Neutral Citation Number: [2012] EWHC 1909 (Admin)

Case No: CO/1809/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN MANCHESTER

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 13/07/2012

Before :

THE HON MR JUSTICE HICKINBOTTOM

- -

Between :

The Queen (on the application of the United Road Transport Union)

Claimant

- and -

The Secretary of State for Transport

Defendant

- -
- -

John Hendy QC and Philip Mead (instructed by **Russell Jones & Walker**) for the **Claimant**
Tim Eicke QC (instructed by The Treasury Solicitor) for the **Defendant**

Hearing date: 6 July 2012

- -

Approved Judgment

Mr Justice Hickinbottom:

Introduction

1. The Claimant ("the Union") is a trade union representing some 13,500 members employed in the road transport industry, mostly as drivers of commercial road vehicles.

2. Generally, a worker has a statutory right to apply to an employment tribunal for a declaration and/or compensation if he is required to work in contravention of the regulations that regulate breaks and rest periods during working hours. However, commercial road transport workers are subject to a different regulatory scheme, which does not expressly include that right. In this claim, the Union seeks judicial review of the Secretary of State's refusal to introduce secondary legislation to provide for a similar right which, it is submitted, is required to give equivalent and effective enforcement rights to such workers.

Working Time Legislation: General

3. Article 31 of the Charter of Fundamental Rights of the European Union provides that:

> "1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
>
> 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of leave."

By virtue of article 6 of the Treaty of the European Union, those rights have the same legal value as if set out in the Treaties themselves.

4. Council Directive 2003/88/EC ("the General Working Time Directive"), which codified earlier Council Directives, regulates workers' daily and weekly rest breaks, night work, maximum working time, annual leave and other matters concerning working time. As a Directive, it is binding on Member States as to the result to be achieved, but the choice of form and methods of achievement are left to the national authorities (article 288 of the Treaty on the Functioning of the European Union). The General Working Time Directive was expressly introduced in the light of the objective in article 137(2) of the Treaty establishing the European Community to improve the working environment; and it is clear from a perusal of the recitals and the substance of the Directive that this is a measure designed to protect the health, safety and working environment of workers. For example, article 1 (Purpose and scope) states:

> "This Directive lays down minimum safety and health requirements for workers."

5. So, under Chapter 2 ("Minimum rest periods – Other aspects of the organisation of working time"), Member States are required to ensure that workers have various entitlements in respect of daily rest (article 3), breaks (article 4), weekly rest periods (article 5) and length of night work (article 8). These provisions of the Directive are

written in terms of workers' entitlement – i.e. workers' rights – in relation to working time.

6. The General Working Time Directive applies to all workers. However, certain of these rights are disapplied for various categories of worker. Article 20 disapplies the essential workers' time rights found in articles 3, 4, 5 and 8 from any "mobile worker", defined in article 2(7) as:

> "… any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway."

Article 20(1) nevertheless requires Member States to "take measures to ensure that such mobile workers are entitled to adequate rest….".

7. The Directive is silent as to enforcement mechanism, which is left to Member States.

8. The Directive was implemented in the United Kingdom by the Working Time Regulations 1998 (SI 1998 No 1833) as amended from time-to-time ("the Working Time Regulations"). It is uncontentious that the Regulations faithfully transpose the workers' rights required by the General Working Time Directive, giving appropriate entitlements to matters such as daily rest (regulation 10(1) and (2)), weekly rest (regulation 11(1)-(3)), rest breaks (regulation 12(1) and (4)), and annual leave (regulations 13 and 13A).

9. Enforcement is dealt with in regulations 28 and following. There is a scheme for enforcement by various agencies including, in respect of the requirements in relation to road transport users, the Vehicle and Operator Services Agency ("VOSA") (regulation 28(6)). As befits a scheme which is for the protection of employees, by regulation 29(1):

> "An employer who fails to comply with any of the relevant requirements shall be guilty of an offence"

10. In addition, regulation 30(1) provides for a civil remedy as against an employer, to which a worker has direct access, as follows:

> "A worker may present a complaint to an employment tribunal that his employer has refused to permit him to exercise any right he has under [the relevant specific working time regulations, including regulations 10(1) and (2), 11(1)-(3)), 12(1) and (4)), 13 and 13A]."

If the tribunal finds that the complaint is well-founded, then it may grant a declaration to that effect and make a just and equitable compensatory award from the employer to the worker (regulation 30(3) and (4)).

11. As with the General Working Time Directive, the Working Time Regulations do not apply to "mobile workers" (regulation 18(4)).

12. Some categories of mobile workers have since been given similar entitlements, and similar means of enforcement, to those given to general workers. The Cross-border

Railway Services (Working Time) Regulations 2008 (SI 2008 No 1660), which implements Council Directive 2005/47/EC (expressly "intended to protect health and safety" of railway workers: see recital (11)), gives cross-border railway workers various entitlements to rests and breaks; and, by regulation 17, provides for a civil remedy in the employment tribunal in similar terms to those in regulation 30 of the Working Time Regulations.

Working Time Legislation: Road Transport Workers

13. The regulation of working time for "mobile workers" who work in road transport (including, of course, lorry drivers) is dealt with in two European measures: Regulation (EC) No 561/2006 ("the Road Transport Regulation") and Council Directive 2002/15/EC ("the Road Transport Working Time Directive").

14. The former, as a Regulation, is of course binding and directly applicable in Member States (article 288 of the Treaty on the Functioning of the European Union). It is the primary measure, in the sense that the Directive is supplementary to it: where necessary, the provisions of the Regulation expressly take precedence over those of the Directive (see article 2(4) of the Directive). The fact that the Directive was first in time does not detract from that subsidiarity: both the Regulation and Directive had predecessors, and are properly seen as part of the evolving landscape of European regulation of road transport.

