Employment Law Newsletter

Summer 2014 Issue 13

INTRODUCTION

In this, the 13th Edition of the Field Court Chambers' Employment Newsletter, we set out the latest appellate decisions in an easily digestible format.

The fall in presented claims will be a topic of interest to most employment lawyers, Victoria Flowers summarises the present position with fees and challenges on page 8. Fewer first instance claims haven't yet led to less interesting appellate decisions.

This newsletter will give you updates on the Supreme Court's views on the employment status of equity partners in LLPs and illegality as a defence to discrimination claims; the AG's opinion on obesity as a disability and the latest instalments in the long running cases of USA v Nolan and Seldon v Clarkson Wright & Jakes.

If you have any questions about matters in this newsletter you can contact any of the employment team through our clerks.

Editors

Employment Law Newsletter

Field Court Chambers Employment Group

CONTENT

EMPLOYMENT TEAM

Paul Randolph (1971)
Hashim Reza (1981)
Franklin Evans (1981)
Miles Croally (1987)
Joshua Swirsky (1987)
David Brounger (1990)
Bernard Lo (1991)
Christopher Stirling (1993)
John Crosfill (1995)
Max Thorowgood (1995)
Nikolas Clarke (2000)
Francis Hoar (2001)
Jason Braier (2002)
Miriam Shalom (2003)
Christine Cooper (2006)
Rhys Hadden (2006)
Toby Bishop (2008)
Victoria Flowers (2009)
Sara Hunton (2010)

For business contact or comments on topics covered in this issue and suggestions for future issues please contact:

clerks@fieldcourt.co.uk
Tel: 020 7405 6114

CASE UPDATES

DISCRIMINATION

Supreme Court case on whether the defence of illegality defeated a complaint of discrimination made by an illegal immigrant

Hounga v Allen [2014] UKSC 47

Miss Hounga came from Nigeria to the UK in January 2007 (when she was aged about 14) under arrangements made by Mrs Allen's family. Pursuant to those arrangements, in which Miss Hounga knowingly participated, her entry was achieved by presenting a false identity and the grant of a visitor's visa for 6 months. For the following 18 months Miss Hounga lived in Mrs Allen's home. Miss Hounga had no right to work in the UK, and after July 2007 no right to remain in the UK. However Mrs Allen employed her, without paying her any wages, to look after her children in the home. The ET found that Mrs Allen had inflicted serious physical abuse on Miss Hounga, and that she had caused her extreme concern by telling her that, were she to leave the house and be found by the police, she would be sent to prison because her presence in the UK was illegal. Miss Hounga was subsequently forcibly evicted from the home and dismissed from her employment.

The ET upheld Miss Hounga's complaint of unlawful discrimination (only the part which related to her dismissal). The EAT dismissed a cross-appeal by Mrs Allen. The Court of Appeal upheld a further cross-appeal by Mrs Allen and set the order aside, holding that the illegality of the contract of employment formed a material part of Miss Hounga's complaint and that to uphold it would be to condone the illegality.

Miss Hounga appealed to the Supreme Court. Anti-Slavery International intervened. Her appeal was unanimously allowed in respect of her claim for the statutory tort of discrimination, committed in the course of dismissal. Another claim was remitted.

The issue was whether the Court of Appeal was correct to hold that the illegality defence defeated the complaint of discrimination.

Lord Wilson (with whom Lady Hale and Lord Kerr agreed) set out that the defence of illegality rests upon the foundation of public policy. The considerations of public policy which militated in favour of applying the defence so as to defeat Miss Hounga's complaint scarcely existed. It was hard to resist the conclusion that Mrs Allen was guilty of trafficking within the meaning of the definition in the Palermo Protocol. If Miss Hounga's case was not one of trafficking on the part of Mrs Allen and her family, it was so close to it that the distinction would not matter for the purpose of what followed. It would be a breach of the UK's international obligations under the Council of Europe Convention on Action against Trafficking in Human Beings for its law to cause Miss Hounga's complaint to be defeated by the defence of illegality. The decision of the Court of Appeal to uphold Mrs Allen's defence of illegality ran strikingly counter to the prominent strain of current public policy against trafficking and in favour of the protection of its victims. The public policy in support of the application of that defence, to the extent it existed at all, should give way to the public policy to which its application is an affront.

