Appeal No. UKEAT/0276/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 March 2017
Judgment handed down on 20 July 2017

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

DR M TATTERSALL APPELLANT

LIVERPOOL WOMEN'S NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2017

APPEARANCES

For the Appellant	MR RYAN CLEMENT (of Counsel) Direct Public Access
For the Respondent	MR JAMES BOYD (of Counsel) Instructed by: Law by Design Ltd Kingsley Hall 20 Bailey Lane Manchester Airport Manchester M90 4AB

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

The Respondent instructed the deduction of certain on-call payments to the Claimant, an Obstetrician and Gynaecologist employed to undertake both clinical and academic work, for a period during which he had refused to undergo certain health screening checks required of those undertaking Exposure Prone Procedures ("EPPs"). The Respondent had initially contended it was not the Claimant's employer but had subsequently argued that it had been entitled to make the deductions as a matter of contract (express or implied) because of the refusal to provide validated screening documentation. The Tribunal had concluded that it had been an express term of the contract that the Claimant supply the screening information, which failing such a term could be implied on the ground of patient protection/health and safety.

On appeal the Claimant contended that the express and implied terms defence had not been pled. However, reasonable notice had been given of all of the arguments to be run by each side and the Claimant had shown in submissions that he understood all of the key points in dispute. There was no identifiable material prejudice as a result of the unsatisfactory procedural history of the case and the absence of formal amendment of the pleadings. In any event the Tribunal had been obliged to ascertain the relevant contractual terms before it could reach a decision on what had been "properly payable" to the Claimant in terms of section 13 of the **Employment Rights Act 1996**. The decision in **Agarwal v Cardiff University** UKEAT/0210/16/RN would not have been followed had there been a challenge to the Tribunal's jurisdiction to consider and construe the terms of the contract.

Further, the Tribunal had not erred in its approach to the identification of the express or implied terms. While there was evidence that could have led to a different conclusion on express terms, the decision reached was one that was open to the Tribunal on the evidence led. The Tribunal had given sufficient reasons for relying on a questionnaire as being "*part and parcel*" of the contractual arrangements. The relevant Occupational Health Policy had not been overlooked; it was included within the various contractual documents. Even had the screening requirement not been sufficiently well incorporated to be an express term, it could be implied from the documentation that made clear that patient protection was an important priority where EPPs were undertaken.

There being no identifiable errors of law in the Judgment, the appeal was dismissed.

A

THE HONOURABLE LADY WISE

Introduction

B

1. This appeal arises out of a claim under section 13 of the **Employment Rights Act 1996** in relation to alleged unauthorised deductions from wages. The decision turned ultimately on what the Tribunal found to be express, which failing, implied, contractual terms. To that extent, the recent decisions in **Agarwal v Cardiff University & Another** UKEAT/0276/16/RN and

C

Weatherilt v Cathay Pacific Airways Ltd UKEAT/0333/16/RN on the issue of the jurisdiction of the Tribunal to consider contractual provisions in section 13 cases are of interest and I will comment briefly on those later in this Judgment. However, as both counsel agreed

D

that the Employment Tribunal in this case had jurisdiction to make the decision that it did, the handing down of the first of those two decisions shortly prior to the hearing in this appeal did not prevent the case proceeding on the basis of the arguments as already formulated. The Claimant represented himself in person at the Tribunal but was represented before me by Mr

E

Ryan Clement of counsel. The Respondent was represented at the Tribunal by Mr J Upton, solicitor, and before me by Mr James Boyd, of counsel. I shall refer to the parties as Claimant and Respondent as they were in the Tribunal below.

F

Background

2. On 1 January 2011 the Claimant, Dr Tattersall, commenced employment as a Lecturer

G

(Clinical) in Obstetrics and Gynaecology under a three-party contractual arrangement involving him, Liverpool University and the Respondent, which is the Trust operating the relevant teaching hospital. The contract was for a fixed three-year term, expiring 31 December 2014.

H

The post comprised 50% clinical training and 50% academic work in research and education. As part of the clinical duties, the Claimant was required to participate in the Trust's on-call rota,

involving clinical duties at the hospital. These duties would include what were termed "Exposure Prone Procedures" ("EPPs"). The Respondent's practice, in place since October 2010, was that all those commencing work who would be carrying out EPPs had to provide validated documentary evidence of their Hepatitis B, Hepatitis C and HIV status before health clearance could be given for clinical duties.

3. Some time after the Claimant commenced employment, the Respondent, having realised that in error the Claimant (and two others) had not been health screened in accordance with their practice, informed him that he was expected to undergo these checks. A dispute ensued about the requirement to produce the requisite validated documentary evidence during which the Respondent instructed the University not to pay the banding supplement for on-call duties to the Claimant, as he was deployed to non-clinical duties only pending resolution of the matter. The Claimant alleges that the Respondent unlawfully instructed the deduction from his salary between May 2012 and 10 January 2013, the latter date being that from which his full salary was ultimately paid following resolution in March 2013.