15. Whilst improvement of the working conditions of road transport workers is a subsidiary objective (see, e.g., recitals (1), (16) and (17)), the purpose of the Road Transport Regulation is focused elsewhere – on the harmonisation of the conditions of competition between modes of transport and, to a lesser extent, road safety. That is clear from the form of the Regulation when looked at as a whole: it imposes obligations on all involved in road transport (including drivers), with only restricted specific obligations on transport undertakings (see article 10).

16. Unlike the General Working Time Directive, the Road Transport Directive is not silent as to enforcement mechanism. Article 18 requires, in standard form, Member States to "adopt such measures as may be necessary for the implementation of this Regulation". However, more specifically, more importantly, and reflecting the focus of the Regulation on imposing obligations on those involved in road transport operations, article 19(1) requires Member States to lay down penalties for infringement, in the following terms:

> "Member States shall lay down rules on penalties applicable to infringements of the Regulation and Council Regulation (EEC) No 3821/85 ('the Tachograph Regulation') and shall take all measures necessary to ensure that they are implemented. Those penalties shall be effective, proportionate, dissuasive and non-discriminatory. No infringement of this Regulation and [the Tachograph Regulation] shall be subjected to more than one penalty or procedure. The Member States shall notify the Commission of these measures and the rules on penalties by [a specified date]…".

17. Article 19(2) enables competent national authorities to impose a penalty on a driver or transport undertaking in respect of an infringement detected in that Member State, although committed in another country. Article 19(3) requires the penalty scheme adopted to include a provision that, in respect of any infringement, whenever proceedings are initiated or a penalty imposed, evidence of that infringement is provided to the driver in writing, even if the object of the proceedings or penalty is someone else (such as the relevant road transport operator).

18. The enforcement provisions in the Road Transport Regulation itself are supplemented by Directive 2006/22/EC, which deals with enforcement of both Council Regulation (EEC) No 3820/85 (the predecessor of the Road Transport Regulation) and the Tachograph Regulation. Whilst there are passing references to health and safety at work and road safety (e.g. in recitals (1) and (5)), the whole purposive thrust of this Directive is the creation of a common market in inland transport services, and the need for appropriate checks and systems for the purposes of enforcement. There is nothing here that dwells on the working environment of workers.

19. Therefore, the characteristics of the scheme of the Road Transport Regulation include the following:

    i) Obligations are imposed on all commercial drivers to meet the requirements imposed by the Regulation in respect of breaks and rest periods. Although obligations are also imposed on others (such as road transport operators), article 19(3) reflects a general focus on driver responsibility.

    ii) Whilst there may be other national means of enforcement, there is a mandatory requirement that those obligations be enforced at a national level by a system of criminal or other form of penalties.

    iii) The system of penalties must be "effective", i.e. effective in ensuring compliance with the substantive requirements imposed by the Regulation.

    iv) There is a prohibition on any infringement being visited by more than one penalty or procedure.

20. The General Working Time Directive gives general workers rights in respect of breaks and rest periods. However, far from giving mobile workers rights, the Road Transport Regulation imposes obligations upon them. These provisions are not written in the language of health and safety at work, but rather in terms of the organisation of transport and enforcing driving time, break and rest rules. That is underlined by the fact that (i) the Road Transport Regulation was made, not with article 137(2) of the Treaty establishing the European Community in mind (i.e. to improve the working environment), but rather article 71 (i.e. for the proper organisation of transport); (ii) article 1 of the Regulation appears to prioritise the objective of harmonising the conditions of competition between modes of transport; and (iii) the Regulation not only repealed its immediate predecessor (Council Regulation (EEC) No 3820/85), but also amended other measures relating to enforcement of requirements in respect of road transport working time etc, including the Tachograph Regulation.

21. Turning to the Road Transport Working Time Directive, that was made having regard to both article 71 and article 137(2) of the Treaty establishing the European Community; and article 1 appears to prioritise to an extent the improvement of the health and safety protection of persons performing road transport activities. There is, therefore, a greater concern about worker's environment than in the Road Transport Regulation.

22. However, whilst the Road Transport Regulation is written in stark terms of obligations imposed on drivers (see, e.g., article 8 of the Regulation: "A driver shall take daily and weekly rest periods"), the Directive is still not written in terms of giving rights to workers in respect of working time. The language of this Directive is in terms of imperatives (e.g. article 5: "Member States shall take measures necessary to ensure that [road transport workers] in no circumstances work more than six consecutive hours without a break"), but not of rights or entitlements. That formulation can be compared with the General Working Time Directive, which *is* written in terms of workers' rights (e.g., articles 3 and 5: "Member States shall take measures to ensure that every worker is *entitled* to" daily and weekly rest periods (emphasis of course added)).

23. Furthermore, unlike the General Working Time Directive but like the Road Transport Regulation, the Road Transport Working Time Directive is not silent on enforcement. Article 14 provides:

> "Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this directive by 23 March 2005 or shall ensure by that date that the two sides of industry have established the necessary measures by agreement, the Member States being obliged to take any steps to allow them to be able at any time to guarantee the result required by this directive…"

That allows Member States to adopt a wide spectrum of enforcement schemes.

24. However, in mandatory terms reflective of article 19(1) of the Road Transport Regulation, article 11 requires a system of penalties to be instigated, as follows:

> "Member States shall lay down a system of penalties for breaches of the national provisions adopted pursuant to this directive and shall take all the measures necessary to ensure that these penalties are applied. The penalties thus provided for shall be effective, proportional and dissuasive."

Again, it is to be noted that the penalty scheme is mandatory and has to be "effective", i.e. effective in ensuring compliance with the substantive requirements of the Directive.