Lord Hughes (with whom Lord Carnwath agreed) was unable to go quite so far. He agreed that the claim of statutory tort was set in the context of Miss Hounga's unlawful immigration, but that there was not a sufficiently close connection between the illegality and the tort to bar her claim. He concluded that Miss Hounga succeeded in her appeal, on the particular facts of the case, on the ground that there was insufficiently close connection

between her immigration offences and her claims for the statutory tort of discrimination, for the former merely provided the setting or context in which that tort was committed, and to allow her to recover for that tort would not amount to the court condoning what it otherwise condemns. But it was not possible to read across from the law of human trafficking to provide a separate or additional reason for this outcome.

Victoria Flowers

To content

Failure to make reasonable adjustments does not cover associative discrimination

Hainsworth v. Ministry of Defence [2014] EWCA Civ 763

The Claimant worked as an inclusion support development teacher for the British armed forces, based in a garrison in Germany. The MoD provided facilities for the education of the children of services and civilian personnel serving away from the UK, but provided no special schools for children in Germany. The Claimant's daughter has Down's Syndrome and could not be schooled in any of the educational establishments provided by the MoD in Germany.

The Claimant applied for a transfer back to the UK in order to meet her daughter's special needs. This was rejected.

The Claimant brought a claim that in rejecting her application the MoD had failed to make a reasonable adjustment. The claim was necessarily brought on an associative discrimination basis, the Claimant's daughter being the associated disabled person.

The Court of Appeal rejected this argument. It held that Article 5 of the Equal Treatment Directive was solely concerned with disabled employees, prospective employees and trainees and did not protect disabled persons outside of those groupings.

Jason Braier

To content

No requirement to show the reason why a particular disadvantage is suffered in claiming indirect discrimination

Essop v. Home Office (UK Border Agency) (UKEAT/048013/SM) (Unreported, 16.05.14)

BME candidates over the age of 35 disproportionately failed a core skills assessment the passing of which was a necessary requirement to progress to higher civil service grades. Nobody knew why this was the case but the statistics showed they were systematically less likely to pass than non-BME and younger candidates.

In a test case in the employment tribunal, the Judge found that to succeed in a claim of indirect discrimination an individual needed to show not only that the group suffered the particular disadvantage (of failing the test) but on a balance of probabilities why they were at that disadvantage.

In allowing an appeal in the EAT, Langstaff J held that that was to provide for an additional obstacle that was not to be found in s.19 of the Equality Act. He noted that indirect discrimination looks beyond formal equality of treatment towards a more substantive equality of results, and that sometimes neither employer nor employee will be able to ascertain why a neutral PCP results in a disadvantage to the group sharing the protected characteristic. To make liability contingent on showing why the disadvantage is caused would be to permit the disproportionate effect to continue.

Jason Braier

To content

Retirement age can be justified within a range, rather than the specific age set

Seldon v. Clarkson Wright & Jakes (UKEAT/0434/13/RN) (Unreported, 30.06.14)

This is the next chapter in the long running age discrimination claim of Mr Seldon, that's been to the Supreme Court and back down to the employment tribunal.

Mr Seldon was a partner at the Respondent solicitors. The firm had a policy of retirement at the age of 65. The Supreme Court had looked at the extent of the bases upon which a default retirement age could be objectively justified against a claim for direct discrimination.

The EAT in this new appeal looked at the proportionality of setting a retirement age of 65 as a result of those legitimate bases.

The Equal Treatment Directive casts proportionality in terms of whether the means of achieving a legitimate aim are appropriate and necessary. Mr Seldon argued that if the legitimate aims could be achieved by setting a higher retirement age than that set, the employer's actions would not be reasonably necessary and hence would be disproportionate. He argued for a retirement age of 68.

