INSTITUTE OF EMPLOYMENT RIGHTS SEMINAR – 21.11.2019

'UNFAIR DISMISSAL AND ARTICLE 8 ECHR 1950'

1/. The passing of the Human Rights Act ('the HRA 1998') represented a momentous change to the British Legal System and has had a far reaching effect upon many areas of law, such as public and immigration law. At [101] of Rowland -v- Environment Agency (2005) 1 Ch 1 May LJ held that its introduction '*was a fundamental watershed in the development of both substantive and procedural law*', whilst at 297 of McCartan Turkington Breen (A firm) -v- Times Newspapers Ltd (2001) 2 AC 277 HL Lord Steyn held :

> 'As Lord Nicholls of Birkenhead put it in the Reynolds case, freedom of expression is buttressed by the Human Rights Act 1998. The Convention fulfils the function of a Bill of Rights in our legal system. There is general agreement that the Human Rights Act 1998 is a constitutional measure'

2/. However, more than 20 years after its passing the HRA 1998 is still yet to have a marked effect upon domestic employment law, particularly in respect of the application of the band of reasonable responses ('the BORR') to unfair dismissal claims. In respect of the latter, the Editor of the Industrial Relations Law Reports, Michael Rubenstein, recently and rightly observed in the highlights section of the June 2018 edition :

> 'From time to time, over the years, in these pages and elsewhere I have pointed out that the band of reasonableness or range of reasonable responses test for whether dismissal is unfair, is a judicial gloss on the statutory language and one which has never been formally approved by the Supreme Court (or House of Lords)'

3/. Notwithstanding my involvement in a number of notable defeats involving human rights arguments, I still remain of the view that the HRA 1998 provides the basis to redefine domestic employment law, particularly that relating to the determination of unfair dismissal claims in view of (i) the terms in which the Supreme Court disappointingly (but intriguingly) refused permission to appeal ('PTA') in Turner -v- East Midlands Trains Ltd (2013) 3 All ER 375 CA; (ii) the flexible interpretation of the BORR by the Northern Ireland Court of Appeal in Connolly -v- Western Health and Social Care Trust [2018] IRLR 239 CA; and (iii) the

Supreme Court's express invitation within their judgment of Reilly -v- Sandwell Metropolitan Borough Council [2018] ICR 705 SC for the Burchell test (and presumably the BORR too) to be expressly challenged.

4/. Although I am of the view that there are a large number of potential arguments that could be made under the HRA 1998, in this talk I will be concentrating solely upon the right to private life under Article 8, the length of service required to bring an unfair dismissal claim and whether compensation should potentially be uncapped if a human rights related unfair dismissal claim is allowed.

A) THE HUMAN RIGHTS ACT 1998

i) Statutory Interpretation

5/. When determining employment claims, under sections 2 and 3 of the HRA 1998 Employment Tribunals must construe domestic provisions such as section 98 ERA 1996 compatibly with Convention rights and must take into account any '*judgment, decision, declaration or advisory opinion of the European Court of Human Rights*' in determining what Convention rights require. Employment Tribunals are under this duty because they (along with public sector employers) are public authorities for the purposes of section 6 of the HRA 1998.

ii) The interface between the HRA 1998 and Unfair Dismissal Claims

6/. The leading case concerning how Convention rights can affect the determination of an unfair dismissal claim is that of the Court of Appeal's judgment in X -v- Y [2004] IRLR 625 CA in which Mummery LJ held at [58] :

> '58. …
>
> (6) There may, however, be cases in which the HRA point could make a difference to the reasoning of the tribunal and even to the final outcome of the claim for unfair dismissal. I shall now consider the possible application and effect of s.3 of the HRA in such cases.

(7) As explained earlier, a dismissal for a conduct reason may fall within the ambit of Article 8 ...

(8) *In the case of a public authority employer, who is unable to justify the interference, the dismissal of the employee for that conduct reason would be a violation of Article 8. It would be unlawful within sections 6 and 7 of the HRA. If the act of dismissal by the public authority is unlawful under the HRA, it must also be unfair within s. 98, as there would be no permitted (lawful) reason in s 98 on which the public authority employer could rely to justify the dismissal. In that case no question of incompatibility between s. 98 and the Convention rights would arise*.

