Appeal No. UKEAT/0304/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 November 2013
Judgment handed down on 12 March 2014

Before

HIS HONOUR JEFFREY BURKE QC

MR B BEYNON

MR J MALLENDER

MRS G ANDREWS — APPELLANT

(1) KINGS COLLEGE NHS FOUNDATION TRUST
(2) SECRETARY OF STATE FOR HEALTH — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS ROCHFORD (of Counsel) Instructed by: Lyons Davidson Solicitors Westbury House 701-705 Warwick Road Solihull B91 3DA
For the First Respondent	MR ANDREW MIDGLEY (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent

SUMMARY

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

The Claimant worked as a part-time nurse from 1982 to 2010. She claimed that she was entitled to pension rights or compensation for the lack of those rights in respect of 3 periods, 1982 to 1988, 1988 to 1991 and 1991 to 2010.

Her claim for the first period had already been dealt with. The Employment Tribunal found in her favour as to the second period and made a declaration. Her appeal based on the inadequacy of the declaration made by the ET as to her rights in respect of that period was resolved by agreement, on the basis of an explanation by the EAT, at paras 11 to 13 of the judgment, of the meaning and effect of the ET's declaration.

For the third period, the Claimant claimed compensation for breach by the employers of the implied term, derived from **Scally** (1991 IRLR 525), that they should take reasonable steps to draw her attention to her entitlement under the NHS pension scheme. The issue was whether such reasonable steps had been taken; the Tribunal resolved that issue in favour of the employers.

Held on appeal that the Tribunal had reached a factual decision on the question of the reasonableness of the steps taken by the employers to inform their staff of their pension rights which was open to them and which was not perverse. Their reference to the sending of information by leaflet to all staff was intended as a statement that it was sent to both part-time and full-time staff and not that it was successfully sent to each and everyone of the 500 plus staff; the Tribunal had not lost sight of the undisputed evidence that a very small (about 15) number of part-time staff had complained that they had not received the leaflet. No error of law was made out.

HIS HONOUR JEFFREY BURKE QC

The nature of the appeal

1. This appeal, by the Claimant before the Employment Tribunal, is another, but an individual, step in the contest between part-time employees working in the National Health Service, their employers, and the Secretary of State for Health as to those employees' pension entitlement.

2. The Claimant worked for the First Respondent, Kings College Hospital NHS Foundation Trust ("KCH"), as a part-time nurse and, latterly, as a clinical nurse specialist, from 1982 to 2010. Her employment spanned three relevant periods; in the first period ("period 1"), from the start of her employment to 31 March 1988, the NHS Pension Scheme was compulsory for full-time employees; but part-time employees were excluded from it. In the second period (period 2), from 1 April 1988 to 31 March 1991, the scheme was optional for full-time employees but part-time employees were excluded. In the third period (period 3), from 1 April 1991 to the end of the Claimant's employment, the scheme was optional for both full and part-time employees.

3. The Claimant seeks pension rights or compensation for the loss of such rights as if she had been a member of the NHS Pension Scheme throughout her employment. So far as period 1 is concerned, she has already been granted by the Employment Tribunal a declaration as to her pension entitlement. The issues before the Employment Tribunal were her claims in respect of periods 2 and 3. In respect of period 2, she brought her claim against KCH and the Secretary of State, seeking a declaration as to her entitlement. She was entitled to such a declaration if, had she been entitled to join the scheme in that period, she would have joined it. It is not necessary to set out why that is so; it is not in dispute; and that will suffice for present purposes. The Tribunal resolved that factual issue in her favour.

4. As to period 3, as a result of the decision of the EAT in **Preston & Ors v Wolverhampton Healthcare NHS Trust (No.3)** (2004 ICR 993) the Claimant accepted that she could not base her claim on discrimination against part-time employees; in that period full-time and part-time employees were in the same position vis-a-vis pension entitlement. Her claim in respect of period 3 was, therefore, put forward, against KCH alone and on a wholly different basis, namely that KCH had been in breach of an implied contractual obligation to take reasonable steps to notify her that she was entitled to join the scheme.