25. The Road Transport Working Time Directive was implemented in the United Kingdom by the Road Transport (Working Time) Regulations 2005 (SI 2005 No 639), as now amended by the Road Transport (Working Time) (Amendment) Regulations 2012 (SI 2012 No 991) ("the Road Transport Working Time Regulations").

26. Breaks are dealt with in regulation 7:

> "(1) No mobile worker or self-employed driver shall work for more than six hours without a break.
>
> (2) Where the working time of a mobile worker or self-employed driver exceeds six hours but does not exceed nine hours, the mobile worker or self-employed driver must take a break lasting at least 30 minutes and interrupting that period.
>
> (3) Where the working time of a mobile worker or self-employed driver exceeds nine hours, the mobile worker or self-employed driver must take a break lasting at least 45 minutes and interrupting that period.
>
> (4) Each break may be made up of separate periods of not less than 15 minutes each.
>
> (5) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of the mobile worker, to ensure that the limits specified are complied with in the case of each mobile worker employed by him.
>
> (6) A self-employed driver must take all reasonable steps, in keeping with the need to protect his health and safety, to comply with the limits specified above"

27. Rest periods are covered by regulation 8:

> "(1) In the application of these Regulations, the provisions of the Drivers' Hours Regulation [now succeeded by the Road Transport Regulation] relating to daily and weekly rest shall apply to all mobile workers to whom they do not apply under that Regulation as they apply to other mobile workers and self-employed drivers under that Regulation.
>
> (2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of the mobile worker, to ensure that those provisions are complied with in the case of each mobile worker employed by him, to whom they are applied by paragraph (1).
>
> (3) A self-employed driver must take all reasonable steps, in keeping with the need to protect his health and safety, to ensure that he complies with the provisions applied by paragraph (1)."

28. Under regulation 17(1):

> "Any person who fails to comply with any of the relevant requirements shall be guilty of an offence"

29. The following are noteworthy about these provisions:

    i) Regulations 7 and 8 found this claim: the Union rely upon rights granted to mobile workers under these provisions, and it is contended on their behalf that it is those rights that, absent a right to bring a civil claim in an employment tribunal, are unequivalently and ineffectively enforced. It is expressly accepted on the Union's behalf that these two regulations faithfully transpose and (save for the issue of available remedy, which is in issue in this claim) implement those parts of both the Road Transport Regulation and the Road Transport Working Time Directive that relate to breaks and rest periods.

    ii) Regulations 7 and 8 apply to all drivers of commercial road vehicles, whether employed or self-employed.

    iii) An employer has an obligation to ensure that the provisions are complied with in the case of each relevant employee; but regulations 7 and 8 primarily and directly impose obligations upon employed and self-employed mobile road transport workers to meet the requirements for breaks and rest periods.

    iv) In the event that workers do not meet the requirements, they commit an offence.

    v) Where a failure to meet the requirements results in an employer also being guilty of an offence, the employee remains criminally liable – although, under regulation 18, proceedings may be taken against an employer even if they are not taken against the employed worker.

The Challenged Decision

30. The Union sought confirmation from successive governments that, in respect of breaks and rest periods, the right to apply to an employment tribunal by way of direct claim against an employer would be extended to mobile road transport workers by secondary legislation.

31. On 1 October 2010, on behalf of the Secretary of State, the Parliamentary Under Secretary of State for Transport wrote to the General Secretary of the Union, as follows:

> "Thank you for your letter of 20 September about providing mobile workers covered by the [Road Transport Working Time Regulations] with an avenue of appeal in the employment tribunals in relation to working time matters.
>
> Earlier in the year letters were sent by the previous Government. These indicated that previous Ministers were minded (subject to consultation) to amend legislation to provide for this.

> After consideration, I have decided not to proceed with amending the relevant legislation in this way. This is because we now take the view that mobile workers are already able to enforce such rights under the provisions in the Employment Rights Act 1996 that deal with protected disclosures. This also accords with the priority of the Coalition Government to minimise new regulation."

The statutory reference is to the "whistle blowing" provisions of the 1996 Act, to which I shall return in due course.

32. The General Secretary followed up that refusal, particularly pointing out the availability of a civil remedy in the employment tribunals for workers generally, compared with its unavailability for road transport mobile workers. The Under Secretary of State wrote again on 26 November 2010, maintaining the refusal in these terms:

> "Thank you for your letter of 9 November, following our meeting on 13 October, regarding my decision not to amend legislation to provide mobile road transport workers with a specific avenue of appeal in employment tribunals in relation to working time matters.
>
> In your letter you raised a particular concern that the Road Transport (Working Time) Regulations 2005 do not contain an equivalent to regulation 30 of the Working Time Regulations 1998.
>
> I have given this careful consideration and explain below why I remain of the view that amending legislation is not required. Please can I remind you that the Department for Transport does not provide legal advice and this should not be taken such; independent legal advice should be sought if required, and ultimately it is for the Courts to interpret the law.
>
> The Working Time Regulations 1998 ("the 1998 Regulations") implement a particular EU Directive. Regulation 30 of the 1998 Regulations simply allows for compensation to be awarded by an employment tribunal in the event of a complaint with respect to breach of rest, rest breaks or annual leave entitlement being upheld.
>
> The Road Transport (Working Time) Regulations 2005 ("the 2005 Regulations") implement a different EU Directive – namely Council Directive 2002/15/EC. There is no specific requirement in this Directive for mobile workers to be paid compensation in the event of there being a breach of rest, rest breaks, or annual leave entitlement, and there is no reason why the 2005 Regulations should include exactly the same provisions as the 1998 Regulations.

