Procurement and the ‘London living wage’: *Boohene v Royal Parks Ltd* Court of Appeal (Civil Division) [2024] EWCA Civ 583

The *Boohene* case involved a creative, but ultimately unsuccessful, attempt to use the rarely-litigated ‘contract worker’ provisions in s. 41 Equality Act 2010 to challenge alleged unequal pay on grounds of race.[1] The case is of importance to the many workers, in both the public and private sectors, whose job involves providing a service to another firm which has placed a contract for that service with their employer. I will label these firms the ‘purchaser’ or ‘principal’ and ‘provider’ or ‘employer’ respectively. Where the service is labour-intensive, those workers’ wages will typically make up a significant proportion of the contract price paid by the purchaser. Although the provider is legally responsible for paying the workers’ wages as their employer, the purchaser also influences the amount they can be paid through the contracting process. Competitive tendering procedures put pressure on providers to keep costs, including wage costs, to the lowest possible level in order to put forward a cheaper bid. Conversely, purchasers can improve workers’ situation by indicating that they are willing to cover the cost of higher wages, for example, by signing up to a ‘living wage’ campaign. In *Boohene*, the purchaser’s decision to guarantee a living wage to its own directly-employed workers but not to the workers employed by its contractors, despite a clear difference in the racial composition of the two groups, was held not to amount to discrimination on grounds of race against the contract workers under s. 41(1). This was because their wages were found to have been set by their employer, even though the purchaser had chosen not to pay a higher contract price which would have guaranteed them a living wage.

Facts

[1] *Boohene v Royal Parks Ltd* [2024] EWCA Civ 583.

Royal Parks Ltd (RPL) is a charity responsible for the running of some of London's open spaces, including the Royal Parks. It does this under contract to the Department for Culture, Media and Sport (DCMS). It employs around 160 office workers, of whom around 140 are white.[2] It uses various outsourcing strategies for the provision of catering, event management and manual work within the parks. In 2014, it entered into a contract with Vinci Construction UK Ltd for the cleaning of toilets and other buildings. Around 50 people worked for Vinci on this contract, of whom around 40 were black or of another UK ethnic minority group.[3]

RPL pays at least the London Living Wage (LLW) to its directly-employed staff.[4] This is a non-statutory rate set by the Living Wage Foundation, which encourages employers to make a public commitment to pay it.[5] The idea is to promote a wage on which a person could realistically live, so it is higher than the statutory National Minimum Wage (NMW) and there are different rates for London and the rest of the UK.[6] However, RPL did not apply the same requirement to its contracting partners. Vinci was invited to put forward two tenders for the cleaning contract – one paying the LLW and one not doing so – and RPL awarded the contract on the basis of the non-LLW bid, noting that it could not afford to pay the additional cost involved.[7] This presumably reflects (in turn) the constraints of the budget awarded to RPL by DCMS. It is worth noting at this point that it was unusually clear in this case that the purchaser had influenced the rate of pay of the workers employed to carry out the cleaning contract. In other situations, where a contractor has multiple contracts or uses the same workers across different contracts and sites, it can be more difficult to pinpoint the purchaser's role in determining how much they will be paid, though the contract price is always a relevant factor.

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[2] *Boohene v Royal Parks Ltd*, Employment Tribunal, 17 November 2021, [71].
[3] Ibid.
[4] Above n 1, [9].
[5] https://livingwage.org.uk/.
[6] The rates at the time of writing are £13.15 in London and £12 for rest of the UK.
[7] Above n 1, [10]-[11].

In 2019, RPL decided to extend the LLW to its contractors as its various contracts came up for renewal.[8] The cleaners employed on the Vinci contract started to receive the LLW in late 2019 or early 2020. The case concerned the workers' pay from 2014, when the contract was awarded, to the point at which RPL and Vinci agreed that they should receive the LLW.