5. The existence of that contractual obligation in the contract of employment of an NHS employee was established by the House of Lords in **Scally v Southern Health and Social Services Board** (1991 IRLR 522). As set out in the speech of Lord Bridge, with whom the other members of the House agreed, that obligation applied in the Claimant's case if three pre-conditions were satisfied, namely: (1) the terms of the contract of employment had not been negotiated with the individual employee but resulted from negotiation with a representative body or were otherwise incorporated by reference; (2) a particular term of the contract made available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; and (3) the employee could not, in all the circumstances, reasonably be expected to be aware of the term unless it were drawn to his attention. If the obligation applied, KCH would be in breach of it if it were shown that they did not take reasonable steps to draw the Claimant's attention to her entitlement to join the Pension Scheme. It was the Claimant's case that KCH had not taken such steps.

6. It is agreed that the Claimant's claim in respect of period 3 is substantial; compensation if awarded will exceed the £25,000 cap on awards which can be made on a contract claim by the Employment Tribunal under the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**.

7. These issues were considered and decided by the Employment Tribunal, sitting at London South, and presided over by Employment Judge Freer. In their judgment, sent to the parties on 25 March 2013, the Tribunal found, at paragraph 65, that the Claimant would have joined the Pension Scheme in 1988 had she been entitled and been aware of her eligibility at that time. At paragraph 66 the Tribunal said that they made a declaration that the Claimant's claim of sex discrimination/equal pay in respect of period 2 was well-founded.

8. So far as period 3 is concerned, the Tribunal, at paragraph 82, concluded that KCH did take reasonable steps to draw to the Claimant's attention her entitlement to join the Pension Scheme. They found, therefore, that there was no breach of the implied obligation to which we have referred and dismissed her claim in respect of that period.

9. The Claimant now appeals in respect of the terms of the declaration made in respect of period 2, seeking the substitution for the declaration which the Tribunal made, of a somewhat different declaration which the parties agree should have been made, and against the Tribunal's conclusion in respect of period 3 that KCH had taken reasonable steps to draw to the Claimant's attention her pension entitlement during that period.

10. The Claimant has been represented by Mr Rochford of counsel; KCH have been represented by Mr Midgley of counsel. The Secretary of State is not concerned with period 3; as to period 2 it has been indicated on his behalf that he does not seek to contest the change in the terms of the declaration which is sought.

Period 2

11. The declaration which Mr Rochford seeks, in substitution for that made by the Employment Tribunal, is in these terms:-

> **"The Employment Appeal Tribunal declares that the Claimant has been unlawfully discriminated against because of her sex and declares that she is entitled to be a member of the Second Respondents' Pension Scheme for the period 1st April 1988 to 31st March 1991 and further requires the Respondents as soon as reasonably practicable to obtain from the trustees and provide figures to the Claimant for the contribution that she must make to the scheme."**

In 2004 Employment Judge Macmillan, who was responsible for deciding test issues in a number of NHS part-time pension cases and had overall responsibility for those cases within the Employment Tribunal, published *"Part-time Worker Pension Cases Information Bulletin No 9"* in which he said, under the heading "Remedy":-

> **"It is now clear that our powers are limited to granting a declaration that an employee is entitled to be a member of her employer's Pension Scheme between specified dates and to require the employer to obtain figures from the pension fund trustees for the contributions which both parties must make to the scheme."**

It was agreed between counsel and the Secretary of State before the Employment Tribunal that, if the Claimant succeeded in her claim, the Tribunal could make a declaration in the form proposed by that bulletin. The Employment Tribunal, however, did not do so and, although in their reasons at paragraph 66 they said:-