The tribunal disagreed, holding there was a narrow range of ages which would achieve the legitimate aims, and in those circumstances any of those would be proportionate.

Langstaff J agreed with the Tribunal. The proportionality test is one of showing that a means is reasonably necessary. The Tribunal did not commit an error of law in identifying 65 as an appropriate retirement age just because it could have identified a slightly later date. It could otherwise always be said that it would be reasonable to set a slightly later date such that no date could be chosen lawfully because any date would be capable of being rendered unlawful by arguing a slightly later date would serve just as well.

Jason Braier

To content

Sexual orientation and retrospective effect: EAT upholds legislation allowing less favourable pension provision to civil partners than to married couples

Innospec Ltd and others v Walker (UKEAT/232/13/1802)

Mr Walker retired in 2003 and was in receipt of £85,000 per year under the company's occupational pension scheme. In January 2006 Mr Walker entered into a civil partnership under the Civil Partnership Act 2004 ("CPA 2004"). Under the rules of the company's pension scheme, if his partner survived him he would be entitled to a survivor's pension of around £500 per year, whereas a widow would be entitled to two-thirds of his pension.

Mr Walker issued a claim in unlawful discrimination on the ground of sexual orientation, relying on section 61 of the Equality Act 2010 ("EqA 2010"). The company relied on the exemption in paragraph 18(1), Sch.9 of EqA 2010 that it is not unlawful for there to be discrimination in respect of access to a benefit payable for periods of service prior to 5 December 2005 (the commencement of the CPA 2004). The ET held that the company had discriminated against Mr Walker and that such discrimination was prohibited by the Equal Treatment Framework Directive (2000/78/EC). On appeal, the EAT held that although there had been discrimination the exemption in the EqA 2010 is compatible with the Equal Treatment Directive. Neither EU case law, nor the Directive itself, require that it should be applied retrospectively. A claim can only be brought from the date a right is recognised, not earlier. Furthermore, Parliament had demonstrated a clear intention not to confer equivalent pension rights to civil partners so the exemption could not interpreted so as to provide for a full survivor's pension. Finally, the EAT held it could not

disapply the legislation as the right in question was not within the scope of EU law at the material time.

Rhys Hadden

To content

Dismissal for pregnancy related absence outside of the protected period is not discriminatory

Lyons v DWP Jobcentre Plus [2014] UKEAT/348/13

The claimant was unable to return to work at the end of her maternity leave and agreed annual leave period, as she was suffering from post-natal depression. She was subsequently dismissed due to her failure to return to work, and brought claims of unfair dismissal relying firstly upon section 98 Employment Rights Act 1996 (ERA), and secondly on sex discrimination and / or pregnancy and maternity discrimination under sections 13 and 18 Equality Act 2010 (EqA).

The claimant succeeded in her claim of unfair dismissal as the tribunal found there had been procedural failures by the employer. However, under section 123 ERA, the tribunal cut the claimant's compensation on finding that, regardless, there was a 50% possibility that she would have been dismissed. The claim under the EqA was dismissed and the claimant appealed.

The EAT dismissed that appeal. The tribunal found that the claimant could not rely upon s18(2)(b) EqA where the treatment complained of occurred after the protected period of maternity leave. As to the claim under s18 EqA, the tribunal decided that when calculating whether or not an absence period justified dismissal, an employer was entitled to consider spells of absence caused by a pregnancy-related illness that continued beyond the maternity leave period.

Sara Hunton

To content

In the Advocate General's opinion morbid obesity can be a disability under the Equal Treatment Directive

Karsten Kaltoft v Municipality of Billund C-354/13

The AG set out the following position:

'in cases where the condition of obesity has reached a degree that it, in interaction with attitudinal and environmental barriers, as mentioned in the UN Convention, plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails, then it can be considered to be a disability.' [55]

It is important to note that it can be, not that it will be. The AG's opinion was that WHO class I and II will not be a disability, but WHO class III obesity, that is severe, extreme or morbid obesity will create limitations '*that amount to a 'disability' for the purposes of Directive 2000/78'*. There is therefore some ambiguity as to whether it is said that WHO class III can or will be a disability.