4. The Employment Tribunal (Employment Judge Robinson) dismissed the claim in relation to unlawful deduction of wages following a lengthy hearing. It concluded that there was an express term in the Claimant's contract that he should submit to the required health screening, which failing that such a term could be implied, given the health and safety issues surrounding the need for patient protection.

The Employment Tribunal's Reasoning

5. The key passages in the Tribunal's Judgment giving reasons for the conclusions reached are the following:

A

"46. On 15 June Ms O'Brien informs the claimant that there was a requirement for new employees of the Trust to be screened if they were carrying out EPP. She accepted that it is not written explicitly as a procedure but, and this is important, the requirement for EPP screening is set put in the Occupational Health screening questionnaire which is issued to all new staff. She also told the claimant that that process had been in place since October 2010. I accepted all that to be the case.

…

B

48. The questionnaire that I have referred to above is very clear in what it requests of EPP workers:-

> **"EPP staff must provide validated documentary evidence of their Hepatitis B, Hepatitis C and HIV status before health clearance can be given. If not available you will be tested in the Occupational Health Department and your ability to undertake these duties will be delayed until these results are processed. You will be asked to show formal photographic ID e.g. valid driver's licence or passport for this procedure, so please ensure you bring this with you."**

C

49. Whatever the claimant may think about policy and procedure, that requirement is clear on the face of the form and was in place from October 2010.

…

65. The contractual position in short was as follows.

D

66. The respondent had difficulty accepting that Dr Tattersall was an employee specifically of theirs and not just simply of the university. By 7 September 2012 they accepted that he was an employee and entitled to receive a written contract, which was sent to him dated 6 September 2012. This document was not signed by the claimant. The contract states that the claimant will participate in the Trust's rota for obstetric and gynaecology for which he would receive payment at Band 1A. The payment would be paid by the university. I also accept that the new employee health questionnaire is part and parcel of his contract and was part of the Trust's processes from October 2010. That document sets out what the Trust requires in terms of exposure prone procedure workers. Once the grievance was dealt with, a further statement of main terms and conditions was sent to the claimant dated 17 January 2013 stating that the claimant's appointment is as an honorary clinical lecturer with Liverpool Women's NHS Foundation Trust, and his appointment was from 1 January 2011 to 31 December 2014 i.e. a fixed term.

E

67. The Occupational Health policy which the claimant accepted as part of his contract of employment states that there will be a pre-employment process that will start on receipt of a fully completed questionnaire. Under the Department of Health guidelines all new NHS staff performing EPP were required to have blood testing for Hepatitis B, Hepatitis C and HIV.

F

…

91. The respondents have not helped themselves by initially denying that the claimant was not an employee and only an employee of the university. Ultimately, however, I had to work out what the real agreement between the parties was during the period of dispute i.e. April 2012 to January 2013.

…

G

93. I find that there is an implied term in the contract that the claimant would submit to screening, otherwise the contract is defective in terms of patient protection.

…

96. I accept that the documentation is not as clear as it should be. I also accept that staff who have been employed by the respondent in the same or similar roles prior to 2010 and staff employed at St Helens & Knowsley Teaching Hospital NHS Trust and seconded to the respondent Trust also might not have been screened.

H

97. However, I accept that the policy had been changed in 2010 by the respondent.

98. The questionnaire that I have referred to above, which is valid from 1 October 2010, clearly shows that staff must provide validated documentary evidence of their Hepatitis B, Hepatitis C and HIV status.

…

103. In view of the questionnaire I accept there was an express term in the claimant's contract that he should give the required screening. Even if I am wrong there is an implied term within this contract that the claimant should so supply the screening information for health and safety reasons.

…

106. There was no obligation, whatever the circumstances, for the Trust to keep the claimant on the on-call rota if he had not complied with their requirements or actually attended on the rota.

107. The claimant suggests that the respondent should have dealt with this as a conduct issue. There is no requirement for the respondent to do this. It is for the managers to manage the situation in the way that they believe promotes the best employment practice at the time.

108. Indeed, Dr Topping thought initially that it was a storm in a teacup and once the claimant realised what he had to do he would simply provide the information.

109. I accept that a worker who is ready and willing to perform his contract but is unable to do so because of an unavoidable impediment may, if the contract continues and subject to the terms, be able to claim his wages, but here the performance of the on-call rota or not, as the case may be, was entirely in the hands of the claimant. The claimant has given no reason as to why he did not want to give bloods, other than his view that there was no proper policy or procedure to allow the Trust to ask him. To him this was a contractual issue.

