a matter of controversy and the subject of judicial criticism. Inhibition on the dependence prohibits a defender from dealing with his heritable property. It has the effect of freezing the whole heritable property of the defender pending the disposal of the action, as it empowers the inhibiting creditor to take legal action to annul any voluntary alienation of heritable property by the defender in breach of the prohibition. In practice, no well-advised purchaser will accept a title from an inhibited seller unless the inhibition against the seller is discharged. Arrestment on the dependence prevents a third party holding moveable property belonging to the debtor, or money due to the debtor, from parting with it

pending the determination of the action and creates a preferential right over the arrested subjects. It was common practice for a pursuer who obtained a warrant of arrestment on the dependence as of right on the commencement of a legal action to serve an arrestment on the defender's bank or banks, thereby freezing any funds in accounts which the defender held with those banks on the date of the arrestment and forcing the defender to open a new bank account or take other measures in order to be able to receive payments and to pay his or her debts as they fell due. The Scottish Law Commission in their report on Diligence on the Dependence and Admiralty Arrestments (1998) (Scot Law Com No 164) drew attention to the many criticisms on the then current procedures which they compared with the more regulated provisional and protective measures authorised in other legal systems. Among their criticisms were (i) that the warrant for diligence on the dependence was too easily obtained, and (ii) that the grounds for recall or restriction of such diligence were far too restrictive. The Scottish Law Commission recommended that a pursuer should no longer as of right be able to exercise diligence on the dependence to secure sums already due but that the court should have a discretion to grant a warrant for diligence on the dependence on stated statutory grounds which were in substance those which were later enacted, as I discuss in para 19 below.

18. Matters came to a head after the enactment of the Human Rights Act 1998 when a defender challenged the automatic grant of a warrant for inhibition on the dependence on the ground that it was a breach of its rights under article 1 of Protocol No 1 ("A1P1") of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). In *Karl Construction Ltd v Palisade Properties plc* 2002 SC 270, a defender in a building contract claim applied successfully for recall of an inhibition on the dependence on the ground among others that the inhibition had been granted contrary to the defender's rights under the ECHR. At para 54 of his judgment in that case Lord Drummond Young set out four requirements that must be satisfied if a right of protective attachment of immoveable property during litigation were to conform to A1P1. The requirements were:

> "1. The pursuer must establish a prima facie case on the merits of the action. 2. The pursuer must establish that there is a specific need for an interim remedy; this will generally involve demonstrating either that there is a significant risk of the defender's insolvency or that the defender is taking steps to conceal or dissipate his assets or that there is a significant risk that the defender will remove his assets from the jurisdiction. 3. A hearing must take place before a judge at which the last two matters are considered. 4. If protective attachment is used without an objective justification, and in particular if the pursuer is unsuccessful in the action, the

> defender should be entitled to damages for any loss that he has suffered in consequence of the attachment."

19. The Scottish Parliament thereafter enacted section 169 of the Bankruptcy and Diligence etc (Scotland) Act 2007 which added Part 1A to the Debtors (Scotland) Act 1987 ("the 1987 Act"). The provisions in Part 1A were designed to address the problems which the Scottish Law Commission and others, including Lord Drummond Young, had identified. I do not need to set out the relevant provisions in any detail but quote only those provisions which are central to the issues in this appeal. Section 15A which is headed "Diligence on the dependence of action" states so far as material:

> "(1) Subject to subsection (2) below and sections 15C to 15F of this Act, the Court of Session or the sheriff may grant warrant for diligence by
>
> (a) arrestment; or
>
> (b) inhibition,
>
> on the dependence of an action.
>
> (2) Warrant for -
>
> (a) arrestment on the dependence of an action is competent only where the action contains a conclusion for payment of a sum other than by way of expenses; …"

Section 15C, which is headed "Diligence on the dependence to secure future or contingent debts", provides:

> "(1) It shall be competent for the court to grant warrant for diligence on the dependence where the sum concluded for is a future or contingent debt.

(2) In this section and in sections 15D to 15M of this Act, the 'court' means the court before which the action is depending. …"

Section 15D provides that a creditor may apply for warrant for diligence on the dependence of the action "at any time during which the action is in dependence" and makes provision for such an application. Section 15E sets out the matters as to which the court must be satisfied before making an order to grant diligence on the dependence without a hearing under section 15F. It provides that that where the court makes such an order it will (i) fix a date for a hearing under section 15K, at which the defender or any person having an interest may seek recall or restriction of the warrant, and (ii) order intimation of the date of that hearing. Section 15F provides for a hearing on an application for a warrant for diligence on the dependence. Under both sections 15E and 15F the matters which the court must be satisfied before it makes an order granting a warrant for diligence on the dependence are in substance the same. Those matters are (quoting from section 15E(2)):

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

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

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

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

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

(c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so." (The words in italics are included only in section 15E)

In each of sections 15E and 15F it is provided that the onus shall be on the creditor to satisfy the court that the order granting a warrant should be made (section 15E(3) and section 15F(4)).

20. It is sufficient at this stage of the judgment to note that the provisions of Part 1A of the 1987 Act require (i) that the action in respect of which a warrant for diligence on the dependence may be granted is one which has a conclusion for the payment of a sum of money other than by way of expenses (section 15A(1) and (2)) and (ii) that the court granting the warrant must be the court before which the action described in (i) above is depending (section 15C(2)). The provisions place no further restriction as to the nature of the action for payment which is before the court which grants the warrant.