(9) Taking the same set of facts, save for the substitution of a private sector employer, it would not be unlawful under the HRA for the private employer to dismiss the employee for eating cake, as a private employer is not bound by the terms of s. 6 HRA not to act incompatibly with Article 8. It is, however, difficult to conceive of a case, in which the unjustified interference with respect for private life under Article 8 (by dismissal for eating cake) would not also be an unfair dismissal under s. 98. Put another way, it would not normally be fair for a private sector employer to dismiss an employee for a reason, which was an unjustified interference with the employee's private life. If that is right, there would, in general, be no need for an applicant to invoke Article 8 in order to succeed on the unfair dismissal claim and there would be no question of incompatibility between s. 98 of the ERA and Article 8 to attract the application of s. 3 of the HRA.

(10) *If, however, there was a possible justification under s. 98 of the dismissal of the cake eating employee, the tribunal ought to consider Article 8 in the context of the application of s. 3 of the HRA to s. 98 of the ERA. If it would be incompatible with Article 8 to hold that the dismissal for that conduct was fair, then the employment tribunal must, in accordance with s. 3, read and give effect to s. 98 of the ERA so as to be compatible with Article 8. That should not be difficult, given the breadth and flexibility of the concepts of fairness used in s. 98*'

B) ARTICLE 8

i) Relevant Provisions

7/. Article 8 ECHR 1950 provides :

'*Article 8 – Right to respect for private and family life*

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'

ii) Relevant Principles

8/. The right to private life under Article 8 has firstly been held to concern an individual's existing relationships with friends, partners and workmates (see [82] of the ECtHR's judgment in the traveller case of Connors -v- United Kingdom (2005) 40 EHRR 9).

9/. It was also accepted at [35]-[38] of Pfeifer -v- Austria (2009) 48 EHRR 8 ECtHR that Article 8 protects an individual's right to reputation as part of the protection afforded to their private life.

10/. Article 8 also goes further than merely upholding the status quo, by safeguarding an individual's right to establish new relationships, particularly through future positions of employment (see [29]-[31] of Niemitz -v- Germany (1992) 16 EHRR 97 ECtHR).

11/. Subsequent case law has held that restrictions placed upon an individual's right to undertake a range of positions of employment, will generally engage their right to private life under Article 8 (see [47]-[50] of Sidabras -v- Lithuania (2006) 42 EHRR 6, [34]-[36] of R(Wright and others) -v- Secretary of State for Health and another (2009) 2 WLR 267 HL and more recently [31]-[32] of the widely reported CRB check/Rehabilitation of Offenders Act 1974 case of R(T) and others -v- (1) Chief Constable of Greater Manchester (2) Secretary of State for the Home Department [2013] EWCA Civ 25 CA).

12/. If Article 8 is engaged whether an individual's human rights have been violated must be determined by reference to the proportionality test in Article 8(2) as considered by Lord Steyn at [27] of R(Daly) -v- Secretary of State for the Home Department (2001) 2 AC 532 HL :

> 'the intensity of review is somewhat greater under the proportionality approach ... first, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, *not merely whether it is within the range of rational or reasonable decisions*. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R -v- Ministry of Defence Ex p Smith [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights ... in other words, the intensity of review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued'

13/. It is also an accepted point of law that in contrast with the neutral burden of proof as to the fairness of a dismissal, in respect of establishing that an interference with an individual's Article 8 rights is proportionate, the burden of proof will rest on the Respondent (see [21] of R(Wood) -v- Commissioner of Police of the Metropolis (2010) 1 WLR 123 CA). In some finely balanced cases, this can be the difference between an Applicant's claim winning or losing, especially if it concerns the application of their fundamental rights (e.g. see [18] of Baroness Hale's judgment in Sadovska and another -v- Secretary of State for the Home Department (2017) 1 WLR 2926 SC).

iii) Turner -v- East Midlands Trains Limited [2013] IRLR 107 CA, (2013) 3 All ER 375 CA

14/. In this case, the Appellant was a Senior Conductor who had continuously worked for the Respondent and their predecessors for more than 12 years. At the time of her dismissal on 26 March 2010 she was 51 years old and had a clean disciplinary record.

15/. The misconduct that the Appellant was dismissed for related to her alleged misuse of a hand held computerised ticket machine ('the Avantix Machine'), used by conductors to issue

tickets to passengers travelling on the Respondent's trains. Her employers concluded that the Appellant had deliberately manipulated the machine to produce non-issued tickets that closely resembled a genuine ticket in appearance, which she then sold to members of the public for personal gain. As is explained in more detail below, there were no witnesses to the alleged misconduct and no direct evidence of personal gain on the part of the Appellant, who at all times denied the allegations. The evidence in support of the charge rested on statistical conclusions drawn from the available data and documentation. The Appellant maintained at all times that this was unreliable, incomplete and inconclusive.

