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Employment Law Summer Update

By Roderick Moore, Counsel

Case Law

Introduction

1. As usual, given constraints of time and space, I have selected the decisions that seem most eye-catching, for whatever reason. In the main, they are taken from those that I have made a mental note to memorise on the basis that they are likely to have a practical bearing on the cases in which I have been or am likely to be briefed to advise or represent.

Contracts of Employment

2. It has long been the case that public law concepts have been deployed by Courts and Tribunals in assessing the parties' rights in relation to each other under a contract of employment. The most obvious example is the implied limit on the exercise of a discretion to award a bonus, as set out by the High Court in **Clark v Nomura** [2000] IRLR 766. It was held that the employer could not exercise the discretion irrationally or perversely, in other words the employer could not reach a decision that no reasonable employer could have reached.

3. In **Braganza v BP Shipping Ltd and Another** [2015] UKSC 17, the Supreme Court held by a majority that the public law principles set out in the old Court of Appeal case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223 applied to the decision making of the employer in respect of its finding as to the reason for an employee's death (death benefits would not be payable if it was decided that the employee had committed suicide).

4. The **Wednesbury** principles have two limbs: first, whether the right matters have been taken into account by the decision maker, and (2) whether the resultant decision is such that no reasonable decision maker could have reached it. The second limb echoes the test in the **Clark v Nomura** decision. The first limb is new, in terms of what can be implied into the workings of contracts of employment.

5. Baroness Hale considered an extensive bank of case law and said as follows at paragraph 28 et seq.:

   *"…There are signs, therefore, that the contractual implied term is drawing closer and closer to the principles applicable in judicial review. The contractual cases do not in terms discuss whether both limbs of the **Wednesbury** test apply. However, in **Gan Insurance**, where the issue was the limits, if any, to the reinsurers' power to withhold approval to the insured's agreement to settle a claim, **Mance** LJ first commented that "what was proscribed was unreasonableness in the sense of conduct or a decision to which no reasonable person having the relevant discretion could have subscribed" (para 64); but he concluded that "any withholding of approval by reinsurers should take place in good faith after consideration of and on the basis of the facts giving rise to the particular claim and not with reference to considerations wholly extraneous to the subject matter of the particular reinsurance …." (para 67).*

   *If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "**Wednesbury** reasonableness" (or "GCHQ rationality") review to consider the rationality of the decision-making process rather than to concentrate upon the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.*

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It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the **Wednesbury** *formulation in the rationality test. Indeed, I understand Lord* ***Neuberger*** *(at para 103 of his judgment) and I to be agreed as to the nature of the test.*

But whatever term may be implied will depend upon the terms and the context of the particular contract involved. I would add to that ***Mocatta*** *J's observation in* ***The Vainqueur José****, that "it would be a mistake to expect [of a lay body] the same expert, professional and almost microscopic investigation of the problems, both factual and legal, that is demanded of a suit in a court of law" (577). Nor would "some slight misdirection" matter, at least if it were clear that, had the legal position been properly appreciated, the decision would have been the same. It may very well be that the same high standards of decision-making ought not to be expected of most contractual decision-makers as are expected of the modern state.*

However, it is unnecessary to reach a final conclusion on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action. Given that the question may arise in so many different contractual contexts, it may well be that no precise answer can be given. The particular context of this case is an employment contract, which, as Lord Hodge explains, is of a different character from an ordinary commercial contract. Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence. This must be borne in mind in considering how the contractual decision-maker should approach the question of whether a person has committed suicide…"

6. It is clear that the decision is both fact specific and based upon unusual facts at that. That said, Lady Hale clearly considers that contracts of employment, with their attendant duties of trust and confidence, are more likely to require decision making to adhere to public law standards than other contracts. It is suggested that there is now more scope than ever to challenge employers' decisions by reference to public law principles. Those decisions are almost limitless, and may include decisions about pay review, bonus, flexible working, and so on.

7. It was established by the decision of the Court of appeal in **Boston Deep Sea Fishing and Ice Co v Ansell** [1888] 39 ChD 339 that, for the purposes of defending a wrongful dismissal claim, summary dismissal may be justified by reference to conduct even if the conduct in question was not known to the employer at the time of termination but was discovered afterwards.

8. **In Williams v Leeds United Football Club** [2015] QBD 383, the High Court considered the impact of **Boston Deep Sea Fishing** to a situation in which the summary dismissal was within the notice period triggered by an earlier dismissal for redundancy, where the misconduct occurred some five years previously, and where the misconduct was discovered through a determination on the part of the employer to avoid paying the balance of the notice monies. At paragraphs 1 and 2, Lewis J summarised the facts as follows:

"This is a claim by Evan Gwyn Williams for damages for wrongful termination of his contract of employment with Leeds United Football Club Ltd. ("the Club"). In brief, the Claimant was employed under a contract which required 12 months notice of termination. He was given notice of termination on 23 July 2013. Had circumstances not changed, the contract would have terminated at the end of that 12 month notice period and he would have been entitled him to receive his salary which amounted to £200,000 and certain other benefits payable during the notice period. However, on 30 July 2013, he was summarily dismissed, that is the contract of employment was brought to an end immediately and without notice, for gross misconduct. The Claimant contends that that dismissal was wrongful and claims compensation for the balance of the salary and contractual benefits that would have been paid during the notice period if the contract had not been terminated on 30 July 2013.