THE JUDGMENTS OF THE COURT OF SESSION

21. In a succinct opinion dated 1 June 2018 ([2018] CSOH 54) the Lord Ordinary, Lord Tyre, refused Ms Anwar's petition for judicial review. He held that the EU law principle of effectiveness would be breached if there were no mechanism, such as diligence on the dependence, to protect the right to compensation of a claimant before an employment tribunal from the risk of a respondent's failure to meet the award (para 24). On the first issue which I have stated in para 12 above he held that *Hawkins v Wedderburn* and *Fordyce v Bridges* established that: (i) it was competent to raise an action in the Court of Session for the sole purpose of obtaining diligence pending the outcome of proceedings in a foreign court; (ii) such an action was not to be dismissed on the ground of lis alibi pendens; and (iii) it was of no consequence that the Scottish court had no jurisdiction to decide the merits of the action (para 28). He held that the introduction of Part 1A into the 1987 Act did not alter the common law in this regard and that there was no reason to distinguish between the powers of the Court of Session and the sheriff court. The fact that the order of an employment tribunal for payment of compensation was enforceable without further intervention by the court (section 15 of the 1996 Act) did not render incompetent an action raised purely to obtain diligence on the dependence. Turning to the second issue which I have stated in para 12 above (the principle of effectiveness), he concluded that the need to raise a separate action in the sheriff court to obtain a warrant for diligence on the dependence did not render Ms Anwar's exercise of the EU law right practically impossible or excessively difficult. The standard of practical impossibility was a high one. The additional expense and inconvenience of having to raise a separate action in the sheriff court to obtain the warrant was likely to be modest and the cost of the application would be incurred regardless of the forum. Lord Tyre also addressed and rejected the argument that there had been a breach of the EU law principle of equivalence.

22. The First Division of the Court of Session (the Lord President, Lord Drummond Young and Lord Malcolm) by majority upheld the Lord Ordinary's decisions in a judgment dated 2 August 2019 ([2019] CSIH 43; 2020 SC 95). Lord Drummond Young delivered the substantive majority judgment and Lord Malcolm delivered a short concurring judgment.

23. In his leading judgment Lord Drummond Young addressed, on the first issue, the law of diligence on the dependence before the amendment of the 1987 Act in 2007 and the effect of those statutory amendments. He held that the legislative innovations in 2007 had no bearing on the competency of raising proceedings in a Scottish court that are ancillary to proceedings in another court or tribunal for the purpose of doing diligence and thereby obtaining interim security in respect of Scottish property. The provisions in sections 15A to 15N of the 1987 Act were designed to deal with the problems of compliance with the ECHR which were identified in *Karl Construction Ltd* and did not supersede the use of diligence on the dependence in ancillary proceedings. He then addressed the provisions of the 2010 Act relating to employment and the workplace which invoked the jurisdiction of the employment tribunal. He concluded that the exclusion of the jurisdiction of the Court of Session and the sheriff court in the determination of a claim under Part 5 of the 2010 Act is irrelevant to the availability of the ancillary proceedings. This is because such proceedings in those courts are concerned with obtaining interim protective measures and not with deciding a claim under Part 5.

24. On the second issue (the principle of effectiveness) Lord Drummond Young observed that diligence is a provisional and protective measure which serves the same function as an interlocutory injunction to prevent the disposal of a defender's assets as exemplified in this context in *AMICUS v Dynamex Friction Ltd* [2005] IRLR 724. In Scotland diligence is one of several remedies that can be used to enforce the effective payment of debts owed to successful litigants. On a defender's insolvency, challenges can be made to gratuitous alienations and unfair preferences and proceedings taken to recover funds paid in breach of trust or breach of fiduciary duty. He stated that the principle of effectiveness has to be considered by having regard to the totality of remedies that are available. Procedures to protect against insolvency or dissipation of assets are not always successful.

25. In his analysis of EU law, he rejected the submission made on behalf of Ms Anwar that the CJEU has developed its case law on the principle of effectiveness beyond the statement of law in *Impact*, which I have discussed in para 3 above. That submission was that EU law had moved on from the position that the national procedures which were available to ensure the effectiveness of EU law rights were not to be applied in a way that made it "practically impossible or excessively difficult" to

enforce such rights and now imposed a much stricter test that required member states to provide remedies that were in fact sufficient to ensure effective legal protection of those rights. In support of this submission counsel cited article 19 of the TEU and article 47 of the Charter, which I have quoted in para 2 above, and case law which I discuss below. Lord Drummond Young analysed the case law as establishing as a critical test "whether particular procedural requirements can be said to be 'excessively difficult', bearing in mind the aims that the relevant provision of EU law seeks to achieve" (para 76). He saw this as essentially a proportionality exercise, asking himself whether the procedural steps required, or the fees, were disproportionate in all the circumstances. Applying that test to the relevant circumstances, he observed that the pleadings in the sheriff court action would be straightforward and short. It is likely that there would have to be a hearing in relation to the financial position of the defender and any risk that there may be of dissipation of assets. But that hearing would be necessary whether the application was in the sheriff court or before an employment tribunal. The extra requirement of having to apply to the court for the warrant for diligence on the dependence was that a writ or summons would have to be drafted, lodged and served. Use of the ordinary court has the advantage that sheriffs and judges are experienced in dealing with property and insolvency-related issues similar to those that require to be addressed under sections 15A to 15F of the 1987 Act. There are alternative remedies available such as interim interdict against the disposal and dissipation of assets and the challenges available on insolvency mentioned in para 23 above. He concluded (para 82) that Scots law does provide an effective remedy for the purposes of EU law, and article 19 of the TEU and article 47 of the Charter in particular.

26. Finally in relation to the principle of equivalence, Lord Drummond Young agreed with the Lord Ordinary that the appropriate comparison is between claims in the employment tribunal that are based on EU law and those claims in that tribunal that are based on domestic law. He also rejected a challenge based on *Commission of the European Communities v Ireland* (Case C-392/96) EU:C:999:431; [2000] QB 636; [1999] ECR I-5901 that the national rules which gave effect to EU law rights are not sufficiently clear and precise to enable parties to be fully informed of their rights so that they could avail themselves of those rights before national courts and tribunals.

27. The Lord President, Lord Carloway, in a short dissenting judgment disagreed on the first and second issues. He held that neither the Court of Session nor the sheriff court has power at common law or under the 1987 Act to grant a warrant for diligence on the dependence except in respect of an action before that court in which the pursuer seeks payment of a sum of money. In the case of arbitration proceedings and in the circumstances discussed in the older case law (para 16 above) it is competent to raise an action in the Scottish courts to obtain warrant for diligence but in each case the action might have to be sisted pending the outcome of the principal proceedings. By contrast, section 120 and Part 5 of the 2010 Act gives exclusive jurisdiction to the

employment tribunal in matters concerning discrimination or harassment in the context of work. In relation to the second issue, the Lord President observed how the 2010 Act has involved employment tribunals in adjudicating on claims of much greater value than the relatively low value claims that were heard by industrial tribunals (as employment tribunals were formerly named) in their early days. He referred to the evidence of the failure to recover awards made by employment tribunals and saw no insurmountable practical obstacle to prevent the employment tribunal from having power to grant warrants for diligence on the dependence or alternatively from transferring high value cases to the sheriff court. He concluded that, even if it were competent for a sheriff to grant a warrant for diligence in support of a claim being heard by an employment tribunal, such a system is by its nature excessively difficult for many claimants, who would have to instruct a legal adviser and incur court fees in excess of £175, and might be liable for the legal expenses of the employer if the application for the warrant were unsuccessful or the employer were to succeed in obtaining its recall.