> **"...the Tribunal makes a declaration that the Claimant's sex discrimination/equal pay claim in respect of being a member of the NHS Pension Scheme during Period Two... is well-founded"**,

that was not reproduced in their formal judgment. Mr Rochford, on behalf of the Claimant, accepts that the Secretary of State has indicated that he will take steps to implement the Employment Tribunal's decision that her period 2 claim is well-founded; but he submits that the full declaration is needed lest the Secretary of State or a successor should change his or her stance, and in order to avoid any argument that the payment for the Claimant as if she had been

a member of the Pension Scheme during Period Two might be *ultra vires*. The Secretary of State has indicated that he sees little reason to oppose the Claimant's appeal on this issue. The Employment Judge declined to review the terms of the formal judgment on the grounds that it was not necessary.

12. The fact that the parties to an appeal agree that an amendment should be made to an order of an Employment Tribunal does not justify an appellate tribunal in allowing the appeal on that basis alone. It has to be established that the Employment Tribunal made an error of law. However, rather than hearing time-consuming argument as to whether the Employment Tribunal had made an error of law in this situation, we asked Mr Rochford whether he would be satisfied if, in place of the declaration which he sought, we explained what, in our judgment, the meaning and effect of the Tribunal's judgment and of paragraph 66 of their reasons were. He agreed that that would provide to the Claimant the protection which she seeks. We therefore regard it as wholly appropriate to state that the meaning and effect of the Employment Tribunal's decision as to period 2 is that there is a declaration that the Claimant is entitled to be a member of the Second Respondent's Pension Scheme for the period 1 April 1988 to 31 March 1991 and that the Second Respondent is required as soon as reasonably practicable to obtain from the trustees and provide figures to the Claimant for the contribution that she must make to the scheme.

13. We are satisfied that, by this method, without our appearing to allow an appeal by consent, the Claimant is indeed fully protected and will get all that she is entitled to under the scheme. On that basis the appeal, insofar as it relates to period 2, is dismissed on withdrawal.

Period 3

The facts

14. We take the facts from the judgment of the Employment Tribunal and from a Schedule of Agreed Evidence and Facts drawn up by counsel, for which we are grateful. The Employment Judge was asked to and did provide his notes of evidence on two points referred to in paragraphs 5(e) and (f) of that Schedule; his response is dated 8 October 2013. In his response, intending no doubt to be helpful, he went to some extent beyond a simple setting out of his notes of the particular facets of the evidence which the parties had sought; with the parties' agreement, and in order to be fair, we have not considered that part of his response. Another part of his response has not been the subject of agreement between counsel, but it has not proved to add to the information before us to any material degree.

15. After the change in 1991 which provided that all part-time members of NHS staff were eligible to join the NHS Pension Scheme by opting in, KCH were advised that they should make attempts to draw that entitlement to the attention of part-time workers. Two methods of doing so were adopted. The first method consisted of the placing of posters of approximately A3 size on staff noticeboards; the evidence was that such posters were placed on all noticeboards in the Trust and in all main corridors, canteens and departments and in staff areas. No distribution list for the posters was produced in evidence, but the Tribunal made findings, at paragraphs 23 to 25 of their judgment, that such posters had been put up on noticeboards around the hospital and contained the requisite information. The second method consisted of the stapling to the outside of each employee's payslip envelope, after the envelopes were provided to the hospital with payslips already inserted inside them, a leaflet which contained the same information. This method of communication by KCH to its (then) 5,500 approx. employees was the standard method by which KCH communicated general information to its

employees in 1991 and, the Tribunal found, was a method which was still in use 20 years later. The Tribunal, at paragraphs 26 to 31, set out their findings as to that method in these terms:-