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The Club contends that, after notice of termination was given, it discovered that the Claimant had used the Club's e-mail system on 28 March 2008 to forward an e-mail together with pornographic images to a male friend at another football club. They dismissed the Claimant on 30 July 2013. Furthermore, some months after the dismissal they discovered that the Claimant had also forwarded the e-mail and the pornographic images to a junior female employee and another male friend at another football club on 28 March 2008. The Club contends that the conduct, taken as a whole, amounted to gross misconduct entitling the Club to dismiss the Claimant summarily on 30 July 2013. They also contend that, in so far as they discovered some of the acts of misconduct after the dismissal, they are still entitled to rely upon those acts to justify the summary dismissal, relying on the principles established in ***Boston Deep Sea Fishing and Ice Company v Ansell*** *(1888) 39 Ch. D. Consequently, they contend that they are not liable to pay damages for the salary and other contractual benefits that would otherwise have been payable during the notice period if the contract had not been terminated on 30 July 2013."*

9. At paragraph 11, the misconduct was described as follows:

"The message in the e-mail said simply "Looks like dirty Leeds!!". Attached to the e–mail was a series of power points setting out a spoof employment offer, involving training and caring for a soccer team in Europe. There then followed a number of photographs. The first set of photographs are entitled "the fans" and are pictures of groups of women or individual women, some with their breasts exposed. The next set of three photographs are entitled "pictures from the club house, the shower". Two photographs show a group of naked women showering. The second of these depict the genitalia of the women in the photograph. The third is a close-up photograph of a woman's genitalia. The next set of five photographs follow on from a reference to a massage session. They include pictures of women displaying breasts and genitalia and engaged in simulated sexual contact with each other."

10. Perhaps unsurprisingly, the Claimant's submissions to the effect that his conduct was insufficiently serious failed. He also submitted that, somehow, he was owed an accrued debt by virtue of the wording of the letter dated 23 July 2013 giving him notice of dismissal by reason of redundancy. Again, unsurprisingly, that argument failed, with the Court drawing a distinction between the instant case, and a case in which the misconduct was discovered after a dismissal where an employer had elected not to give notice but make a payment in lieu. At paragraph 76, the Judge explained:

"That general position is not altered by the decision of the Court of Appeal in ***Cavenagh v Williams Evans Ltd.*** *[2013] 1 W.L.R. 238. There, the employer terminated the contract by exercising an express contractual right to terminate the appointment without notice on payment of salary and the value of other benefits in lieu of notice (see paragraphs 12 and 14 of the judgment). The exercise of that specific contractual right did give rise to an accrued debt and the Court of Appeal held that the principle in* ***Boston Deep Sea Fishing*** *did not provide the employer with a defence to a claim for payment of an accrued debt. The termination of the contract had already triggered the liability to pay in lieu of notice. That position is to be contrasted with a position where there had been a summary dismissal of the employee and, subsequently, the employer acquired knowledge which would have entitled the employer to terminate the contract without notice. In the latter circumstances, the principle in* ***Boston Deep Sea Fishing*** *did apply and did entitle the employer to rely on that misconduct, discovered subsequently, to justify the dismissal and resist the claim for damages for wrongful dismissal. See paragraphs 37 to 39 and 50 and 55 of the decision in Cavenagh."*

11. There is a useful summary of the law at paragraph 80:

"The proper contractual analysis is this. In relation to contracts of employment, if an employer gives notice to terminate, the contract will, in normal circumstances, end at the expiry of that notice period. The employer would be liable for salary payable during that period of notice and until the end of the contract. If, however, the employer dismisses the employee summarily during the notice period, that dismissal will bring the contract to an end immediately and the employer will not, after that dismissal, be liable for any further salary. Furthermore, if the employer subsequently discovers that, prior to the summary dismissal, the employee had engaged in conduct amounting to a repudiatory

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breach, the employer is entitled to rely upon that conduct as justifying the summary dismissal and as enabling it to resist a claim for damages for wrongful dismissal, that is for the salary that would otherwise have become payable during the notice period: see ***Boston Deep Sea Fishing*** *1888 (39) Ch D. 339 at page 364 and* ***Cavenagh v William Evans Ltd.*** *[2013] 1 W.L.R. 238 at paragraph 5."*

And as to the Claimant's argument that it was unfair for the Defendant to escape liability given its resolve not to pay what was due (even at the point when the reason for dismissal was redundancy), and its subsequent determination to find an excuse for non payment, the Judge said this at paragraphs 82 to 84:

"The fact that the Club committed an anticipatory breach of contract on 22 July 2013 when it decided not to pay any further salary under the contract or committed breaches of the contract by failing to pay the salary due before the contract had been brought to an end on 30 July 2013 does not prevent the Club dismissing the Claimant summarily when it discovered the misconduct (nor does it prevent the Club from relying on misconduct discovered after the dismissal in order to justify it).

Similarly if, viewed objectively, the conduct does amount to a repudiatory breach by the employee, then the employer is entitled to rely upon that repudiatory breach as justifying the dismissal irrespective of the employer's motives or reasons for wishing to do so. Consequently, the fact that the Club were motivated by consideration of their own financial and commercial interests, and wished to find a reason, and indeed were actively looking for evidence, to justify the Claimant's dismissal, does not prevent the Club from relying upon conduct amounting to a repudiatory breach as justifying the dismissal on 30 July 2013. Nor does the fact that the Club were unprepared until recently to accept that the notice period was 12 months, rather than three, prevent them from relying upon conduct amounting to a repudiatory breach as justifying termination of the contract without notice.