THE CHALLENGE BEFORE THIS COURT

(i) The first issue: an ancillary jurisdiction?

28. Mr Aidan O'Neill QC on behalf of Ms Anwar renews the submission that the Court of Session and the sheriff court do not have power to grant a warrant for diligence on the dependence of an application to the employment tribunal by a worker alleging work-related discrimination or harassment.

29. He submits, first, that neither court has any power at common law or through an inherent jurisdiction to grant warrant for diligence on the dependence in any case in which it does not have jurisdiction to hear and determine the merits and substance of the dispute. I disagree. In my view the Court of Session and the sheriff court have jurisdiction to hear an action which is ancillary to other proceedings and to grant a warrant for diligence on the dependence of that ancillary action, thereby in substance providing security for the claim in the other proceedings.

30. The first reported case to recognise the power of the Court of Session to grant diligence on the dependence in support of a claim being pursued in proceedings in another tribunal is a decision of the whole of the Court of Session in *Hawkins v Wedderburn* (1842) 4 D 924. That case arose in a dispute concerning alleged entitlements to participate in the profits of a commercial partnership based in London, in which proceedings were brought in Chancery in England against parties domiciled in England. Those defendants owned estates and moveable property in Scotland and

were resident in Scotland. The claimants in the English proceedings raised an action in the Court of Session seeking payment of the same debt as they were claiming in their suit in London, but expressly for the purpose of obtaining a warrant for diligence on the dependence and not to have the merits of the dispute determined by the Scottish court. The sole purpose of the Scottish action was to obtain security for the enforcement of any decree which the plaintiffs might obtain in the Chancery proceedings in England. The Lord Ordinary (Lord Cuninghame) determined that the action for this purpose was competent and rejected the defenders' plea of lis alibi pendens. The Second Division on appeal was divided on the question and consulted the other judges of the Court of Session who decided by a majority of 9:3 that the proceedings were competent. The Lord Justice-Clerk (Lord Hope) summed up the decision in these terms (pp 944-945):

> "I go distinctly on the principle, that I think a party is entitled to raise and keep up an action for the very purpose of securing himself by ultimate payment, although he may not be in a condition … to follow out the action at the time, but must wait the decision of another tribunal ... [A]n action may be raised and will be sustained for the purpose of security …
>
> For this result I think there is a clear principle, and it seems to me to be applicable equally whether the subject matter of discussion is under submission, or before the court in England. By a process which is in dependence, the party may be subjected in liability to the pursuer. The debt is not yet constituted or liquidated; neither is it when a common action is raised in this country for a debt. Whether it is to be liquidated by a decree in a submission, or by a decree in the cause in Scotland, or by production of a decree to be obtained in the English court, does not appear to me to affect the competency of obtaining and maintaining security over property in this country, by an action with diligence on the dependence."

The Lord Justice-Clerk's reference to a "submission" in the second paragraph which I have quoted is a reference to a submission to arbitration, which excludes the court from hearing and determining the merits of the claim but does not render the court action incompetent: see *MacDonald v MacDonald* (1829) 7 Shaw 765, to which the Lord Justice-Clerk referred at p 945.

31. Shortly afterwards, in *Fordyce v Bridges* (1842) 4 D 1334, a case concerning a will governed by English law, the Second Division of the Court of Session followed the whole court's decision in *Hawkins* in upholding the competency of an action in the Court of Session which was raised for the purpose of obtaining diligence on the dependence against heritable property in Scotland as security for the proceedings in England.

32. In *Fordyce* the proceedings in Chancery were to set aside certain decrees of that court, an action which, if successful, would give rise to monetary claims against the defendant who owned the heritable property in Scotland. Both Lord Medwyn (p 1339) and the Lord Justice-Clerk (pp 1343-1344) made clear their view that the competency of the ancillary process in Scotland did not depend upon it being competent for the Scottish court to try the substantive question. The Lord Justice-Clerk took the opportunity further to explain the principle which underlies the court's earlier judgment in *Hawkins* (p 1343):

> "… I do not think the competency of such an action as the present depends at all on the enquiry, whether this court has jurisdiction to try the question on the merits between the parties. The principle which I stated in *Wedderburn*, on which I apprehend that judgment rests, was this: - A party has a suit in England in which he may obtain decree, and he finds that his debtor has property in Scotland which it may be necessary for him to secure, in order to meet and satisfy the decree, if he obtains it in England. He comes into this court with a summons narrating the English suit, averring, of course, that he will obtain decree. He sets forth *that* as his interest and civil right to us who have jurisdiction over the property of his adversary, and he raises his action here to secure property to make that decree effectual; and, on obtaining that decree, asks for judgment and execution in terms of it." (Original emphasis)

33. The judgment of the whole court in *Hawkins*, as explained in *Fordyce*, is clear authority for the existence of a common law power of a Scottish court in an ancillary action to grant diligence on the dependence in security of claims made in other proceedings even if the Scottish court does not have the competence to determine the substantive question raised in those other proceedings. In what has historically been the leading textbook on the law of diligence, *Graham Stewart, A Treatise on the Law of Diligence* (1898), the learned author referred to the two cases (pp 21 and 534) and expressed the view (at p 21) that *Fordyce* had carried the principle of comity beyond

the limits of the practice of other nations. Be that as it may, those cases have not been overruled. The common law remedy which they provide may have been superseded in some circumstances by statutory provision. In *Atkinson and Wood v Mackintosh* (1905) 7F 598; 12 SLT 856 the First Division questioned the continuing authority of those cases in relation to the support of litigation commenced in England since the enactment of the Judgments Extension Act 1868 but did not determine the matter. Section 27 of the Civil Jurisdiction and Judgments Act 1982 now gives statutory authority to the Court of Session to grant provisional and protective measures in relation to proceedings in other jurisdictions of the United Kingdom and certain foreign jurisdictions in the absence of substantive proceedings in Scotland. But there has been no departure from the principle which those cases articulated.

