Appeal No. UKEAT/0151/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 May 2017
Judgment handed down on 15 January 2018

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

TYNE AND WEAR PASSENGER TRANSPORT EXECUTIVE t/a NEXUS — APPELLANT

MR S ANDERSON & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS LUCY BONE (of Counsel) Instructed by: Addleshaw Goddard LLP One St Peter's Square Manchester M2 3DE
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<u>SUMMARY</u>

UNLAWFUL DEDUCTION FROM WAGES

In previous decisions of divisions of this Tribunal in **<u>Agarwal v Cardiff University and Another</u>** UKEAT/0210/16/RN and **<u>Weatherilt v Cathay Pacific Airways Ltd</u>** UKEAT/0333/16/RN a difference of view had arisen as to the jurisdiction of Employment Tribunals in relation to claims for deduction from wages under Part II **Employment Rights Act 1996** where the parties did not agree about the meaning of contractual provisions. By analogy with the approach taken by the Court of Appeal in **<u>Southern Cross Healthcare Co Ltd v Perkins and Others</u>** [2010] EWCA Civ 1442, [2011] ICR 285 in **<u>Agarwal</u>** it was decided that the Employment Tribunal had no jurisdiction if the contract had to be construed. **<u>Weatherilt</u>** declined to follow **<u>Agarwal</u>** because the decisions in the Court of Appeal in **<u>Delaney v Staples (trading as De Montfort Recruitment)</u>** [1991] ICR 331 and **<u>Camden Primary Care Trust v Atchoe</u>** [2007] EWCA Civ 714 accepted that in deciding whether a deduction was authorised the terms of the contract, express or implied, had to be considered. On consideration of further authorities, including **<u>Anderson and Others v London Fire & Emergency Planning Authority</u>** [2013] EWCA Civ 321 and **<u>Cabinet Office v Beavan and Others</u>** UKEAT/0262/13/BA, **<u>Weatherilt</u>** was followed on the principles enunciated in **<u>Lock and Another v British Gas Trading Ltd (No 2)</u>** UKEAT/0189/15/BA, [2016] IRLR 316. The Court of Appeal decisions in **<u>Coors Brewers Ltd v Adcock and Others</u>** [2007] ICR 983 and **<u>Tradition Securities & Futures SA v Alexandre Mouradian</u>** [2009] EWCA Civ 60 were dealing with a different problem and were to be distinguished. Nor should the remarks made about the nature of the Part II procedure in **<u>Delaney</u>** in the House of Lords by Lord Browne-Wilkinson and by Wall LJ in **<u>Coors</u>** be regarded as conclusive; nowadays Employment Judges deal with complex matters.

Although the Employment Tribunal had erred by considering whether a term needed to be implied and using the construct of the officious bystander rather than the conventional approach of considering "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*"? (**Arnold v Britton** [2015] 1 AC 1619 per Lord Neuberger PCS at paragraph 15 of his judgment - see 1627G), the Employment Tribunal had clearly reached the right result on the factual matrix and the appeal would be dismissed (see paragraph 21 of the judgment of Laws LJ in **Lincoln College v Jafri** [2014] EWCA Civ 449, [2014] ICR 920).

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HIS HONOUR JUDGE HAND QC

Introduction

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1. This is an appeal from the Judgment and Written Reasons of an Employment Tribunal comprising Employment Judge Hunter ("EJ Hunter") sitting at North Shields on 14 and 15 December 2015 ("the Reasons"), which was sent to the parties on 21 December 2015. His decision was that the Appellant, which is known as "*Nexus*" and which operates the Tyne and Wear Metro and to which I will refer to from now on as *Nexus*, had made unauthorised deductions from the wages of the Respondents to this appeal, who were the Claimants below and to whom I will refer from now on as the Claimants. *Nexus* has been represented by Ms Bone of counsel, who did not appear below. The Claimants have been represented by Mr Stubbs of counsel who appeared on their behalf in the Employment Tribunal.

