INJUNCTIVE RELIEF FOR EMPLOYEES

Notes for a talk at the Matrix Employment Seminar on 12/2/2015

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Introduction

1. In this talk I will discuss the forms of injunctive relief commonly sought by employees, and I will explain that in light of a number of recent decisions injunctive relief is now more readily available to employees than it was previously.[1]

2. In this paper I focus on three types of injunctive relief:

   (1) Negative injunctions which restrain implementation of notice to terminate (as was sought in the *War Horse* litigation). Such injunctions are analogous to an order for specific performance (see below);

   (2) Injunctions restraining an employer from asking an employee to do certain kinds of work;

   (3) And finally, injunctions which restrain implementation of internal contractual procedures.

3. Injunctions can be either interim or final (see s.37(1) of the Senior Courts Act 1981). However since few injunctive relief cases continue after the interim stage, this paper will focus on interim injunctions.

[1] The fact that injunctive relief is more widely available was recognised by the Supreme Court in *Geys* (see for example Lord Hope at [18] on the court being less reluctant than it once was to give injunctive relief in such cases).

What is Specific Performance?

4. A definitive explanation of the law on specific performance is outside the scope of this paper. However, in summary, specific performance is equitable relief, given by the court to enforce an employer (or other defendant) to do what it agreed by contract to do. The court is able to grant specific performance if there is a valid, enforceable contract in existence (Snell's Equity at 17-006)[2], and it is available in instances of both actual and threatened breach of contract. Specific performance is normally granted when damages or other financial relief would be inadequate, and therefore would not ordinary be granted in cases where financial relief constitutes an adequate remedy.

1. INJUNCTIONS AGAINST DISMISSAL

Time for a Review?

5. The decision of the Supreme Court in *Geys v Societe Generale* [2013] 1 AC 523, [2012] UKSC 63 is crucially important to understanding why injunctive relief for employees should be more widely available than before. As is well known, in *Geys*, the Supreme Court unanimously held (Lord Sumption dissenting in part) that a party's repudiation terminates a contract only if and when the other party elects to accept the repudiation ("the elective theory"), and that it would be unjust if a contract terminated without a party having the opportunity to affirm the contract ("the automatic theory") because this would allow a wrongdoer to benefit from his own wrong (see in particular Lord Hope at [15 – 19] and Lord Wilson at [63-97]). The Supreme Court thereby confirmed that employment law (i.e. the law governing contracts of service) is no different to the mainstream of contract law ("*an unaccepted repudiation is a thing writ*

[2] Snell's Equity, 2010, Sweet & Maxwell.

in water"), and that the elective theory applied equally to wrongful repudiations by employers and employees.[3]

6. Under the elective theory, as endorsed by the Supreme Court in *Geys*, it is for the innocent party to judge whether it is in his interests to keep the contract alive. It is a natural consequence of the decision on the principal question in *Geys*, resolving the "elective/automatic" controversy, that a reconsideration of the remedies available to a wronged employee should take place. There is little or no point in an employee being able to affirm a contract if there is no remedy to enable him to keep the contract alive for any practical purpose.

7. Further, in *Geys*, Lord Wilson, observed at [77] that:

> **'[t]he big question whether nowadays the more impersonal, less hierarchical, relationship of many employers with their employees requires review of the usual unavailability of specific performance has been raised**, for example by Stephenson LJ in the Chappell case… but is beyond the scope of this appeal.'[4] (emphasis added)

8. Lord Wilson's call for a review of the availability of injunctive relief to employees expressly picked up on the observations of the Court of Appeal in *Chappell v The Times Newspapers Ltd and others* [1975] 2 All ER 233.[5] In *Chappell*, the Court of Appeal was asked to consider an application for injunctive relief by six employees

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[3] 1. The elective theory can work both ways, as was evidenced in *Sunrise Brokers LLP v Rodgers* [2015] IRLR 57, where the Court of Appeal held that an employer was entitled to choose whether to accept the repudiation of the contract represented by an employee's purported resignation or, provided they had good reason, to affirm the contract and keep it alive.

[4] See also *C.H. Giles* (*supra*).