> **"26. In addition, the First Respondent also attached a leaflet (in the form of those contained at page 190 [of] the bundle) to the wage slips of all employees.**
>
> **27. The First Respondent's pay-roll department received from an external provider the employees' payslips contained in envelopes and the leaflet was manually stapled to the outside of each individual pay-slip envelope.**
>
> **28. The leaflet was attached to the wage slips of all employees as the First Respondent was unable at that point to differentiate between full-time and part-time employees. The First Respondent employed around 5½ thousand employees.**
>
> **29. The payslips in envelopes were received by the First Respondent's pay-roll department around 24 hours before they were distributed to staff.**
>
> **30. Attaching documents to the wage slips was the method of general communication used between the First Respondent and its employees. The Claimant accepted in her evidence that this was the main route of communication. This was normal practice for the First Respondent's payroll department in around 1991 and apparently is a process that remains in use.**
>
> **31.The information regarding part-time employees' eligibility to join the Scheme was attached to one round of payslips only, in either January or February 1991."**

16. The Claimant's evidence was that she did not know about the 1991 changes which brought about her eligibility to join the Pension Scheme. She carried out much of her work away from the hospital at family planning clinics; she did not attend canteens or restrooms within the hospital; she worked her daily three-and-a-half hours and went home. It was accepted that she had not been aware of the posters. As to payslips, her evidence was that she had received no leaflet or other notification relating to her eligibility to join the Pension Scheme. All of her payslips had been retained by her husband, who, it was said, was a hoarder; we are told that they were present at the Tribunal hearing but no-one felt it necessary to look at them. It was not suggested that the Claimant was not telling the truth when she said that she had not seen any leaflet such as that said by KCH to have been stapled to her payslip envelope. Her evidence was that there was no sign on any relevant payslip of anything having been attached to its envelope, but that, of course, did not prove that there had never been an attachment to the envelope which contained the payslip. It is agreed that there was no evidence

that the leaflet could have been stapled to the envelope without leaving a mark on the payslip enclosed within it.

17. The Tribunal found, at paragraph 60, that the Claimant was genuinely unaware of her eligibility to join the Pension Scheme until 2005.

18. The only witness for KCH, Mr Peacock, had been Head of Payroll and Pension Services until he retired in 2012. His witness statement, at paragraph 5, said:-

> **"From 1st April 1991, part-time members of staff who work less than half the standard hours became eligible to join the NHS Pension Scheme by opting in. Guidance was issued to the Trust from the NHSPA informing the Trust about the change to the pensions regulations. The Trust disseminated this information to its staff by putting up notices on staff notice boards, leaflet distribution and attachment to payslips. This change was also well publicised in the national press."**

In oral evidence he said that KCH had at the time an in-house payroll system with about 30 staff, who shared responsibility for the payroll and any attachments to pay envelopes. Pay envelopes with the payslips inside would be provided throughout the workplace. He was asked in cross-examination:-

> **"Ample scope to be missed out?"**

His answer was:-

> **"Some scope."**

He was asked:-

> **"Scope to become detached?"**

And his answer was:-

"Yes."

(There was some dispute between counsel as to Mr Peacock's precise words but the Employment Judge's notes, as counsel accept, trump any such dispute; and we have quoted the notes verbatim as set out by the Employment Judge.) The attachment of the pension information in 1991 to pay envelopes was made in respect of one payment, in either January or February of that year. Mr Peacock's evidence, which the Tribunal accepted at paragraph 32, was that he could recall 12 to 15 cases of reported non-receipt of the pension information. That figure represents something less than 0.3% of the total workplace and about 1% of the part-time employees at that time.

19. The Claimant decided in 2005 that she could and should have joined the Pension Scheme in 1991; she brought a grievance against KCH based on the lack of information as to her eligibility, which failed; but in the course of it Mr Peacock, the Tribunal found, said that she might have been "missed out" in 1991. Her claims were put before the Employment Tribunal after her grievance did not succeed.

The Tribunal's conclusions

20. We have set out the salient facts upon which the Tribunal made their decision. The Tribunal's conclusions are set out at paragraphs 67 to 82. They concluded, first, at paragraph 74, that the three preconditions to the existence of what it is safe to call "the **Scally** implied term", which we have set out above, were satisfied and that the implied term formed part of the Claimant's contract of employment. They describe that term in these words:-

"74. Accordingly it is the Tribunal's conclusion that there was in existence an implied contract term for the First Respondent [to] take reasonable steps to notify the Claimant that she was entitled to join the Scheme."

