**OUTER HOUSE, COURT OF SESSION**

**[2018] CSOH 54**

**P249/17**

OPINION OF LORD TYRE

in the Petition of

AA

Petitioner

against

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Respondent

and

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Intervener

**Petitioner: JJ Mitchell QC, Blair; Drummond Miller LLP**
**Respondent: Johnston QC, Komorowski; Office of the Advocate General**
**Intervener: Springham QC; Equality and Human Rights Commission**

1 June 2018

**Introduction**

[1] In September 2015, the petitioner commenced proceedings in the employment tribunal in Glasgow against her former employer and former line manager, alleging harassment on the grounds of sex, race and religion. Following a hearing on the merits, the tribunal issued a judgment in August 2016 making 29 findings in the petitioner's favour. The respondents were ordered, jointly and severally, to make payment to the petitioner of a

sum of around £75,000 plus interest and expenses in respect of loss and damage, including psychological damage, suffered by her.

[2] After the judgment was issued and before any payment had been received, the petitioner's legal adviser obtained information suggesting that the individuals in charge of her former employer were intending to take steps to close down the existing business and transfer its funds to another entity, with a view to defeating the award made to the petitioner by the tribunal. An interim interdict was sought and obtained at Glasgow Sheriff Court. By October 2016, however, the sum at credit of the employer's bank account had fallen to about £4,000. The petitioner has not to date received any of the sums that the tribunal ordered the respondents to pay to her.

[3] In the present application, the petitioner states that she would not have found herself in the position of being unable to recover the sums awarded to her if she had been able to effect arrestment on the dependence against her former employer at the time of commencement of the tribunal proceedings. An employment tribunal judge, however, has no power to grant an order for diligence on the dependence. The petitioner contends that the absence of such a power constitutes a breach of the community law principles of effectiveness and equivalence. She seeks judicial review of what she claims to be the respondent's failure properly to implement in Scotland a right, consequent upon the obligations incumbent on the Crown under two EU directives, to arrest on the dependence of a community law-based claim to the employment tribunal. She seeks *inter alia* an award of compensation from the respondent for such failure. The Commission for Equality and Human Rights sought and was granted leave to enter the petition procedure as intervener in support of the petitioner's argument.

**Equal treatment: the EU Directives**

***The Framework Directive***

[4] Council Directive 2000/78/EC laid down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in member states the "principle of equal treatment", ie the principle that there shall be no direct or indirect discrimination on any of the grounds just mentioned. Harassment is a form of discrimination for these purposes (article 2(3)). Under article 9(1), member states must ensure that judicial and/or administrative procedures for the enforcement of obligations under the directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them. In terms of article 17, member states are obliged to lay down rules on sanctions applicable to infringement of national provisions adopted pursuant to the directive. Sanctions, which may include payment of compensation to the victim, must be effective, proportionate and dissuasive.

***The Equal Treatment Directive (recast)***

[5] Directive 2006/54/EC of the Parliament and the Council brought together and amended various existing directives for the purpose of ensuring the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. To that end, the directive contains provisions to implement the principle of equal treatment in relation to *inter alia* working conditions, including pay. Harassment is once again included within the definition of discrimination. Article 17 contains an obligation to make available judicial procedures for enforcement of obligations under the directive, similar to those in the Framework Directive. Article 18 likewise requires

the introduction of measures to ensure "real and effective compensation or reparation" for damage sustained as a result of discrimination on grounds of sex.

**The principles of effectiveness and equivalence**

[6] It is common ground that the vindication of rights derived from community law is subject to the principle of effectiveness and the principle of equivalence. Those principles were conveniently stated by the Grand Chamber of the Court of Justice in *Impact* v *Minister for Agriculture and Food* [2008] 2 CMLR 47 at paragraph 46 as follows:

> "…As is apparent from well-established case law, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)."

It is also common ground that those principles apply to the rights which the petitioner in this application sought to vindicate before the Employment Tribunal.