[5] In *Ashworth v Royal National Theatre* [2014] IRLR 526 Cranston J cited *Geys* and *Chappell* , but held that the case before him (the War Horse case) was "not an exceptional case" but a "standard case where on a traditional analysis loss of confidence is the primary block to this type of relief" (see [23]).

preventing an employer from terminating their employment in the context of strained industrial relations. Whilst the Court of Appeal upheld the judgment of Megarry J refusing the injunction, Stephenson LJ recognised that the development of working relationships required **continuous reconsideration** of the court rules, and may affect the way that the court exercises its discretion to grant equitable remedies. He held at [241] that:

> 'Relations between employer and employed have indeed developed and are still developing; and their development invites continuous reconsideration by the court of rules worked out in different conditions. … In this developing situation there may arise cases in which it is proper for the court to exercise its discretion in favour of a workman and grant an injunction which will hold an employer against his will to the continued performance of his contract of employment. … Like Stamp LJ, dissenting in *Hill v Parsons* … 'I would be far from holding that in a changed and changing world there can be now new exception from the general rule' that a court will not grant an injunction in aid of specific performance of a contract of personal service, so that if the servant has been wrongfully dismissed, it will consider his contract unilaterally terminated by the master and leave the servant to his remedy in damages. I would not, however, look for new categories in which to pigeonhole new exceptions to this rule as it works either for the employer or the employee, but I would make exceptions in accordance with the general principle on which discretionary remedies are granted, namely, where and only where, an injunction is required by justice and equity in a particular case, and at the interim stage, by the balance of convenience'.

9. Since *Chappell* was decided in 1975, there have been considerable changes in the relations between employers and workers. In my view, key changes would include the following:

(1) The significant increase in the numbers of those who are not employees[6], and who work for an employer in a more remote or impersonal manner as workers or sub-contractors;

(2) The significant increase in "zero hours contracts";

(3) The increase in part-time and remote working;

(4) The increase in the amount of time spent working abroad;

(5) The recent inroads made by the current government into the statutory protection offered to employees against unfair dismissal. In particular, the recent imposition of a cap on unfair dismissal compensation which places categories of employees who it has long been recognised encounter difficulties finding new employment (in particular the disabled or those close to retirement), and arguably means that employees no longer receive adequate compensation for an unfair dismissal.

THE APPROACH OF THE COURTS

10. In practice, a negative injunction restraining an employer from giving notice to terminate will have the same effect as an order for specific performance compelling

[6] As defined in s.230 ERA 1996

an employer to continue to employ an individual pursuant to contract or re-engage them. As such, the two remedies are commonly sought in the alternative.

11. In *Ashworth*, where an interim injunction was sought, Cranston J held at [16] that 'The principles applicable to either remedy in this context are the same'. Accordingly, this paper will proceed upon the basis that the same principles apply to both remedies at the interim stage. However, there is an argument that a non-*American Cyanamid* test applies where the interim relief sought is specific performance. See Snell's Equity at 17-003 - 17-006.[7] This different test does not involve asking where the balance of convenience lies.

12. As is well-know, the conventional test for granting an interim mandatory injunction (ie one where the employer is required to take positive action) is the same test as set out in *American Cyanamid*.[8] The questions for the court are:

    (1) Whether there is a serious question to be tried with a real prospect that the Claimants will obtain a final injunction in substantially the form of the interim injunction sought, and[9]

    (2) If there is a serious issue to be tried, would damages be an adequate remedy for the Claimants; and

[7] Snell's Equity, 2010, 32nd Ed, Sweet & Maxwell.
[8] See *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] 5 LRC 370 at para 19.
[9] The Court of Appeal in *Re Regent International Hotels (UK) Limited and another v Pageguide Limited* , 10 May 1985, accepted that an identical characterisation of the issues to be decided at the interim stage was correct.

(3) If not, or if there is doubt as to the adequacy of the damages available to the Claimants, where does the balance of convenience lie? (*American Cyanamid v Ethicon Ltd* [1975] AC 396.)

13. If the court is able to reach a clear view as to the relative strength of the parties' cases, that should be taken into account (*Series 5 Software v. Clarke* [1996] 1 All ER 853). Developing a clear view of the merits will frequently be impossible, but it is more likely to be achievable in a case which turns on contractual construction: *Arbuthnot Fund Managers Ltd v. Rawlings* [2003] EWCA Civ 518 (CA).