Consequently, where, as here, there is a repudiatory breach of the contract of employment by the employee, and there has been no affirmation or waiver of the repudiatory breach, the employer is not prevented from relying on that breach as justifying summary dismissal because it had itself decided to breach its contractual obligations or was looking for a reason to justify dismissal or was motivated by its own financial interests. There is no basis for concluding that it is "unfair or "unjust" to allow the Defendant to rely upon the Claimant's anticipatory conduct to resist a claim for wrongful dismissal in such circumstances."

13. The outcome was surely not in doubt. Perhaps the employee's indignance at his former employer's determination to avoid payment explains some of the arguments attempted on his behalf.

Unfair Dismissal

14. The test for dishonesty in criminal cases is set out in the famous case of **R v Ghosh** [1982] QB 1053, and is well known. In **John Lewis plc v Coyne** [2001] IRLR 139, the EAT appeared to recommend the importation of this test into the consideration of fairness of a conduct dismissal under s98(4) ERA. In that case, Bell J said this at paragraph 27:

"Mr Wicks, in his submissions, equated use of Peter Jones's telephone for any personal reason with dishonesty. But the test of dishonesty is not simply objective. What one person believes to be dishonest may in some circumstances not be dishonest to others. Where there may be a difference of view of what is dishonest, the best working test is in our view that propounded by Lord Lane CJ in the ***R v Ghosh*** *[1982] QB 1053 75 Criminal Appeal Reports at 1054. In summary, there are two aspects to dishonesty, the objective and the subjective, and judging whether there has been dishonesty involves going through a two-stage process. Firstly, one must first of all decide whether according to the ordinary standards of reasonable and honest people what was done dishonest. Secondly, if so, then one must consider whether the person concerned must have realised that what he or she was doing was by those standards dishonest. In many, but not all, cases where actions are obviously dishonest by ordinary standards, there will be no doubt about it. In the present case, in our view, it was not necessarily obvious that using the appellant's telephone for personal calls*

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was 'dishonest'. Much might depend upon the circumstances of the particular case. The appellant, however, did not investigate the question of dishonesty. It assumed it from the making of any personal calls, putting it into the same category, in effect, as stealing money. Mr Wicks is entitled to argue that a reasonable employer would be entitled to regard what Mrs Coyne admittedly did as dishonest. But even so, her dishonesty, such as it was and if it was, did not in our view mean that the appellant necessarily had to dismiss her. Yet Mr Hunt clearly, on our interpretation of the tribunal's finding at paragraph 23, took the view that dismissal was an inevitable consequence. The disciplinary code highlighted that dishonesty was normally regarded as serious misconduct, normally leading to dismissal, and indeed gave it as an example of gross misconduct that is particularly likely to lead to dismissal. But that terminology must, in our view, mean that it did not inevitably lead to dismissal, or at least that the information given to the employee by the employer was that it did not inevitably lead to dismissal. In all those circumstances, in our view, as the tribunal concluded, the duty on the appellant to act fairly and reasonably required that it should investigate the seriousness of the offence in the particular case."

15. Recently, the EAT (HHJ Hand QC) has expressed considerable doubt as to the suitability of the application of criminal law principles to employment law. In **Gondalia v Tesco Stores Ltd** 20 January 2015; 0320/14, it said as follows at paragraphs 45 et seq.:

*"It may be that in the future it will be necessary to consider in detail the extent to which it is helpful or sensible to have opened a gateway into employment law from jurisprudence about directions to a jury as to dishonesty in a criminal case. We have some sympathy with Mr Ryan's submissions that it may be far too complicated to import a yet further consideration into the steps to be taken in deciding whether a dismissal has been fair or unfair under section 98(4) and the gloss or template placed on it or over it by **Burchell v BHS** [1978] IRLR 379. It is not necessary, however, for us to decide that matter in order to dispose of this appeal.*

We do not doubt that the subjective state of mind of an employee accused of misconduct is a relevant consideration. Nor can it be doubted that an objective view of that conduct will be of equal importance. Whether appeals to common sense or, for that matter, a handbook that defines gross misconduct by reference to common sense is a sensible way of approaching internal rules as to conduct or an external arbitration upon decisions relating to them is a matter that may need to be argued further in this case or in another, but we need say no more about it at this stage.

Plainly the issue was the Appellant's conduct, and the question of the acceptability of that conduct. Those were matters that needed to be considered under section 98(4). Whether the word "dishonesty" is used or is not used will not necessarily be conclusive in an analysis of what sort of conduct it is. Where concepts such as personal gain are invoked, issues of honesty or dishonesty may or may not arise. Where conduct is regarded as unacceptable and as leading to a loss of trust, as appears to have been the case with Mr Lane, are all matters that will need to take a place amongst the circumstances to be considered in deciding whether the sanction of dismissal was within the band of reasonable responses, which is just another way of saying whether the factors set out in the statutory language of section 98(4) have been evaluated one way or another.

*The first ground of appeal in this case, in our judgment, would not result in the appeal succeeding. The fact that Employment Judge Ryan did not give himself a **Ghosh** direction or approach the matter in relation to the concepts involved in the jury direction suggested by the Lord Chief Justice in **Ghosh** is not, in our view, an error of law. The question is whether the circumstances were considered in his analysis in paragraph 15 of the Judgment as required by section 98(4)."*

16. There is no reference to *"dishonesty"* in the ERA. Indeed, *"conduct"* is referred to at s98(2)(b) ERA, as opposed to *"misconduct"*. That being the case, it is surely best to avoid the inevitable confusion and complication that usually results from too much "spin" being settled onto the words of the statute.