110. I accept that giving blood is an invasive procedure, but doctors and medical staff generally are used to those sorts of procedures, not only for patients but also having the procedures performed upon themselves. Consequently the claimant's refusal to be screened was an avoidable impediment giving rise to circumstances where it can be implied that he was not entitled to his wages.

111. In similar circumstances in the case of *Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714, it was clear that Mr Atchoe was removed from the roster on health and safety grounds, so in this case Mr Tattersall was removed from the on-call rota on safety grounds. I can see little difference between the facts of that case and the case before me here.

112. Finally, where an employee acts within the contract of employment the fact that the employee loses income does not render that loss an unauthorised deduction. The starting point is what wages are properly payable, and that needs an analysis of all the relevant terms of the contract, including the implied terms. I concluded that the payments for the on-call work were a separate identifiable wage that could be either given or retained dependent on whether the claimant performed the work."

6. The Claimant's appeal against the Employment Tribunal's decision is now restricted to two grounds. These are - (i) that the Tribunal's conclusion was based on a defence not pled, and (ii) that it erred in concluding that there was a contractual obligation to undertake pre-employment screening. I will deal with the arguments on each in turn.

A

The argument that the Tribunal's conclusion was based on a defence not pled

7. The background to this ground of appeal is that, initially, the Respondent defended the claim on the basis that the Trust was not the Claimant's employer and not responsible for making payments of wages or salary to him. It contended that the University was the responsible payer in respect of any unauthorised deduction of wages claim. However, as matters evolved, the Respondent's position changed and correspondence that was before the Tribunal reflected that. An argument that the only defence pled was in relation to the alleged absence of any contract between the Claimant and the Trust was raised by the Claimant in submissions before the Tribunal and dealt with in the Judgment in the following way:

B

C

> **"21. There is also an issue which the claimant has raised in his submissions that the only defence that the respondents have raised is that they had no contract of employment with the claimant. That was clearly the original position of the respondents, who were the second respondents at first and the University of Liverpool the first respondent. This contractual arrangement is the normal three party contractual arrangement between an academic doctor, a university and a Teaching Hospital, where Dr Tattersall in this case had an honorary clinical lecturer contract which ran parallel to his contract with the University of Liverpool.**
>
> **22. The University of Liverpool were the paying body. It was the Trust who asked the university not to pay Dr Tattersall until they had evidence of health screening from the claimant.**
>
> **23. It is that lack of health screening during the course of 2012 which caused the respondent to ask the university not to pay the claimant, and it is the central issue in this case. I have to identify what wages are properly payable under the claimant's contract of employment.**
>
> **24. The respondent's position did move. I accepted the contents of the letter from Law By Design at pages 367-370 of the bundle, sent to Gateley's on 22 September 2014, which made it clear to the claimant's then representative and consequently to the claimant himself the Trust's position with regard to this litigation. Indeed, both solicitors were setting out what their relevant and respective positions were at that time.**
>
> **25. The claimant has therefore known for some considerable time what the defence of the Trust was. Similarly, the Trust has known the claimant's claim since that time as well."**

D

E

F

8. In the correspondence referred to by the Tribunal, in particular a letter of 22 September 2014 sent by the Respondent's representative to the solicitors then acting for the Claimant, the Respondent's position is set out in some detail. It is clarified that the Respondent does not accept there was any agreement under which the Claimant would be re-deployed to alternative duties and still remain entitled to his banding supplement, albeit that for a period between 17 April and 10 May 2012 the Respondent had agreed to maintain his remuneration to give him the

G

H

A

opportunity to provide the screening documentation required. The main focus of the Claimant's argument when the letter of 22 September 2014 was written was that he contended that there was an agreement that he would be re-deployed on academic duties during periods when he

B

would otherwise have been on-call. He had provided a list of duties he claimed to have performed during those periods and the Respondent makes clear in the letter that it disputes that any such duties were performed and that even if they were, the Respondent neither instructed nor authorised them. The letter goes on to state that the Respondent's stance will be to contend

C

that the precise contractual terms are irrelevant but that as a fall-back position that certain terms are implied into the Claimant's contract of employment including that the Respondent is entitled to remove the Claimant from the on-call rota if this becomes necessary for health and

D

safety reasons and/or to protect patient interests.

9. Accordingly, it seems that while the pre-hearing correspondence put the issue of implied

E

terms forward as a possible defence, there was at that time a disavowal of the case turning on any express contractual terms. The Respondent did not seek to amend its written case to plead formally any argument about implied terms. However, the correspondence referred to at paragraph 24 of the Judgment was sent to the Tribunal on 12 December 2014 with a letter form

F

the Respondent's representative that stated "*… it appears the Employment Tribunal may not have a full copy of the pleadings in this case. Accordingly, to update the Employment Tribunal file, we now enclose copies of the following …*" and the correspondence already referred to is

G

listed and enclosed.