14. As set out above, most of the reported cases are in respect of applications for interim injunctive relief. A final or permanent injunction is a discretionary remedy, which can be ordered by the court after liability has been determined.

15. It is beyond the scope of this paper to examine the law on the grant of interim injunctive relief. However, it suffices to say that there must be an actionable wrong committed or threatened before a court will intervene by way of an injunction. Further, an injunction is a discretionary remedy, and therefore the courts are likely to refuse to grant an injunction if the applicant has "unclean hands" and/or if the applicant has delayed in seeking an injunction.

Cross-undertaking in Damages

16. It is of note that an applicant for injunctive relief would normally be expected to give a cross-undertaking in damages. However, the court is able to order that an applicant need not give a cross-undertaking. Further, even if the applicant is impecunious this is not an absolute bar to injunctive relief, and can be outweighed by the potential seriousness of the court not granting relief (see the following: *Allen v Jambo Holdings Ltd* [1980] 1 W.L.R. 1252; [1980] 2 All E.R. 502, CA; *Ganandran v Cyma Petroleum*

(CA) 15 October 1993; and *Kirklees Borough Council v Wickes Building Supplies Ltd; Mendip District Council v B & Q plc* [1991] 4 All ER 240).

SERIOUS ISSUE

17. This issue will be fact specific. However, any consideration of the likelihood that the employees will obtain a final injunction in substantially the form of the interim injunction sought, will necessarily entail a consideration of the bars to the availability of injunctive relief or specific performance (see below).

EMPLOYEES: A SPECIAL CASE?

18. There is no principle or rule of law which bars an employee, ie an individual working for an employer pursuant to a personal contract of service, from seeking either specific performance or an analogous injunction. In *LauritzenCool AB and another v Lady Navigation Inc* [2006] 1 All ER 866 (CA), the primary argument considered by the Court of Appeal was the submission that the courts will not order negative injunctive relief if a contract is a contract of services (see [9] and [19]). In respect of this submission, Mance LJ held that:

> "This brings me to Mr Popplewell's submission that there is a general principle that injunctive relief will not be given in respect of contract for services if the practical effect would be to compel performance. He suggests that this derives from the nature of the relationship of trust and confidence which exists in relation to such contracts, and is, he submits, of particular importance in time charters. If so, the point must have been overlooked by Lord Chelmsford LC in *De Mattos v Gibson* and by the Court of Appeal in *The Georgios C* if and in so far as it is suggested that it is specific to time

charters. However, I cannot, for my part, see what there is in *The Scraptrade* to suggest that any of these courts was wrong or to alter the pre-established principles stated in them.

Even if one is considering a contract for services far more easily described as personal in nature than the present, **there is no inflexible principle precluding negative injunctive relief which prevents activity outside the contract contrary to its terms'.** (emphasis added).

19. Accordingly, an injunction, analogous to specific performance, may be granted to restrain implementation of a purported notice to terminate a personal contract of service (see also Lord Wilson in *Geys* at [77]).

20. Indeed such injunctions have been granted in a number of cases. *Hill v C A Parsons & Co Ltd* [1971] 3 All ER 1345 (CA)[10] concerned a 63 year old employee, who had two years' service left until he was due to retire on a pension, the amount of which depended upon his average salary during the last three years of his employment. His employer purported to dismiss him and all of his colleagues because he refused to join a trade union, and Mr Hill brought a test case challenging that dismissal and seeking an injunction restraining the employer from dismissing him. The Court of Appeal upheld Mr Hill's appeal against the decision of the High Court to refuse relief. The Court of Appeal appear to have been influenced by the fact that it was 'plain' that the employer had behaved wrongfully, and that the notice given to Mr Hill was far too short.

[10] *Hill* is cited by Lord Wilson in *Geys* at [77]

21. In *Hill* , Lord Denning recognised at 1350 :

> 'The court can in a proper case grant a declaration that the relationship still subsists and an injunction to stop the master treating it as at an end'.