16/. Whenever a Conductor issued a proper ticket that was not then sold for use by the passenger (for example because the passenger changed their mind as to their ticket requirements during the transaction), it was known as a non-issue and there was a rigorous procedure for recording the fact of such tickets on their daily shift sheet that is handed in with the machine and any monies collected by the Avantix Lobby within the Respondent's Nottingham Depot. Such a non-issued ticket must also always be returned by the Conductor. However in contrast, no such procedure existed in respect of Automatic Non-Issues ('ANI's'), which are tickets which are faulty in some respect, so that they should not be sold to the customer. The Avantix machine is able to record the degree to which such an ANI has been printed which is expressed as a percentage of the 500 lines of print that make up a perfect ticket, and this will be detailed on the relevant Conductor's end of shift ('EOS') card. However as the Tribunal noted at [18] the information on the EOS card : '*is not of itself indicative of the quality of the item produced and the extent to which it, therefore, would or could be mistaken for a valid ticket. That is because a large number of lines may be overprinted so that although most of the 500 lines appear they do not do so in a legible format or may take up only a portion of the available space on the ticket*'.

17/. In respect of procedures within the Avantix Lobby concerning ANIs the Employment Tribunal held at [18] : '*ANIs are also supposed to be returned to the Avantix lobby. There is however, no facility or requirement to record them on the shift sheet. The lobby staff did not search assiduously for ANI returns, although if returned and retrieved they too would be stapled to the other documentation. A number of ANIs would be obviously worthless, blank or very poorly printed tickets and would not be regarded as anything other than rubbish either by the conductor issuing it or anyone else who came across it subsequently, if for instance it*

went out again in the bag after not being noticed and recovered by the lobby staff'. It was common ground between the parties that on occasion, the Avantix Lobby staff would hand out Avantix machines to Senior Conductors in bags which still contained ANIs from the previous shift.

18/. The disciplinary charge that the Respondent brought against the Appellant was that she had on numerous occasions inappropriately and deliberately manipulated her Avantix ticket machine so as to produce ANIs of sufficient merchantable quality to give the appearance of being proper tickets, which she had then fraudulently sold to members of the public and dishonestly kept the proceeds. The allegations can therefore be fairly categorised as being that the Appellant had committed a vast number of crimes of dishonesty, representing a breach of trust to her employer of the utmost severity.

19/. However, as emphasised above, there was no direct evidence of the Appellant behaving in a fraudulent matter. As the ET held at [22] : '*This investigation has always been founded on statistics and the inferences which the Respondent drew from them. It is accepted that there is no evidence of any ANI ticket actually having been used or of an attempt having been made to use it. Nor has the Claimant been observed manipulating or attempting to manipulate the Avantix machine to generate a useable ANI ticket*'. Instead the basis for the Respondent's charge was that during the relevant sample period, the Appellant had issued a significant number of suspicious ANIs on her Avantix machine (as recorded on her EOS card), that had not been followed by the immediate issue of a replacement ticket with the same details (as, said the Respondent, would be expected if the ANI had come about innocently due to a computer printing error) and where the relevant ANI ticket could not be found within the Respondent's records.

20/. The Nottingham Employment Tribunal dismissed the Appellant's unfair dismissal claim, but at [36], the Employment Judge ('EJ') plainly had doubts as to whether the Respondent did have reasonable grounds to believe that the Appellant had perpetrated a fraud upon the company, holding : '*it is correct that in the course of the hearing the Judge did observe that there are no instances of potentially suspect tickets having been issued 'en bloc' but that rather the evidence relied upon points to a single, usually low value ticket being generated occasionally and usually once per shift ... the Judge might, therefore, have been inclined to*

question the likelihood of this pattern being in fact indicative of the dishonesty alleged'. However the EJ did not ultimately find in the Appellant's favour on this issue, recording the lay members' view that the statistical evidence was sufficient to amount to reasonable grounds for her dismissal. In such circumstances, the EJ felt bound to conclude by reason of the BORR : '*there is certainly no reason to say that the view taken by the Respondents was, therefore, outside the band of reasonable responses. To hold otherwise would indeed be inappropriately to substitute our own view for that of the reasonable employer with specific knowledge of their own industry*'.