> Directive 2002/15/EC requires penalties for breaches of national provisions adopted pursuant to the Directive to be "effective, proportional and dissuasive". The Department considers that this has been given effect by providing enforcement powers to the Vehicle and Operator Services Agency (VOSA).
>
> As I previously explained, the Department considers that mobile workers are able to uphold the rights afforded to them under Directive 2002/15/EC – in employment tribunals if necessary. In keeping with this the Department takes the view that mobile workers who assert their right to rest, breaks or annual leave could ultimately rely on the protected disclosure provisions in the Employment Rights Act 1996, in the event of being dismissed or suffering some other detriment for asserting those rights."

33. It is that decision which the Union now challenges.

The Grounds of Challenge

34. The foundation of the challenge is the substantive rights in relation to breaks and rest periods granted to mobile road transport workers by regulations 7 and 8 of the Road Transport Working Time Regulations. Those rights are derived from the European measures to which I have referred.

35. In relation to enforcement of those rights, the general principles are well-settled. In the words of the European Court of Justice (Preston v Wolverhampton Healthcare NHS Trust [2001] 2 AC 415 at paragraph 31):

> "… [A]ccording to settled case law, in the absence of relevant Community rules, it is for the national legal order of each member state to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, *provided that* such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness)…" (emphasis added).

In short, enforcement is a matter for the national government, provided that the means of enforcement adopted are equivalent and effective.

36. It is submitted on the Union's behalf that the failure of the statutory scheme expressly to provide for a mechanism of individual enforcement by direct application to an employment tribunal is unlawful because it results in a relevant worker's rights being enforced by means that are neither equivalent to the means of enforcing analogous rights, nor effective.

37. I will deal with equivalence (paragraphs 38-75) and effectiveness (paragraphs 76-85) in turn.

Equivalence

38. The formulation of the principle of equivalence is well-established and uncontroversial, and finds useful articulation in the judgment of Lord Kerr on behalf of the Supreme Court in FA (Iraq) v Secretary of State for the Home Department [2011] UKSC 22 at [12]: in respect of the form of remedy to ensure protection of European rights, there is a limitation on the procedural autonomy of Member States in that national rules must not be less favourable than those governing comparable domestic actions.

39. Lord Kerr also succinctly identified the rationale for the principle. After quoting, at [19], the description of the principle's aim from the opinion of Advocate General Léger in Levez v T H Jennings (Harlow Pools) Ltd [1999] ICR 521 at paragraph 26 (which Lord Kerr approved), he said, at [24]:

> "… [T]he essential reason for the development of the principle was that a Community law right should not suffer disadvantageous treatment vis-à-vis national rights which lie outside the field of Community law."

Levez makes clear that that remains the rationale for the principle of equivalence: it is to prevent a European law right being treated – in procedural terms – less favourably than a comparable domestic law right to the disadvantage of European law and those relying on it.

40. For the principle to apply, the proposed comparators must be sufficiently similar in respect of their purpose and essential characteristics. The General Working Time Directive (and, insofar as Mr Hendy relied upon it, the Cross-border Railway Services Working Time Directive: see paragraph 12 above) is primarily directed at safeguarding the health and safety of workers, and is consequently focused on workers' rights to breaks and rest periods. Health and safety is only one of three purposes behind the Road Transport Working Time Directive, the others being the prevention of a distortion in competition and road safety. The primary means of enforcement is by a mandatory, "effective" system of penalties, for which some reasonably detailed provision is made. Mr Eicke submitted with some force that, in those circumstances, the scope for any principle of equivalence to apply must be, at most, limited. Therefore, although for the purpose of this application I have assumed that the enforcement of these rights is sufficiently similar for the principle of equivalence to apply, I accept that the contrary may be arguable.

41. To be triggered, the principle requires a contrast between a "Community [now, European Union] action" and a "domestic action" (see Oyarce v Cheshire County Council [2008] EWCA Civ 343 at [55] per Buxton LJ). For the purposes of these definitions, the focus is upon from where the right being asserted derives: European law, or domestic law. What is required is a material difference between an action in which a right deriving from European law is being asserted, and an action in which a right deriving from domestic law is being asserted, adverse to the former. The

principle seeks to avoid discrimination against European law and those who rely upon it, not more broadly to impose uniform procedural law across Europe.

42. There may, of course, be difficult cases. In FA (Iraq), the Supreme Court were asked to consider the difference in rights of appeal from a decision of the Secretary of State on a claim for humanitarian protection (which derived from rights under European law), and on a claim for asylum (which arguably derived from strands of both domestic law and European law), respectively. What was the correct approach in circumstances in which the comparator for a European law-derived right was a right having a "mixed source"? The Supreme Court considered that the law in relation to that question was sufficiently unclear to warrant a reference to the European Court. As I understand it, that reference was made but it did not ultimately proceed; and so there is no further guidance from the European Court from that case.

43. Mr Eicke submitted that, on the weight of authority and principle, the answer to the fundamental question posed by the Supreme Court to the European Court is that, for the principle of equivalence to apply, the comparator must be an action in respect of a right derived *exclusively* from domestic law: it does not apply where the comparator is of a "mixed source".

44. If this case turned on such a point, given the view of the Supreme Court in FA (Iraq), there would be a strong and probably overwhelming case for referring that issue to the European Court for a preliminary ruling. However, Mr Eicke submitted that this case did not fall into that category, because the Union seeks to compare actions based respectively and only upon (i) rights derived from the General Working Time Directive, and (ii) rights derived from the Road Transport Working Time Directive; i.e. the rights on both sides of the comparison all derive exclusively from European law. The contrast between a European action and a domestic action, required for the principle of equivalence to apply, is therefore absent.