10. On 31 December 2014, a week before the commencement of the hearing on 7 January

H

2015, the Employment Tribunal sent a letter to the Respondent's agent, copied to the Claimant for information, headed "*Response - Amendment Granted*" and confirmed that an Employment

A

Judge has considered the letter of 12 December 2014 and "… *ordered that it be treated as an addition to the response*". By this time the Claimant was unrepresented. In any event no application to comment on the Respondent's application had been given and the correspondence raised no issue in relation to express contractual terms.

B

11. However, matters then developed further at the hearing itself, which took place over a number of dates between January and October 2015 before the decision was considered in chambers on 29 January 2016 and issued to parties on 5 February 2016. During the hearing, the issue of the Respondent's Occupational Health Policy and the pre-employment questionnaire were both aired in evidence. Both parties lodged written closing submissions. The Claimant addressed the issue of the express contractual status of the pre-employment questionnaire at some length both in his written submissions and in his response to the Respondent's closing submissions. In particular, in the latter document he submits that the applicable express provision of his contract in relation to screening was the Trust's Operational Policy and not the questionnaire by then being relied on by the Respondent. Accordingly, by the time the Tribunal came to deliberate, the issue of express contractual obligations was a live one.

C

D

E

F

12. The question posed by this first ground of appeal is whether the Employment Tribunal erred in determining the matter on the basis of a case that had not been pled by the Respondent. Against the background and chronology of events already outlined, Mr Clement argued on behalf of the Claimant that the Tribunal's decision, based as it was on a case not contained within the ET3, which had never been amended, was flawed and that the Respondent's failure to plead the issue of express contractual provision had caused material prejudice to the Claimant. Reliance was placed on the statements of Langstaff J in **Chandhok and Another v Tirkey** [2015] IRLR 195 to the effect that the parties must set out the essence of their

G

H

A

respective cases in the ET1 and the answer to it and that "… *an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings*". There could be no doubt that formal amendment of the pleadings was required where a line different to that taken in the initial response was to be put forward and that the approach to any such application to amend was settled by authority, in particular **Selkent Bus Co Ltd v Moore** [1996] ICR 836. The general rule was that a Tribunal's jurisdiction was limited to consideration of the complaints made to it; it was contrary to principle to permit a point to be taken that has not been pled - **Remploy Ltd v Abbott and Others** UKEAT/0405/14/DM.

B

C

D

13. Mr Clement argued that the prejudice to the Claimant arising from the lack of pleadings for the defence ultimately put forward arose from the timing of the Tribunal's decision to allow the correspondence to be treated as an addition to the response and from the Claimant's status as a litigant in person at that time. By the date of the Tribunal's letter of 31 December 2014, witness statements had been exchanged and the parties' positions focused. The Claimant would not have known that something unusual had occurred, namely the inclusion of correspondence in a response and that without any application to amend being made, far less any opportunity to oppose it. In any event, the correspondence had not raised the issue of any questionnaire being part of the express terms of the contract and so there had never been any notice of that aspect of the defence in any written form prior to the hearing.

E

F

G

14. On behalf of the Respondent Mr Boyd contended that as the basis of the claim was an alleged unlawful deduction of wages pursuant to section 13 of the **Employment Rights Act 1996**, the Tribunal was obliged to determine what the contractual position was between the parties in relation to the on-call payments so that it could decide whether the deductions made

H

in respect of those payments resulted in the Claimant receiving less than the amount "properly payable" to him. Thus the Tribunal had to address the question of the provisions of the Claimant's contract, which included both express and implied provisions, and identify what terms were applicable. It was accepted on behalf of the Respondent that a Tribunal should not decide an issue in a case without having given both parties the opportunity to deal with it. In the present case both sides had cross-examined witnesses and made submissions on the question of the Respondent's express or implied contractual right to insist on its health screening requirements. No breach of natural justice had occurred. The absence of amendment on the part of the Respondent was not determinative of the issue. The pre-employment questionnaire was an item of evidence that fed into the question of what the express or implied contractual provisions were.

15. Mr Boyd contended that in any event it could not be said that the Claimant was ultimately prejudiced to any material extent by the Tribunal's approach. He had been able to formulate detailed and comprehensive written submissions on the issue of the questionnaire and the Occupational Health Policy, something raised by both sides in the course of evidence. The Employment Judge had given an opportunity for responses to each party's submissions to be lodged and both sides had taken up that opportunity. It was clear from the Claimant's initial written submissions and his response to the Respondent's submissions that by that time he understood and had been afforded the opportunity to put his case forward and rebut the Respondent's case. He had made submissions on the issues of express and implied terms and had addressed directly the point about the questionnaire, analysing that latter point in some detail. In those circumstances he was unable to point to any material prejudice as he could not identify what more he would have done. Looking at the matter holistically, the process was ultimately fair. The only matter which he suggested (in written submissions before the hearing)

A

that he might need more time to explore was in relation to an argument that the Respondent had put forward that "express terms are not unassailable", in other words suggesting that implied terms could override them even if directly contradictory. In the event the Tribunal had accepted the Claimant's argument on that point, so nothing turned on it, but it illustrated that he was capable of seeking more time to answer something if he felt he needed that. As the Claimant could not seriously contend that the outcome would have been different had the Respondent's case been formalised in the pleadings, his first ground must fail.