22. Lord Denning continued (at 1350):

> "**It may be said that, by granting an injunction in such a case, the court is indirectly enforcing specifically a contract for personal services. So be it. Lord St Leonards LC did something like it in *Lumley v Wagner*. And I see no reason why we should not do it here**." (emphasis added)

Asymmetrical Protection

23. Whilst an employee is able to seek specific performance of a contract of employment or an analogous injunction, an employer is not able to. This asymmetrical protection has its origins in statute: the Trade Union and Labour Relations (Consolidation) Act 1992, s.236 provides that no court shall compel an employee to do any work by ordering specific performance or by restraining the breach of such a contract by injunction. However, the existence of this statutory prohibition has no effect on the availability of the same remedy against employers (*MacPherson v London Borough of Lambeth* [1988] IRLR 470 at [21]).

24. In *MacPherson*, reliance was placed on s.16 of the 1974 Act (now s.236 of the 1992 Act), and it was suggested that s.16 would also preclude an order which compelled an employer from performing his part under a contract of employment. Dismissing such an argument, Vinelott J described the point as a 'novel one' and held at [21] that 'if this point were a valid one it would have been offered in answer in many of the cases

to which I have been referred in which the courts have granted an injunction at the suit of an employee'.

25. The reason for the prohibition on specific performance of a contract of employment at the request of the employer is that it is thought that such an order would interfere unduly with a person's liberty; whereas requiring a corporate body to employ an individual does not engage questions of personal liberty at all. See also the discussion in *Sunrise Brokers LLP v Rodgers* [2015] IRLR 57 at [32-3] about the court's inability to grant an injunction if the effect of the injunction would be to reduce the employee to 'idleness and starvation' if he did not return to work.

BARS TO THE AVAILABILITY OF RELIEF

26. Both injunctions and specific performance are of course discretionary remedies. As is explained in further detail below, neither remedy is likely to be granted by the court in the following circumstances:

(1) Trust and confidence between the parties to the contract has broken down;

(2) A continued relationship is unworkable for some other reason;

(3) Historically, it has been said that the court will not specifically enforce a contract under which one party is bound by continuous duties, the due performance of which might require constant supervision by the court: *Ryan v. Mutual Tontine Association* [1893] 1 Ch.116.[11] This issue is unlikely to arise in the employment context.

[11] For a powerful critique of the "supervision" principle see Megarry J in *C.H. Giles & Co Ltd v. Morris* [1972] 1 WLR 307 at [316E – 319A].

(4) The court will not specifically enforce a contract if it is futile to do so because the parties are entitled to terminate the contract upon notice in any event.

1 & 2: Trust and Confidence/Workability

27. In *Chappell* Geoffrey Lane LJ held at [506] that "if one party has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster". As was explained by Lord Wilson in *Geys*, it is the fact that neither specific performance nor an injunction is available as a remedy in circumstances in which trust and confidence have been forfeited that has made a "special case" of contracts of employment. Whilst, as set out above, there is no general bar to contracts of employment being enforced by way of specific performance or analogous injunctions; in practice, trust and confidence arguments are likely to arise more frequently in cases where the employee works under a personal contract of service.

28. The two requirements of trust and confidence and a workable relationship are often dealt with together, under the heading of "workability". This is because the real issue for the court when considering specific performance is not whether there is sufficient confidence between the parties, but whether the degree of co-operation required for the contract to operate is sufficient. Thus in *Robb v London Borough of Hammersmith and Fulham* [1991] IRLR 72 at [21] Morland J held that 'the all important criterion is whether the Order sought is workable'. It is of note that the question is not about confidence per se, it is about whether the employer has faith in the honesty, integrity or loyalty of the employee or not (see *Irani* at [604]).

29. In *Powell v Brent London Borough Council* [1988] ICR 176, the employee in question, P, was told by her employer that she had been successful in applying for a

promotion. P was told to report to her place of work the next day, she duly did so and started work shortly afterwards. However, another employee who was not successful in his application for the promotion challenged the decision of the employer to promote P, on the basis that the employer had breached its own procedures. P was then told that the employer would undertake the recruitment exercise afresh and P was asked to reapply. P sought to remain in her post.