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Whistle-Blowing

17. In **Chesterton Global Ltd and Another v Nurmohamed** 8 April 2015; 0335/14, we now have what is probably the first appellate decision on the *"public interest test"* that was introduced into s43B(1) ERA as from 25 June 2013. The words *"in the public interest"* were inserted into the section in an attempt to reverse the effect of the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, in which it was held that a breach of a legal obligation owed by an employer to an employee under his or her own contract of employment may constitute a protected disclosure.

18. That section now provides as follows:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

19. The EAT (Supperstone J) concluded at paragraph 34:

"I accept Ms Mayhew's submission that applying the Babula approach to section 43B(1) as amended, the public interest test can be satisfied where the basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable."

20. It was there referring to the Court of Appeal decision, which he summarised at paragraphs 30 et seq.:

*"In **Babula v Waltham Forest College** [2007] ICR 1026 a whistleblower believed that a criminal offence had been committed. However it was common ground that it is not permissible, as a matter of construction, to adopt a different interpretation of what is meant by "reasonable belief" when applying that phrase to any of the situations in section 43B(1)(a) to (f). The test, as it applied to the old section 43B, is set out by Wall LJ in his judgment:*

"81. … An employment tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the paragraphs in section 43B(1)(a) to (f) of ERA 1996. The second is to decide, objectively, whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith.

82. In this context, in my judgment, the word 'belief' in section 43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test."

Section 18(1)(a) of the 2013 Act repeals the requirement in section 43C of the 1996 Act that the disclosure be made in good faith, and section 17 inserts in section 43B the requirement that it be made in the public interest.

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Wall LJ observed (at paragraph 75) in Babula:

"Provided [the worker's] belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute".

That this is so follows from the purpose of the statute which, as Wall LJ notes, is "to encourage responsible whistleblowing". He observes (at paragraph 80):

"To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute". "

21. In **Chesterton Global Ltd**, the employee had complained about the misstatement of £2m worth of costs and liabilities in his employer's accounts, which could have a negative impact on his own bonus and that of 99 of his colleagues.

22. The EAT further concluded at paragraphs 38/39:

"In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately mis-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied.

In the course of argument Mr Palmer accepted that if the First Appellant was a publicly listed company then disclosure of manipulation of their accounts would be in the interest of the public. However he suggests that this is not so in the present case as the First Appellant is a private company. In my view whether or not the disclosures which potentially affected the bonuses and commissions to be paid to the 100 senior managers were made in the public interest does not turn on the First Appellant being a private, rather than a public, company. "

23. It seems entirely clear that the new "public interest test" is not particularly hard to cross, because the test is not whether the disclosure is in the public interest. Rather, it is whether the worker's belief that it be so was objectively reasonable. And it is clear that it can be even if it is accompanied by a good deal of self-interest.

TUPE

24. In **Ottimo Property Services Ltd v Duncan and Another** 9 January 2015; 0321/14, the EAT had to consider a novel point about the correct approach to the concept of "the client" in the provisions on SPC in Reg 3(1)(b) of TUPE, namely whether it can includes multiple clients. The Court of Appeal in **Hunter v McCarrick** [2013] ICR 235 had already held that the identity of the client for whom services are provided must remain the same throughout.

25. At paragraphs 43 et seq., the EAT (HHJ Eady QC) answered the question in the affirmative.

"I think it is right to say that the point raised by this appeal is novel. Although the identification of "the client" for the purposes of Regulation 3(1)(b) TUPE has been the subject of earlier consideration in the case-law, none of those cases

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had to expressly address, on the facts, the question whether - allowing no changes in the end users before and after the SPC - the client had to be understood solely in the singular or whether the regulation could allow for there to be - providing they remained identical - more than one client.

In approaching this question, I do not find it helpful to adopt a "purposive approach" (as Mr Korn urged). The underlying rationale for the introduction of this "silver plating" (to adopt HHJ Richardson's apposite phrase) was to provide greater certainty. That may or may not be provided by allowing that "the client" can be read as "the clients"; that will depend on the facts. And I note Slade J's concern in ***Hunter*** *(in the EAT), that Regulation 3(1)(b) might be rendered less certain if "the client" was read in the plural.* ***Hunter*** *was, however, dealing with the situation where the identity of the client changed. If Regulation 3(1)(b) allowed for the client or clients to change identity before and after the SPC, questions would arise both as to certainty and as to defining the relevant intent for Regulation 3(3)(a)(ii) purposes. Does that mean that the general approach laid down by section 6 of the Interpretation Act should not apply here? Should I discern a contrary intention from Regulation 3(1)(b), such that the words in the singular are - contrary to the normal role - not to read as including the plural?*

Miss Reece says "the client" has to be a single legal entity. The approach to construction laid down by the Interpretation Act should not apply here because it would lead to uncertainty and would make it impossible to ascertain the client's intention. In support of Miss Reece' case in this respect I further note that Regulation 3(1)(b)(i) uses the word "client" to refer to "a person", again in the singular. There is, however, no other definition of "client" in TUPE; it can encompass an individual person, a limited company, a partnership or an unincorporated association. Given that this is so, for my part I see no reason why, in principle, a SPC might not involve, for example, a contract for the provision of particular services drawn up between a contractor and a group of persons who are collectively defined as "the client" under that contract. If the case in question then fell to be considered under Regulation 3(1)(b)(i), that would require "a person" to also be read as encompassing the plural, "people", but I do not see why a contrary intention should be read into the provision so as to rule that out.