21. They then turned to the question whether there was a breach of the implied term. They said:

> **"75. However, the Tribunal concludes in answer to the third and final question on the list of issues, that the First Respondent was not in breach of its obligation.**
>
> **76. The First Respondent provided the information by attaching it to the wage slips of *all* its employees. This was a standard and acknowledged mode of communication that had been effective in the past and is still currently in use. It was an entirely reasonable method of drawing the attention of staff to newsworthy items.**
>
> **77. The evidence of Mr Peacock was that around 12 to 15 people made complaints about not receiving the pensions advice, a relatively low proportion overall, although, of course it must be recognised that those who were unaware of all the communication would be unlikely to complain about lack of receipt. However, it is an indicator of sorts.**
>
> **78. Posters were also used to communicate the information. They were placed on staff notice-boards. Even if it is true that there are no notice-boards in some of the external clinics, it was reasonable for the First Respondent to place the posters on notice-boards in the main working environment. The Tribunal concludes that there was a reasonable expectation by the First Respondent that employees would appraise themselves of information placed on staff notice-boards. At that time there was no work intranet service.**
>
> **79. The Claimant acknowledged, as part of her grievance, that there was a campaign, but that she was not informed. The First Respondent also followed advice from the NHS Pension Scheme.**
>
> **80. It is true that the First Respondent could have been more efficient in imparting the information. For example it could have attached the information to more than one run or wages, or could perhaps have taken greater steps to guarantee receipt of the information, for example by the First Respondent's administration sending letters to employees with an acknowledgment to be signed and returned. However the test is one of reasonableness.**
>
> **81. Attaching the information to wage slips in the circumstances was a reasonable mode of communication. It is likely that other employees, in common with the Claimant, did not frequent the staff canteen or habitually look at the staff notice-boards, even though their purpose was to convey information. However, one thing to which most staff have regard is their payslip.**
>
> **82. The Tribunal concludes that the First Respondent did take reasonable steps to draw the matter to the Claimant's attention. It was not perfect, but the steps that were taken were reasonable in the circumstances and accordingly the Claimant's claim with regard to Period Three is not well-founded."**

22. We should add that it was not part of the Claimant's case that the leaflet did not contain adequate information. The issue before the Tribunal was whether the method adopted by KCH to disseminate that information was or was not in compliance with the duty owed to the Claimant by reason of the **Scally** implied term.

The grounds of appeal

Grounds 2-5

23. Mr Rochford set out the grounds of appeal against those conclusions in grounds 2-8 of his Notice of Appeal. Orally he grouped grounds 2-5 together and addressed ground 6 and grounds 7/8 separately; and we will follow that approach. We start, therefore, by considering grounds 2-5.

24. KCH did not suggest that the posters were of themselves sufficient to amount to compliance with the duty imposed by the **Scally** implied term. The attaching of the leaflets to the payslips was the primary method of the provision of the necessary information; the argument before us focussed principally, although not exclusively, upon the Tribunal's conclusions as to that method.

25. The thrust of Mr Rochford's argument on grounds 2-5 can be summarised in this way. At paragraphs 26 to 28 the Employment Tribunal said that the leaflet was attached to the wageslips "of all employees"; the leaflet was manually stapled to the outside of each individual payslip envelope. The Tribunal's use of the word "all" in that context must, it was submitted, be taken to have been intended to mean "each and every one" of the employees. The same is true of the Tribunal's use of the word "all" in paragraph 76. That construction of the word "all" was, Mr Rochford submitted, supported by the use of the word "each" in paragraph 27 and by the Tribunal's finding, at paragraph 23, that KCH were following advice given by the Pension Scheme that employers should "do all they can to advise existing part-time employees of the extension to Scheme membership" and should issue copies of the leaflet to "all part-time employees." However, Mr Rochford submitted, that finding was in error of law or perverse as involving the omission of a relevant fact, namely that it was accepted by the Tribunal, in paragraph 77, that some 12 to 15 members of the staff complained that they had not received

the information and that that number, the Tribunal accepted, might have been higher because those who were unaware of the changed position would have been unlikely to complain about the absence of information as to it.