45. Mr Hendy for the Union made a two-fold submission in response.

46. First, he submitted that that contrast was not necessary for the principle to apply: it applied to all cases where the national regime of remedies distinguished between the enforcement of rights with essentially the same characteristics, whether derived from European or domestic law.

47. Eloquently as it was put, I cannot accept that submission. As authorities have consistently said, and the Supreme Court has recently confirmed in FA (Iraq), the principle of equivalence is based upon that very contrast: it is based upon the premise that there should be no discrimination between the enforcement of European rights and the enforcement of domestic rights. It is not based upon the differential treatment of the enforcement of different European rights, even analogous European rights. The principles of non-discrimination are well-developed in European law; and there is no principle of non-discrimination as regards the enforcement of one European right when compared with the enforcement of another.

48. In his written submissions, Mr Hendy referred to extracts from European cases which, he submitted, suggested that whether the comparator was based on European law or domestic law was irrelevant to the principle of equivalence. For example, in Levez (cited at paragraph 40 above), in its judgment the full court said (at paragraph 41):

> "The principle of equivalence requires that the [procedural] rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar…".

The court used similar phraseology in the recent case of Case C-177/10 Santana v Consejeria de Justitia y Administración Pública de la Junta de Andalucia (8 September 2011), at paragraph 90, to which I was also referred.

49. However, those quotes cannot be looked at *in vacuo*: they must be considered in context. It is clear, from reading those judgments as a whole, that the court proceeded on the basis that a contrast between a European action on the one hand, and a domestic action on the other, was required for the principle of equivalence to apply. For example, in paragraph 43 of Leves, the court said:

> "In order to determine whether the principle of equivalence has been complied with in the present case, the national court… must consider both the purpose and the essential characteristics of allegedly similar *domestic* actions…" (emphasis added).

Similar phraseology was used in Santana (later in paragraph 90).

50. In the course of debate, Mr Hendy gracefully and properly accepted that the European authorities were consistently against the proposition he propounded – or at least not supportive of it – except for one European Court case which (he submitted) was on all fours with this case, and in which it was held that the principle of equivalence applied.

51. That case was Paquay v Société d'Architectes Hoet & Minne SPRL [2007] ECR I-8513; [2008] ICR 420, which concerned two Directives, Council Directive 76/207/EEC (which in general terms forbids discrimination between men and women in respect of access to employment), and Council Directive 92/85/EEC (which specifically protects pregnant workers). The applicant was given notice of dismissal by the respondent firm of architects during the period of employment protection following the birth of her baby. Giving that notice was inconsistent with the rights of the applicant under each of the Directives. The European Court was concerned with the difference in sanction for those breaches, provided for by Belgian domestic law. It held that there was no justification for a difference in sanction.

52. Mr Hendy submitted that this is unequivocal authority for the proposition that the principle of equivalence permits the comparison of a European law right with the domestic implementation of an analogous European right. He relied particularly upon paragraphs 50-52 of the judgment:

> "50. If, under Articles 10 and 12 of Directive 92/85 and to comply with the requirements established by the case-law of the Court on the issue of sanctions, a Member State chooses to sanction the failure to respect obligations arising under Article 10 by granting a fixed amount of pecuniary damages, it follows, as the Italian Government pointed out in the present case, that the measure chosen by the Member State, in the case of infringement, in identical circumstances, of the prohibition

> on discrimination under Articles 2(1) and 5(1) of Directive 76/207 must be at least equivalent to that amount.
>
> 51. If the compensation chosen by a Member State under Article 12 of Directive 92/85 is judged necessary to protect the relevant workers, it is difficult to understand how a reduced level of compensation adopted to comply with Article 6 of Directive 76/207 could be deemed adequate for the injury suffered if the injury was brought about by a dismissal in identical circumstances and contrary to Articles 2(1) and 5(1) of that latter directive.
>
> 52. Moreover, as the Court has already stated, in choosing the appropriate solution for guaranteeing that the objective of Directive 76/207 is attained, the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those application to infringements of domestic law of a similar nature and importance (Case 68/88 Commission v Greece [1989] ECR 2965, paragraph 24, and Case C-180/95 Draehmpaehil [1997] ECR I-2195, paragraph 29). That reasoning applies *mutatis mutandis* to infringements of Community law of a similar nature and importance."

He drew particular attention to paragraph 52 which, he submitted, can only be a reference to the principle of equivalence. The judgment continues:

> "53. It is therefore necessary to reply to the second part of the second question that, since a decision to dismiss on the grounds of pregnancy and/or the birth of a child, notified after the end of the period of protection set down in Article 10 of Directive 92/85, is contrary both to that provision of Directive 92/85 and to Articles 2(1) and 5(1) of Directive 76/207, the measure chosen by a Member State under Article 6 of that latter directive to sanction the infringement of those provisions must be at least equivalent to the sanction set down in national law implementing Articles 10 and 12 of Directive 92/85.
>
> 54. Having regard to the above, the reply to the second question must be that a decision to dismiss on the grounds of pregnancy and/or the birth of a child is contrary to Articles 2(1) and 5(1) of Directive 76/207 irrespective of the moment when that decision to dismiss is notified and even if it is notified after the end of the period of protection set down in Article 10 of Directive 92/85. Since such a decision to dismiss is contrary to both Article 10 of Directive 92/85 and Articles 2(1) and 5(1) of Directive 76/207, the measure chosen by a Member State under Article 6 of that latter directive to sanction the infringement of those provisions must be at least equivalent to the sanction set down in national law implementing Articles 10 and 12 of Directive 92/85."