**Domestic law: The Equality Act 2010**

[7] The Equality Act 2010 ("the Act") deals separately with discrimination and harassment. Section 13(1) provides that "a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Section 26(1) provides as follows:

> "A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

The relevant protected characteristics listed in section 26(5) include race, religion or belief, and sex. Chapter 1 of Part 5 of the Act ("Work") contains prohibitions in relation to employment. These include section 40(1), in terms of which an employer (A) must not harass a person (B) who is an employee of A's or who has applied to A for employment.

[8] Part 9 of the Act deals with enforcement, and any proceedings relating to a contravention of the Act must be brought in accordance with that Part. As a general rule in Scotland, the sheriff court is given jurisdiction by section 114(1) to determine claims relating to alleged contraventions. The exception to the rule concerns complaints relating to a contravention of Part 5 (ie by an employee or prospective employee). Under section 120, jurisdiction to determine such complaints is given not to the sheriff court but to the employment tribunal. The two jurisdictions are mutually exclusive, and the remedies available are not identical. No provision is made in the Act for the granting of diligence, either on the dependence or in execution, by an employment tribunal. Section 15(2) of the Employment Tribunals Act 1996 provides that 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 issue**

[9] The issue that arises for decision is whether, by failing to make statutory provision for the granting of diligence on the dependence by an employment tribunal, the United Kingdom is in breach of its community law obligation to provide the petitioner with a remedy for harassment, in connection with her former employment, that is compliant with the principles of effectiveness and equivalence.

**Argument for the petitioner**

[10] The argument for the petitioner focused upon the principle of effectiveness. As regards the principle of equivalence it was recognised that in *Totel Ltd* v *HMRC* [2017] 1 WLR 2313, the Court of Appeal had held that because some domestic law claims such as for unfair dismissal were subject to the same employment tribunal regime as community law-based claims, the principle of equivalence was not breached. *Totel* had, however, been appealed to the Supreme Court and so the matter could not yet be regarded as settled.

[11] It was not in dispute that the employment tribunal had no power to order diligence on the dependence (or any equivalent protective order like a freezing injunction in England). Nor, it was submitted, did any Scottish court have power to grant diligence on the dependence in relation to a discrimination claim in the employment tribunal. Exclusive jurisdiction was given to the tribunal by the Act. In contrast to the parallels suggested by the respondent (such as arbitration), no such application could competently be presented to a court. It was far from clear what the legal basis would be for a parallel action that was manifestly incompetent. The wording of the relevant provisions of the Debtors (Scotland) Act 1987 gave no indication that a warrant to arrest could be granted with regard to a complaint in a different action. Any proceedings raised in the sheriff court for the purpose of obtaining arrestment would be met by an unanswerable or at least strongly arguable plea of *lis alibi pendens*. An award by the employment tribunal was enforceable in terms of the 1996 Act without any sheriff court involvement, so the hypothetical protective sheriff court proceedings would have no subsequent purpose. Without a mechanism for interim protection, the principle of effectiveness was breached: cf *R* v *Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.

[12] In any event, even if such a course of action could be taken, it would require parallel proceedings in two different fora. The obvious expense (including court fees) and inconvenience that this would involve was, in the absence of a satisfactory justification by the respondent, sufficient to render such a course excessively difficult and thus breach the principle of effectiveness. The existence of after-the-event remedies such as sequestration or liquidation of a former employer was irrelevant for present purposes: they did not address the mischief of an employer who was deliberately dissipating the assets of a business to defeat a tribunal award. Similarly, doing diligence after the tribunal had issued its decision would not assist a claimant in the petitioner's position.

[13] For these reasons, the remedy afforded by the Act to discrimination claimants who were required by statute to pursue their claims in the employment tribunal was not effective in comparison to claimants who required to pursue their claims in the sheriff court where protective diligence could be sought. There was just as much need for protection of employment tribunal claimants as sheriff court claimants. The fact that arrestment on the dependence would not be granted in all cases was irrelevant; the claimants to whom it would be granted if available were those whose rights were breached. The difficulties faced by employment tribunal claimants had been highlighted in published reports of surveys showing that the majority of successful employment tribunal claimants did not recover their awards in full. It would be entirely feasible to confer power on employment tribunals to order arrestment on the dependence. In the absence of such a power, the principle of effectiveness was breached, and declarator should be pronounced accordingly.