26. The Tribunal should, he argued, have considered and made a finding whether the leaflet had been attached to the Claimant's payslip and should have analysed the efficiency of the method adopted by KCH to get the information to the Claimant, both in terms of failures to attach leaflets to payslip envelopes and in terms of leaflets becoming detached in the process of delivery of the payslips to the employee in the hospital or in outlying work locations; the Tribunal failed to appreciate that there was an issue as to whether the leaflet had been attached to the Claimant's payslip envelope.

27. Mr Midgley submitted that a fair reading of the Employment Tribunal's reasons as a whole could not lead to the conclusion that they had found as a fact that the leaflet was attached to the payslip envelope of every employee. The evidence was, and it was not disputed, that 12 to 15 employees had complained of non-receipt. The Claimant's evidence that she had not received the leaflet was not disputed; the Tribunal had therefore accepted that there could have been some non-recipients who might not have received the leaflet and others who might not have complained because they did not know that any communication to them had been intended. The Tribunal's task was, he submitted, to make a finding not as to whether the Claimant as an individual had received the leaflet but as to the general effectiveness of the system; a finding that every payslip envelope had the leaflet attached to it or that every envelope with the leaflet still attached reached every employee was not necessary. An employer of a substantial workforce could not be expected, particularly years later, to be able to produce evidence which could justify such a finding. When the judgment was read a whole, he submitted, it was clear that the Tribunal could not have reached, and did not make, a perverse

finding. A much more realistic construction of the relevant paragraphs of the Tribunal's reasons was that made apparent by paragraph 28; "all employees" was a phrase used to describe the inclusion within the distribution of the leaflet of both full-time employees and part-time employees, because KCH at that time could not differentiate between the former and the latter. What was being described in those paragraphs was the general nature of the method of dissemination adopted by KCH.

28. We prefer Mr Midgley's submissions. It is trite to say that an Employment Tribunal's judgment must be read as a whole; but this judgment is a clear example of the importance of that principle. If it is applied, it becomes clear, in our judgment, that the Tribunal did not make a finding that the leaflet was stapled to each and every payslip envelope including that of the Claimant. The Tribunal was considering the efficiency and reasonableness of the method of dissemination which KCH adopted; the word "all" related to the method or intention of KCH to include all employees and not only part-time employees in the distribution of the leaflets. Mr Rochford's argument, cogently as he advanced it, has the hallmark of an over-legalistic analysis of particular words in the judgment, on the basis of which has been mounted an argument as to error of law, which , on a true analysis of the Tribunal's reasons as a whole, is not made out.

29. These arguments reveal, however, that there was a wider gulf between the parties. Mr Rochford rightly laid emphasis on the individual obligation owed by KCH under the **Scally** implied term to the Claimant; the duty could not be discharged, he submitted, if there was in the distribution system used a risk that the leaflet on which that system depended might not have been attached to the Claimant's payslip envelope; if there had been a team of five clerks in the payroll department, each of whom was responsible for 1,000 or 1,100 attachments (the workforce amounting to 5000-5,500 employees) and one of them missed the attachment in one

case, then in that case, he submitted, there was a breach of duty. He further submitted that if, in one case, the leaflet was attached to the payslip envelope but became detached before it got to the employee, for example at a site well away from the hospital to which the payslip would have to be conveyed, or if the employee was ill or off work for some other reason for some time and the payslip envelope was sent in the post, as was the custom in such cases, but never arrived, then there would have been a breach of duty in respect of any employee directly affected. It was, as it seemed to us, that approach to the **Scally** term which lay behind Mr Rochford's submission that the Tribunal had failed to make a finding as to what had happened in the case of the Claimant's payslip envelope.