The judges of the European Court will take account of the AG's opinion, but are not bound by it, the judgment is likely to be handed down at the end of this year.

Those advising in this area should be aware of last year's decision of the President of the EAT in *Walker v Sita Information Networking Computing Ltd*, to the effect that tribunals should focus less on the cause of symptoms and more on their effect.

Toby Bishop

To content

EMPLOYMENT STATUS

An equity partner in a limited liability partnership could be a "worker" for the purposes of a whistleblowing claim

Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32

A solicitor, an equity partner in a British law firm, was seconded to Tanzania and blew the whistle on the managing partner of the Tanzanian law firm. She claimed that she was subjected to a number of detriments as a result of her disclosures, and brought a claim before the employment tribunal under the 1996 Act.

She was not employed by the British law firm, a limited liability partnership, but asserted that she was a "worker" under s.230(3)(b).

Held: The solicitor's situation fell within the express words of s.230(3)(b). She could not market her services as a solicitor to anyone other than the partnership and was an integral part of its business. She was, in no sense, her client or customer. She was a worker. That conclusion was entirely consistent with her rights under the European Convention on Human Rights 1950 art.10. The effect of s.230(3) and (5) of the 1996 Act, and s.4(4) of the Limited Liability partnerships Act 2000, read together, was that a person who was worker under s.230(3)(b) was a person "regarded for any purpose as employed" by the LLP within s.4(4).

Nikolas Clarke
To content

An employment judge was entitled to find that there was no contract of employment between a referee and the governing body

Conroy v Scottish Football Association Ltd, EAT, 12 December 2013 (unreported),

The appellant referee claimed to be an employee of the governing body Respondent in a claim for unfair dismissal, age discrimination and holiday pay. All referees who officiated at matches under its jurisdiction had to register with it. The judge at first instance found that he was a worker for the Working Time claim, and employee for the Equality Act 2010, but not an employee for the unfair dismissal claim. The appeal against that decision was dismissed. The matters before the tribunal were questions of fact, for example as to whether there was control of the referee by the governing body. It could not be argued that the judge made findings of fact which she was not entitled to make and it was not made out that she had made any error of law in drawing the inferences in law which she drew from those findings of fact. She found facts that supported both sides of the argument but carefully weighed all her factual findings and came to a decision that she was entitled to reach.

The governing regulatory body provided referees for football matches that were played under its jurisdiction. It was perfectly possible for such a body to have standards and rules that a referee had to meet and adhere to without his being employed by it.

Nikolas Clarke
To content

Northern Irish Court of Appeal hands down a judgment with a useful schedule to assist in determining whether a claimant is an employee

Crawford v Dept Emp and Learning [2014] NICA 26

The Court of Appeal referred the issue of employment status back to the industrial tribunal, annexing to its judgment a schedule of the considerations the tribunal ought to have addressed. The case involved a brother and

sister who were directors and shareholders without written employment contracts and were seeking payments from the state following the company's insolvency.

A copy of the schedule is at the end of the Newsletter.

Toby Bishop
To content

PRACTICE AND PROCEDURE

Applications to dismiss claims on withdrawal by the Claimant do not need to be made in writing for the purposes of r 25(4), Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

Denteh and Ors v South London and Maudsley NHS Foundation Trust UKEAT/365/13; [2014] ICR D21

Claims of unfair dismissal and race discrimination were brought by the Appellants against their employer in August 2011. The race discrimination claims were subsequently withdrawn at a case management discussion and, upon an oral application by the Respondent, those claims were dismissed. In September 2012, each Claimant lodged a second Tribunal claim alleging race discrimination on the same basis as in August 2011. At a pre-hearing review, Judge Kurrein held that the Tribunal had no jurisdiction to consider the revived claims.