34. There is also ample modern authority supporting the view that both the Court of Session and the sheriff court have the power to grant warrant for diligence on the dependence in support of arbitral proceedings, including foreign arbitral proceedings. (See *Motordrift A/S v Trachem Co Ltd* (para 16 above); *Svenska Petroleum AB v HOR Ltd* 1986 SLT 513; *Mendok BV v Cumberland Maritime Corpn* 1989 SLT 192; *MT Group v Howden Group plc* 1993 SLT 345; *Rippin Group Ltd v ITP Interpipe SA* 1995 SLT 831 and *Robert Taylor & Partners (Edinburgh) Ltd v William Gerard Ltd* 1996 SLT (Sh Ct) 105.) While it appears that the older cases of *Hawkins* and *Fordyce* were not cited to the courts in those cases, the conclusions reached by the courts are consistent with the reasoning in the earlier cases. Since then, the Arbitration (Scotland) Act 2010 has been enacted but it has not superseded those cases. The Scottish Arbitration Rules contained in Schedule 1 to that Act preserve the existing powers of the court in relation to arbitration and add a default rule that the court has the same power in an arbitration as it has in civil proceedings, including to grant warrant for arrestment and inhibition: Schedule 1, rule 46(1)(e) and (5).

35. Mr O'Neill submits, correctly, that while an agreement to arbitrate ousts the court's jurisdiction to inquire into and determine the merits of a dispute, the court has jurisdiction to pronounce a decree to enforce the award of the arbitral tribunal and, if the arbitration were to be abandoned, the court may determine the dispute (*Hamlyn v Talisker Distillery* [1894] AC 202, 211; 1894 21 R (HL) 21, 25 per Lord Watson; *Sanderson & Son v Armour & Co* 1922 SC (HL) 117). He seeks to contrast that with the exclusive jurisdiction which sections 113 and 120 of the 2010 Act confer on the employment tribunal and draws attention to the fact that an order for payment by an employment tribunal may be enforced without any intervention by the court (see section 15(2) of the 1996 Act to which I have referred in para 14 above).

36. I am not persuaded by either point. The power to grant a warrant for diligence on the dependence in support of a claim in an arbitration does not depend upon the

court having jurisdiction to determine the merits of the dispute as *Hawkins* and *Fordyce* demonstrate. Thus, the ability of the court to determine the merits of a case should an arbitration founder is neither here nor there. Further, the distinction which counsel seeks to draw between decrees-arbitral and the orders of the employment tribunal is not in my view one of substance. The order for payment made by an employment tribunal may be enforced without any intervention of the court because it is deemed to have a warrant for its execution from the sheriff court. In that respect it differs from a decree arbitral, which, if the parties have not consented to its registration for execution in the Books of the Sheriff Court or the Books of Council and Session, would require an application to the court for an order to authorise enforcement. But, while it is unnecessary for a complainant who has an order for payment from an employment tribunal to seek a court order for its enforcement, and a judge might refuse to grant such an order for that reason, there is no reason why the court could not competently grant such an order. There is therefore nothing in the common law which prevents the Court of Session or the sheriff court from entertaining an ancillary action, the purpose of which is to seek diligence on the dependence in support of a claim in an employment tribunal.

37. That is not a complete answer to Ms Anwar's challenge on the first issue because Mr O'Neill submits that the statutory regime in Part 1A of the 1987 Act is a complete statutory code for diligence on the dependence, has superseded the common law, and has removed any power to grant a warrant for diligence on the dependence in an ancillary action. Again, I am not persuaded that that is so.

38. First, as Lord Drummond Young pointed out, the statutory provisions are not a complete code as many questions concerning diligence are left to the common law. In my view, he was correct ([2019] CSIH 43; 2020 SC 95, para 41 of his opinion) in his description of the relevant sections as being "concerned with aspects of court procedure and the matters that the pursuer must establish in order to obtain diligence".

39. Secondly, a closer examination of the words of the relevant sections does not lead to a contrary view. First, section 15A(1) and (2) provides that the warrant for diligence must be on the dependence of the action in the court which grants the warrant and that that action must contain a conclusion for payment of a sum other than by way of expenses. An ancillary court action, which seeks payment of a sum of money and is raised to obtain diligence on the dependence of the ancillary action itself but not to have a court determination of the merits of the claim, meets those requirements of section 15A. Secondly, whether one categorises the claim for payment in the court action as a pure but illiquid debt or a contingent debt - see *W A Wilson, The Scottish Law of Debt*, 2nd ed (1991), para 1.09-111 - both fall within the scope of

Part 1A of the 1987 Act (section 15C). Thirdly, the requirement in sections 15E(2)(a) and 15F(3)(a) that the court be satisfied that "the creditor has a prima facie case on the merits of the action" does not support the view that an ancillary action of the nature which I have discussed has implicitly been abolished. There is no reason to infer that the "action" to which the statutory provisions refer would not include the ancillary action as its ultimate success will depend upon the determination of the employment tribunal. There is further no reason to think that the court is prevented from reaching a broad view on the merits of a claim which will be determined by the employment tribunal just as it would when a claim is to be determined by an arbitral tribunal. I do not accept Mr O'Neill's submission that, because the UK Parliament has referred the claim for discrimination and harassment to specialist tribunal judges in the employment tribunal, it is inherently unlikely that Parliament (by which he must mean the Scottish Parliament which enacted the amendments to the 1987 Act) intended a non-specialist judge in the ordinary courts to make judgments as to the existence or non-existence of a prima facie case in such claims. Many persons involved in disputes refer their disputes to arbitration. One of the reasons for seeking arbitration can be to obtain the determination of a specialist tribunal with relevant experience of the industry or activity in which the dispute has arisen. Non-specialist judges addressing an application for a warrant for diligence on the dependence of an action which is ancillary to the arbitration are equipped to reach a view on whether the claimant/pursuer has made out a prima facie case in circumstances which may be significantly more complex than allegations of discrimination and harassment. I see no basis for the assertion that allowing a non-specialist judge to take a view on whether there is a prima facie case of such discrimination or harassment would be a recipe for introducing uncertainty, friction and confusion into the working of the system, as Mr O'Neill contends.