21/. The Appellant Claimant challenged the Nottingham Employment Tribunal's decision on the basis that the reasons for her dismissal interfered with her right to private life under Article 8 in that it severed the working relationships she enjoyed as a result of her position of employment, damaged her reputation and seriously compromised her ability to obtain future employment. The Appellant further alleged that the ET's application of the band of reasonable responses ('BORR') was inconsistent with the requirements of the Article 8(2) proportionality test which required the Tribunal to make a decision upon the fairness of the Claimant's dismissal for itself.

22/. The Court of Appeal dismissed her appeal. At [27], [29] and [32] Elias LJ accepted that Article 8 could be engaged by reason of damage to an employee's reputation, restrictions upon their ability to obtain future employment and the severing of the social relationships they enjoyed at the workplace. However he stressed firstly, [49] of the ECtHR's judgment in Sidabras in which it was held that Article 8 cannot be relied upon in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as the commission of a criminal offence, and secondly, that Article 8 itself requires any interference with an individual's rights to be procedurally fair. In finding that the BORR was compatible with Article 8, Elias LJ held at [52] :

> 'I find it very difficult to see how a procedure which could be considered objectively fair if adopted by a reasonable employer could nonetheless be properly described as an unfair procedure within the meaning of Article 8. I accept that where Article 8 interests are engaged, matters bearing on the culpability of the employee must be investigated with a full appreciation of the potentially adverse consequences to the employee. But the band of

> reasonable responses test allows for a heightened standard to be adopted where those consequences are particularly grave ... the assessment of the procedure is made by the tribunal and not the employer, and in making it the tribunal is adopting an objective test of whether the employer has acted as a reasonable employer might do. Accordingly I see no breach of Article 8'

23/. On 9 May 2013, the Supreme Court disappointingly refused the Claimant's application for PTA, notably holding :

> 'Permission to appeal be refused because the application does not raise a point of law which ought to be considered by the Supreme Court at this time. Whatever the merits of re-examining the Burchell test in this Court, this is not an appropriate case in which to do so'

iv) Is it correct that the BORR is compatible with Article 8?

24/. Although the Court of Appeal have upheld the status quo in Turner by finding that the BORR is compatible with Article 8, significant doubts remain as to whether this is consistent with ECtHR case law which requires Courts and Tribunal to be able to (i) make findings of fact for themselves when applying Article 8(2); and (ii) take into account evidence which was not before the relevant decision maker, when doing so.

25/. The operation of the BORR test is explained by Elias LJ at [16] of Turner, where he cites Aikens LJ's summary of the applicable principles at [78] of Orr v Milton Keynes Council [2011] ICR 704 CA which continues to be applied to the present day in unfair dismissal claims, both conventional and in respect of human rights issues (see [46] of Kuteh -v- Dartford and Gravesham NHS Trust [2019] IRLR 716 CA). It is noteworthy that :

(a) The ET must not substitute its own view as to the fairness of dismissal for that of the employer, rather the Tribunal must determine whether the decision fell within a range of reasonable responses that a reasonable employer might have adopted;

(b) In turn this means that "*there are many misconduct cases … in which the Tribunal decides that an employee has been treated harshly and even that*

members of the Tribunal would not, if it had been left to them, have regarded it as fair to dismiss; but they conclude that the dismissal fell within the range of reasonable responses open to the employers in the situation before them": Bryant v Sage Care Homes Ltd [2012] UKEAT/0453/11/LA at [29];

(c) The BORR test applies not only to the question of whether the sanction was permissible, but to the dismissal process, including whether the pre-dismissal investigation was fair and appropriate: see Elias LJ at [17] of Turner citing Sainsbury's Supermarkets v Hitt [2003] ICR 111 CA;

(d) The BORR approach does not allow for any primary fact finding on the part of the ET: see Elias LJ at [16] of Turner, Beedell v West Ferry Printers Ltd [2000] ICR 1263 EAT at [84] and [121] of Elias LJ's judgment in Mattu -v- University Hospitals of Coventry and Warwickshire NHS Trust [2012] IRLR 661 CA in which he holds in respect of the BORR : '*this does not allow the tribunal fully to review the decision of the employer. The employment tribunal cannot review the finding of primary facts for itself*';