The Claimants appealed on the grounds that r 25(4) of the Employment Tribunal Regulations 2004 required any application for dismissal on withdrawal to be made in writing. Dismissing the appeal, Supperstone J followed *Drysdale v Department of Transport* (UKEAT/0171/12, 13 February 2013) where HHJ Richardson held that there was no "valid purpose in requiring a written application to the ET office when the parties are present at a hearing and the matter can be addressed there and then". HHJ Richardson held it was "plain that rule 25(4) [was] intended to impose a time limit on an application to dismiss, not to prevent an application to dismiss being made orally at the hearing where the claim has been withdrawn".

The Claimants had not reserved their position or indicated that the withdrawal was for a reason that required the cause of action to be kept alive. Supperstone J held therefore that "to require a written application in such circumstances would be inimical to the overriding objective, which includes dealing with cases expeditiously and saving expense".

Anita Rao
To content

Where a claim for race discrimination has been dismissed as out of time, making additional allegations of race discrimination in a second claim where they could have been raised in the first claim is an abuse of process

Agbenowossi-Koffi v Donvand Ltd [2014] EWCA Civ 855; [2014] WLR (D) 282

The Claimant's initial claim of race discrimination was out of time and dismissed on limitation grounds. The Claimant subsequently issued a second claim repeating the first 15 paragraphs of the original claim, and setting out several further allegations that had occurred around the time of the original allegations. At a pre-hearing review, EJ Grewal struck out the claim on the grounds of cause of action estoppel and as an abuse of process, finding that if the additional allegations made were considered to be acts of race discrimination, they would have been included in the first claim and that the only reason they were so raised in the second claim was to resurrect the first claim. This decision was upheld by the Judge Burke QC in the EAT.

On appeal, Lord Dyson MR held that EJ Grewal was entitled to conclude that the Claimant did not consider the additional allegations to be acts of race discrimination, on the basis of her findings of fact and having heard no evidence from the Claimant. In any event, the Court should be very slow to interfere with the Tribunal's assessment and should only do so "if satisfied that she reached a conclusion which is plainly unsustainable".

On whether this amounted to an abuse of process, Lord Dyson MR held that EJ Grewal had properly directed herself in accordance with *Johnson v Gore Wood & Co [2002] 1 AC 1.* Although the question of whether a second claim was abusive was one 'to which… there is only a correct answer', Lord Dyson MR held that the Court would generally only interfere with this assessment where a judge has taken into account immaterial factors, failed to take into account material factors, erred in principle or come to a conclusion not open to him: *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260.

On the issue of harassment, although there was no evidence that the Claimant had issued the second claim 'in order to' harass/oppress the employer, Lord Dyson MR held that the fact of multiple claims where one could and should have sufficed 'will often of itself constitute oppression'. It was not necessary to show that there had been harassment 'beyond that which is inherent in the fact of having to face further proceedings'. Appeal dismissed.

Anita Rao
To content

REDUNDANCY

Public sector workers are protected by s.188 TULR(C)A, those in crown employment are not

United States of America v Nolan [2014] EWCA Civ 71

The Court of Appeal held that, in closing a US military base in Hampshire, the USA was not discharged from its duty to consult employees' representatives about planned collective redundancies under section 188(1) Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). This judgment verifies the position that public sector workers in the UK have statutory redundancy protection, whilst workers in "crown employment" are excluded and covered by voluntary provisions. However, the Court of Appeal ordered an additional hearing to consider whether or not the duty to consult over collective redundancy arises only once the closure decision has been made (known "as the Fujitsu issue", following *Akavan Erityisalojen Keskusliitto Alek RY and others v. Fujitsu Siemens Computers OY* Case C-44/08 [2009] IRLR 944).

Prior to giving its judgment, the Court of Appeal had made a referral to the CJEU. However, the CJEU decided that the dismissal of workers at a military base was beyond the scope of Directive 98/58 (due to the exclusion in article 1(2)(b) of Council Directive 98/59/EC) and, therefore, did not to respond to the Court of Appeal's question. Thus, the USA submitted that s.188 TULR(C)A had to be interpreted in a similar way and that this provided a full rebuttal to the claim. The Court of Appeal denied the USA's contentions.