**Argument for the intervener**

[14] On behalf of the intervener it was agreed that the core issue was whether the principle of effectiveness was breached by the absence of a procedural rule enabling protective measures to be taken in respect of a discrimination claim in the employment tribunal. Effective judicial protection sometimes required national procedural rules to be adapted to meet the member state's obligations under community law. The principle of effective judicial protection was also enshrined in the European Convention on Human Rights, and the importance of effective enforcement procedures was recognised in Strasbourg case law. As regards the availability of protective measures in the sheriff court in respect of an employment tribunal claim, senior counsel adopted the submissions on behalf of the petitioner, noting that it did not appear that any claimant had ever taken or attempted to take this course of action.

[15] It was readily apparent from the reports that had been lodged (a 2013 study by the Department for Business Innovation & Skills of payment of tribunal awards; and a 2014 report to the Citizens Advice Bureaux on enforcement of employment tribunal awards) that there was a problem, especially in Scotland. The former study indicated that in Scotland, even where the claimant had taken enforcement action, 46% had received no payment and a further 13% had been paid in part only. The 2014 report contained similar findings. Certain other EU jurisdictions had protective procedures in employment-related claims.

[16] The present system also breached the principle of equivalence. According to *Totel*, the court required to identify the comparable domestic action and then, if it was governed by different procedural rules, examine the justification for the difference. In the present case the petitioner's situation should be compared with a claimant seeking redress for harassment, victimisation or discrimination on the grounds of religion in a non-employment

context, such as in the provision of a service or in the context of further or higher education. Such a claimant would be required by the Act to pursue her claim in the sheriff court and would have the benefit of being able to seek arrestment on the dependence. In the absence of justification, the principle of equivalence was not met.

[17] In addition, article 21 of the European Charter of Fundamental Rights prohibited discrimination on any ground in the implementation of community law. The Act discriminated in its implementation of the Gender Goods and Services Directive and the Equal Treatment Directive by selecting different fora for different disputes. The Directives contained no justification for such discrimination. It was for the respondent to justify the difference in treatment under reference to article 52(1) of the Charter, which stated that limitations on the exercise of rights recognised by the Charter could be made only if they were necessary and genuinely met objectives of general interest or the need to protect the rights and freedoms of others.

**Argument for the respondent**

[18] On behalf of the respondent it was submitted that the prayer of the petition should be refused. It was a matter for each member state what remedy was provided, so long as the suite of remedies were of sufficient quality to be regarded as effective. It could not be said as a generality that after-the-event remedies were always irrelevant or insufficient.

[19] The fact that a court did not possess the power to determine the merits of a case did not mean that it did not have jurisdiction to grant security for a claim or to enforce a party's rights once ascertained. This was true both where the claim was made in a foreign court (*Hawkins* v *Wedderburn* (1842) 4D 924; *Fordyce* v *Bridges* (1842) 4D 1334) or in an arbitration (*Motordrift A/S* v *Trachem Co Ltd* 1982 SLT 127). The proposition should apply *a fortiori* to

public tribunals constituted under the law of Scotland. It was not barred by *lis alibi pendens* (*Hawkins*), nor by exclusive jurisdiction resting with another authority (*Fordyce*). In the present circumstances, the exclusive jurisdiction conferred on the employment tribunal to determine the merits of the petitioner's complaint was not incompatible with a court rendering assistance, if required, to make the remedy effective.

[20] It followed that proceedings could be presented in the sheriff court seeking a sum representing the anticipated award from the employment tribunal, with an application for diligence on the dependence. Procedural rules had to be interpreted in such a way as to contribute to attainment of effective judicial protection (*Factortame*). The court would have discretion to grant diligence in such circumstances under section 15C of the Debtors (Scotland) Act 1987. Similar security had been granted in England: *Amicus* v *Dynamex Friction Ltd* (2005) IRLR 724).