40. In concluding this first issue, I would hold that the Court of Session and the sheriff court have power, if the criteria in Part 1A of the 1987 Act are met, to grant a warrant for diligence on the dependence of an ancillary action which has been brought in effect to provide interim security for a claim for discrimination or harassment which a worker is advancing before an employment tribunal. It follows that Ms Anwar's challenge on this issue fails and that the third issue, which I have set out in para 12 above, does not arise.

(ii) The second issue: does the ancillary jurisdiction meet the requirements of EU law?

(a) The principles of effectiveness and effective judicial protection

41. Ms Anwar's second challenge is that the United Kingdom has failed properly to implement the enforcement provisions of the Equality Directives by its failure to provide effective interim protection for successful workplace discrimination and harassment claims. In advancing this challenge Mr O'Neill relies principally on the submission that the need for a claimant, who pursues such a claim in the employment tribunal, to raise separate proceedings in the sheriff court to obtain diligence on the dependence, breaches the principles of effectiveness and effective judicial protection enshrined in article 19(1) of the TEU and article 47 of the Charter. He also argues that there has been a breach of the principle of legal certainty in EU law: the clarity and accessibility of legal rules are, he submits, components of the principle of effectiveness.

42. In support of the contention that EU law mandates that an individual seeking a remedy for an infringement of a right conferred by EU law be provided with a "one stop shop", that is a tribunal that will determine the merits of his or her claim and also be empowered to authorise interim measures such as diligence on the dependence, Mr O'Neill refers to judgment of the Grand Chamber of the CJEU in *Minister for Justice and Equality v Workplace Relations Commission* (Case C-378/17) EU:C:2018:979; [2019] 2 CMLR 13. He founds in particular on para 50 of the judgment in which the CJEU stated:

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

43. In my view the judgment does not support counsel's contention. The words, which I have emphasised in para 50 of the CJEU's judgment and on which counsel relies, are to be understood in the context of the legal challenge which was made. The

case concerned complaints brought before the Equality Tribunal in Ireland by people who had been excluded from the procedure for the recruitment of new police officers to the national police force because they were above the maximum age for recruitment which was laid down in national regulations. The challenge was that the setting of the maximum age constituted discrimination prohibited by Directive 2000/78 and by the national law which transposed that Directive. The Minister challenged the jurisdiction of the Equality Tribunal, which was the predecessor of the Workplace Relations Commission ("the WPC"). The referring court held that the WPC had jurisdiction to rule on complaints against measures that were allegedly incompatible with the Directive and national law but that only the High Court had jurisdiction to disapply or strike down a rule of national law. The CJEU interpreted the essence of the referring court's question as being (para 31):

> "whether EU law, in particular the primacy of EU law, must be interpreted as precluding national legislation … under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."

In answering that question in the affirmative, the CJEU asserted the principle of the primacy of EU law and repeated its ruling that that principle required all organs of the state, which were called upon, within the exercise of their powers, to apply EU law, to disapply national legislation that is contrary to EU law. There is no question on this appeal of a tribunal having to have power to disapply national legislation. The CJEU's judgment did not address the wholly separate question, which arises on this appeal, whether a tribunal charged with applying EU law must have the power to order interim measures or whether a national legal system can lawfully provide that another public body, such as a court, is to exercise that power.

44. Mr O'Neill also submitted that, if there were an ancillary jurisdiction by which the courts could support the claimant in an employment tribunal, the rules establishing that jurisdiction were not sufficiently clear and accessible to the claimant to comply with the principle of effectiveness. He observed, as did the Lord President, that employment lawyers do not appear to be aware of the possibility of using the courts for this purpose. He argued that the proper transposition of the Equality Directives required a formal statement of law as to the availability of interim remedies and not mere case law, and in particular the case law in this appeal which he described as "antiquarian".

45. In support of those contentions, he referred to two judgments of the CJEU. The first was *Commission of the European Communities v Kingdom of the Netherlands* (Case C-144/99) EU:C:2001:257; [2001] ECR I-3541, which concerned Council Directive 93/13/EEC on unfair terms in consumer contracts. The Commission's complaint was that specific provisions of the Directive, on how to assess the unfair nature of contract terms and on the interpretation of written consumer contracts, had not been expressly transposed into Netherlands law so as to make the specific rights which the Directive conferred on consumers clear and unambiguous. As appears from the opinion of Advocate General Tizzano (EU:C:2001:50), the Netherlands Government relied not only on specific provisions of the Netherlands Civil Code in relation to property law, obligations and contracts which were not to the same effect as the relevant terms of the Directive but also on a decision of the Hoge Raad (the Dutch Supreme Court) that the provisions of the Netherlands Civil Code governing standard contractual terms must be interpreted in such a way as to confer on consumers at least the same level of protection as the Directive. The Advocate General opined (points 26-31) and the CJEU held (para 20) that the results intended by the Directive could not be obtained by applying the domestic law of the Netherlands as it then was. It was against this background that the CJEU made the following statement (para 21) on which Mr O'Neill relies:

> "As regards the argument advanced by the Netherlands Government that, if the Netherlands legislation were interpreted in such a way as to ensure conformity with the Directive - a principle endorsed by the Hoge Raad der Nederlanden (Netherlands) - it would be possible in any event to remedy any disparity between the provisions of Netherlands legislation and those of the Directive, suffice it to note that … even where the settled case law of a member state interprets the provisions of national law in a manner deemed to satisfy the requirements of a Directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty. That, moreover, is particularly true in the field of consumer protection."

46. In my view, this statement is not authority for a proposition that when EU law is given effect in a common law jurisdiction, in which judge-made law is a source of law independent from statute and enjoys a considerable degree of certainty by the operation of the doctrine of precedent, authoritative propositions of domestic law laid down in case law are to be deemed to lack clarity because they are not in the form of legislation. *Commission of the European Union v The Netherlands* must be read in the context in which the Dutch courts were seeking in a general ruling to impose a strained

interpretation on the provisions of the Netherlands Civil Code by requiring those provisions to be read up or read down in order to implement the Directive.