(e) As a result, an ET is limited to assessing the factual findings made by an employer and is prohibited from making its own findings of fact concerning a Claimant's alleged misconduct, in accordance with [41]-[42] of London Ambulance Service NHS Trust -v- Small [2009] IRLR 563 CA ;

26/. In contrast to the above, in the traveller case of Connors -v- United Kingdom (2005) 40 EHRR 9 the ECtHR held at [92] in finding a breach of Article 8 :

'92. ... The Government has relied on the possibility for the applicant to apply for judicial review and to obtain a scrutiny by the courts of the lawfulness and reasonableness of the Council's decisions ... in the applicant's case, his principal objection was based not on any lack of compliance by the Council with its duties or on any failure to act lawfully *but on the fact that he and the members of the family living with him on the plot were not responsible for any nuisance and could not be held responsible for the nuisance caused by others who visited the site. Whether or not he would have succeeded in that argument, a factual dispute clearly existed between the parties*. Nonetheless, the local authority was not required to

establish any substantive justification for evicting him and on this point judicial review could not provide any opportunity for an examination of the facts in dispute between the parties ...

94... the court is not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family has been sufficiently demonstrated by the Government. *The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal* has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community'

27/. The above approach was expressly accepted by the Supreme Court in respect of the application of Article 8 to housing cases in Manchester City Council -v- Pinnock (Secretary of State for Communities and Local Government and another intervening) (2010) 3 WLR 1441 in which Lord Neuberger, whilst giving the judgment of the Court, held :

'45. ... it is clear that the following propositions are now well established in the jurisprudence of the European Court : (a) any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end ... (b) a judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i.e. *one that does not permit the court to make its own assessment of the facts in an appropriate case*) *is inadequate as it is not appropriate for resolving sensitive factual issues*'

28/. Further and more recently in Kiarie -v- Secretary of State for the Home Department (Bail for Immigration Detainees intervening) (2017) 1 WLR 2380 SC Lord Wilson held at [42]-[47] in the course of his leading judgment :

'42. When on appeal the tribunal considers an argument that deportation would breach the appellant's Convention rights, for example under Article 8, its approach to the Home Secretary's decision is not in doubt … *in summary, the tribunal must decide for itself whether deportation would breach the appellant's Convention rights; in making that decision, it can depart from findings of fact made by the Home Secretary and indeed can hear evidence and make findings even about matter arising after her decision was made* (section 85(4) of the 2002 Act); and, in making that same decision, *it must assess for itself the proportionality of*

deportation, albeit attaching considerable weight to the considerations of public policy upon which the Home Secretary has relied, and to any other part of her reasoning which, by virtue of her position and her special access to information should carry particular authority …

44. The issue which arises relates to the court's treatment of the Home Secretary's findings of fact …

45. In R(Giri) -v- Secretary of State for the Home Department (2016) 1 WLR 4418, the issue was whether the Home Secretary had been entitled to refuse to grant the applicant leave to remain in the United Kingdom. She had been entitled to do so if, in making his application for leave, he had failed to disclose a material fact. She found as a fact that he had failed to do so. The Court of Appeal applied the Wednesbury criterion … in holding that her findings of fact had not been unreasonable.

46. The difficulty is that the Giri case did not engage the court's duty under section 6 of the 1998 Act. In Manchester City Council -v- Pinnock … the tenant of a house owned by a local authority argued that possession of the house pursuant to the order which it sought against him would breach his rights under Article 8. This Court held at [74] that :

> 'where it is required in order to give effect to an occupier's article 8 Convention rights, the court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view'

In the Lord Carlile case [2015] AC 945 … Lord Sumption JSC said, more broadly, at para 30:

> 'when it comes to reviewing the compatibility of executive decisions with the Convention, there can be no absolute constitutional bar to any inquiry which is both relevant and necessary to enable the court to adjudicate'

47. Even when elevated by the protean concept of 'anxious scrutiny', application of the Wednesbury criterion to the right to depart from the Home Secretary's findings of fact (including any refusal to make such findings) in the course of a judicial review of her certificate under section 94B is in my opinion inapt. If it is to discharge its duty under section 6 of the 1998 Act, the court may need to be more proactive than application of the criterion would permit … even in the course of a judicial review, the residual power of the court to

determine facts, and to that end to receive evidence including oral evidence needs to be recognised'

v) Will the compatibility of the BORR with the ECHR's proportionality test be meaningfully reconsidered by the Senior Courts?