The argument that the Tribunal erred in concluding that there was a contractual obligation to undertake pre-employment screening

16. The Claimant contends that the finding that the pre-employment questionnaire constituted an express contractual term is flawed for two reasons. First, it is said that the Tribunal failed to give adequate reasons for preferring the term in the pre-employment questionnaire to that contained within the Respondent's Occupational Health Operational Policy. The terms of that Policy are summarised at paragraph 67 of the Judgment. It made clear that blood testing for Hepatitis B, Hepatitis C and HIV was required for "new NHS staff". The Claimant did not fall within that category. The Tribunal appeared to have confused the relevant Policy in place in 2010/2011 which only required screening for new NHS staff and the later 2012 Policy which imposed that requirement on all those new to the Trust. Secondly, the said finding was perverse. The Trust's requirement for such blood testing was merely a practice, not a contractual provision. Unlike the Occupational Health Operational Policy, it had not been disclosed by the Respondent as one of the "policies and procedures" referred to in the Claimant's contract of employment. The contract eventually provided to the Claimant on 6 September 2012 referred to the Trust's policies and procedures, which included the Occupational Health Operational Policy of May 2010 but could not be said to include a

A

questionnaire not provided to the Claimant either when he commenced employment or when he attended for Occupational Health assessment. There was simply no evidential basis for this finding on the part of the Tribunal. It appeared that the Tribunal had become confused as between the Policy in place from 2010/2011 which required only new NHS staff to undergo blood testing and the 2012 Policy which subsequently required all staff who perform EPP as part of their role to submit to screening. It was unclear from paragraph 67 of the Judgment which Policy was being referred to but it could only be that in force at the material time. So far as the questionnaire was concerned, in the absence of a finding that one was issued and that both parties intended it to be completed it was not open to the Tribunal to find that it amounted to an express term of the contract. Mr Clement emphasised in oral argument that the Judgment made no reference to the unusual chronology of events in terms of the timing of the receipt of a written contract by the Claimant, which was when the dispute was well under way and after some deductions had been made.

17. In relation to the conclusion that, failing an express provision, there was an implied term that the Claimant was required to submit to blood screening, two arguments were advanced for the Claimant. First, as the Respondent had staff working in EPP roles seconded from other organisations, who had not been screened as the Department of Health's own guidelines did not require such screening for existing NHS staff, it was perverse to conclude that such an implied term was necessary to prevent the contract being defective on grounds of public safety. Secondly, the term that the Tribunal decided existed as an implied term was directly contrary to an express term of the employment contract (i.e. the terms of the Occupational Health Operational Policy) which only required such testing for new NHS employees. While the Tribunal had correctly stated the law (at paragraph 80) as being that an implied term cannot override the clearly expressed intention of the parties in the contract, it then failed to apply that

rule. The Claimant's written contract contained a statement that it was expected that he would comply with Trust policies and procedures and take reasonable care for the health and safety of others with whom he came into contact. The written policies and procedures with which the Claimant had to comply required only new staff to undertake the tests in question. One of the Respondent's witnesses (Dr Topping) said in evidence that practice was to go beyond the written policy.

18. For the Respondent Mr Boyd first addressed the issue of what policies were in place at the material time. The Claimant had commenced employment on 1 January 2011, but the Occupational Health Operational Policy relied on in argument by the Claimant was not ratified until July 2012 and so cannot be the Policy referred to in the Tribunal's Judgment. So far as the questionnaire was concerned, a letter of 15 June 2012 from the Respondent to the Claimant enclosed the questionnaire with an explanation that it had been in place since October 2010, all as accepted by the Tribunal at paragraph 46 of the Judgment. While there was undoubtedly confusion when the Claimant started employment about which provisions were in force, by the time of the dispute about whether he had to undertake screening, the matter had been clarified. An employee who had not been given the correct documents on day 1 of their employment was not entitled to refuse subsequently to complete something that was a continuing obligation. Deficiencies in the process of providing the documentation did not alter that obligation. The aim of public safety that was behind the requirement could not be ignored.

