Julian Milford KC successful in Court of Appeal case concerning contract worker discrimination

The CoA has today (24 May 2024) handed down an important judgment on the scope of contract worker discrimination: *Boohene v The Royal Parks Ltd.* This was a claim by 16 contract workers carrying out work for The Royal Parks (TRP) under a contract between TRP and Vinci, a large outsourcing company. The claimants alleged that TRP had applied a provision, criterion or practice (PCP) of paying its own employees the London Living Wage (LLW), but not requiring its contract workers to be paid the LLW. They said this indirectly discriminated against them on grounds of race. The claim succeeded at first instance. The Tribunal found that TRP had applied a PCP that its own employees should be paid the LLW and workers on the Vinci contract should not be paid the LLW; the PCP was indirectly racially discriminatory because a much higher proportion of workers on the Vinci contract were black or minority ethnic, than TRP's own employees; and there was no justification for the PCP, because the only justification relied on was cost. Such an approach has potentially very wide implications for employers' ability to maintain a "two tier" workforce, where their own employees are guaranteed the LLW, but contract workers are not.

The EAT overturned the Tribunal's judgment on the narrow and fact-specific basis that the Tribunal and claimants had proceeded on the basis of an illogical PCP and "pool" for comparison, because the PCP and pool should properly have applied to and included all TRP's employees, and all its contract workers, rather than simply workers on the Vinci contract. Because the claimants had adduced no evidence about the racial makeup of TRP's contract workforce generally, the claim had to fail.

The CoA has now upheld the EAT's finding on the PCP/pool. But it has also rejected the claimants' appeal on the wider and much more generally important basis that the subject matter of the claim did not fall within the scope of discrimination against contract workers under s.41 Equality Act 2010 at all. The Court focused upon the wording of s.41(1)(a), which prohibits discrimination in the "*terms on which the principal allows the worker to do the work*". The Court said that this wording was not concerned with detriments which were the result of the terms of the worker's contract of employment, but only with detriments imposed by the principal: [68]. In this case, the alleged discrimination concerned contractual terms between the claimants and their employer, Vinci. Such discrimination could not fall within s.41(1). The Court pointed out that this result was consistent with equal pay law. If the claimants had been basing their claim on sex rather than race, no equal pay claim could have succeeded, because they had a different employer from TRP's own employees, and their terms of employment accordingly did not derive from a "single source".

That legal approach was sufficient to dispose of the appeal. However, the Court said that it also did not consider that TRP had "directed" or "effectively dictated" what the claimants should be paid as a matter of fact (as the EAT had concluded). So it had not "applied" any PCP to the claimants. TRP had paid a contract price transparently priced on the basis that Vinci would not pay the claimants the LLW, when a "LLW rate" had been offered. But the additional element of transparency did not affect the fundamental analysis: TRP as principal controlled the claimants' rate of pay only in the same sense that any contractor would do so in any contracting-out case, simply by agreeing a contract price.

Julian Milford KC appeared for The Royal Parks.