53. I have to say that I do not find these passages easy to analyse, or this authority easy to construe. Certainly on one reading, paragraph 52 suggests that the reasoning behind the conventional equivalence cases (with their comparison of how European rights are enforced with how domestic rights are enforced) applies equally where there is an adverse comparison between two rights both derived from European law. As Mr Hendy pointed out, the two cases referred to (Commission v Greece and Draehnmpaehl) concerned the duty on Member States to guarantee the application and effectiveness of Community law.

54. However, having considered the matter, I am not persuaded that this is the true interpretation of the case, for the following reasons.

55. First, the traditional reasoning behind the conventional equivalence cases simply does *not* apply to where there is an adverse comparison between two rights both derived from European law. The traditional reasoning is based upon the premise that there should be no adverse discrimination between enforcement of European rights on the one hand, and enforcement of domestic rights on the other. That reasoning cannot be extended to circumstances in which the comparison is between two rights both deriving from European law.

56. Second, in Paquay the European Court did not expressly refer to "the principle of equivalence", at all. Indeed, despite paragraph 52, it does not begin to grapple with any of the wealth of authority in respect of the principle of equivalence and its foundation. It does not even refer to any such cases, Commission v Greece and Draehnmpaehl not being directly in point. That would be very surprising if the court intended to extend the principle of equivalence; and particularly surprising if they intended to extend it in a direction that would not be warranted on the same basis as the principle has been founded upon hitherto. It is noteworthy that the judgment of the court was delivered without the benefit of an opinion from an Advocate General. All of that strongly suggests that it was not the court's intention to extend the principle of equivalence, radically, in the manner Mr Hendy suggests.

57. Third and finally, Paquay was considered by the Court of Appeal in Oyarce (cited above at paragraph 42). It is always invidious to rely upon the particular constitution of a court, as giving particular weight to an authority; but it is worth noting that the Court of Appeal in Oyarce comprised not only Buxton LJ, but also Longmore and Richards LJJ. On this issue, Buxton LJ gave the only substantive judgment, with which the rest of the court agreed.

58. The court did not consider that Paquay was a case involving the principle of equivalence at all, but one that was concerned with the obligation of effective transposition. Buxton LJ said (at [14]):

> "The court held, in paragraphs 53-54, that to be regarded as effective in that sense the sanctions provided by Belgian law for conduct inconsistent with Directive 1976/207 must be at least as effective as the sanctions provided by Belgian law for conduct inconsistent with Directive 1992/85."

But that was because such a remedy would have to be available for the effective transposition of Directive 76/207 into the domestic law of Belgium, not because of the principle of equivalence. It was also, in Buxton LJ's view:

> "… a matter of simple common sense, granted that the [same] conduct complained of had been found to be in breach of both of those Directives."

59. As I have already indicated (see paragraph 41 above), he went on to hold that the principle of equivalence required a comparison of the means for enforcing a European law right with the means of enforcing a domestic law right.

60. Mr Hendy was driven to submit that that analysis of Paquay (and also the expression of principle as to the requirement for a domestic comparator) was simply wrong. However, whether or not that analysis of Paquay is technically binding upon me, I am persuaded it is correct. Whatever the proper interpretation of the case, paragraph 52 of Paquay is unhappily and ambiguously drafted. This analysis of the case explains why the court in Paquay itself did not refer to or set out "the principle of equivalence" or analyse the foundation for the principle, or refer to any cases directly involving the principle.

61. It also, perhaps, explains why Paquay is not referred to in FA (Iraq), and why it does not appear even to have been referred to the court in that case. If Mr Hendy's view of Paquay were correct, it would clearly have been relevant to the issues before the court; but, on the view contended for by Mr Eicke, it would of course be irrelevant, as having nothing to do with the principle of equivalence.

62. Consequently, I do not consider that Paquay supports the proposition relied upon by Mr Hendy. It was the only authority upon which he substantively relied on this issue.

63. For those reasons, as a matter of both principle and authority, I do not consider that the principle of equivalence applies where the two relevant rights are both wholly derived from European law.

64. However, that leads me to Mr Hendy's alternative submission. He submitted that the rights of general workers did not derive wholly from European law (so they were, at least arguably, "domestic" for the purposes of the relevant comparison), a submission made on two bases.

65. First, he submitted that rights of mobile workers derived from the Road Transport Regulation (which, as a Regulation, directly grants rights to workers), whereas the rights of general workers derive from the General Working Time Directive (which, as a Directive, requires Member States to enact legislation to provide the relevant rights). If he were required to do so, he submitted that the latter are therefore "domestic rights" for these purposes.

66. However, I am unable to accept that argument.

67. Mr Hendy was cautious, even reluctant, in making this submission; as he accepted that it would be surprising if the rights of individuals to a particular remedy depended upon the nature of the European measure from which they derived which may depend

upon irrelevant circumstances. In this case, it seems that the Road Transport Regulation may have been in the form of a Regulation rather than a Directive because of the failure of the relevant parties to come to an agreement on the relevant issues.

68. This surprise is engendered because the submission misplaces the focus of the principle of equivalence, which here is not on the form of the measure, as the submission suggests, but from where the relevant rights derived – European law, or domestic law. In these circumstances, rights that a Directive require a Member State to ensure are enacted as much "derive" from the European measure as rights that are granted by a Regulation.

69. In any event, in this case, the Union rely upon rights purportedly granted to workers by the Road Transport Regulations; which were arguably enacted in pursuance of the Road Transport Working Time Directive, and not the Road Transport Regulation (see the Explanatory Note to the Regulations). Certainly, for the reasons I have given, workers' rights cannot derive from the Road Transport Regulation. In that case, all of the rights by which the comparison would be made derived from Directives.

70. Second, Mr Hendy submitted that the enforcement provisions in respect of the General Working Time Directive were left to the Member State. In particular, employment tribunals are creatures of domestic legislation. Therefore, the contrast is between mobile workers (entirely European based), and general workers (at least partly based on domestic law, because of the enforcement provisions).