19. In answer to Mr Clement's first contention about inadequacy of reasoning, Mr Boyd submitted that it was uncontroversial that a Judgment does not require a formulaic recital of all facts, matters and arguments advanced. It should allow parties to know why they have won or lost on the key arguments. Paragraphs 67 to 72 of the Judgment adequately set out the

Tribunal's position on the Occupational Health Policy. Paragraph 97 makes a finding that the Policy changed in 2010 and paragraph 98 makes a finding that the questionnaire, valid from 1 October 2010, clearly showed that staff must provide validated documentary evidence of their Hepatitis B, Hepatitis C and HIV status. It was accepted that the Judgment was a little lax in not distinguishing with as much clarity as might have been hoped for between policy, procedure, process and the questionnaire but there can be no doubt that the questionnaire was central to the determination of the case and the relevant finding (paragraph 98) on that conveyed clearly to the Claimant that he had lost that argument. Any oversight in filling in the questionnaire could not negate the obligation to do so. The conclusion of the Tribunal was that the Claimant was bound by the policies and procedures of the Trust; those procedures incorporated the questionnaire from October 2010 and the specific procedural obligation was that contained in the questionnaire. On the issue of express terms the Decision was clearly **Meek** compliant.

20. On the perversity argument, Mr Boyd submitted that the Claimant could not overcome the high bar set by the test for perversity. It should be noted that the Tribunal had concluded that the new employee health questionnaire was "*part and parcel*" of the Trust's processes from October 2010 (paragraph 66). As already indicated, while the Judgment had not separated out neatly the categories of policy, procedure, process and the questionnaire, the finding that the questionnaire was an integral part of the process was unimpeachable. There was nothing in the perversity ground.

21. In relation to implied terms, it was contended that on the first point, the fact that there were other seconded staff working in EPP roles who may not have been screened simply had no bearing on whether such a term would be implied into the Claimant's contract of employment.

The other two individuals whose screening had initially been overlooked were, once identified, subjected to the same request as the Claimant and, unlike the Claimant, duly complied. On the argument that the implied term found by the Tribunal was in direct contradiction to an express term, reference was made to paragraphs 78 to 81 of the Judgment. In addition to a correct statement of the law on overriding express terms at paragraph 80, the Judge had gone on (at paragraph 81) to state that before a term can be implied a decision maker "*must be satisfied that the term is necessary in order to give the contract business efficacy, or it is normal custom and practice to include such a term in contracts of that particular kind, or an intention to include the term is demonstrated by the way in which the contract has been performed, or the term is so obvious that the parties must have intended it*". Having reviewed the evidence the Tribunal then concluded (at paragraph 93) that there was an implied term that the Claimant would submit to screening "*otherwise the contract is defective in terms of patient protection*". The Tribunal had not addressed any issue of conflict between that and the express terms of the contract, rightly, as there was none. The Claimant's focus was on paragraph 10.22 of the Respondent's Occupational Health Operational Policy but the provisions of paragraphs 10.3 and 10.5 of that Policy relating to the questionnaire and the pre-employment process could not be ignored in this context. Those provisions, which required questionnaires to be completed and kept updated were the relevant express terms and were consistent rather than inconsistent with the implied term that the Tribunal had concluded the contract contained in the event that it was not express. The appeal should be dismissed.

Discussion

22. As the Claimant's position before the Tribunal was that he had suffered unauthorised deductions from his wages, the issue of whether his contract permitted such deductions was central to the argument presented by both sides. Section 13(1) of the **Employment Rights Act**

A

1996 provides that an employer shall not make a deduction from a worker's wages unless it is authorised by a statutory provision or relevant provision of the worker's contract or by written consent to the deduction. Section 13(2) defines "relevant provision" in this context as including both express and implied terms of the contract. The definition of relevant provisions is then applicable to section 13(3) which provides:

B

C

> **"(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

It seems to me that in order to determine that issue in this case the Tribunal required to ascertain what the contractual position was between the parties in relation to the disputed on-call payments. In the particular circumstances that required consideration of both the express terms of the contract and any implied terms, something that the Tribunal was clearly entitled to do on the authority of the Court of Appeal decision in **Camden Primary Care Trust v Atchoe** [2007] EWCA Civ 714. That was accepted, very properly, by Mr Boyd at the hearing before me, notwithstanding that the decision in **Agarwal v Cardiff University** UKEAT/0210/16/RN is to the contrary effect and would have allowed him to argue that the Tribunal did not have jurisdiction to do that. As indicated earlier in this Judgment, the decision in **Agarwal** has not been followed in the subsequent case of **Weatherilt v Cathay Pacific Airways Ltd** UKEAT/0333/16/RN. For the reasons given by HHJ Richardson in that case and on the basis that the scope of the Tribunal's jurisdiction to consider and construe contractual terms in this context is both set out in the legislation and confirmed by the Court of Appeal I would not have followed **Agarwal** had counsel insisted on the point.