29/. The case of Connolly -v- Western Health and Social Care Trust [2018] IRLR 239 NiCA did not involve any human rights arguments, but instead concerned a Nurse who feeling the onset of an asthma attack (but who did not have their inhaler with them at the time) entered the medicine room and took 5 puffs from a Ventolin inhaler, but tell the Ward Sister what she had done. She was not at work the following day, but on her return to the workplace she was asked what had occurred and confirmed that she had used the inhaler. The Respondent summarily dismissed her from their employment, which was upheld by an Employment Tribunal which rejected the Claimant's unfair dismissal claim. However, the Northern Ireland Court of Appeal allowed the Claimant's appeal with Denny LJ applying the BORR in an extremely flexible fashion :

'36. It appears to me that, even taking into account the delay, for which an explanation was given which was not rejected as a finding of fact, that could not constitute 'deliberate and wilful conduct' justifying summary dismissal. Her Terms of Employment do not seem to have expressly prohibited such a use. The Code of Conduct is ambiguous at best on the topic. If she had asked the Ward Sister for permission before she used the inhaler and the Sister had refused her permission and she had nevertheless gone ahead and used it … that would have been a deliberate flouting of essential contractual conditions i.e. following the instructions of her clinical superiors. But that is not what happened here. Furthermore, I agree … that dismissals for a single first offence must require the offence to be particularly serious. Given the whole list of matters which the employer included under the heading of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as 'particularly serious' …

38. For this court to approbate the tribunal's decision upholding as within a reasonable range of responses the summary dismissal of an employee from her chosen profession on these facts without any prior warning as a 'repudiation of the fundamental terms of the contract' would be to turn language on its head. Employment law is a particular branch of the law of contract. With statutory interventions it has, of course, developed a character of its own. But any dismissed employee opting to go into a court of law and claim damages for breach of contract

at common law against an employer who had summarily dismissed them for using a Ventolin inhaler while suffering from an asthmatic attack and delaying two days in reporting that, particularly when it was their 'first offence,' could be tolerably confident of success before a judge, in my view.

39. It seems to me therefore that this is one of those cases where the conclusion reached by the tribunal was 'plainly wrong' (Mihail) and one that no reasonable tribunal ought to have arrived at.

40. The interpretation of what, in this jurisdiction, is art 130(4)(a) of the 1996 Order has been fixed by a series of appellate courts over the years ie that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the tribunal would have made. That test, expressed in various ways, is too long established to be altered by this court, and in any event has persuasive arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in art 130(4)(b) ie that that decision 'shall be determined in accordance with equity and the substantial merits of the case'. Those words provide a protection to both employees and employers. They are a protection to the employee where the employer, usually acting through other employees with delegated power, acts with a genuine belief in what they are doing but in a way that is inequitable and contrary to the substantial merits of the case.

41. But art 130(4)(b) is also a protection to the employer. It conveys that even if an employer is guilty of one or more errors in procedure nevertheless that should not be equated with unfair dismissal unless those errors have indeed led to unfairness to the dismissed employee which would render it inequitable or contrary to the substantial merits of the case to dismiss them.

42. The tribunal in its judgment acknowledged, at para 67, that it must consider whether the decision to dismiss was proportionate in all the circumstances of the case. Proportionality has come to the fore in legal thinking since 1996, it might be said. But it is difficult to see how they did approach this in a proportionate way, particularly as, at para 97, the tribunal acknowledged that the penalty imposed was 'at the extreme end.'

43. For all these reasons I conclude that the tribunal erred in law and in its appreciation of the facts and would quash its decision that the appellant was fairly dismissed. As discussed at the

hearing I would allow the parties to consider the issue of remedy before making our Order, as a mere remittal to another tribunal would be clearly inappropriate in the circumstances'

30/. Further, in Reilly -v- Sandwell Metropolitan Borough Council [2018] ICR 705 SC Baroness Hale recognised at [32]-[35], albeit in an *obiter* aside, that the manner in which unfair dismissal claims are presently determined is arguably wrong in law :

'32. The case might have presented an opportunity for this court to consider two points of law of general public importance which have not been raised at this level before. The first is whether a dismissal based on an employee's "conduct" can ever be fair if that conduct is not in breach of the employee's contract of employment. Can there be "conduct" within the meaning of section 98(2)(b) which is not contractual misconduct? Can conduct which is not contractual misconduct be "some other substantial reason of a kind such as to justify the dismissal" within the meaning of section 98(1)(b)? It is not difficult to think of arguments on either side of this question but we have not heard them—we were only asked to decide whether there was a duty to disclose and there clearly was.