Furthermore, in such a case the group of persons defined as "the client" would have demonstrated common intent in entering into the contract as, collectively, one party to its terms. I would thus not see the fact that the client was comprised of more than one entity as fatal to ascertaining future intention for the purposes of Regulation 3(3)(b). In such a case, that intention might be discernible from the terms of the contract itself or it might require a broader-ranging factual enquiry. Provided those involved in "the client" retain their identity, however, I do not consider that to give rise to any fatal objection.

I take the view, therefore, that "the client" for the purposes of Regulation 3(1)(b) can include "clients". Such clients would have to retain their identity before and after the SPC, but, the fact that the service is provided to more than one legal entity does not, in my judgement, necessarily mean there cannot be a SPC transfer."

26. This was surely an inevitable conclusion.

27. Courtesy of the Court of Appeal in **Rynda (UK) Ltd v Rhijnsburger** [2015] EWCA Civ 75, we now have a useful 4 point guide to determine whether there has been an SPC. According to Jackson LJ at paragraph 44:

"I would summarise the principles which emerge from the authorities as follows. If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE. The first stage of this exercise is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a "grouping" for the principal purpose of carrying out the listed activities."

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Discrimination

28. In **Donelien v Liberata UK Ltd** 16 December 2014; 0297/14, the EAT (Langstaff P) had to consider whether or not an employer had constructive knowledge of an employee's disability so as to trigger a duty to make reasonable adjustments under s20 EqA. It was already clear from the Court of Appeal's decision in **Gallop v Newport City Council** [2014] IRLR11 that an employer is unable to rely on expert medical opinion without more. It must form its own view. At paragraphs 30/31:

*"We recognise that **Gallop** is a case which was decided upon its own particular facts. It was a case in which, on those facts, it simply could not be said that the Occupational Health doctor had addressed the relevant questions. In the light of that, no reliance could logically be placed by the employer upon the Doctor's view. Every case, particularly involving disabilities which vary from person to person, is bound to turn upon its own particular facts. We accept and apply, in any event being bound by it, the legal principle so far as **Gallop** sets it out, that the decision as to whether or not an employee is disabled, so as to trigger the duty of reasonable adjustment, is one for the employer to make. It is not a decision which can be delegated to an Occupational Health advisor. This was the essential error in the reasoning of the Tribunal which the Court of Appeal ultimately corrected.*

It will normally be expected, therefore, that a Tribunal will look for evidence that the employer has taken its own decision. In doing so, the lay members sitting with me in this case would wish to emphasise that in general, great respect must be shown to the views of an Occupational Health doctor, but any view expressed by such a doctor should not be approached uncritically…."

29. It is thus increasingly clear that a medical opinion that does little more than asserts that an employee is not disabled within s6 EqA will not provide any meaningful defence to a claim based upon alleged failure to make adjustments. The expert must be invited to consider the impairment itself, the substantiality of its effects and its past and likely future duration. Even then the employer should look and be seen to have looked at the opinion critically, to see if its fits with other evidence or indicators of the health of the employee.

30. There are relatively few decisions on what constitutes a *"detriment"*. It is established that the concept of detriment is determined from the point of view of the employee: a detriment exists if a reasonable person would or might take the view that the employer's conduct had in all the circumstances been to his detriment; but an unjustified sense of grievance cannot amount to a detriment: see **Derbyshire v St Helens** MBC [2007 UKHL 16; [2007] ICR 841 at paragraph 37 per Baroness Hale. This issue was recently revisited by the Court of Appeal in **Deer v University of Oxford** [2015] EWCA Civ 52.

31. Elias LJ indicated that, in practice, less favourable treatment will usually amount to a detriment, almost by definition. At paragraph 26 he said as follows:

"In fact it seems to me - as it did to Underhill LJ as he said when granting permission to appeal - that although the concepts of less favourable treatment and detriment are distinct, there will be very few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes, or is reasonably likely to cause, distress or upset will reasonably be perceived as a detriment by the person subject to the discrimination even if there are no other adverse consequences. That is perhaps more starkly the position in cases of discrimination on race or sex grounds where it can be readily seen that the act of discrimination of itself causes injury to feelings. But similar reasoning applies to victimisation discrimination. This is also an important protection for an employee or ex-employee, and a real and burning sense of injustice or unfairness may be experienced by someone who is discriminated against on this ground. It is perhaps possible that there may be evidence showing that in fact in a particular case the claimant did not suffer any sense of grievance or injustice notwithstanding less favourable treatment, but the normal inference would surely be that he or she did."