D

E

F

G

H

23. Turning to the first ground of appeal, namely that the Tribunal's conclusion was based on a defence not pled, it is indisputably the position that the Respondent's eventual position was

not properly pleaded. While there is specific reference in the ET3 to the Claimant having failed to comply with the Trust's screening requirements, the argument was not characterised as one of express or implied terms of contract in the pleadings. I have set out at paragraphs 8 to 11 above the circumstances in which the Tribunal came to deal with issues not pled formally by either side in the litigation. There is always a balance to be struck between avoiding unnecessary formalism and ensuring the fairness of the procedure to both sides. The giving of fair notice is what is at the heart of our system of written pleadings. In the Employment Tribunal the form of the pleadings is relatively informal but is intended to set the parameters of the dispute. As Langstaff J emphasised in **Chandok and Another v Tirkey** [2015] IRLR 195, "*… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it*". In this case the Tribunal allowed a rather unorthodox form of "amendment" in relation to, amongst other matters, the issue of implied terms and then had head evidence and argument on the issue of express terms without there being any written case at all for that issue. The question is whether the procedure went so far awry in this case that there was consequent material prejudice to the Claimant such that the decision cannot stand.

24. In my view, it is not insignificant that the Claimant was legally represented at the time of the intimation of the Respondent's position that there was (at least as a fall-back position) an implied term that health and safety reasons could justify removal (and therefore deduction from wages) from the on-call commitment. The correspondence of August and September 2014 referred to in the Tribunal's Decision at paragraph 24, illustrates that both sides were setting out positions that had changed or at least developed since the claim was raised and initially answered. In an email of 6 August 2014 the Claimant's agent specifically raised with the

A

Respondent an alleged lack of any evidence from the Respondent that deductions had been made in accordance with either a statutory provision or relevant provisions of a contract. The Respondent's position on there being an implied term was a response to that. Accordingly, from 22 Septembers 2014 the Claimant, who still had the benefit of legal representation, had fair notice of the implied term argument. The circumstances in which that argument was later regarded as received into the pleadings without formal amendment are unsatisfactory. I cannot speculate as to why the Employment Tribunal accepted this correspondence as if it was an application to amend and more importantly why no formal opportunity to oppose it, if it was an amendment, was given. Nonetheless, those procedural aberrations do not alter the fact that the Claimant had ample written notice of that line of argument. While the absence of a proper amendment process where a party wishes to materially alter their case or response cannot be condoned, what this appeal seeks to do is take retrospective objection to the inclusion of a position on implied terms that has been fully argued before the Tribunal. The issue then becomes one of whether the Claimant has suffered material prejudice, to which I will return.

B

C

D

E

25. The position in relation to the express terms of the contract is a little different. No advance written notice had been given of that, although as already indicated, the relevant statutory provisions require the Tribunal in a case of this sort to examine the applicable contractual provisions in order to decide what was properly payable by way of wages or salary. There was no dispute before me that both sides at the Tribunal had cross-examined witnesses and made detailed submissions on the issue of the contractual terms. The Claimant is clearly a highly intelligent and articulate individual who produced impressive written submissions, including a lengthy reply to the Respondent's written submissions. At the outset of that reply he submitted that "… *the fundamental issue which the Tribunal needs to determine to resolve this case is that of exactly what the Claimant's contractual provisions were with regard to*

F

G

H

whether he was required to submit to …" the relevant screening. The substance of both the Claimant's initial written submission and this subsequent response make reference to the Occupational Health Operational Policy and the nature and extent of the contractual terms, including the extent to which written policy should take precedence over unwritten practice. As Mr Boyd pointed out, the only matter about which the Claimant ultimately indicated he would want more time to consider was that of the Respondent's unsuccessful (and clearly erroneous) line that express terms were not unassailable and could be overridden by implied terms. I conclude that, while the requirement to set out one's position in the written case remains an important safeguard against ambush litigation and deviation from it may well result in unfairness to the other party such that adverse consequences require to be met by the party who fails to do so, in the particular circumstance of this case, the dispute in relation to express contractual terms having been fully litigated, the issue again becomes one of whether there has been material prejudice such as to justify interference with the substantive decision.

26. On the issue of prejudice, there was no real attempt at the hearing before me to suggest that the outcome would have been any different had the Respondent included the issues of express and implied terms within the response form. While the timing of the Tribunal's intimation that the pleadings were to be treated as amended meant that witness statements had been exchanged, those statements were prepared against a background of the Claimant having had intimation since September 2014 that the Respondent would argue the implied term issue. The arguments on the express terms of the contract were fully argued by both sides at the hearing and the opportunity was given to the Claimant to make a detailed response to the Respondent's written submissions. As already indicated, the Claimant put the issue of the contractual provisions squarely into the territory of the central matter for determination. He knew that he could seek more time to respond to issues that if he felt at any disadvantage and

A

did so in relation to the matter of inconsistent express and implied terms albeit that the Tribunal was not against him on that point and so no further time was required. In all the circumstances I have concluded that, notwithstanding the unsatisfactory way in which the pleadings and procedure developed in this case, sufficient notice of the response to his claim was given to the Claimant such that he was not materially prejudiced by those deficiencies. He presented his arguments in a coherent and highly articulate manner and was able to respond to all of the points presented for the Respondents. The first ground of appeal accordingly fails.