30. That approach, which would require the employer in every case to be able to prove that the relevant information was both sent to and reached an employee who claims that he did not receive it, seeks, in our judgment, to impose on the employer an obligation which goes beyond the true content of the **Scally** implied term. The obligation they are under is not to ensure that the information is received by the employee; it is to take reasonable steps to bring the relevant information to the attention of the employee. Although the duty is owed to each employee individually by virtue of the **Scally** implied term, the employer does not, in our judgment, have to do more in the case of any employee than to take reasonable steps to disseminate to him or her the relevant information.

31. Thus the Employment Tribunal correctly identified KCH's obligation under the **Scally** implied term at paragraph 74.

32. Whether the employer did take such reasonable steps is, of course, a question of fact. The Tribunal described the method used and the steps taken by KCH in detail. At paragraph 80 and 82, they justifiably drew attention to the fact that the method could have been more

efficient and was not perfect; but they correctly applied the test of reasonableness and concluded, on the facts, that the steps which were taken were reasonable in the circumstances. That was a conclusion which was open to the Tribunal on the facts; no error of law as contended for by grounds 2-5 of the Notice of Appeal has been made out.

33. Mr Rochford submitted that, in considering the proper construction of the Tribunal's reasons, it was relevant to take into account the statutory obligation on all employers to give to their employees a statement of terms and conditions of their employment including any terms and conditions relating to Pension Schemes; that obligation is currently to be found in section 2 of the **Employment Rights Act 1996.** Mr Midgley pointed out that this was a new argument which had not been advanced before the Tribunal; but in the light of Mr Rochford's acceptance that his point went to the proper construction of what the Tribunal said in their reasons and was not an argument intended to broaden the extent of the **Scally** implied term or what it was reasonable to do to apply it, Mr Midgley accepted that no new evidence was required on this point; and we allowed Mr Rochford to make it. However the point does not carry any weight; the statutory provisions on which the argument is based do not, in our view, inform or bear upon the extent of the **Scally** duty and, still less, upon what the Tribunal intended to convey by the words which they used. Any breach of the statutory requirements in respect of a statement of terms and conditions may lead or could have led to a separate remedy under the 1996 Act; but the two strands of obligation, one contractual, one statutory, are not intertwined.

Ground 6

34. At paragraph 79 the Tribunal found that KCH had followed advice from the NHS Pension Scheme. Mr Rochford submitted that that was a perverse finding. There were in the documents before the Tribunal letters from the Scheme, dated 13 March 1991 and 4 April 1991, addressed to multiple bodies within the NHS, which included KCH as an employing authority.

The heading of the first letter was "National Health Service Pension Scheme Extension of Eligibility for Scheme Membership"; at paragraph 3 it said:-

> **"Employing authorities are asked to do all they can to advise existing part-time employees of this extension to Scheme membership."**

The second letter, under the heading "Extension of Scheme Membership – Part-Time Employees" said, so far as relevant:-

> **"SD Letter 91(6) announced the extension of eligibility for Scheme membership to include all part-time employees. To assist EAs in the publicity of this change the Scheme has produced a small leaflet which is based on one of the notices contained in the Appendix to that letter. EAs are asked to issue copies of the leaflet to all part-time employees. If however identification of part-time employees is not possible EAs are asked to issue a copy of the leaflet to <u>all</u> employees. The leaflet has been designed to fit inside pay slip envelopes for those EAs who wish to use that method of distribution. An initial supply of the leaflets will be made to EAs without requisition. Further supplies can be obtained from the Scheme's statutory store at the following address:-**
>
> **DPSU**
>
> **Stationery Store**
>
> **Primrose Mill**
>
> **Clitheroe**
>
> **Lancs BB7 1BP Telephone No: 020022187**
>
> **A poster announcing the change has been produced and will be issued shortly without requisition. EAs are asked to display the poster in staff areas used by part-time staff. If required, further supplies of the poster will obtainable from the Scheme's stationery store after the initial distribution."**

35. Mr Rochford's argument was that KCH did not follow this advice; they did not do all they could, did not issue the leaflet to all employees – because on the evidence some, including the Claimant, did not receive it – and did not go as far in terms of posters as the advice proposed.