[21] Separate court proceedings to obtain security would not be practically impossible or excessively difficult. All that would be required would be a short hearing on the application for diligence, and not a lengthy satellite litigation. No question of limitation of fundamental rights arose in this case: the question was simply whether an effective remedy was available. It was recognised that the reports referred to by the petitioner and the intervener indicated that the current situation regarding enforcement of employment tribunal awards was unsatisfactory, but the petitioner had focused on the wrong target. Pursuers and claimants in both courts and tribunals were exposed to the risk of a defender's insolvency or inability to pay, and did not obtain automatic protection against that risk. Pursuers in court actions were not automatically entitled to the protection of arrestment on the dependence.

[22] As regards the intervener's submissions, the same considerations applied to the assessment of effectiveness under human rights law as under community law. There was no

rule precluding a state from imposing upon a party some or all of the costs of enforcement of a tribunal award; the same applied to the costs of seeking diligence on the dependence. With regard to equivalence, it was a complete answer that certain statutory rights under the Employment Rights Act 1996, such as the right not to be unfairly dismissed, were similar claims that had to be pursued in the tribunal. It was irrelevant that discrimination claims in the employment field were comparable to discrimination claims that could be litigated in the sheriff court. The respondent was not obliged to advance a policy justification for differences between the sheriff court and employment tribunal regimes, provided that the protection afforded to claims relying on community law was equivalent as a totality to that afforded to comparable national law claims. If any justification was required, it consisted of the careful scrutiny required of applications for diligence on the dependence. The different treatment of discrimination in the field of employment and discrimination in the field of goods and services did not itself constitute discrimination on a ground such as sex, race etc in the sense used in article 21(1) of the Charter of Fundamental Rights.

**Decision**

***The principle of effectiveness***

[23] It is common ground among the parties that the principle of effectiveness requires the UK to provide an effective remedy for a claim to the employment tribunal, and that the tribunal has no power to grant diligence on the dependence or any equivalent measure protecting the claimant against a respondent's inability to pay or, indeed, its wilful dissipation of resources prior to determination of the claim. I agree with the petitioner's submission that after-the-event remedies which may permit protective action to be taken

during the process of enforcement of a tribunal award are not of themselves sufficient to provide an effective remedy.

[24] I accept also that the principle of effectiveness would be breached by the absence of any mechanism such as diligence on the dependence to protect, prior to determination of his or her claim, an employment tribunal claimant's prospective right to compensation from the risk of a respondent's failure to meet an award. That seems to me to follow from the decision of the Court of Justice in *Factortame (No 2)*, applied by the House of Lords at the reference above cited. The judgment of the Court of Justice (set out at page 644-5) was that

> "Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule".

The form of interim relief at issue in *Factortame (No 2)* was interim injunction, which the House of Lords had held the courts had no jurisdiction to grant in terms that would involve either overturning a UK statute in advance of a decision by the Court of Justice that it infringed community law or granting an injunction against the Crown. In my view, however, the principle established is sufficiently broad to encompass interim relief in the form of diligence on the dependence. The matter was helpfully discussed by the Advocate General (Tesauro), who addressed the fact that there was likely to be a gap in time between the assertion of the existence of a community law right and its establishment by judicial decision as follows (paragraph 18):

> "…Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of

> establishing the right, which was also specifically affirmed by the Court of Justice when it linked interim protection to a requirement that, when delivered, the judgment will be fully effective…"

In my opinion that statement of purpose is applicable to interim protection of effective exercise of a right to compensation for breach of the community law principle of equal treatment. A rule of national law which precluded such protection would have to be set aside.

[25] The principal issue between the parties therefore comes to be whether, as a matter of law, the UK provides an effective system for protection of the rights of persons with claims for breach of the community law principle of equal treatment which fall within the jurisdiction of the employment tribunal in Scotland. More specifically, the issue is whether a mechanism exists whereby such claimants can obtain diligence pending the outcome of their tribunal claim. The subsidiary issue is whether, if so, that mechanism is such as not to render the exercise of those rights practically impossible or excessively difficult.