33. Nor have we heard any argument on whether the approach to be taken by a tribunal to an employer's decisions, both as to the facts under section 98(1) to (3) of the Employment Rights Act 1996 and as to whether the decision to dismiss was reasonable or unreasonable under section 98(4) , first laid down by the Employment Appeal Tribunal in British Home Stores Ltd v Burchell (Note) [1980] ICR 303 and definitively endorsed by the Court of Appeal in Foley v Post Office [2000] ICR 1283, is correct. As Lord Wilson JSC points out, in para 20 above, the three requirements set out in the British Home Stores case are directed to the first part of the inquiry, under section 98(1) to (3) , and do not fit well into the inquiry mandated by section 98(4) . The meaning of section 98(4) was rightly described by Sedley LJ, in Orr v Milton Keynes Council [2011] ICR 704 , para 11, as "both problematical and contentious". He referred to the "cogently reasoned" decision of the Employment Appeal Tribunal (Morison J presiding) in Haddon v Van den Bergh Foods Ltd [1999] ICR 1150, which was overruled by the Court of Appeal in the Foley case [2000] ICR 1283. Even in relation to the first part of the inquiry, as to the reason for the dismissal, the British Home Stores approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair. Once again, it is not difficult to think of arguments on either side of this question but we have not heard them.

> 34. There may be very good reasons why no one has challenged the British Home Stores test before us. First, it has been applied by employment tribunals, in the thousands of cases which come before them, for 40 years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that the British Home Stores case is wrong, and it has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider that the approach is correct and does not lead to injustice in practice.
>
> 35 It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct'

vi) The length of service required for an unfair dismissal claim and the right to an effective remedy under the ECHR 1950

31/. Since 6 April 2012, Section 108(1) of the ERA 1996 has required an employee to have two years service ending with their effective date of termination in order to bring a standard unfair dismissal claim :

> '(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination'

32/. However it is clear from the case of Redfearn -v- United Kingdom (2013) 57 EHRR 2 ECtHR that in certain defined circumstances, the ECHR 1950 will demand that a Claimant must be entitled to bring an unfair dismissal claim even if they do not have the said length of service. In Redfearn the Applicant was a driver employed by Serco Ltd in Bradford and worked on a route on which most of his customers were of Asian origin. Prior to a local election occurring, the Applicant was identified as a candidate for the British National Party, which at the time only allowed white British nationals to become members. On 15 June 2004, the Applicant was elected as a local councillor for the BNP and was subsequently dismissed by Serco on the grounds that his continued employment constituted a potential health and safety risk due to the anxiety among their passengers, their carers, the damage to Serco's reputation and the potential loss of its contract with Bradford City Council. As the Applicant

had not been continuously employed for one year (which was the relevant length of service required by section 108 ERA 1996 at the time), he could not bring an action for unfair dismissal. Instead the Applicant brought a claim for race discrimination, alleging that either he had been directly or indirectly discriminated against. This claim was dismissed by an Employment Tribunal, and despite a bizarre judgment from the EAT allowing the Applicant's appeal, the ET's judgment was subsequently upheld by the Court of Appeal. The Applicant then lodged an application with the ECtHR, who allowed his complaint under Article 11 ECHR 1950 holding :

> '45. … regard must also be hard to the fact that the applicant was a 'first class employee' and, prior to his political affiliation becoming public knowledge, no complaints had been made against him by service users or by his colleagues. Nevertheless, once he was elected as a local councillor for the BNP and complaints were received from Unions and employees, he was summarily dismissed without any apparent consideration being given to the possibility of transferring him to a non-customer facing role ...
>
> 46. Moreover, although the applicant was working in a non-skilled post which did not appear to have required significant training or experience, at the date of his dismissal he was 56 years old and it is therefore likely that he would have experienced considerable difficulty finding alternative employment.
>
> 47. Consequently, the Court accepts that the consequences of his dismissal were serious and capable of striking at the very substance of his rights under Art 11 of the Convention …
>
> 49. … the principal question for the Court to consider is whether, bearing in mind the margin of appreciation afforded to the respondent State in this area, the measures taken by it could be described as 'reasonable and appropriate' to secure the applicant's rights under art 11 of the Convention.
>
> 50. In the opinion of the Court, a claim for unfair dismissal under the 1996 Act would be an appropriate domestic remedy for a person dismissed on account of his political beliefs or affiliations. Once such a claim is lodged with the Employment Tribunal, it falls to the employer to demonstrate that there was a 'substantial reason' for the dismissal. *Following the entry into force of the Human Rights Act 1998, the domestic courts would then have to take*

full account of Art 11 in deciding whether or not the dismissal was, in all the circumstances of the case, justified.