The claim in outline

The workers' central claim was that RPL had discriminated against them as 'contract workers' under s. 41 Equality Act 2010 by failing to require their employer, Vinci, to pay them the LLW. Giving the judgment of the Court of Appeal, Underhill LJ broke the application of s. 41 down into three stages: identifying a relationship of 'principal' and 'contract worker', determining whether any discrimination has taken place, and (if so) deciding whether the discrimination falls within one of the forms listed in s. 41.[9]

The first stage, identifying a relationship of 'principal' and 'contract worker', was relatively straightforward in this case.[10] The relevant provisions of s. 41 are as follows:

(5) A 'principal' is a person who makes work available for an individual who is —
(a) employed by another person, and
(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).
(6) 'Contract work' is work such as is mentioned in subsection (5).
(7) A 'contract worker' is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

[8] Ibid [13].
[9] Ibid [48].
[10] Much of the existing case-law on s. 41 focuses on this preliminary issue, so was of little assistance in this case.

It was accepted by the ET that RPL was a ‘principal’ within the meaning of the section, in the sense that it was making work available to the claimants who were employed by another (legal) person, Vinci. RPL did not appeal this finding in the EAT.[11]

To answer the second question, it is of course necessary to apply the usual tests, in this case, for indirect discrimination under s. 19 Equality Act 2010. It was contended on behalf of the claimants that RPL had applied a ‘provision, criterion or practice’ (PCP) of paying the LLW to its own directly-employed workers, but not to those working on the Vinci contract. It was argued that there was no material difference between the two groups of workers, because the LLW was intended to apply across the board, and that the PCP was discriminatory because of the striking difference in the ethnic composition of the two different groups of workers. The ET found that RPL had not provided a sufficient justification for the discrimination and RPL did not appeal this finding. However, both the EAT and the Court of Appeal held that the claimants had failed to make out their case for indirect discrimination because the PCP and thus the pool for comparison had been incorrectly formulated and applied.[12] The EAT described the tribunal’s conclusions on this point as ‘indefensible’.[13] I return to this point below.

The crucial question for the purposes of the appeal was the third one: if any pay discrimination had been present, would it have been prohibited by s. 41? The most plausible argument was under s. 41(1)(a), which provides:

(1) A principal must not discriminate against a contract worker —
(a) as to the terms on which the principal allows the worker to do the work…

At this stage, the role of the tribunal or court is to identify what the principal has done to determine the terms on which the work is to be

[11] Above n 1, [32].
[12] Ibid [78].
[13] *Royal Parks Ltd v Boohene* [2023] EAT 69, [79].

performed by the contract worker. The ET did not expressly address this issue, but the EAT, adopting a strongly purposive approach, found that RPL had 'effectively dictated' the terms on which the work was to be performed by choosing the non-LLW contract price over the LLW-compatible one.[14] The Court of Appeal disagreed, opting for the orthodox view that the payment of wages was a matter for the claimants' employer, Vinci, and not for RPL.[15] This meant that, even if indirect discrimination had been present, RPL would not have been liable for it as principal under s. 41.

Reversing the order followed by the Court of Appeal, I will briefly discuss the second question before turning to the third, which was the main focus of analysis in the judgment.

Indirect discrimination

The Court of Appeal identified three problems with the PCP identified by the ET, of paying the LLW to RPL's own workers but not requiring this of contractors. One was whether RPL had 'applied' a PCP at all, a question involving substantially the same issues as those arising in relation to s. 41. I return to these below. The other two problems were the identification of the correct pool for comparison, and the comparability of the terms and conditions of employment of the relevant groups of workers. Although the Court of Appeal's conclusions on these issues are *obiter* and somewhat buried in the judgment, they are worth considering because they have wider implications.