30. The Court of Appeal granted the injunction allowing P to remain in post pending trial. Whilst it noted the "strenuous opposition" by P's employers to P continuing in her job (see [193]), it held that there was the necessary confidence between P and her employers to justify the making of an injunction. In so deciding, Ralph Gibson LJ held at [194] that:

> 'Having regard to the decision in *Hill v Parsons* and to the long-standing general rule of practice to which *Hill v Parsons* was an exception, the court will not by injunction require an employer to let a servant continue in his employment, when the employer has sought to terminate that employment and to prevent the servant carrying out his work under the contract, unless it is clear on the evidence not only that it is otherwise just to make such a requirement but also that there exists sufficient confidence on the part of the employer in the servant's ability and other necessary attributes for it to be reasonable to make the order. **Sufficiency of confidence must be judged by reference to the circumstances of the case, including the nature of the work, the people with whom the work must be done and the likely effect upon the employer and the employer's operations if the employer is required by injunction to suffer the plaintiff to continue in the work**'.

31. In *Powell* the relevant circumstances of the case were said by Ralph Gibson LJ to be:

> 'The council is a large organisation employing many people in different departments. It is vastly different from a man or woman with a small business, partnership or small firm with a small staff. The council is also an organisation which, among the senior staff, who must, by their view and attitudes, greatly affect the attitudes of others, is a rational and fair-minded organisation well able to accept the independent view of the court as to the fair and proper basis of preserving the rights of the parties pending trial. I am confident that the same can be said of the councillors'.

32. The courts have drawn a distinction between a lack of confidence and a preference for other employees. An employer's preference for other individuals or forms of providing the services previously provided by employees is not analogous to a situation where one party doubts the honesty, integrity or loyalty of the other (*Anderson v Pringle of Scotland Ltd* [1998] IRLR 64 at [12]).]). In *Anderson* an employer sought to make Mr Anderson (and 289 others) redundant. The Court of Session distinguished cases of misconduct 'or the like' when an employer might raise concerns about trust and confidence in an employee, from a redundancy situation. Further, Lord Prosser held that he was:

> 'not persuaded that there is any true analogy between the respondents' preference for other employees and the need for confidence which is inherent in the employer/employee relationship. It may be very inconvenient or difficult for the respondents to abide by the priorities they have agreed to; but they can hardly call it unfair to be held to their own bargain'.

33. Accordingly, as the employer was not said to be at 'any immediate risk of disaster', interim relief was granted in order to maintain the status quo.

34. Finally, the existence of legal proceedings does not affect whether the employer has confidence in the employee or not, as was recognised by Taylor J in *Hughes and others v London Borough of Southwark* [1988] IRLR 55 at [7]:

> 'It would be quite wrong to consider that simply because there is a dispute between employer and employee mutual confidence has gone. If that was so there could never be a situation in which an injunction could be granted because there will always be a dispute before such an application for such an injunction will be made'.

Non-Employees

35. Concerns about trust and confidence are less likely to apply if the contract is one *for* services, or does not require the individual to provide their services personally. This is the case, even if some degree of mutual co-operation, trust and confidence is required between the parties. Thus in *Re Regent International Hotels (UK) Limited v Pageguide Limited* , 10 May 1985, (unrep), the Court of Appeal held that new buyers of the Dorchester Hotel (Pageguide), should be restrained by an injunction and/or specific performance from terminating contracts with Regent to manage and market the hotel, notwithstanding Pageguide's position at court that it had lost confidence in Regent's ability to manage the Dorchester Hotel.

36. Similarly, in *Leeds Cricket Football and Athletic Co Ltd v Craven Gilpin & Sons* , 28 January 1993 (unreported), Colman J granted an injunction[12] preventing a cricket club from obstructing the caterers' performance of the catering services provided to the cricket club, or taking any steps to enter into contractual relationships with alternative caterers, notwithstanding the club's evidence that it had lost confidence in the ability of the caterers. Colman J found that since the degree of co-operation required for the operation of the contract was sufficient, both at management and Board level, and amongst 'below-management staff', the grant of an interim injunction for approximately 18 months should be made.

37. However in the War Horse litigation, *Ashworth v Royal National Theatre* [2014] IRLR 526, Cranston J held at [23] that:

> '[a[role in War Horse is miles away from the impersonal organisation referred to by Lord Wilson in *Geys*… and from the situation in *Powell*.., where the employee had been performing the superior role and had the confidence of her superior. The plain fact is that the production of a play necessarily entails close cooperation between all those involved, the actors and those directing and producing the play.'