47. The second judgment of the CJEU to which we were referred in this context is *European Commission v United Kingdom* (Case C-530/11) EU:C:2013:554; EU:C:2014:67; [2014] QB 988. The case concerned a complaint by the European Commission that the United Kingdom had failed to transpose into domestic law a requirement imposed by Parliament and Council Directive 96/61 (inserted into articles 3(7) and 4(4) of Parliament and Council Directive 2003/35/EC) that procedures for the review of approvals of projects which might affect the environment were not to be prohibitively expensive. In resisting the complaint, the United Kingdom Government relied on the discretion conferred on a court to make a protective costs order in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600 and other cases. The CJEU observed (para 56) that the effect of the body of case law was subject to debate and the case law did not provide the unequivocal rules which were needed to make effective the rights which the Directive conferred. The transposition of the Directive was therefore not sufficiently clear and precise. It went on to explain that the case law test that required that the issues were of public interest was not appropriate, that the courts did not appear to be obliged to grant protection where the cost of the proceedings was objectively unreasonable, and that it was not appropriate to exclude the costs protection where a particular interest of the claimant was involved. The regime laid down by the case law also did not ensure the claimant reasonable predictability as regards his or her exposure to costs.

48. This case is not authority for the proposition that legal rules set out in case law cannot meet the requirements of precision and clarity that EU law requires when the relevant EU provision is designed to create rights for individuals. As the CJEU stated (paras 35-36) a judicial practice that the courts may decline to order an unsuccessful party to pay costs is not sufficient to meet the requirements of precision and clarity but "it cannot be considered that every judicial practice is uncertain and inherently incapable of meeting those requirements." Much will depend upon the circumstances of the relevant rules.

49. Mr O'Neill also relied on the statement of the CJEU in para 65 of its judgment, which cited *Križan* (para 4 above) and the case law, being the *Factortame* and *Unibet* judgments, to which it referred:

> "it is apparent from settled case law that a national court seised of a dispute governed by European Union law must be in a position to grant interim relief in order to ensure full

> effectiveness of the judgment to be given on the existence of the rights claimed under European Union law."

50. It is important to see this statement in its proper context. In both *Factortame* and *Unibet* the relevant interim measures which were sought were the suspension of national measures alleged to be incompatible with EU law. *Križan* concerned an environmental challenge (under article 15a of Council Directive 96/61 and the Aarhus Convention) to the validity of a permit for a landfill site and the failure of the relevant public authority to disclose the urban planning decision as to the location of the site. The question of interim measures, which was the fourth question addressed by the CJEU in *Križan*, concerned the temporary suspension of the application of the permit pending the court's final decision on the legal challenge. In my view these circumstances are far removed from interim orders freezing the assets of a defender in order to obtain security for a financial claim in the event that a claim is successful. Care must be taken when addressing the reasoning in those cases to have regard to their proper context.

51. It is also important to consider what are the enforcement provisions in the Equality Directives which it is said the UK Government has failed properly to implement. In each case they concern the defence of rights and compensation or sanctions.

52. Directive 2000/43 provides for the defence of rights in article 7(1) in these terms:

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

Article 15 provides:

> "Member states shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions,

> which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive."

53. Directive 2000/78 includes in articles 9(1) and 17 identical provisions on the defence of rights and sanctions as articles 7(1) and 15 of Directive 2000/43 which I have quoted in the immediately preceding paragraph.

54. Directive 2006/54 provides for the defence of rights in article 17(1):

> "Member states shall ensure that … judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

Article 18 provides for compensation or reparation:

> "Member states shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the member states so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered."

55. What is worthy of note is that the Equality Directives themselves do not themselves mandate the creation of interim measures. The requirement of EU law that interim measures should be available is the product of article 19 of the TEU, article 47 of the Charter and the established case law of the CJEU, which I have discussed in paras 4 and 50 above. Mr David Johnston QC for the respondent does not dispute that EU law mandates the availability of interim measures. But there is no reason why those measures should not exist as part of the general law of a domestic legal system rather than being specified in legislation that implements the Equality Directives.

56. The requirement of precision and clarity in this context must in my view be assessed by the standard of the informed lawyer rather than the lay claimant. The existence of the ancillary jurisdiction is, as I have said, discussed in *Graham Stewart* on *Diligence*. The cases of *Hawkins* and *Fordyce* are discussed in *MacLaren, Court of*

Session Practice (1916), pp 77 and 387, which was formerly the leading textbook on practice, and more recently in the *Stair Memorial Encyclopaedia, The Laws of Scotland* (1991) vol 8, para 260. Both those texts refer to the doubts expressed in *Atkinson and Wood v Mackintosh* (para 33 above) but the text in the *Stair Memorial Encyclopaedia* recognises the continued existence of the ancillary jurisdiction in relation to arbitration, including foreign arbitrations. Modern texts on court practice also recognise that jurisdiction: *Macphail, Sheriff Court Practice*, 3rd ed (2006), para 2.99 and Court of Session Practice (2020), para E115. The ancillary jurisdiction is also recognised in leading texts on arbitration. It is based ultimately on the decision of the whole Court of Session in *Hawkins v Wedderburn* which remains authoritative. Ms Anwar's challenge based on arguments of legal certainty and precision must therefore fail.

57. That leaves the question whether the requirement to raise an ancillary action for payment in the sheriff court in order to obtain diligence on the dependence of that action to secure the claim in the employment tribunal renders the claimant's exercise of his or her EU law rights practically impossible or excessively difficult. In my view, essentially for the reasons which have been stated by the Lord Ordinary and the majority of the First Division, the answer to that question is that that requirement does not breach the principle of effectiveness or the analogous principle of effective judicial protection.

58. It is important to bear in mind that diligence on the dependence, which freezes a defender's bank account if an arrestment is used or which inhibits the defender's ability to transact with his or her heritable property if an inhibition is used, is a draconian remedy. It was for that reason that the availability of the remedy as of right was criticised in the Report of the Scottish Law Commission and it was held to be unlawful by the Court of Session in *Karl Construction* because it did not respect the ECHR rights of the defender. That case and subsequently Part 1A of the 1987 Act set up the tests in sections 15E and 15F which a pursuer must meet to obtain a warrant for diligence on the dependence: para 19 above.