B

C

27. On the second ground of appeal, I have already acknowledged that the Tribunal was obliged in terms of the relevant statutory provisions to consider the evidence and documents and ascertain what the actual contractual position was. That there had been a significant delay in providing the Claimant with a written contract was not disputed. When he was first told that the Trust expected him to undergo health screening he had not been provided with his written contractual terms and cannot be criticised for questioning the basis of the request. However, in a letter to the Claimant of 15 June 2012, the Respondent enclosed the questionnaire with an explanation that it had been in place since October 2010. When eventually he was provided with a written contract (in September 2012) the questionnaire was again enclosed. That questionnaire made clear that all EPP staff must provide validated documentary evidence of their Hepatitis B, Hepatitis C and HIV status before health clearance could be given and so the Tribunal concluded this was an express term of the Claimant's contract that had been in place from October 2010 (paragraphs 46, 48, 49, 67, 98 and 103). While the Tribunal's Judgment does not set out with as much precision as one might have wanted the specific policies, procedure and practices relevant to its analysis, the real issue is whether it was entitled on the evidence before it to reach a conclusion that the questionnaire was "*part and parcel*" of the Trust's processes, and consequently the Claimant's contract, from October 2010.

D

E

F

G

H

A

B

C

D

E

F

G

H

28. I have reached the view that the Tribunal was entitled on the evidence led to reach such a conclusion. While there was certainly evidence to support an argument that the Trust required screening only for employees new to the NHS, there was also evidence supportive of a contrary argument that a requirement that all those new to the Trust undergo screening was in place. Against a background of important health and safety considerations involved in performing EPPs, there was evidence that, at least by October 2010, the Trust had imposed the requirement to undergo screening on all those who would be performing those procedures. Such a requirement was not inconsistent with its stated Policy, but rather extended it to make clear that the screening requirement could not be avoided by a new employee simply by virtue of having been employed elsewhere in the NHS previously. The Claimant had accepted that he was bound by the Respondent's policies and practices and the relevant procedures had, by October 2010, incorporated the questionnaire. As I reject the contention that the requirement was inconsistent with stated policy, there was no issue of preferring one term over another and so the reasons challenge is in my view misconceived. There was a clear evidential basis for the Tribunal's conclusion on express terms, albeit that a different conclusion would have been possible. I accept the submission that delays in the process of requiring the Claimant to undergo screening cannot negate an obligation to do so where that is contractual. In all the circumstances I conclude that the decision on express terms was one that the Tribunal was entitled to reach on the basis of the evidence led.

29. So far as the arguments against there being an implied term are concerned, I consider the position of the other staff who had not initially been screened to be irrelevant. The Respondent acted as soon as it was realised that screening had been overlooked for those individuals in the same way that it did with the Claimant. The other staff accepted without question the Respondent's position that screening was required. The more substantive

A

argument was whether the Tribunal had erred in identifying an implied term that was directly contrary to an express term of the employment contract which, on the Claimant's account, required screening only for new NHS employees. The problem with that argument is that it presupposes that the Tribunal had erred in identifying the questionnaire as a central feature of the contractual arrangements, whether or not it went so far as incorporating an express term into the contract. As indicated, the contractual arrangements included the pre-employment process, the Trust's policies and practices as well as the questionnaire. Accordingly, even if the decision had fallen short of identifying an express term, the pre-employment process highlighted by Mr Boyd in his submissions illustrated that the screening requirement in question did not conflict with the express contractual arrangements. It is clear that what lay behind all of the relevant documentation was an intention to ensure that the highest standards of patient protection were maintained where EPPs were undertaken. The decision on an implied term goes no further than narrating that even if the screening requirement was insufficiently clear in the written documentation to be an express term, such a term could be implied in the context of patient protection being something that was so obviously a priority that the parties must have intended it to be included even if had not been sufficiently overtly expressed. It was unnecessary for the Tribunal to explore or address any notion of conflict between the express and implied terms because there was none. The written documentation, which included the questionnaire, supported the view that patient protection was of particular importance where more risky procedures were being undertaken, hence the statement in the questionnaire that the ability to undertake such procedures would be delayed pending screening results. Even if this statement had not been characterised as an express contractual term, it is sufficient to amount to an implied term that the screening information was required for health and safety reasons.

B

C

D

E

F

G

H

A

30. For the reasons given, I have reached the conclusion that there is no identifiable error of law in the Tribunal's Judgment that would justify interference with the decision. The appeal is dismissed.

B

C

D

E

F

G

H