[26] In *Hawkins* v *Wedderburn (supra)*, an action for payment was brought in an English court against defendants domiciled in England who owned property in Scotland. An action on the same grounds was subsequently raised in the Court of Session. The pursuers stated candidly that they only intended to insist in the Scottish action for the purpose of obtaining diligence against the defenders' property in Scotland, and did not intend to pursue the merits of the case in the Scottish court. The defenders argued that the Scottish action was incompetent, or in any event fell to be dismissed on the ground of *lis alibi pendens.* The Second Division having been equally divided in opinion, the other judges were consulted. It was held by a clear majority that the Scottish action was competent and did not fall to be dismissed. Delivering an opinion with which most of the others agreed, Lord Mackenzie stated (page 940):

> "…There seems *prima facie* no room for doubt, that if, in favour of the defenders, proceedings be sisted until the issue of the suit in the English court, that is the utmost the defenders can ask. For by that the defenders are entirely relieved from the hardship of double discussion, or discussion in the Court least qualified to investigate the facts and law of the case; and the only effect of sustaining process with such a sist is, that after decree shall be pronounced in England, the action here will then be more speedy than if it had to be raised *de novo*; and legal and just diligence in this country for due execution of judgment in the case will be better had."

In a concurring judgment, Lord Justice-Clerk Hope observed (page 944-5):

> "… 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—and it seems to me to be of little moment from what cause, if he is not to blame—to follow out the action at the time, but must wait the decision of another tribunal. I take the case of a matter being under submission by regular deed, which completely bars the second trial and prosecution of the matter before any other tribunal. Yet an action may be raised, and will be sustained for the purpose of security, and that although the submission is not noticed or founded on in the summons… 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."

[27] Much the same point came before the court again a few months later in *Fordyce* v *Bridges (supra).* An heir of entail of Scottish property and the beneficiary under an English will had raised proceedings in England to set aside various earlier English court orders. He then raised an action in Scotland, ostensibly for reduction of the English court orders but in reality to enable him to use diligence on the dependence against the Scottish property. The case differed from *Hawkins* v *Wedderburn* in one material respect: the substantive proceedings to set aside English court orders could not competently have been pursued in Scotland. It was held, however, that the earlier case was not distinguishable on this ground, the Lord Justice-Clerk stating (page 1343):

> "…In the view I take of the question involved in this case, and decided by the judgment in *Wedderburn*, 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."

[28] Taken together, these cases established that:

- 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;
- Such an action was not to be dismissed on the ground of *lis alibi pendens*; and
- It was of no consequence that the Scottish court had no jurisdiction to decide the merits of the action.

The two cases appear to have attracted little judicial comment over the years, perhaps because the law regarding enforcement of English judgments in Scotland (or vice versa) was amended by the Judgments Extension Act 1868, section 2 of which provided that a judgment of an English court, once registered in Scotland, was enforceable as if it were a decree of the Court of Session. In *Atkinson & Wood* v *Mackintosh* (1905) 7F 598, in which a plea of *forum non conveniens* was sustained, the pursuer, founding upon *Hawkins* and *Fordyce*, moved the court to sist the action so that his arrestments on the dependence would remain in place pending the raising of proceedings in England. The court refused to do so and dismissed the action. Lord President Dunedin observed that if *Hawkins* had been in point, he would have been minded to send the case before him to a larger court for reconsideration of

*Hawkins* in the light of differences created by the passing of the 1868 Act. Lord Pearson observed:

> "In [*Fordyce*], the opinion of Lord Justice-Clerk Hope, which may be regarded as expressing the doctrine at its highest, distinctly says that it is the dependence of the suit in England which gives jurisdiction in Scotland, to the effect of securing the defender's property for the ultimate safety of the pursuer. For my part, while giving all due obedience to the principle laid down by a majority of the whole Court in *Hawkins*, I am not prepared to take a step further in the same direction, which we should be doing if we were to sustain the present action to the limited effect of enabling the pursuers to secure funds to answer a decree to be pronounced in an English proceeding not yet begun…"

[29] Despite these statements, it does not appear that the continuing authority of *Hawkins* and *Fordyce* was subjected to review in any subsequent case. The decisions themselves are now superseded, in relation to proceedings in *inter alia* England and Wales, Northern Ireland, or any Brussels or Lugano contracting state, by section 27 of the Civil Jurisdiction and Judgments Act 1982, which authorises the Court of Session to grant warrant for arrestment of assets in Scotland, inhibition over property situated in Scotland, interim attachment of corporeal moveable property in Scotland, or interim interdict, where proceedings have been commenced in another relevant jurisdiction.