38. Referring to the witness evidence of the executive director of the National Theatre that the producers and directors of War Horse believed that the play was better off without the musicians, he held that:

[12] Which Colman J held that, the injunction would at least in part have the effect of specific performance of positive obligations by the Cricket Club.

> 'That to my mind is precisely the type of situation where on the authorities it would be inappropriate for the court to enforce a contract by specific performance of analogous injunction. There is clearly an absence of personal confidence on the part of the National Theatre. In addition the claimants themselves would be affected by knowing that the National Theatre does not want them and believes that the play is better without them.'

Lost Confidence

39. Finally, in cases where the order requires the employee to be *treated* as if still employed and to receive his pay while not working (such as the disciplinary and capability procedure cases dealt with below), the fact that trust and confidence has broken down has been held not to be relevant to the grant of injunctive relief or specific performance at all (see for example *Public Trustee as Executor of Onofre Braganza v Nuffield Nursing Homes Trust* (7 May 1993) (CA) and *Gryf –Lowczowski v Hinchingbrooke Healthcare NHS Trust* [2006] IRLR 100 at [73]).

40. Thus in *Irani v Southampton and South-West Hampshire Health Authority* [1985] ICR 590, Warner J granted an injunction restraining the Health Authority from implementing the notice purporting to terminate employment, notwithstanding the position of the Defendant at Court that it was unable to continue to employ *both* Mr Irani and the consultant in charge, with whom he had quarrelled (see [604]).

4: Futility

41. As to issue (4), a practical difficulty affecting the grant of orders of specific performance in this context is the fact that most contracts involving an element of personal service have provisions which do entitle the employer to give reasonable notice of termination at any time and for any reason. So, there is no point in ordering

X to employ Y where X has the power to dismiss Y under the contract on 2 months' notice. Whether specific performance is futile or not, is likely to be fact specific and will depend on the purported reasons for giving notice, and the length of the notice period.

ADEQUACY OF DAMAGES

42. The question of whether damages are an adequate remedy is to be asked in the context of the underlying purpose of the jurisdiction, namely that of doing what is just. As Sachs LJ (with whom Edmund Davies and Cairns LJJ agreed) said in *Evans Marshall & Co v Bertola SA* [1973] 1 WLR 349 at 379H:

> 'The standard question in relation to the grant of an injunction, "Are damages an adequate remedy?" might perhaps, in the light of the authorities of recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?'

43. There are a number of powerful arguments that can be made as to the inadequacy of damages in circumstances in which an employee is facing dismissal.

44. Firstly, a dismissed employee is likely to suffer non-pecuniary losses which cannot be compensated in damages. As was recognised by Taylor J in *Hughes v London Borough of Southwark* [1988] IRLR 55 at [12], damages are not an adequate remedy if the Claimants will suffer a loss of job satisfaction, distress and other factors, and such distress is not capable of being compensated in damages.

45. Further, the courts have accepted that the loss of prestige and pride in one's work is not capable of being compensated in damages. Thus in *Powell v London Borough of Brent*, the Court of Appeal unanimously held that damages would not be an adequate

remedy for the Claimant if she were to succeed at trial in respect of what she would suffer if she were to be excluded from her post and the Defendant was to advertise and fill it. As per Ralph Gibson LJ at [196]:

> 'She could be compensated, of course, for loss of earnings between now and then, but **she would have lost the satisfaction of doing this more demanding and rewarding job, and I accept that damages for estimated future financial loss would not be full compensation to her'**. (emphasis added)

46. Nicholls LJ held at [199] that:

> 'If the plaintiff should so succeed but an interlocutory injunction is refused an award of damages would not wholly recompense her. Making up the loss of salary would leave her uncompensated for her distress and embarrassment in having to resume her former job meanwhile and not having the opportunity to take up the more senior post at once.'

47. Further, the Court of Appeal held at [81] that damages would not be an adequate remedy, even if the employer undertook not to fill the employee's post pending trial.