71. However, I am also unable to accept this argument.

72. As enforcement provisions of European rights are invariably left to Member States, if this proposition were true, then the principle of equivalence would in practice apply to all circumstances where the comparison involves a European law right and another European law right which has been the subject of domestic enforcement regime. In those cases, it would substantively negate the requirement for some "domestic" element in the comparator.

73. In any event, the submission again fails to take into account the relevant focus, which is on the rights and from where they derive. However enforced, any rights here all derive from European law. As I have indicated above, there is no basis in principle or case law for allowing the principle of equivalence to be applied to domestic remedies implementing different European obligations, even where those obligations are sufficiently similar in respect of their purpose and essential characteristics.

74. For those reasons, I do not consider that the failure on the part of the Secretary of State to provide an express right for an individual mobile road transport worker to apply to an employment tribunal or other court to seek recourse against an employer to be contrary to the principle of equivalence.

75. This ground consequently fails.

Effectiveness

76. The formulation of the principle of effectiveness is equally well-established and uncontroversial, and again finds articulation in the judgment of Lord Kerr in FA

(Iraq), at [12]: in respect of the form of remedy to ensure protection of European rights, national rules must not render the exercise of rights conferred by European law to be virtually impossible to achieve or excessively difficult to access.

77. That reflects article 47 of the Charter of Fundamental Rights of the European Union, which provides:

> "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"

Those conditions relate to a fair trial, and the opportunity for being advised, defended and represented, which themselves reflect article 6 of the European Convention on Human Rights. The rights in the Charter are recognised as being of the same value as the Treaties (article 6(1) of the Treaty on European Union); and the rights in the Convention constitute general principles of the law of the European Union (article 6(3) of the Treaty on the European Union).

78. Mr Hendy submitted that mobile road transport workers have rights in respect of working time, but have no effective access to or means of enforcing those rights. The only enforcement scheme in the Road Transport Regulations is effectively by VOSA. Whilst an employer may be guilty of an offence, a prosecution can only be brought by an inspector, or with the consent of the Director of Public Prosecutions (regulation 20). Inspectors have powers of inspection etc (paragraph 2 of schedule 2). They also have the power to serve an improvement notice on a person who is considered to be in contravention of any of the regulations, and requiring him to stop (paragraph 3 of schedule 2). Such a notice can be served on a driver who is believed to be in contravention. Similarly, inspectors have a power to serve a prohibition notice on any person whose road transport activities are considered to give rise to a risk of serious personal injury (paragraph 4 of schedule 2).

79. That scheme does not however enable an individual driver to rely on his rights in respect of working hours, and to pursue a claim against his employer or indeed to enforce his right directly in any way. A worker is limited to lobbying VOSA for action on their part. The absence of such a right means that the exercise of a worker's European law rights is virtually impossible to achieve.

80. In my judgment, this issue is more difficult than that of equivalence, which is in my view clear for the reasons I have given above.

81. I have very much in mind the terms of article 31 of the Charter of Fundamental Rights (quoted above: paragraph 3) which puts the limitation on working hours etc firmly on the basis of a worker's *right*, a word used in article 31(1) and (2); and article 20 of the General Working Time Directive which, at the same time as disapplying from mobile workers many of the working time provisions in the Directive, required Member States to "take measures to ensure that such mobile workers are *entitled* to adequate rest…." (emphasis added).

82. Furthermore, the decision letters of 1 October and 26 November 2010 both appear to accept that the Road Transport Working Time Regulations afford mobile workers

rights in respect of working time: both letters refer to such "rights" and how, in the Under Secretary of State's view, enforcement of those rights is adequately provided for.

83. There is also at least superficial attraction in the submission in the form of a *cri de coeur* from Mr Hendy that, under the General Working Time Regulations, millions of workers in the United Kingdom have rights to daily rest, a weekly rest period and rest breaks – expressed in the form of entitlements or rights, and enforceable by them individually as against employers in an employment tribunal – and it is difficult to see why mobile road transport workers should be denied such rights. It is not regarded by mobile workers as being fair – and, submitted Mr Hendy, it is neither fair nor lawful. General workers have a right to enforce the working time provisions for breaks and rests by direct action against employers in the employment tribunal. Mobile road transport workers are equally entitled to effective enforcement of their rights.

84. Generally, I have some sympathy with those submissions. However, I am unpersuaded by them, for the following reasons.

i) Mr Hendy submitted that both the Road Transport Regulation and the Road Transport Working Time Directive required other relevant remedies, over and above the envisaged system of penalties. However, that is not so: the Regulation and Directive certainly *allow* such additional remedies, but none of their language *requires* more than the mandatory system of penalties. Indeed, that language suggests that a system of penalties may well be sufficient. For example, both require a system of penalties that is "effective" (article 19 of the Road Transport Regulation, and article 11 of the Road Transport Working Time Directive); and no infringement of the Regulation can be subject to "more than one penalty or procedure" (article 19 of the Regulation). That language may not be determinative; but it is strongly suggestive that the envisaged system of penalties might be sufficient to be effective. It is certainly not language that requires remedies additional to that system.

ii) For the reasons given above, I do not consider that the Road Transport Regulation gives rights to mobile transport workers, such as drivers. Rather, it imposes obligations upon them. The Road Transport Regulations, upon which the Union relies, are not made pursuant to the Regulation, but purportedly made to implement the Road Transport Working Time Directive.