The USA has requested leave to appeal the decision to the Supreme Court.

Sara Hunton
To content

FEES UPDATES

All employment lawyers are aware of the introduction of fees to employment tribunals on 29 July 2013. This article looks at the effect of fees on the number of claims brought, and considers whether the current fee regime is here to stay.

Unison brought a well-publicised challenge to the legality of the fees regime by way of judicial review proceedings in June 2013: *R (on the application of UNISON) v Lord Chancellor* [2014] IRLR 266. The Commission for Equality and Human Rights intervened.

Unison mounted four challenges (see [18]):

(i) The requirement to pay fees as a condition of access to the ET and EAT violated the principle of effectiveness since it would make it virtually impossible, or excessively difficult, to exercise rights conferred by EU law;

(ii) The requirement violated the principle of equivalence since the requirement to pay fees or fees at the levels prescribed meant that the procedures adopted for the enforcement of rights derived from EU law were less favourable than those governing similar domestic actions;

(iii) That in reaching the decision to introduce the new fees regime and in making the 2013 Order the defendant acted in breach of the Public Sector Equality Duty; and

(iv) That the effect of the 2013 Order was indirectly discriminatory and unlawful.

By a reserved judgment dated 7 February 2014 the High Court (Lord Justice Moses and Mr Justice Irwin) dismissed Unison's application. Comments made within the judgment are, however, thought-provoking.

In respect of (i), the judgment records that:

"The Lord Chancellor has now, publicly and in court, announced that the claim is premature. It would thus be quite impossible for him to object to any future claim on the basis that it is too late to launch it. Far better, we suggest, to wait and see whether the fears of Unison prove to be well-founded. The hotly disputed evidence as to the dramatic fall in claims ***may turn out to be powerful evidence to show that the principle of effectiveness, in the fundamentally important realm of discrimination, is being breached by the present regime.*** *If so, we would expect that to be clearly revealed, and the Lord Chancellor to change the system without any need for further litigation…"* [46] (Emphasis mine)

As to (iv), Unison, supported by the Commission, contended that the imposition of a higher rate of fees in type B cases had a disparate impact on minority groups, such as women, ethnic minorities and the disabled constituting indirect discrimination. The High Court did not find it possible to reach a conclusion as to whether the imposition of a higher rate of fees for type B claims could be objectively justified if it had an indiscriminate effect. They suspected that the imposition of the fee regime would have a disparate effect on those within the protected classes but it was not possible "as yet" to gauge the extent of the impact. For that reason, it was not possible, and would be wrong for the court, to reach a conclusion as to objective justification (dependent as it was on weighing the extent of the disparate impact).

The Court referred to the Lord Chancellor having himself undertaken to keep the issue of the impact of the regime under review:

"If it turns out that over the ensuing months the fees regime as introduced is having a disparate effect on those falling within a protected class, the Lord Chancellor would be under a duty to take remedial measures to remove that disparate effect and cannot deny that obligation on the

basis that challenges come too late. ***It seems to us more satisfactory to wait and see and hold the Lord Chancellor to account should his optimism as to the fairness of this regime prove unfounded.*** *We believe both Unison and the Commission will be, and certainly should be, astute to ensure that accurate figures and evidence are obtained as to the effect of this regime."* [89] (Again, emphasis mine.)

The court thought that the "*fundamental flaw*" in these proceedings was that they were *"premature"* and the evidence *"at this stage"* lacks that robustness necessary to overturn the regime ([90]).

It is understood that in May 2014 Unison were granted permission to appeal this decision to the Court of Appeal.

So what do the statistics show? MOJ statistics for the period October to December 2013, shortly after the introduction of fees, show a reduction of 79% in claims overall when compared to the same quarter in 2012. Receipts of single claims in Employment tribunals were 59% lower in January to March 2014 than they were in January to March 2013. The statistics set out that the number of multiple claim cases has been falling over the last few quarters from around 1,500 in January to March 2013 to around 400 in January to March 2014.