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32. In particular, Elias LJ was clear that there could be a detriment in the way in which a grievance or other process was conducted, even if the outcome of that process would always have been the same. At paragraph 48 he said:

"…if the appellant were able to establish that she had been treated less favourably in the way in which the procedures were applied, and the reason was that she was being victimised for having lodged a sex discrimination claim, she would have a legitimate sense of injustice which would in principle sound in damages. The fact that the outcome of the procedure would not have changed will be relevant to any assessment of any compensation, but it does not of itself defeat the substantive victimisation discrimination claim…"

33. Elias LJ also made it clear, at paragraph 51, that he considered that delay in providing information required by the Data Protection Act 1998 pursuant to a Subject Access Data Request was capable of constituting a detriment. However, such an argument failed on the facts of the case, because the delay was pursuant to legal advice. At paragraphs 52/53, Elias LJ explained:

"However, the Tribunal has also found that the appellant would not be able to establish a detriment for a quite distinct reason, namely that the university was acting on legal advice and had acted reasonably in furtherance of its interests in the litigation. There is plenty of authority for the proposition that no reasonable employee could treat as a detriment ordinary and reasonable steps taken by the employer in the course of litigation: see the detailed discussion of the relevant authorities by Underhill P (as he then was) giving the judgment of the EAT in ***Pothecary Witham Weld v Bullimore*** *[2010] ICR 1008. Mr Segal suggested that it was far from self-evident that it was reasonable to withhold personal data which would eventually have to be disclosed. But the finding below was that it was reasonable, and the appellant adduced no evidence to suggest that it was not an ordinary step in the course of litigation.*

In my judgment, therefore, it is fanciful to believe that this particular claim could succeed. The university was acting on the advice of lawyers. As the employment judge recognised, whether the advice was right or wrong, there was no basis for believing that the university had done anything other than rely upon the advice. Short of a submission that the lawyers were in some kind of dishonest collusion with the university - and that argument has properly not been advanced - the only proper inference is that the university was acting in what it perceived to be its best interests in the litigation."

Collective Redundancy Consultation

34. At long last we have the decision of the ECJ in **USDAW and Another v WW Realisation 1 and Others** 30 April 2015 (Case C-80/14), which has been widely reported in the National press. This is the "Woolworths Case".

35. The ECJ has confirmed that *"establishment"*, for the purposes of the collective redundancy consultation provisions in the EU Collective Redundancies Directive (No. 98/59), means the entity to which the worker is assigned. It follows that, under s188 TULR(C)A, where an undertaking comprises several entities meeting the criteria for *"establishment"*, collective consultation is required only at those establishments where it is proposed to dismiss 20 or more employees. There is no requirement for dismissals at all establishments to be aggregated for the purpose of this threshold, and so the 1992 Act is not incompatible with the Directive in this regard.

36. What next? The claims will now return to the Court of Appeal. Although the ECJ has not conclusively determined that each individual store should be considered a separate establishment, its judgement clearly suggests that this was a permissible approach for the Employment Tribunals to take. A press release quotes the USDAW General Secretary as saying that the: *"decision marks the end of the road for our members from Woolworths and Ethel Austin seeking justice and they are heart broken by today's verdict".*

37. It has also been suggested that the Trade Union movement will now press for legislative change. That seems unlikely to be forthcoming given the outcome to the General Election.

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Practice and Procedure

38. There is a growing body of case law that considers whether an Employment Tribunal is obliged to raise/take points of its own volition, or merely confine itself to the pleaded case on either side.

39. Related arguments can arise over the status of *"Lists of Issues"*, which are now commonplace in many regions. These kind of issues often come in to particular focus in cases involving litigants in person, and adjustments in disability discrimination cases. Various such issues were considered by the EAT in **Remply Ltd v Abbott and Others** 24 April 2015; 0405/14. The EAT (HHJ Serota QC) provided the following analysis at paragraphs 73 et seq.:

"When is an amendment not required? There are circumstances in which a point is so well known and obvious that an Employment Tribunal may be expected to determine the point in any event even if not specifically advanced by the parties. This may well be so in a case in which either or both of the parties are not represented.

*The high water mark of such cases is perhaps **Langston v Cranfield University** [1998] IRLR 172, in which the Claimant had been unrepresented at the Employment Tribunal and remained unrepresented in the EAT; the Respondent did not appear. It appears that the Claimant was not up to the challenge and told the EAT, "I understand I probably made a mess of the Tribunal". The Claimant claimed that the dismissal for redundancy was unfair at the Employment Tribunal. The only issue identified by the Employment Tribunal was whether the Claimant was fairly selected for redundancy. However, on appeal he sought to raise issues relating to alleged inadequate consultation prior to dismissal and whether the employers had taken reasonable steps to find alternative employment for him. The Respondent opposed this on the grounds that these issues had not been raised before the Employment Tribunal and could not, therefore, be argued in the Employment Appeal Tribunal, relying on such authorities as Kumchyk, to which I have already referred. HHJ Peter Clark held that:*

> *"30. … Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer."*

He later added:

> *"34. … We would normally expect the industrial tribunal to refer to these three issues on the facts of the particular case in explaining its reasons for concluding that the employer acted reasonably or unreasonably in dismissing the employee by reason of redundancy."*

The EAT permitted the appeal to proceed on the new points on the basis that the Employment Tribunal should have considered these points regardless of whether the parties had referred to them.

*This decision was considered by the Employment Appeal Tribunal (HHJ Ansell) in **Buckland v Aifos** [2005] All ER (D) 40 (Oct). In that case the Employment Tribunal took the view that it was not appropriate for an Employment Tribunal to deal with issues that were not raised by the parties in circumstances where the parties had themselves defined the issues and not identified those ones as issues for consideration. The Employment Tribunal was not obliged to go outside the nature of the inquiry as it had been defined by the parties, and declined to follow **Langston**.*

*I do not consider that the decision of **Langston** is of blanket application. Whether an Employment Tribunal is bound to take a point not raised by the parties will depend on the circumstances, and I shall consider this matter further when I come to my discussion and conclusions. If a point was not raised by the parties, the necessary evidence upon which a decision may be based may well not have been adduced.*

I have heard substantial argument as to the effect of the list of issues and whether the presence of an issue in the list of issues will give the Employment Tribunal jurisdiction to determine that issue even if not raised in the ET1, nor has it been the subject of amendment.