59. A claimant pursuing a complaint, which involves a claim for compensation of a value of many tens of thousands of pounds, in an employment tribunal may well engage a lawyer to pursue that claim, as Ms Anwar did in this case. The claimant would wish to protect that claim if he or she had evidence that the debtor/employer was facing insolvency or acting to defeat the claim. It is highly likely that the claimant would wish the assistance of a lawyer to present a case for such a warrant by demonstrating that the statutory tests are met in an action in the sheriff court and also even if the application for the warrant could be presented in the employment tribunal. But the claimant is entitled to present the application without legal representation in

the sheriff court. The application in the employment tribunal would require some form of written pleadings and evidential documentation to demonstrate the matters, such as the insolvency or imminent insolvency of the debtor, which must be established and there would have to be a hearing at which the application could be challenged. It cannot be assumed that an employment tribunal would not charge any fee if it were given this new jurisdiction. On obtaining a warrant for diligence on the dependence the claimant would incur the cost of (i) engaging sheriff officers or messengers at arms to serve the schedule of arrestment on a third party or serve the inhibition on the debtor and (ii) registering the inhibition in the Register of Inhibitions. Section 15M of the 1987 Act provides that, subject to the court's power to modify, the claimant is entitled to the expenses incurred in obtaining the warrant and in executing the arrestment or inhibition.

60. The additional hurdles which a claimant faces by having to raise an action in the sheriff court are (i) the payment of court fees, (ii) the preparation of a straightforward initial writ which contains a crave for payment, an application for a warrant for diligence on the dependence and averments about the existence of the employment tribunal claim and its likely success, and (iii) the exposure to the prospect of an adverse award of expenses in favour of the debtor/employer (a) if the claimant has acted unreasonably in applying for and obtaining the warrant for diligence on the dependence (section 15M(2) of the 1987 Act) or (b) if the claimant is unsuccessful in the application or in resisting an application by the debtor for restriction or recall of the diligence (section 15M(4)).

61. A perceived need to incur the expense of engaging a lawyer may deter many claimants from seeking to obtain a warrant for diligence on the dependence, whether the application be made in the sheriff court or, as Ms Anwar advocates it should be, in the employment tribunal. But a claimant with a claim which does not involve a substantial sum of money is unlikely in any event to seek diligence on the dependence as the diligence would be likely to be treated as nimious unless an arrestment were restricted to a modest sum commensurate with the likely value of the claim.

62. In its intervention before this court the EHRC has presented evidence of the likely costs which a claimant might face, which was not available to the courts below, as well as evidence of the difficulty that claimants have encountered in enforcing orders for payment by the employment tribunal which had been presented to the Scottish courts. I have serious reservations about the practice of introducing new evidence of this nature for the first time in a hearing before this court when it could have been made available to assist the courts below. Notwithstanding those reservations, as Mr Johnston has not taken issue with the content of the affidavits relating to those costs, I have taken them into account. The affidavit of Mr Iain

Rutherford, who is a solicitor and a partner in Brodies LLP whom the EHRC have instructed, records (i) the sheriff court dues for the initial writ and the motion as £183.00 in aggregate, (ii) solicitor's fees for preparing the documentation and representing the client at a court hearing to obtain a warrant for diligence on the dependence as £900 inclusive of VAT, and (iii) the sheriff officers' fees for service of the initial writ, an arrestment and an inhibition as £319.32 inclusive of VAT and a £25 fee for registering an inhibition. But I must observe that of those expenses, which come to £1,427.32 in total, only the sheriff court dues (£183), part at least of the cost of the solicitor's preparation of the initial writ (£150) and the costs of service of the initial writ (£81.16) would be avoided if the application could be made in the employment tribunal and the claimant wished to be legally represented. Mr Rutherford also provided evidence of the greater costs involved in seeking a warrant in the Court of Session, but I see no reason why a vulnerable claimant should incur such additional expenses when a remedy is available in the sheriff court.

63. Mr O'Neill relied on those figures to submit that the requirement to raise an action in the sheriff court in order to obtain a warrant for diligence on the dependence breached the principle of effectiveness and the principle of effective judicial protection. He also asserted a breach of article 52(1) of the Charter which I have set out in para 2 above. He submitted that each of the requirements of that article (ie that the restrictions were provided by law, respected the essence of the right or freedom, and were proportionate) had to be met in order to justify the domestic procedural rule that interim security for a claim brought in an employment tribunal could be obtained only in a court of law. He cited in support of that submission *Peter Puškár v Finančné riaditel'stvo Slovenskej republiky* (Case C-73/16) EU:C:2017:725; [2017] 4 WLR 209, para 62. If the requirement to use the ordinary courts to obtain diligence on the dependence is to be categorised as a limitation on the right to an effective remedy under article 47 of the Charter as Mr O'Neill contends, I am satisfied that the requirements of article 52 of the Charter are met. I am satisfied that it is provided by law, that it respects the essence of the right to the remedy of compensation for discrimination or harassment and it is proportionate in its protection of the rights of others. Like Lord Drummond Young, I am not persuaded that the general principle of effective judicial protection imposes a different or more stringent test than the principle of effectiveness. The continued reference in the jurisprudence of the CJEU to the test laid down in *Impact* (para 3 above) is not consistent with the supersession of the principle of effectiveness by a more stringent test. While it is not appropriate to be definitive in the absence of detailed submissions, it appears to me that the principle of effective judicial protection is a general principle, and that the principle of effectiveness is the manifestation of that principle in the context of the procedural requirements for domestic actions in which individuals exercise rights conferred by EU law in the absence of EU rules on jurisdiction and procedure. The appropriate test to be applied to the requirement of Scots law that there be a separate application to a court for provisional and protective measures therefore remains the test whether it is

excessively difficult to exercise rights derived from EU law. As Lord Drummond Young pointed out in para 68 of his opinion, anything that was "practically impossible" would fall foul of the test of "excessive difficulty".

64. Having the benefit of Mr Rutherford's affidavit, which was not available to the courts below, I agree with the Lord Ordinary and the majority of the Inner House that the expense and procedures involved in obtaining a warrant for diligence on the dependence in the sheriff court do not make the exercise of a claimant's rights derived from EU law "impossible in practice or excessively difficult".