36. It appears that nobody noticed before the Tribunal that the two letters do not pre-date but post-date the leafleting exercise which KCH undertook in the pay round of either

January or February 1991; but that was not advanced by Mr Rochford as a criticism of the Tribunal.

37. However, putting that point on one side, the Tribunal were, in our judgment, entitled to conclude that, in general terms, KCH had sufficiently complied with that advice; they had adopted a method intended to inform all part-time employees; they had displayed posters in areas used by part-time staff, although not in all such areas; and the exhortation that employing authorities should "do all they can" cannot be interpreted, particularly in the light of the **Scally** term, as meaning more than that they should do all they reasonably could. In any event, the Tribunal did not conclude that the steps taken by KCH were reasonable because they complied with the advice; there is nothing in the reasons which shows that the following of the advice was *the* reason or even *a* reason why the Tribunal concluded that KCH had taken reasonable steps. The conclusions as to reasonableness at paragraphs 80-82 are not based on the following of the advice.

38. For those reasons there was no perversity in this area; the Tribunal made findings of fact based upon what KCH did and made the factual assessment as to whether what they did was reasonable. No error of law has been made out under this ground.

Grounds 7/8

39. Both these grounds revealed with greater clarity that Mr Rochford's case involved the argument that the **Scally** duty is wider than it might be seen, from the words used by Lord Bridge in his judgment in **Scally**, to have been intended. Under ground 7 Mr Rochford's argument was that the Tribunal, having found that the method of disseminating the leaflets and putting up posters in the manner we have described was reasonable, failed to consider whether these steps were sufficient to amount to satisfying the **Scally** duty. In his skeleton argument the

reference to the statutory obligation to produce a statement of terms and conditions, to which we have referred earlier, was used to support this argument, on the basis that it was an example of what further steps could and should have been taken (although, as we have said, Mr Rochford orally eschewed that use of the statutory obligation argument); as we have said, that point was said to be pertinent to grounds 2-5; but we reject it as adding nothing of value to the argument that there were other steps which could have been taken which would have been more effective; they are listed in Mr Rochford's skeleton argument; we do not need to go through them. Although ground 7 is pleaded both on the basis that the Tribunal's conclusion that the **Scally** duty had been discharged was perverse and on the basis that the Tribunal failed to ask themselves whether what KCH did amounted to a discharge of that duty, orally only the latter point was deployed; we do not suggest that Mr Rochford abandoned his perversity point; but he did not seek to sustain it.

40. By ground 8 Mr Rochford criticised the Tribunal for having found that the **Scally** duty had been discharged when KCH could have been more effective in imparting the information.

41. Neither of these arguments was persuasive. The duty was not to do everything possible or to take all steps which were not unreasonable to disseminate the information; the duty was to take reasonable steps to do so. The Tribunal did not make any error such as that set out in ground 7; having found the facts as to what KCH had done, they identified the **Scally** duty correctly at paragraph 74, as we have said in relation to grounds 2-5, and reached factual conclusions which it was open to them to reach. Our response to ground 8 is the same. The Tribunal did say, at paragraph 80, that KCH could have been more efficient and, at paragraph 82, that what KCH had done was not perfect; but there was no inconsistency or shadow of perversity in their concluding, despite those findings, that KCH had taken reasonable steps. In

our judgment there was no perversity nor any other error of law such as those asserted in grounds 7 and 8, in the Tribunal's conclusions that the **Scally** duty had been complied with.

Conclusion

42. For the reasons we have set out no error of law has been made out; and the appeal is dismissed.