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The point may be academic, because although there may have been some consensus as to the list of issues, no list of issues has ever been agreed let alone approved by the Employment Tribunal. The starting point of consideration must be the well-established rule in ***Chapman*** *and the other authorities I have cited that stresses that for an Employment Tribunal to have jurisdiction to decide a particular claim it must be pleaded.*

Lists of issues are valuable case management tools widely used in Employment Tribunals. However, even when a list of issues is approved by the Employment Tribunal, it is not an order of the Employment Tribunal nor a pleading. In ***Parekh v London Borough of Brent*** *[2012] EWCA Civ 1630 Mummery LJ stated:*

> *"31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see* ***Land Rover v Short*** *Appeal No UKEAT/0496/10/RN (6 October 2011) at 30 to 33. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence …"*

If a party subsequently disagrees with the list, the proper course is to query it with the Tribunal, not to seek to appeal to the Employment Appeal Tribunal.

While a list of issues may limit the issues to be determined, consistently with the authorities the list of issues cannot extend the list of issues to be determined beyond those contained in the pleadings. Any addition to those issues will require an amendment.

Employment Tribunals are also obliged to have regard to the overriding objective, including the avoidance of delay, dealing with cases in ways proportionate to their complexity and the importance of issues, in exercising their very wide case management powers, including in particular the giving of permission to amend.

Discussion and Final Conclusions: Taking points not in the ET1

In my opinion, it is contrary to principle to permit a point to be taken in the Employment Tribunal or on appeal unless it has been pleaded. As a general rule the addition of further Particulars of an existing allegation will require an amendment to be made. If the fresh points can properly be considered to be particularisation of an allegation already pleaded, a more liberal approach may be taken in considering whether to grant permission to amend, than in cases where the point is a "new" point, or will require the parties to produce further evidence or disclosure and prejudice the timetable set for the proceedings or cause further delay. Further as I have already observed, it is not easy to see how the Employment Tribunal could take a point that depends on factual investigation unless the parties have prepared and led some evidentiary material. The question, for example, of whether the Respondent was in breach of its obligations in relation to seeking suitable alternative employment cannot be determined in a factual vacuum. In straightforward cases it may properly be left to the Employment Tribunal to determine for example all the Burchell points or various heads of compensation for unfair dismissal, but in a complex case such as the present case where the parties are legally represented and have pleaded their case with some particularity, any addition to the Particulars will require an amendment, which will have to be applied for and considered in the usual way on conventional grounds. I ask forensically how the Employment Tribunal might have been expected to consider the question of alternative employment if the parties had not raised it. The point could only properly be determined, if the Employment Tribunal were bound to determine the point, if it had been drawn to the attention of the parties, who would then have had to consider what evidence if any might be required and to make appropriate submissions.

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*I do not consider that the principle in **Langston** has any application to the present case, because of its complexity, history of case management and professionally drawn notices of application. I am supported in my view that an amendment was necessary because the Claimants evidently accepted this was the case by making an application (even if they now assert they may not have needed to) to amend, and the Employment Tribunal acceded to the application."*

40. It is very important to remember that a pleaded case cannot be expanded simply by inclusion within the List of Issues. It is a common tactic to try this, when something significant has been omitted from the ET1/ET3, and vigilance is therefore required at the PH.

Appeals

41. In **Carroll v Mayor's Office for Policing and Crime** 9 February 2015; 0203/14, the EAT confirmed the decision in **Sian v Abbey National plc** [2004] ICR 55 that the 42 day time limit in Rule 3(3)(a)(i) of the EAT Rules (which provides that it runs *"from the date on which the written reasons were sent to the parties"*) applies even though the reasons were never received by the would-be appellant or, in the instant case, where the reasons were sent to the wrong address, with any unfairness being cured appropriate use of the discretion to extend time.

42. It also set out 15 key principles on the discretion to extent time which can be derived from the authorities on this issue, in particular the decision of the EAT in Muschett v Hounslow London Borough Council [2009] ICR 424, which is set out below:

" The following principles emerge from these cases (most of these principles are set out by HHJ McMullen at paragraph 5 of the judgment in Muschett (see pages 427 and 428)):

(i) both the public interest and the interests of the parties are best served by there being certainty as to, and finality of, legal proceedings;

(ii) generally speaking no distinction is to be drawn between the unrepresented litigant and those who enjoy representation;

(iii) this Tribunal is stricter in the approach to time limits relating to an appeal, where there has already been a hearing of an issue than in relation to time limits at first instance where there is yet to be a hearing of it;

(iv) consequently the adherence to the 42-day time limit is fundamental and compliance with it essential (Woodward paragraphs 3 and 4) and

(v) it will only be relaxed in rare and exceptional cases, for there is no excuse, even in the case of an unrepresented party, for ignorance of the time limits (Abdelghafar, at p 71) and litigants, whether represented or not, must not expect the procedure to be re-written so as to accommodate their own negligence, incompetence or idleness (Jurowska paragraph 19);

*(vi) nor, since the **Practise Statement of 2005** made the position abundantly clear, is it likely there will be any acceptable excuse for failure within the time limit to assemble and submit the stipulated suite of documents, which should accompany an appeal, or for failure to explain their absence;*