65. In reaching this conclusion, I recognise not only the value of the employment tribunal system as a means of compensating for the imbalance of economic power between employers and employees, but also the vulnerability of employees who may recently have lost their jobs. The benefits of being able to present a claim in a flexible and relatively informal forum without requiring legal representation, at moderate cost, and without exposure to adverse awards of expenses are important attributes of the employment tribunal system. But I agree with Mr Johnston that the requirement to raise proceedings in the sheriff court to obtain diligence on the dependence, including the possible exposure of the claimant to an adverse award of expenses, is a modest departure from that favourable regime. Having regard to the potential of such diligence to disrupt and even destroy the employer's business by freezing its assets, I agree with Lord Drummond Young that that departure is proportionate.

66. The EHRC also presented evidence of wider problems in the enforcement of orders for payment made by employment tribunals, which it had presented to the courts below. A report by the Ministry of Justice (concerning England and Wales) recorded the results of a survey conducted in 2009 which revealed that 39% of successful claimants received no payment of their award and a further 8% only a partial payment. The equivalent figures for awards over £10,000 were 43% and 10%. Claimants working for large organisations were significantly more likely to be paid in full than those working for smaller organisations. A similar survey for the Department of Business Innovation and Skills in 2013 revealed a decrease in claimants who received no payment (34%) and an increase in those who received only part payment (16%) and equivalent figures in Scotland of 46% and 13%. The survey suggested that only 41% of the claimants who responded to the survey in Scotland reported that they had been paid in full.

67. The 2013 study revealed that when successful claimants initiated court proceedings to enforce their awards, 34% of claimants in England and Wales received no payment compared with 47% before enforcement. In Scotland, when claimants used sheriff officers to enforce their claims, the equivalent figures were that non-

payment fell from 53% to 46%. The 2013 report suggested that the most common reason which claimants gave for their non-payment was that the employer was insolvent or had ceased to trade but almost half of those who so reported believed that the employer was trading again under a different name.

68. The United Kingdom Government has recognised that this is an unsatisfactory state of affairs. In a consultation paper in 2018 ("Good Work: The Taylor Review of Modern Working Practices") on the recommendations of the Taylor Review concerning the enforcement of employment rights, the UK Government has recommended making the enforcement process simpler and establishing a naming and shaming scheme for employers who do not pay awards within a reasonable time.

69. I agree with Lord Drummond Young that the statistics which the EHRC has presented to the court are clearly disappointing. But the statistics merely provide the background against which Ms Anwar has made her challenge. Ms Christine O'Neill QC for the EHRC accepts that the studies which she has provided the court do not focus on the law of diligence on the dependence or equivalent interim remedies in English law as the source of the claimants' difficulties. But she urges on the court an approach which is not "unduly formalistic" so as to require satisfaction of traditional concepts such as a causal link between the inability of an employment tribunal to grant diligence on the dependence and the failure to recover an award. I cannot accept that invitation. More effective interim remedies may be, at best, part of any solution to or amelioration of the wider problems which claimants face in obtaining payment of employment tribunal awards. In a ministerial statement following the publication of the 2013 study, the then Employment Relations Minister, Jo Swinson, stated that the Government would consider empowering an employment tribunal to demand deposits from businesses who might not pay up, as well as fixed penalty notices, the naming and shaming of employers, and making people aware of the options for enforcement of an award. But none of this background assists Ms Anwar in her claim. The remedies which she seeks are set out in statement 14 of her petition and are (i) a declarator that the failure of the UK Government to make provision for arrestment on the dependence part of employment tribunal procedure in Scotland is unlawful, and (ii) damages for that failure. To establish a breach of the principle of effectiveness she must show that having to seek a warrant for diligence on the dependence in the sheriff court rather than in an employment tribunal renders the exercise of her rights derived from EU law practically impossible or excessively difficult. For the reasons set out above, that has not been shown.

70. Finally, the facts of Ms Anwar's case show that she would probably not have been assisted by applying for diligence on the dependence when she commenced her claim as the available published financial statements which Mr McGrade later obtained

suggested that her employer was solvent and in possession of funds at the end of the previous financial year. Even after the employment tribunal had upheld her claim of harassment, her employer still had funds which would have met the bulk of her claim on 1 August 2016. The problem which eventuated is that the charity used up its cash in the bank after the employment tribunal's determination and after the order for payment had been made. As Lord Drummond Young explained, the difficulty may have been at least in part that Roshni was a charity with limited cash reserves which depended upon donations of grants to fund its activities. Apart from the payment of £11,000 to "Engage ESF", to which I referred in para 8 above, the payments that diminished the charity's bank balance appear to be normal running costs (and the bank account was not replenished by further grants).

(b) The principle of equivalence

71. Ms Anwar also asserts a breach of the principle of equivalence. The principle requires that a right deriving from EU law is not treated in a manner less favourable than similar domestic law claims. In *Totel Ltd v Revenue and Customs Comrs* [2018] UKSC 44; [2018] 1 WLR 4053, this court, in a judgment delivered by Lord Briggs, described the principle of equivalence thus (para 7):

> "[T]he principle of equivalence is essentially comparative. The identification of one or more similar procedures for the enforcement of claims arising in domestic law is an essential pre-requisite for its operation. If there is no true comparator, then the principle of equivalence can have no operation at all: see the *Palmisani* case [1997] ECR I-4025, at para 39. *The identification of one or more true comparators is therefore the essential first step in any examination of an assertion that the principle of equivalence has been infringed*." (Emphasis added)

72. Both the Lord Ordinary and the First Division (unanimously) identified the correct comparator in this case as another employment-related claim which comes before the employment tribunal and which is based on domestic law, such as a claim for unfair dismissal. As Lord Drummond Young explained (in para 89 of his opinion) claims come before the employment tribunal because they are based on contracts of employment. The comparison advanced on behalf of Ms Anwar was between an EU-derived claim for employment-related discrimination which is heard in the employment tribunal and an EU-derived claim for discrimination brought in the sheriff court, for example in relation to a contract for the supply of goods or the supply of services. One insuperable difficulty with that comparison, as Lord Drummond Young

pointed out, was that it did not compare a claim based on EU-derived rights against a claim based on domestic rights. This observation is in my view unanswerable. Mr O'Neill did not attempt to answer it. He made no submission that the courts below had erred in law in making the comparison which they did. In my view the courts below were unquestionably correct in making that comparison. As an employment tribunal cannot grant a warrant for diligence on the dependence when considering either a claim derived from EU law or a claim based solely on domestic law, there is no breach of the principle of equivalence.

CONCLUSION

73. I would dismiss the appeal.