The ET described the PCP with specific reference to the workers employed on the Vinci contract. The EAT held that the claimants' case as pleaded was broader, referring to all workers employed via outsourcing arrangements.[16] The Court of Appeal upheld this conclusion both as a

[14] Above n 13, [70].
[15] Above n 1, [68].
[16] Above n 13, [78]-[84].

technical matter of pleading and as the most logical approach to defining the PCP on the facts.[17] RPL's practice of not requiring payment of the LLW was not confined to the Vinci contract, but was common to all of its contracted-out service provision. In turn, this meant that the correct comparison was between workers employed by contractors and workers directly employed by RPL. Since the claimants had not produced any evidence relating to the pay of other outsourced workers, the claim could not succeed. Although this did not affect the outcome of the case, which failed on the s. 41(1) point anyway, it serves as an important reminder of how significant – and unattainable – the evidential burden in a discrimination claim can be. Claimants in the position of the Vinci workers would have needed to obtain evidence relating not only to their own pay and those of the directly-employed workers, but also the pay of workers employed by other contractors.

The Court of Appeal chose not to address in detail another tricky question which would have arisen in relation to the PCP, which is whether the claimants and other workers working for RPL's contractors were sufficiently similarly-situated to RPL's directly employed workers for the comparison to be appropriate within s. 23(1) Equality Act 2010. This requires that there be 'no material difference between the circumstances relating to each case' to be compared.[18] The ET held that, because the LLW was intended to be a minimum standard of pay applicable to all workers in London, it did not matter that the two groups of workers did very different jobs or that there were historical differences in the way their pay had been set. The EAT found that this was a conclusion that the tribunal had been entitled to reach.[19] However, there is more than a hint in the judgment that the Court of Appeal would not have found this to be the case.[20] Differences identified in the judgment

[17] Above n 1, [78]-[92].
[18] It is worth noting that different requirements would have applied had the case been concerned with pay discrimination between women and men, a point I return to in the discussion below.
[19] Above n 13, [91]-[92].
[20] Above n 1, [74].

included different market rates for the relevant jobs, and the fact that RPL's directly-employed workers had traditionally been employed on civil service pay scales.

Did RPL set the claimants' pay?

The decisive issue in the case was whether RPL could be held responsible for the fact that the claimants – unlike its own workers – did not receive the LLW. In technical terms, this reflects the need to prove that the defendant has 'applied' the PCP for the purposes of s. 19 and, more importantly in this case, whether RPL as 'principal' had set the 'terms' on which the claimants were to work within the meaning of s. 41(1)(a). There are other options within s. 41(1), but sub-paragraph (a) was accepted as the most plausible fit.

The ET failed to address this issue, finding only that the claimants were contract workers and that indirect discrimination had been established.[21] The EAT attempted to supply the missing reasoning on the application of s. 41(1). It noted that, in strict contractual terms, the workers' terms and conditions, including their pay, were set by Vinci, not RPL. It recognised that there were limits to the role of s. 41(1):

> It is, however, important to recognise that section 41 provides a means by which a contract worker may complain about their treatment by a principal; it does not provide an alternative route (for example, to section 39 EqA) for such a worker to complain about the content of terms set by their own employer – it is not a means of simply allowing a contract worker to automatically seek parity of terms with persons employed by the principal.[22]

Having said that, the EAT identified a number of features of the factual matrix showing an unusual level of involvement by RPL in the setting of the claimants' wages.[23] These included asking Vinci to quote two

[21] Above n 1, [56].
[22] Above n 13, [68].
[23] Ibid [71]-[72].

different prices for the contract, one paying the LLW and the other not, and reserving the right to require payment of the LLW in the future. The EAT took the view that a purposive approach should be taken to s. 41:

> Having regard to the very specific choice made by the principal in this instance, and the real-world impact that had, and also to the further degree of control that it exercised on the minimum rate of pay that would be allowed to be paid to workers working on the toilets and cleaning contract, we consider the ET was entitled to reach the conclusion that this was a case falling within section 41(1) EqA.[24]

RPL had 'effectively dictated' or 'directed' how much the workers would be paid under the contract, and for that reason, the EAT found that it had determined the terms on which the contract workers would work within the meaning of s. 41(1)(a).[25]