48. Second, it is open to employees to argue that damages are not an adequate remedy at the interim stage, because the effect of refusing interim relief will make it impossible or almost impossible for the employees to obtain a final injunction at trial, because in 2-3 months' time, after Speedy Trial, a Judge is very unlikely to be prepared 'to put the clock back'. In *Leeds Cricket Football and Athletic Co Ltd*, 28 January 1993 (unreported), Colman J held that if an interim injunction was not granted, then the

relevant services would probably be provided by another organisation in the intervening period before trial. In such circumstances, he held that :

> 'The prospect of any court being prepared to put the clock back by granting a permanent injunction is virtually nil. Accordingly, a decision at this stage that there should be no interlocutory injunction is in substance a decision that there should be no permanent injunction at the trial'.

49. He concluded that since there was a serious prospect of a permanent injunction being granted at the trial which, but for an interim injunction would probably not be ordered, it was in all the circumstances appropriate to preserve the status quo over the 18 month period before trial.

BALANCE OF CONVENIENCE

50. The court should take whatever course appears to carry the lower risk of injustice if it should turn out to have been the "wrong" course (*Reg. v Secretary of State for Transport ex parte Factortame Ltd* [1991] 1 AC 603 at 683).

51. In interim relief cases, the balance of convenience tends to favour the status quo. As such, in employment cases, there is a powerful argument that the employees should remain doing the work they have done and were doing prior to any dispute arising (see *Hughes* at [16]).

52. When considering the risk of injustice to the parties, policy considerations, and in particular the importance of holding employers to a bargain which they have made, have persuaded the courts to find in favour of employees. As Warner J held in *Irani* at [604], if the court was to decline to grant the Order sought it would 'in effect be

holding that, without doubt, an (employer) in the position of the defendant is entitled to snap its fingers at the rights of its employees'. See also *Robb* at [26].

2. TYPE OF WORK

53. It is in theory possible to seek injunctive relief in order to restrain your employer from requiring you to carry out a certain kind of work. In *Hughes v London Borough of Southwark* [1988] IRLR 55, the employees in question were social workers employed at a hospital, and complained that they were being unlawfully seconded to carry out work which was under-staffed, difficult and did not form part of their contractual duties.

54. Taylor J granted an interim injunction, having applied the test from *American*, and particular weight on the balance of convenience. In particular, he considered the employer to have abdicated its right to decide how to allocate its employees, in circumstances in which in his view the employer had failed "to inform themselves of the relevant considerations before deciding on priorities'. The Judge's decision was clearly influenced by the fact that the employer had not consulted the affected employees or the hospital prior to deciding to second the employees, and the Judge clearly formed the view that the decision to second them was very misguided.

55. There are no other reported decisions in which employees have successfully obtained injunctive relief in respect of the nature of work they undertake. In my view, it would take fairly extreme circumstances to persuade a court to grant such relief.

3. INTERNAL PROCEDURES

56. Thirdly, as is well known, employees are able to seek injunctive relief in order to restrain an employer from wrongly applying or implementing an internal procedure if

the facts justify it. The increased prevalence of this type of injunction can be traced back to the decision of the Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, confirming that damages are not available at common law to an employee dismissed in breach of express contractual terms in a disciplinary procedure.

57. The adequacy of damages in respect of any breach of internal procedure is of course an important matter for the court when deciding whether to grant injunctive relief (see above). Further, as Lord Wilson explained in *Geys* at [73]:

> 'The law is clear that an injunction may issue so as to enforce the requirement (of an internal procedure); and the absence of a right to claim damages for breach of a duty to follow a disciplinary procedure (see Edwards… **makes the availability of the injunction particularly precious.'**

58. In *Edwards* at [44] Lord Dyson dealt with the suggestion that the availability of such injunctions jeopardised the statutory protection against unfair dismissal, and held that:

> 'That is not to say that an employer who starts a disciplinary process in breach of the express terms of the contract of employment is not acting in breach of contract. He plainly is. **If that happens, it is open to the employee to seek an injunction to stop the process and/or to seek an appropriate declaration**. Miss O'Rourke QC submitted that, if in such a situation there is a breach of contract sufficient to support the grant of an injunction but (for whatever reason) the employee does not obtain an injunction, it is anomalous if the normal common law remedy of damages is in principle not available to him. **The short answer to this submission is that an injunction to prevent a threatened unfair dismissal does not cut across the statutory**