Moreover, a written answer in the Lords Hansard of 24 June 2014 indicates that the Justice Secretary is committed to reviewing the impact of the introduction of fees in the employment tribunal system, the MoJ is currently finalising arrangements for the timing and scope of the review to ensure that the impacts can be properly assessed, and an announcement will be made when the review begins.

In summary: watch this space.

Victoria Flowers

To content

CHAMBERS NEWS

Seminars

Jason Braier and John Crossfil

In June John Crosfill and Jason Braier delivered a seminar for the Lambeth pop up clinic, Jason focussing on updates in discrimination law and John giving an introduction to employment law.

To check availability for future seminars and workshops contact the clerks at:

clerks@fieldcourt.co.uk

To content

EMPLOYMENT STATUS – SCHEDULE OF CONSIDERATIONS

Crawford v Department of Employment and Learning [2014] NICA 26

What follows is Part 1 of the Schedule, Part 2 was the issues in dispute between the parties in the Crawford case.

1. The following matters fall to be considered by the tribunal:

1) Job Title;

2) Start Date;

3) Salary/Overtime;

4) National Minimum Wage Compliance (but see Part 2);

5) Working Time Directive Compliance (but see Part 2);

6) Pension Provision;

7) Expenses;

8) Benefits in Kind;

9) Hours;

10) Duties;

11) Management/supervision of the Individual;

12) Place of Work;

13) Holiday Provisions;

14) Sick Pay and Absence Provisions;

15) Performance Reviews;

16) Disciplinary/grievance procedures;

17) The difference between the individual's role as director and their role as employee (but see Part 2);

18) The issue whether the individual held any other posts in any other businesses, linked or not to the insolvent company (but see Part 2);

19) The issue whether there were any differences between the treatment of the individual in question and other employees in particular where the purported contract terms are the same or comparable;

20) The issue of compliance or non-compliance with the requirements on Director's Service Contracts under Article 228 of the Companies Act 2006;

21) Dividends and Loans (to or from the company):

a) Whether Loans and Dividend Payments were paid as part of Directors' remuneration;

b) How were Loan and Dividend payments agreed;

c) Frequency of payment.

22) Changes to all of the above (Including when, how and by whom agreed);

23) The Implementation of and adherence to the terms along with any variations in the above, and;

24) How the above operated in reality.

2. The tribunal should inquire as to:

1) When was the claimed contract agreed?

2) Who agreed the terms?

3) Who was the employer representative?

4) What was agreed with reference to the matters listed at 1) - 24) above?

5) Were any variations agreed or introduced?

a) If so, what were the variations?

b) How were they agreed?

c) Who agreed them?

6) Whether the agreement or any part thereof was ever committed to writing and if not why not?

7) Compliance or non-compliance with legal requirement to provide written terms & conditions.

3. The following are potentially relevant documents and the presence or absence of any such documents is potentially relevant:

1) Written signed and agreed statement of Main Terms and Conditions and any notification of changes;

2) Written evidence of agreement, which may be found in:

a) A Memorandum or note as required under Section 228 Companies Act 2006;

b) Memorandum and Articles of Association, and;

c) Board Meeting Minutes.

3) Payslips;

4) Pay Records;

5) Claims for expenses including but not limited to fuel and Benefits in Kind (or such documentation as exists verifying the existence of an entitlement to claim expenses);

6) P60s;

7) P45;

8) Self-Assessment Return

9) P11Ds;

10) RD18 - National Insurance Contribution Records;

11) Interactions with company as evidenced in writing;

12) Holiday records;

13) Pension documentation;

14) Overtime records;

15) Timesheets/clocking cards;

16) Performance Reviews;

17) Sickness absence and sick pay records;

18) Any other variation documentation;

19) Disciplinary/Grievance records, and;

20) Staff handbook.

4. The question whether the claimant received reduced and/or no pay during the course of their purported period of employment is of relevance. If so, the reasons for the reduction or cessation of payment are potentially relevant as is the issue of whether the claimant consented to receiving reduced or no pay.