[30] The situation regarding protective diligence for the purposes of arbitration proceedings was considered in *Motordrift A/S* v *Trachem Co Ltd (supra)*. A Norwegian company raised an action in the Court of Session against an English company, using arrestments of funds in Scotland to found jurisdiction. The defender sought recall of the arrestments on the ground that the parties had agreed to resolve their dispute by arbitration under English law, so that no decree would ever be pronounced in Scotland. Refusing the motion for recall, the Lord Ordinary (Ross) said (page 128):

> "It is to be assumed that when defences are lodged, the defenders will move for the action to be sisted pending arbitration, and it seems likely that that will be done. I am not, however, satisfied that a decree could never be pronounced in this action, as

> counsel for the defenders suggested. The jurisdiction of the court is not wholly displaced by an agreement to refer disputes to arbitration…
>
> …If for any reason the arbitration in England were to founder, the issue between the parties could still be resolved in the present process. However, even if the arbitration in England reaches a conclusion, and that conclusion is in favour of the pursuers, the pursuers may require to resort to the Scottish courts in order to enforce their rights, and, in my opinion, the present process with a pecuniary conclusion directed against the defenders would be a suitable means for enforcing these rights. I accept that some amendment or adjustment might be necessary, but basically it would remain an action against the defenders containing a pecuniary conclusion. This is not a situation where a new and independent action would be required to enforce any decree-arbitral; in my opinion, the pursuers would be entitled to use the present process to enforce any decree-arbitral in their favour relative to the matters raised in this action.
>
> In these circumstances, I am unable to agree with counsel for the defenders that no decree in the pursuers' favour could ever be pronounced in this process…"

It thus appears to have been a feature of Lord Ross's reasoning that there was at least a possibility that the court would one day be asked to pronounce decree in the action.

[31] Finally in this review of the authorities, I should mention the decision of the English High Court in *Amicus* v *Dynamex Friction Ltd (supra)*. It was held that the court had power to make a freezing order in respect of a pre-existing cause of action before an employment tribunal. Royce J noted that counsel for the defendant had contended that an employment tribunal claimant could not be regarded as having a cause of action that could be afforded protection by the court if the respondent appeared to be about to dissipate assets and thus frustrate the proceedings, and observed that:

> "…It would be highly unfortunate if this court did not have jurisdiction in circumstances where a person with a very strong case for compensation in the employment tribunal was frustrated by a respondent or defendant who is able to dissipate assets and thus bring to an end any realistic prospect of that individual recovering compensation."

[32] The circumstances of the present case are not exactly on all fours with any of the Scottish authorities to which I have referred. In *Fordyce* and in *Motordrift* it was held

competent to bring proceedings before a Scottish court in order to obtain interim protection in the form of diligence on the dependence, even though it would not have been competent to pursue the substantive issue because another forum had exclusive jurisdiction. In both of those cases, however, there was envisaged at least a possibility that the Scottish court proceedings might have to be used at some future date in connection with enforcement of the order of the competent forum: ie the order of the English court in *Fordyce*, or the decree arbitral in *Motordrift*. That is not the position with regard to an order by an employment tribunal for payment of compensation which, as I have mentioned, is by virtue of section 15 of the Employment Tribunals Act 1996 enforceable as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff. Indeed, there do not appear to be any circumstances in which the protective court action would ever have to be used for anything other than its initial purpose of facilitating diligence on the dependence. Does that, then, render incompetent an action raised purely to obtain diligence on the dependence?