51. However, as the applicant had not been employed for the one year qualifying period at the date of his dismissal, he was unable to benefit from this remedy. He therefore brought a race discrimination claim under the 1976 Act but this claim was rejected by the Court of Appeal … consequently, the Court does not consider that the 1976 Act offered the applicant any protection against the interference with his rights under Art 11 of the Convention.

52. There is therefore no doubt that the applicant suffered a detriment as a consequence of the one-year qualifying period as it deprived him of the only means by which he could effectively have challenged his dismissal at the domestic level on the ground that it breached his fundamental rights …

54. … (the Court) observes that in practice the one-year qualifying period did not apply equally to all dismissed employees. Rather, a number of exceptions were created to offer additional protection to employees dismissed on certain prohibited grounds, such as race, sex and religion, but no additional protection was afforded to employees who were dismissed on account of their political opinion or affiliation.

55. The Court has previously held that political parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the convention system, the Court considers that in the absence of judicial safeguards a legal system which allows dismissal from employment solely on account of the employee's membership of a political party carries with it the potential for abuse.

56. … for the court what is decisive in such cases is that the domestic courts or tribunals be allowed to pronounce on whether or not, in the circumstances of a particular case, the interests of the employer should prevail over the art 11 rights asserted by the employee, regardless of the length of the latter's period of employment.

57. Consequently, the Court considers that it was incumbent on the respondent State to take reasonable and appropriate measures to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation , either through the creation of a further exception to the one-year qualifying period or through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation. As the UK

> legislation is deficient in this respect, the Court concludes that the facts of the present case give rise to a violation of art 11 of the Convention'

33/. The ECtHR's findings in Redfearn apply with even greater force now that there is a two year qualifying period for an unfair dismissal claim. It remains to be seen whether the ECtHR would be willing to widen their protected categories of Applicant who are deserving of such greater protection, beyond the ground of membership of a political party in due course.

vii) What effect would a finding that Article 8 has been violated have upon a Claimant's right to a remedy for their unfair dismissal?

34/. Further, if Article 8 is theoretically engaged (either by the reason for the dismissal or the consequences of the same for the employee concerned) and the dismissal is found to be procedurally unfair under section 98(4) with the consequence that the employee's Article 8 rights have similarly been breached, this could have a substantial effect on the award of any compensation. Firstly, under Article 41 of the ECHR 1950, the ECtHR has the power in a deserving case to award compensation for injury to feelings (which it refers to as '*non-pecuniary loss*'), which raises the possibility of the House of Lords decision in Dunnachie -v- Kingston upon Hull City Council (2005) 1 AC 226, which held that section 123(1) of the Employment Rights Act 1996 did not include an entitlement to be awarded sums for injury to feelings.

35/. Secondly, in the event of the breach of an individual's human rights, the overriding objective under Article 41 of the ECHR 1950 is to place that person in the position they would have been in had the violation of their rights not occurred. If restitution cannot be provided under the domestic law of the relevant member state, then Article 41 will 'fill the gap' and empowers the ECtHR to grant the applicant the necessary relief. Therefore it appears strongly arguable that in an unfair dismissal case in which a Tribunal has found that a Claimant's convention rights have been violated by their dismissal and that a sizeable sum of loss can be established, this must mean that the statutory cap imposed by section 124(1),(1ZA) of the ERA 1996 (namely the lower of either £86,444 or 52 multiplied by a week's pay of the person concerned) in respect of a standard unfair dismissal claim has to be disapplied.

36/. These principles emerge *inter alia* from the ECtHR's judgment in Brumarescu -v- Romania (2001) 33 EHRR 36 in which the Court held at [19] :

> '19. The Court reiterates that a judgment in which it finds a breach *imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach*.
>
> 20. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate'

PAUL DRAYCOTT
Doughty Street Chambers
19 November 2019
enquiries@doughtystreet.co.uk