The Court of Appeal reversed the EAT on this point. Underhill LJ began by identifying the mischief to which s. 41 was directed, which he saw as the ability of the principal to discriminate against contract workers *by virtue of its control over the work and the workplace*.[26] He contrasted this with the contract worker's rights under their contract with their employer. Classic examples of the kinds of problems s. 41 was intended to address were situations in which the principal refused to allow a contract worker onto the premises at all on discriminatory grounds, denied a contract worker access to facilities provided to others, such as a canteen, on discriminatory grounds, or imposed a dress code which discriminated against a contract worker because of their religious beliefs.[27]

Underhill LJ drew on the reasoning of the Court of Appeal in *Allonby*,[28] another outsourcing case, to justify this distinction.[29] The claimant in

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[24] Ibid [72], though as the Court of Appeal pointed out, the ET had not in fact made any decision on the point.
[25] Ibid [70].
[26] Above n 1, [57].
[27] Ibid [58].
[28] *Allonby v Accrington and Rossendale College* [2001] EWCA Civ 529, [2001] ICR 1189.
[29] Above n 1, [59]-[65].

Allonby had been employed as a part-time lecturer by a college, which then dismissed all its part-time lecturers and sought instead to obtain their services via an agency. This resulted in a drop in pay, because she was paid per lecture, but also in the removal of various other benefits she had previously enjoyed as an employee of the college. These included training opportunities, professional indemnity insurance, various notice rights and a right to payment for cancelled classes. One of the questions which arose in the case was whether she could bring a claim against the college in respect of the loss of these benefits, or whether they were 'contractual matters' which could only be the subject of a claim against her employer. The three judges in *Allonby* made slightly different comments on this distinction and its application on the facts, but all three appeared to agree that there was a distinction to be made.[30]

Having drawn this distinction, Underhill LJ then went on to apply it to the situation in *Boohene*.[31] He found that payment at a rate equal to or in excess of the LLW was a contractual matter for which the claimants' employer, Vinci, was responsible, not RPL, and therefore no claim could lie against RPL under s. 41(1)(a). There was no term relating to pay in the (non-contractual) relationship between the claimants and RPL. The EAT had, of course, avoided this conclusion by deciding that RPL had 'dictated' the terms on which Vinci had employed its workers. However, the Court of Appeal rejected that approach, for several reasons. First, the statutory language as interpreted in *Allonby* distinguished between matters which were the responsibility of the principal and matters which were the responsibility of the employer.[32] It would not be appropriate as a matter of construction to blur that distinction. Second, this conclusion was reinforced by the view that to blur the distinction would undermine the general idea familiar from equal pay law that a claim only lies when there is a 'single source' to remedy the discrimination.[33] Section 41 should not be used to get around that restriction. Third, and more

[30] Ibid [65].
[31] Ibid [66].
[32] Ibid [68].
[33] Ibid [70].

broadly, the Court of Appeal found the concept of 'dictating' terms to be problematic.[34] As Underhill LJ explained, it is a 'basic commercial reality in every contracting-out situation that what a supplier can afford to pay its workers… depends on the overall contract price'.[35] This was unusually apparent in *Boohene* because RPL had asked for different quotes based on payment or non-payment of the LLW and had opted for the price without the LLW. But this did not necessarily amount to 'dictating', according to Underhill LJ: RPL had not prohibited payment of the LLW and Vinci could have found the money to do so in other ways, for example, by cutting costs on materials or reducing its own profit. In other cases, the matter would probably be even less clear given the variety of costs making up the total contract price.