[33] In my opinion it does not. As a starting point, I can identify no rule of law which would have this effect. Section 15A of the Debtors (Scotland) Act 1987, which confers upon *inter alia* the sheriff the power to grant warrant for diligence by arrestment or inhibition on the dependence is in general terms. Under section 15A(2), warrant for arrestment requires a conclusion for payment of a sum other than by way of expenses, but section 15C provides that it is competent to grant diligence on the dependence for a future or contingent debt. There is no requirement that the contingency be resolvable in the action in which the warrant is granted. Any argument by the defender that the action should be dismissed on the ground of *lis alibi pendens* would, in my opinion, be excluded by the authority of *Hawkins* and *Fordyce*. In any event I do not regard such an argument as sound in principle. The mischief with which the plea of *lis alibi pendens* is concerned is the need to contest two

actions with the same subject matter at the same time. As Lord Mackenzie observed in *Hawkins*, the defender is protected from such risk by the sisting of the protective action pending the outcome of the substantive proceedings elsewhere.

[34] The matter goes further, however, when one bears in mind that the arguments in these proceedings concern effective enforcement of community law rights. Just as *Factortame (No 2)* provided the foundation of the petitioner's argument that national law must provide effective interim protection pending the establishment of the existence of a claimant's community law right to compensation, so it is destructive of the argument that UK law currently fails to provide protection in relation to employment tribunal claims in Scotland. If it were the case that there was a rule of domestic Scots law that diligence on the dependence could not be sought in a Scottish court in order to protect such claims, then the principle of effectiveness would, according to *Factortame*, require that rule to be set aside.

[35] In reaching the above conclusion, I see no reason to distinguish between the powers of the sheriff court and the Court of Session respectively. The 1987 Act makes no difference between the two in conferring power to grant warrant for diligence on the dependence, and it follows that if, as I have held, it is competent for a Scottish court to grant protective diligence for employment tribunal proceedings, there is no basis for restricting that competency to the Court of Session.

[36] Nor do I attach any weight to the statement made in the course of argument that the intervener was unaware of any such action having been taken by an employment tribunal claimant. There may be a number of reasons for that: in particular, it may only be in a minority of cases that the ability and willingness of a respondent to satisfy an award of compensation is in doubt at the time of commencement of the tribunal proceedings. I agree with senior counsel for the intervener that the reports drawn to my attention paint a

concerning picture regarding enforcement of tribunal awards. They do not, however, allow any conclusion to be drawn as to the extent to which the availability or otherwise of interim protective diligence has been a material factor. In only a minority of cases was the reason for non-payment stated to be the employer's refusal or inability to pay, and even in such cases it is not possible to ascertain from the data in the reports whether arrestment on the dependence would have made any difference. Warrant for diligence on the dependence is not now, of course, granted automatically. I am not persuaded that the petitioner, were she to have raised a protective action in the sheriff court for a sum representing a reasonable estimate of the amount likely to be awarded by the tribunal if she were successful, would have been in a worse position than that of a pursuer in a non-employment-related sheriff court action against the same defenders.

[37] I turn then to the question whether the need to raise protective proceedings in a separate action renders the exercise of the petitioner's community law right practically impossible or excessively difficult. On behalf of the petitioner it was submitted that *any* limitation on the exercise of a community law right, including additional expense or inconvenience, was illegitimate unless it could be justified by the member state as proportionate. Here there was (i) a limitation, consisting of the need to raise parallel court proceedings, (ii) an alternative available solution, consisting of conferring a statutory power to award diligence on the dependence upon employment tribunal judges; and (iii) no adequate policy justification to enable the court to assess proportionality. The situation was said to be on all fours with *R (Unison)* v *Lord Chancellor* [2017] ICR 1037, the case concerning employment tribunal fees.