iii) It is a more difficult question as to whether that Directive gives rights to mobile workers. Whilst article 31 of the Charter of Fundamental Rights which puts the limitation on working hours etc for all workers firmly on the basis of a worker's right, and article 20 of the General Working Time Directive requires Member States to take measures to ensure that such mobile workers are entitled to adequate rest as of right, as I have explained, the Road Transport Directive is not written in the language of workers' rights, as is the General Working Time Directive. In the context of the scheme for road transport in the Regulation and Directive viewed together, any rights granted to mobile transport workers appear to be, at best, weak rights when compared with the primary purposes of the regime.

iv) Those primary purposes are concerned with the organisation of road transport (including ensuring competition between various modes of inland transport), and road safety. It is unsurprising that the Road Transport Regulation and the Road Transport Working Time Directive both consider that the essential means of enforcing the requirements in the light of those purposes is by means of a national system of penalties, aimed directly at drivers, supplemented by a system of inspection and notices. That penalty system is required to be "effective" in enforcing the relevant requirements.

v) The Secretary of State, through VOSA, is responsible for those systems. As a matter of law, if the Secretary of State or VOSA fail in their obligations effectively to enforce the requirements, then they are amenable to judicial review.

vi) Furthermore, as a matter of law, drivers cannot be required to work in contravention of the relevant requirements for breaks and rests: Mr Eicke submitted that to require them to work would be a breach of an implied term of their employment contract (that they would not be required to work in an illegal manner), and if they were dismissed or otherwise disadvantaged by refusing to work in such a manner then they would be entitled to the protection of the whistle-blower provisions of Part IVA of the Employment Rights Act 1996, and would have a right to bring a claim in an employment tribunal under the protective provisions of sections 47B and 48(1A) of that Act (Ross v Eddie Stobart Ltd (2011) UKEAT/0085/10/CEA).

vii) Given the obligations imposed upon mobile road transport workers in terms of breaks and rest periods – and their enforceability through the criminal justice system – it is difficult to envisage circumstances in which a worker would have a civil claim against his employer, other than where he himself (the worker) would be guilty of an offence for infringement. That is materially different from the scheme that applies to general workers, through the Working Time Regulations. It is unsurprising that the relevant regulations do not introduce or envisage a right of claim that could only be exercisable in practice by an employee on the basis of his own criminal act.

viii) Those are matters of law. In respect of effectiveness in fact, the Union have not submitted any evidence that the system of enforcement of the provisions relating to breaks and rest periods under the Road Transport Working Time Regulations are not effective. Indeed, the limited evidence that there is suggests the contrary. The First Report from the Commission on the Implementation of the Working Time Rules relating to Road Transport dated 3 August 2009 does not suggest that, in transposing the Directive, any Member State has adopted a procedure for a civil claim. Whilst the number of Member States that responded to the request for information as to the establishment of systems to check for the effectiveness of enforcement was small, the United Kingdom (together with four other Member States) did so; and there is no suggestion in the report that the VOSA system adopted in the United Kingdom was not effective, for want of a civil remedy or otherwise. In proposals for amending the Directive, it has not been suggested that a right to claim by individual action against an employer is necessary, or indeed that the system of penalties at the heart of the enforcement regime in ineffective in the United

Kingdom. There is no evidence before me that a single mobile road transport worker has worked in breach of the requirements of the Road Transport Working Time Regulations at the behest or even with the knowledge of his employer; and certainly no evidence of a worker doing so who would not have so worked if he had had a right to claim against his employer.

ix) In terms of authorities, Mr Hendy relied heavily upon the European Court case of Antonio Muñoz y Chia SA v Frumar Ltd [2002] ECR I-7312, which concerned the proper interpretation of two Regulations (Regulation (EEC) No 1035/72 and Council Regulation (EC) No 2200/96) concerning the common organisation of the market in fruit and vegetables. In the United Kingdom, the Horticultural and Agricultural Act 1964 imposed penalties for the sale of produce in breach of European standards, and the Horticultural Marketing Inspectorate was empowered to make checks. The applicant sought an order restraining the respondents from marketing table grapes in the United Kingdom. The European Court held (at paragraph 31) that the specific obligations in the Directive not to display goods that did not comply with European standards:

> "… imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor".

Mr Hendy submitted that Muñoz is, at the very least, informative in relation to this case; because the system of enforcement in that case, via an inspection agency within the relevant Government department, mirrors the VOSA system in this case.

x) However, I consider that case of limited value in the different context of the road transport scheme for working hours. The right to enforce by individual civil action was implied in that case by reference to the terms of the substantive obligations, in the context of the scheme as a whole including its purpose. The implication of such rights must necessarily be scheme specific: whether the imperative for individual workers to be able to enforce their rights can be implied into a scheme must depend upon the nature of that scheme, looked at as a whole. The differences between the scheme in Muñoz and the scheme of the Road Transport Directive are many. The circumstances of the relevant European measures are clearly different: they have different purposes, and seek to attain those purposes in different ways. In particular, the system of enforcement by way VOSA inspections etc and of penalties is peculiarly comprehensive; and the relationship between the respective parties are significantly different. In Muñoz, the parties were trading competitors, in this case they are contractually bound as employer and employee, in circumstances in which the employee could not bring an civil claim except in circumstances in which he himself would be in breach of the relevant European obligations and liable to a penalty for the same. I do not derive any significant assistance from Muñoz.

85. In the circumstances, on the law, evidence and authorities, I am simply unable to conclude that the remedies currently provided to mobile road transport workers in

relation to breaks and rest render "practically impossible or excessively difficult the exercise of rights conferred" by European law.

Conclusion

86. For those reasons, I do not consider that the failure of the Secretary of State to introduce secondary legislation expressly to provide mobile road transport workers with a mechanism for the individual enforcement of their rights to breaks and rest periods in working time by direct application to an employment tribunal is unlawful, on grounds of either a lack of equivalence or ineffectiveness.

87. I therefore dismiss this application.