Discussion

The *Boohene* case raises in sharp form one of the major problems associated with outsourcing: the fragmentation of large, diverse workplaces into smaller, more homogenous units, making it easier for unfairness to develop around pay. To illustrate the point, it is helpful to imagine a counterfactual: a world in which RPL employed not only office staff, but cleaners, caterers, maintenance workers and others to run its parks. In other words, the vast majority of its activities would be carried out in-house. In that situation, it is inconceivable that RPL would have decided to pay the LLW to some staff and not others. Of course, it might have decided not to pay the LLW at all, to anyone, until it could afford to pay it to everyone. But the point of signing up to the LLW, as an employer, is to make a commitment to pay all staff at least at this level. Where some services are outsourced, it is much easier to set a minimum for some staff but not others, or to give some a pay rise but not others. The employer ultimately responsible for pay in a financial sense can hide behind the fact that other employers, the contractors, are responsible in

[34] Ibid [71].
[35] Ibid.

a legal sense, thereby concealing growing differentials between different groups.

This issue is exacerbated by the outsourcing process itself, in which bidders compete against each other to win contracts. Although there is nowadays much greater recognition that the cheapest bid does not always offer the best value in broader terms, a point reflected in modern procurement law, price competition is still a major factor and, in labour-intensive contracts, this can lead to downward pressure on workers' wages.[36] The NMW is important in setting a statutory floor below which wages cannot go.[37] But purchasers can also play an important role in counteracting the downward pressure on wages by taking an interest in what workers performing the contract are going to be paid. It is apparent from the judgments that RPL had done this to some extent, partly out of concern for the contractor's ability to recruit and retain workers to provide the relevant services, partly because it was worried about the reputational harm that might ensue if workers were not paid the LLW, and partly because it believed that paying the LLW was 'the right thing to do'.[38] However, it had not followed through because of the additional cost involved. While this must have reflected its own budgetary concerns – as noted above, RPL's funding is determined by the government – cost would not have been available as a defence had it been possible to bring a discrimination claim.

One source of legal protection for workers' terms and conditions of employment in an outsourcing situation is found in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).[39] TUPE applies to safeguard workers' jobs and to preserve their terms and conditions of employment if their work is outsourced to a contractor,

[36] E.g. Procurement Act 2023, s. 19, using 'most advantageous tender' rather than 'most economically advantageous tender', as was the case under the Public Contracts Regulations 2015 (SI 2015/102), reg. 67(1).
[37] National Minimum Wage Act 1998.
[38] Above n 13, [23].
[39] Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

transferred between contractors when a re-tendering exercise takes place, or brought back in-house.[40] In *Boohene* itself, some of the workers employed on the Vinci contract had transferred with these protections.[41] But the weaknesses of TUPE are well-documented. The contractor may be able to make changes if the sole or main reason is not the transfer itself but an 'economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation', a test which is not usually difficult to satisfy.[42] Even where the contractor is unable to justify a change on this ground immediately, it may become easier over time to prove that a change is not due to the transfer (though there is no 'time limit' on TUPE protection).[43] The decision in *Alemo-Herron* effectively precluded the option of protecting transferred workers' terms and conditions in a dynamic way by continuing to apply a public sector collective agreement after the transfer.[44] And of course TUPE only addresses the situation of transferred workers: people hired after the transfer to work on the contract can be paid at whatever rate the contractor chooses. Overall, while TUPE offers some limited protection, it does not serve to prevent pay differentials from developing over time between in-house and outsourced workers. This is particularly so where, as in *Boohene* itself, more generous pay policies are adopted for in-house workers but no steps are taken to ensure that outsourced workers get the same treatment.

Equality law provides another potential route to challenge emerging pay differentials but, as *Boohene* shows, the very fact of outsourcing typically works to limit the potential scope of application of this set of norms. In a large, diverse organisation – such as a local authority – with workers performing a range of different jobs, there is considerable potential for

[40] Ibid reg. 3.
[41] Above n 13, [5].
[42] Above n 39, reg. 4(4)-(5A).
[43] See the obiter remarks of Lord Slynn in *Wilson v St Helens BC* [1999] 2 AC 52, p 89.
[44] C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* EU:C:2013:521, [2013] ICR 1116. This is codified in above n 39, reg. 4A.