[38] I reject this submission. In my opinion the absence of a power to grant diligence in the employment tribunal, taken together with what I have held to be the availability of

interim protection in the sheriff court (or Court of Session), does not constitute a limitation in the sense discussed in *Unison.* The question is not whether there is an adequate policy justification for requiring protective proceedings to be raised in the sheriff court, but rather whether that requirement renders the exercise of the right practically impossible or excessively difficult: cf *Impact (supra)* at paragraph 51. There is no obligation on member states to provide an ideal solution: the obligation is merely to provide a solution that does not breach the principle of effectiveness. In my opinion the need to seek interim protection in a court, rather than in the tribunal, does not breach that principle. The additional expense and inconvenience occasioned by requiring to raise an action in the sheriff court which will proceed no further than an application for a warrant to arrest is likely to be modest. The cost of the application itself would be incurred regardless of the forum. The standard of practical impossibility or excessive difficulty is a high one, and is not in my opinion met by what would be required of a claimant who wished to obtain protective diligence, in an appropriate case, from a court.

***The principle of equivalence***

[39] In *Totel Ltd* v *HMRC (supra)*, it was noted by the Court of Appeal that there was ample ECJ jurisprudence to support what was described as the no "most favourable treatment" proviso as an established feature of the equivalence principle. In other words, the court held (paragraph 47, per Arden LJ), that it was open to a member state to apply any available set of rules which were already applied to similar claims to an EU-derived claim, provided that an EU-derived claim was not selected for the worst treatment. In the present case the question is whether the UK has acted in accordance with the equivalence principle in treating employment-related discrimination-based claims in the same way as other

employment-related claims, or whether it breached the principle by failing to treat such claims in the same way as non-employment-related discrimination-based claims.

[40] In my opinion, the conclusion that I have reached in relation to the principle of effectiveness largely disposes also of the argument based upon the principle of equivalence. If, as I have held, interim protection by way of an application to the court is available to claimants such as the petitioner, then it makes no difference what domestic action her claim is compared with, because in all cases interim protection is available one way or another. Even if I were wrong in my primary conclusion, I am not persuaded that the appropriate comparison is not with other employment-related claims. As Arden LJ observed in *Totel* at paragraph 51, the ECJ case law does not make clear how a national court is to determine, for the purpose of the equivalence principle, whether an action is "similar" to another action, and that the degree of abstraction necessary to find whether similarity exists is a matter of judgement for the national court. In my judgement, the appropriate comparison is with employment law rights not derived from community law. It is clear from the titles and recitals of both of the relevant directives that the employment context is central to their purpose of securing equal treatment. I therefore regard it as appropriate, when considering the principal of equivalence, to focus on the employment context, rather than upon non-employment circumstances where discrimination, including harassment, might occur. That being so, there is no material difference between the pursuit of a community law-based claim for discrimination and a domestic law-based claim for, say, unfair dismissal. For these reasons, I hold that the circumstances of the present case do not give rise to a breach of the principal of equivalence.

***Convention and Charter rights***

[41] In *Apostol* v *Georgia* [2006] ECHR 999, the European Court of Human Rights reiterated (paragraph 54) that the right under article 6(1) ECHR to have a claim brought before a court was not merely a theoretical right to secure recognition of an entitlement, but also included the legitimate expectation that the decision would be executed. The Court further observed, in *SC Prodcomexim Srl* v *Romania (No. 2)* [2010] ECHR 1054 (paragraph 39), that the state has a positive obligation to organise a system for enforcement of judgments which is effective both in law and in practice. In my opinion, however, the ECHR jurisprudence takes the matter no further than the community law principles. If, as I have held, arrestment is available to an employment tribunal claimant by means of a protective action in a court, then there is no breach of the claimant's article 6 rights because the UK has provided a system for enforcement that is effective in law and in practice.

[42] Nor, in my view, is the intervener's argument based upon article 21(1) of the European Charter of Fundamental Rights well founded. I accept the respondent's submission that a difference in treatment between, on the one hand, discrimination in the employment context and, on the other, discrimination in connection with supply of goods and services, does not itself constitute discrimination based on a ground such as sex, race etc, so as to fall within the scope of article 21(1). There is no reason why a member state should not adopt different regimes for different types of interaction where discrimination might take place, so long as the principle of non-discrimination is promoted within each of those regimes. In any event, for the reasons set out above, I do not consider that there is a material difference between the two regimes so far as interim protection is concerned.

**Disposal**

[43] For these reasons I shall sustain the third plea-in-law for the respondent and refuse the petition.