(vii) any application for an extension of time is an indulgence requested from this Tribunal and it is unlikely to be granted because of ignorance of the need to comply with time limits or of the need to submit the stipulated documents;

(viii) consequently before extending time this Tribunal must be satisfied that it has received a full, honest and acceptable explanation of the reasons for the delay (Abdelghafar, pp 70, 71);

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(ix) this Tribunal will have regard to the length of delay, although the crucial issue is the excuse for delay, not whether the delay is long or short (O'Cathail paragraph 36), and any evidence of procedural abuse or intentional default is likely to result in the indulgence being refused (Abdelghafar, at p 71);

(x) an excuse may not be sufficient unless it explains why a notice of appeal and the requisite accompanying documents were not lodged during the entirety of the period of the time limited for appealing because those who submit or attempt to submit appeals towards or at the end of the 42 day period run the risk that something may be wrong and there may not be time to correct it (O'Cathail paragraph 26);

(xi) consequently, the whole period will need to be examined before any indulgence can be granted;

(xii) this does not mean the ability to lodge the correct documents at any time during the 42 days will necessarily be fatal to granting the indulgence because an analytic approach should be taken to that period and the questions to be asked are (Abdelghafar at p. 72)

(1) what is the explanation for the default?

(2) does it provide a good excuse for the default?

(3) are there circumstances which justify the exceptional step of granting an extension of time?

(xiii) prejudice may be a factor, to be considered along with other factors;

*(xiv) the merit of the proposed appeal may be a consideration; in **Aziz** Butler-Sloss said this at paragraph 17*

> *"17. … Merits may be relevant and there will be cases where it would be right to extend time because the merits of the case require it. That is well within the general propositions expressed by Mummery J that the merits of the appeal may be relevant. Morison J did look at the merits and I have myself looked at the notice of appeal which does not disclose on the face of it, I have to say, any clear propositions of law in which it is suggested that the employment tribunal erred. There are a number of criticisms of their approach to the evidence and I would, for my part, find it very difficult to say that those can be translated into points of law. I do not myself think, therefore that there are strong merits in this case, but in any event I see no fault in the way in which this case was dealt with."*

and Sir Christopher Staughton added at paragraph 23:

> *"23. I would only add this in relation to the merits. Mummery J said at p.246 of the United Arab Emirates case, in a passage which my Lady has read, that the merits are usually of little weight and they should not be investigated in detail. I agree with that. But I would however say that, if it is plain that the appeal has no prospect of success, that must be a matter which should be taken into account. There can be no point in giving an extension of time for an appeal which is bound to fail. I have had great difficulty in seeing any point of law in this proposed appeal and the jurisdiction of the Employment Appeal Tribunal is confined to hearing appeals on points of law. So that too would, in my judgment, very probably have been a proper ground for refusing the application for leave to appeal to the Employment Appeal Tribunal."*

(xv) if a legal adviser has been at fault that might be a consideration to be considered along with others (Chohan paragraph 16).

43. The decision in **Chohan v Derby Law Centre** [2004] IRLR 685 concerned the late presentation of a discrimination complaint at first instance. It will probably take an exceptional case for bad legal advice to lead to an extension of time for appealing to the EAT.

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Legislation

44. The **Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322** will apply to complaints presented to Employment Tribunals on or after 1 July 2015.

45. These Regulations amend the ERA and WTR.

46. Regulation 2 amends section 23 ERA to insert a limitation on how far back in time an Employment Tribunal is able to consider when determining whether a worker has suffered unauthorised deductions from their wages. The effect of this amendment is that the Employment Tribunal can only consider deductions from wages where the wages from which the deduction was made were paid within the previous two years before the worker brought their complaint to the Employment Tribunal.

47. The limitation applies to complaints in relation to deductions from those wages that fall under section 27(1) ERA, except for those wages specified in section 27(1)(b) to (j). So most normal complaints are covered by the new rule. In particular these changes relate to complaints in respect of deductions from wages which arise as a result of the employer failing to pay appropriate levels of holiday pay in accordance with the requirements of WTR. It will therefore limit the effect of the decision of the EAT in **Bear Scotland and Others v Fulton and Others** EATS 0047/13, which held that the WTR can be construed to take into account non-guaranteed overtime in the calculation of the basic 4 weeks' holiday pay in Reg 13 (following the ECJ decisions in **British Airways plc v Williams** [2012] ICR 847 and **Lock v British Gas Trading Ltd** [2014] ICR 813[1]).

48. Regulation 3 makes an amendment to the provisions in the WTR that deal with the right to payment in respect of periods of annual leave under WTR It clarifies that the right to payment in respect of annual leave provided for by WTR is not intended to operate in such a way so as to provide that right under a worker's contract. It is a separate statutory right.

49. **S124 of the Equality Act 2010** will remove Employment Tribunals' power to make wider recommendations in discrimination cases from 1 October 2015.

[1]And see now Lock and Others v British Gas Trading Ltd and Another, Leicester ET 23 March 2015; 1900503/12

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- Over a number of years, the leading legal directories have referred to:
- him having "a high-profile practice with a particular emphasis on appearing in discrimination cases"
- his "outstanding cross examination skills and unflappable demeanour"
- his "exceptional grasp of intricate employment issues" and "excellent grasp of the full spectrum of law"
- him being "approachable and user-friendly" and having a "down-to-earth and non-stuffy approach"

He aims to be accessible and responsive at all times.