discrimination claims across different groups. This is most familiar in the context of equal pay claims brought by women. For example, in *Leverton*, nursery workers (mostly female) were able to compare their work with better-paid clerical officers (mostly male), arguing that their jobs involved similar levels of skill and effort.[45] In a contracted-out world, firms often specialise in a particular activity, making it much more difficult for workers to find comparators. The judgments in *Boohene* do not reveal whether Vinci had other staff, what they did or how much they were paid. But the 50 workers employed on the parks cleaning contract were, presumably, all paid roughly the same (low) wage, and it is quite possible that they simply had no-one else with whom to compare themselves. Of course, one obvious response to this is to say that the purpose of discrimination law is to tackle unjustified inequalities, not to develop a fairer labour market. However, as the counterfactual discussed above illustrates, the way in which firms and public bodies are structured – not something workers typically have any control over – dictates the boundary between a potentially actionable inequality under the Equality Act, and a more general (and probably not actionable) example of unfairness.

One solution to this is, of course, to permit comparisons to be made across different employing entities if certain conditions are met. This has been attempted in a few cases dealing with unequal pay between men and women under the Equality Act 2010 and EU law. There are important differences between these provisions and those applicable in *Boohene*, where the protected characteristic was race.[46] In an equal pay claim, the claimants must prove that they are engaged in like work, work of equal value or work rated as equivalent to that of a real (not hypothetical) comparator, that they are employed by the same or an

[45] *Leverton v Clwyd CC* [1989] AC 706.

[46] It was announced in the 2024 King's Speech that a bill would be put forward to create a specific statutory right to equal pay for claimants whose protected characteristic is race or disability, which may serve to reduce the differences between these causes of action. Note that there is no equivalent of s. 41 in equal pay law.

associated employer and, where they do not work at the same establishment as the comparator, that there are common terms across the different establishments.[47] These domestic law requirements are usually sufficient in themselves to preclude a comparison between outsourced and in-house workers. However, Article 157 TFEU, which provided an alternative basis for an equal pay claim during the UK's membership of the EU, has been interpreted by the CJEU to permit comparisons to be made across employing entities, but only where there is a 'single source' responsible for the pay discrimination which is able to put it right. Section 79 Equality Act 2010 was amended to retain the 'single source' test after the UK's exit from the EU.[48] In *Lawrence*, a group of school dinner ladies whose jobs had been outsourced by the council to a private firm sought to compare their pay with that of other workers doing equivalent work who were still employed by the council.[49] The claim in *Lawrence* failed because the pay of the dinner ladies and their comparators was attributable to the decision-making of two different employers. The EAT in *Boohene* counselled against reading across from the EU equal pay provisions into domestic equality law, where the potential scope of comparison is broader and less technical,[50] but in any event, the CJEU's reasoning comes back to the same point at issue under s. 41: was RPL responsible for deciding what the contracted-out workers were paid? This was explicitly addressed by the CJEU in its decision in *Allonby*:

> The fact that the level of pay received by the applicant is influenced by the amount which the college pays ELS is not a sufficient basis for concluding that the college and ELS constitute a single source to which can be attributed the differences identified in the applicant's conditions of pay and those of the male worker paid by the college.[51]

[47] Equality Act 2010, ss. 64-71.
[48] Equality Act 2010 (Amendment) Regulations 2023 (SI 2023/1425), reg. 5.
[49] C-320/00 *Lawrence v Regent Office Care Ltd* EU:C:2002:498, [2002] ECR I-7325.
[50] Above n 13, [92].
[51] C-256/01 *Allonby v Accrington and Rossendale College* EU:C:2004:18, [2004] ECR I-873, [48].

Thus, even under the arguably more generous ‘single source’ test as interpreted by the CJEU, a claim against RPL would have failed.

This brings me neatly to the core issue in *Boohene*: the meaning of s. 41(1). It is worth quoting the provision again in full:

> A principal must not discriminate against a contract worker—
> (a) as to the terms on which the principal allows the worker to do the work;
> (b) by not allowing the worker to do, or to continue to do, the work;
> (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
> (d) by subjecting the worker to any other detriment.