> **scheme for compensation for unfair dismissal. None of the objections based on the co-existence of inconsistent parallel common law and statutory rights applies. The grant of injunctive or declaratory relief for an actual or threatened breach of contract would not jeopardise the coherence of our employment laws and would not be a recipe for chaos** in the way that, as presaged by Lord Millett in *Johnson v Unisys Ltd* [2001] IRLR 279, the recognition of parallel and inconsistent rights to seek compensation for unfair dismissal in the tribunal and damages in the courts would be.' (emphasis added)

59. Injunctions restraining employers from implementing internal procedures have been most prevalent within the public sector where internal procedures are more likely to be contractual. In the vast majority of cases to date, employees have sought injunctive relief in reliance on express terms in and/or incorporated into their contracts of employment (or terms said by the employees to be express terms).

60. However, in a recent significant case, *Hendy v Ministry of Justice* [2014] IRLR 856, the employee abandoned his reliance on the express terms of his contract and instead relied on an implied obligation of fairness and good faith (see [53]). In *Hendy*, the MoJ admitted that there was an implied obligation that an employer operate a disciplinary policy in good faith and fairness (see [60-1]). The Judge in *Hendy* therefore considered whether the employer had conducted the disciplinary procedure in accordance with the implied duty of fairness. Whilst the significance of *Hendy* is unclear as yet, given that the MoJ admitted the existence of the implied duty and it was not subjected to full legal argument, the case potentially represents a very significant development in the availability of injunctive relief for employees.

61. Injunctions have been granted in favour of employees restraining employers from the following:

(1) Summarily dismissing an employee without following a contractual procedure: *Irani v Southampton and South West Hampshire Health Authority* [1985] ICR 590.

(2) Dismissing an employee before it had completed the contractual disciplinary procedure: *Gryf-Lowczowski v Hichingbrooke Healthcare NHS Trust* [2006] ICR 425;

(3) Wrongly applying a disciplinary procedure: *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [2014] IRLR 227;

(4) Increasing a disciplinary sanction on appeal: *McMillan v Airedale NHS Foundation Trust* [2014] IRLR 803.

62. It is of note that same of the injunctions sought, for example that in *Chhabra*, have been final injunctions rather than interim injunctions.

63. An injunction might also be granted in circumstances in which an employer contravened important parts of other internal procedures, including internal capability procedures, or in circumstances in which an employer has committed serious breaches of the implied duty of fairness when operating a disciplinary policy (*Hendy)*.[13]

64. It is also of note that injunctions have been granted restraining employers from not implementing a contractual redundancy procedure. In *Anderson*, there was a serious

[13] In *Hendy*, no injunction was granted on the facts. However, it is clear from the court's decision that the court would have been inclined to do so had it found serious breaches of the duty of fairness.

issue as to whether the redundancy selection criteria were contractual or not, and whether the employer was required to operate a last in first out method of selection rather than the different scheme that the employer proposed introducing.

65. As with the dismissal cases, the approach of the court at the interim relief stage is to apply *American Cyanamid*. In particular, the court must be satisfied that there is a serious question to be tried as to whether there was an unfairness of sufficient seriousness to justify prohibiting progress with the whole capability or disciplinary proceedings (*Hendy* at [86]). The court will be prepared to intervene in an internal procedure if it is demonstrated that the proceedings are being conducted on a basis which makes their conduct a breach of conduct such that the pursuit would also be a breach (*Hendy* at [49]). The court will not micro-manage internal procedures, and will not intervene with a breach of an internal procedure if there has been only a minor irregularity (see *West London Mental Health NHS Trust v Chhabra* [2014] IRLR 227 at [39]).

66. Thus in *Hendy*, although the employee had demonstrated some concerns regarding the procedure adopted, Mann J held at [86] that:

> '[i]f there was any degree of unfairness in what happened, then it was not of such a degree as to **taint the whole process to such an extent as to require it (even arguably) to be brought to a halt'**. (emphasis added)

Contact Information

67. If you have any questions about this talk, please feel free to contact me by email, twitter or in chambers.

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