The first three sub-paragraphs correspond neatly to the three classic examples of situations generally believed to be caught by s. 41(1): applying a discriminatory dress code, sending the worker away because of their protected characteristic, or denying the worker access to workplace facilities such as a canteen. But s. 41(1)(a) simply refers to ‘terms’ and is clearly not just about dress codes.

There was general agreement in the case that s. 41(1)(a) was not intended to give workers a means of bringing discrimination claims against the principal when their proper avenue of redress lay against their own employer.[52] However, this apparently obvious point is difficult to apply when no claim would lie against the employer, generally because it does not (or would not) employ a person who could be a comparator. The claimants in *Boohene* (and *Lawrence* and *Allonby*) presumably had no claim against their employer because it did not employ the people with whom they wished to compare themselves. Perhaps a better way to put the point is that a grievance about pay should generally be made to one’s employer even if, in some cases, there is no basis for bringing any kind of legal challenge to the employer’s decision on pay.

[52] Above n 1, [57]; above n 13, [68].

The Court of Appeal sought to capture the relevant distinction by resorting to contractual terminology.[53] Issues relating to (contractual) terms and conditions of employment would be for the worker's employer to resolve, whereas issues relating to (non-contractual) terms applied by the principal to the worker would be caught. These terms are assumed to be non-contractual because there is unlikely to be a contract (even implied) between the worker and the principal, given that the situation is explained by the worker's contract with the employer and the employer's contract with the principal.[54] This approach produced the desired outcome in *Boohene* itself: the workers' pay was set by their contract with Vinci, not by any 'term' applied to them by RPL, so no claim lay under s. 41(1). However, there are two obvious problems with a contractual approach. One is that it produces a wholly formalistic answer to the issue at the heart of the *Boohene* decision: any influence exercised by a principal over the employment of contract workers will not give rise to liability where it is given effect via the terms and conditions of their contract with their employer. The other is that it creates possibilities to manipulate the situation through contract drafting. If a principal wishes to insist on a particular 'term', it can avoid a potential discrimination claim by insisting that the provider includes it in its contracts with workers, though its actions may be caught by other provisions of the Equality Act.[55] And if a principal wishes to deny a particular benefit to contract workers, it could make it a contractual entitlement of its own employees (though there may be other, pragmatic, reasons why the employer may not want to do this), thereby creating the impression that the matter is one for whichever entity is employing the worker.

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[53] Above n 1, [57]-[58].
[54] *James v Greenwich LBC* [2008] EWCA Civ 35, [2008] ICR 545.
[55] E.g. s. 111, as interpreted in *NHS Trust Development Authority v Saiger* [2018] ICR 297, [117], or s. 112. These provisions were not helpful in *Boohene* itself because there was no discrimination claim against Vinci on the facts. For a broader discussion of the potential of these types of liability, albeit in a different context, see A Bogg and PS Davies, 'Accessory Liability for National Minimum Wage Violations in the Fissured Workplace', in A Bogg et al (eds), *Criminality at Work* (OUP 2020).

Some of the older case-law uses ideas of control and influence in order to determine whether someone is a contract worker, and these ideas can be helpful in deciding whether a 'term' has been applied.[56] The purpose of the legislation is, after all, to deal with the opportunities a principal has to discriminate against a contract worker, and this is bound to involve some exercise of power over that worker. However, as Lady Hale reminds us in another context, there is no substitute for a close focus on the statutory language.[57]

With that in mind, was the Court of Appeal right to conclude that RPL did not set the terms on which the contract workers worked? With some reluctance, I think that it was. Admittedly, RPL did choose a contract price not involving payment of the LLW over a contract price that would have secured the LLW to Vinci's workers. But the relationship between the contract price and the workers' pay was not straightforward, even in this relatively simple case. The figures set out in the EAT's judgment make this clearer.[58] Vinci's bid for the five-year contract was close to £6 million, of which the payroll cost was £2.8 million. Payment of the LLW would have added just over £700,000 to the total contract price. Nevertheless, the payroll cost was slightly less than half the overall contract price. Presumably, the rest was made up of other costs, such as materials and administration, and of Vinci's profit. RPL did not forbid Vinci from paying the LLW, and it could perhaps have done so had it chosen to take less profit from the contract, or found a way to make savings on its other costs. It could even have opted to supply fewer workers but to pay them better. As a result of these variables, it is difficult to state clearly, even on these facts, that RPL was responsible for the decision that the claimants would not receive the LLW.

Of course, this does not reflect the view, held by many commentators, that the corporate veil is a central obstacle to the effectiveness of equal

[56] E.g. *Harrods Ltd v Remick* [1998] ICR 156, though it is not a requirement: *Leeds City Council v Woodhouse* [2010] EWCA Civ 410, [2010] IRLR 625.
[57] *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730, [39].
[58] Above n 13, [9].

pay law.[59] Allowing workers to compare across corporate entities could be an important way of broadening out the scope of possible claims and moving more towards a model in which pay is set sectorally rather than by individual firms. Exposing any public body or firm to a potential challenge if it paid the LLW to its own staff but did not insist on the same for its contractors' staff would broaden the scope of application of the LLW very significantly, and would do much to counteract the downward pressure on pay generated by outsourcing. However, there are significant practical problems with pursuing this approach. One is that it exposes purchasers to claims from prospective providers that they will only pay the LLW if the contract price is increased by a certain amount. These claims could be difficult to challenge, enabling firms to inflate their prices and profits without themselves contributing anything towards the payment of the LLW. This, in turn, might make it even less likely that purchasers commit to the LLW, leading to 'levelling down' instead of pay increases. It would also lead to complex factual enquiries as tribunals and courts sought to apply the EAT's test – whether the purchaser had 'effectively dictated' the workers' pay through the contract price – to much more intricate fact patterns than that in *Boohene*. The risk here is that claimants end up embroiled in lengthy and complex litigation, the costs of which outweigh any payment they are likely to obtain, already a well-documented problem in equal pay law.[60]

Importantly, though, the Court of Appeal's decision should not be taken to mean that a principal can *never* be liable under s. 41(1) when it has imposed discriminatory terms and conditions on a contract worker by insisting that they are included in the worker's contract by their employer. Take the example of a dress code which is discriminatory on religious grounds, with no justification. If it is included in the worker's contract, the worker will be able to bring a discrimination claim against their employer. But this might be a rather pointless exercise if it is still

[59] E.g. Sandra Fredman, 'Marginalising Equal Pay Laws' (2004) 33 ILJ 281.
[60] E.g. Sandra Fredman, 'Inching Forward: Preliminary Victory for Equal Value at Tesco and Asda' (2022) 51 ILJ 166.

clear that the principal will not accept workers who do not comply with the code. It would be much more useful to be able to bring proceedings against the principal as the person responsible for discriminating against the contract worker in relation to the 'terms' on which they were permitted to work.[61] This highlights a significant weakness of the Court of Appeal's contractual approach.

Conclusion

On a moral level, the conclusion that RPL did not discriminate is deeply unattractive. Even if it is accepted that RPL did not decide how much the workers would be paid, it did have a positive opportunity to ensure that they received the LLW and it chose not to pursue that opportunity because of the cost. This meant that a group of marginalised workers endured some five years of very low pay with no recourse. However, there is a more positive ending to the story. RPL eventually decided that it did want to move all of its contractors' workers onto the LLW as a minimum, and gradually brought in this approach as its various contracts came up for renewal. As noted above, this reflected its own view of the rights and wrongs of the situation, together with concerns about recruiting workers and pressure from the relevant trade unions. All of this goes to show that industrial, social and market pressure can work together to secure better terms and conditions for disadvantaged workers when equality law, with all its technical complexities, has failed.

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[61] See n 55 above for another approach to this situation.