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The Factual Background

2. The issue about unauthorised deductions from wages originated from the 2012 pay settlement negotiated by collective bargaining between the RMT, to which the Claimants belonged, and *Nexus*. Some of what follows is set out in the Reasons but I have also referred to some of the documents, particularly those to be found in the supplemental appeal bundle. These matters are addressed in the Reasons but I have set them out by reference to the documents in order to present as complete a picture of the factual background as I can.

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3. The Claimants were known as "*red book staff*" and were all employed on maintenance work below Grade 4 in the pay structure (see paragraph 1.2 of the Reasons). This comprised a number of elements including basic pay, a productivity bonus, a shift allowance, overtime payments and additional allowances, one of which was called the "*Red Book bonus*".

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4. In the supplemental appeal bundle between pages 29 and 43 is a document entitled "*Conditions of Service for Metro Staff*". It bears the date 27/02/2009 and is described as Version No. 1.0. By clause 1.1 it informs the reader that (see page 33 of the supplemental appeal bundle):

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> **"The pay structure for Metro Staff follows the arrangements set out below. Individual rates of pay within Sections, whilst based on these arrangements may vary depending upon the additional productivity and efficiency measures negotiated within each Section and ratified by the Joint Negotiating Committee for Metro Staff."**

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By clause 1.3.1 "*a productivity bonus*" was to be added to the basic pay Grades 1 to 3B. A similar amount was included "*as part of the basic pay for Grades 4* … [to] … *7*". Clause 1.3.3 stated that "[t]*hese additional payments*" would be paid "*as part of the normal day rate where applicable*" (see also page 33).

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5. There followed at clause 1.4 a table setting out the amount of shift allowances as "*Basic Pay*" plus an uplift percentage (see page 34 of the supplemental appeal bundle). By way of example, the allowance in the first row of the table (paragraph 1.4.1) for alternating shifts is shown as "*Basic pay +12½%*". Each successive row of the table deals with a different allowance setting out the computation in the same way save for a variation in the percentage appropriate to the particular allowance. At paragraph 1.8 (see pages 38 to 42 of the supplemental appeal bundle) each pay grade is successively set out, commencing at "*Grade 1*" and ending with "*Traincrew*", and under each heading is listed the relevant "*Basic Pay*" together with the relevant amounts relating to allowances together with some figures as to percentage of basic pay, which figures would seem to be intended to provide a kind of "ready reckoner" so as to facilitate computation.

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6. I understand that this material was put before the Employment Tribunal. I do not know whether there are documents containing figures for years later than 2009, although one might

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have expected that if there were any later documents these would have been disclosed and placed before the Employment Tribunal.

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7. The 2012 pay settlement was negotiated against the background of government guidelines on austerity, which provided that in the public sector there should be only a 1% general pay increase in 2012-2013 (see paragraphs 2.5 and 2.6 of the Reasons). Although

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Nexus was not a government or local government entity it took the view that it ought to adhere to those guidelines. *Nexus* also proposed "*to consolidate £200.00 of the "Red Book bonus" into basic salary* … [and] … *consolidate the productivity bonus (25.5%) into basic salary*". These changes were referred to and approved by a "*referendum of affected members*" and

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consequently accepted by the RMT on behalf of the affected employees.

8. The evidence of this process is somewhat scant. It comprises a letter written by Mr

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Bartlett, the Human Resources Director of *Nexus*, on 10 October 2012 to Mr Thomson, a full-time official of the RMT (see pages 60 to 62 of the supplemental appeal bundle). It was a response not only to earlier correspondence, not included in the material before me, but also to what had happened at the JNC meeting of 7 August 2012. This meeting does not appear to

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have been dealt with by the Employment Tribunal but an earlier meeting in June is mentioned at paragraph 2.9 of the Reasons. Having referred to the "*current economic climate*" and a notification that "*pay will be frozen in our sector for a third consecutive year*" the letter of 10

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October 2012 set out this offer:

> **"a) To consolidate £200 of the Red Book bonus into basic salary for employees at Nexus Rail and of the Seasonal Payment for employees at the Ferry. In making the consolidation amount fixed we aim to benefit those on lower pay with a higher percentage increase in basic pay. The bonus will be reduced accordingly in future.**
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> **b) To consolidate the productivity bonus (25.5%) into basic salary. This will benefit employees by having an official higher basic salary."**

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9. The then General Secretary of the RMT, the late Mr Bob Crow, wrote a letter dated 22 November 2012 "*To All Branches, Regional Offices & Regional Councils*". It was addressed "*Dear Colleagues*" and referred to "*Rates of Pay & Conditions of Service 2012 - Nexus (Tyne & Wear Metro)*" (see pages 63 and 64 of the supplemental appeal bundle). In other words, it was written to his members (or, at least, intended for distribution to the members). It informed them that the pay negotiations had concluded and identified the offer tabled by *Nexus* as:

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> **"Partial consolidation of the Red Book Bonus/Seasonal Payment (Ferry) into Basic Salary to the sum of £200.00 which will reflect a 1% increase as in line with the Treasury's November 2011 announcement.**
>
> **Consolidation of the Productivity Bonus into basic salary (cost neutral, fully pensionable and provides a greater basic salary)."**

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Also it informed members that there would be "*a referendum of affected members at Nexus*" and that the executive of the RMT recommended acceptance of the offer.

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10. I am not clear as to exactly what referendum process followed (and paragraph 2.11 of the Reasons does not say more than that a decision was made to conduct a referendum) but whatever process took place it was to end on 29 November 2012 (see the RMT letter of 22 November referred to in the previous paragraph). I think it reasonable to infer these changes were approved and that "*the changes*" referred to as implemented on 1 April 2013 by *Nexus* (see paragraph 2.14 of the Reasons) were those that had been discussed in the correspondence. What in fact was introduced was a division of basic pay into two elements "*Basic 1 and Basic 2*". The former represented the 2011 basic pay amalgamated with the "*Red Book bonus*"; the latter represented the consolidation of basic pay and the productivity bonus. *Nexus* declined to calculate shift allowances by reference to "*Basic 2*" but confined the calculation to "*Basic 1*".

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11. The issue that has arisen is whether these new arrangements changed the basis upon which the shift allowance is to be calculated. It had always been calculated as basic pay plus

whatever additional percentage was relevant to the particular shift. The Claimants contend that the shift allowance should have been calculated on both elements of the basic pay for 2012-2013. *Nexus* has not calculated the shift allowance on that basis and this has repercussions not only for the shift allowance but also for holiday pay. The shortfall alleged by the Claimants amounts to about £500,000.00 over the relevant period. Looked at another way, on the Claimants' contentions the effect of the pay settlement in 2012-2013 should have been an increase in pay of about 5% on average (see paragraphs 2.13 and 2.14 of the Reasons). The Employment Tribunal characterised the issue at paragraph 1.4 of the Reasons as being "*whether by implication that agreement changed the basis on which the respondent was entitled to calculate the shift allowance*".

12. Apparently, no grievance was raised in respect of this form of calculation for a period of about 15 months. When permitting this appeal to go through to this hearing His Honour Judge Shanks referred to "*a possible new point*" which had been raised, mainly at his prompting, namely whether the conduct of the Claimants between 1 April 2013 and the raising of the grievances over a year later may have given rise to "*some kind of estoppel by convention or variation by conduct*". HHJ Shanks acknowledged that the point may not have been raised before EJ Hunter and did not permit any amendment to the Notice of Appeal allowing the point to be raised, although he did not discount the possibility of a future amendment. In the event, Ms Bone submitted that I ought to allow an amendment and this argument ought to be open to her. As things have turned out this has proved to be the lesser of the concerns about what should be argued on this appeal by way of amendment. I shall return to it in due course.

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The Reasons

13. EJ Hunter gave himself extensive directions as to the law relating to the construction of contracts and the implication of terms into contracts (see paragraph 3 of the Reasons). Having done so he reached the following conclusions. Firstly, that the Terms and Conditions of employment relating to the shift allowance were unambiguous (see paragraph 4.2 of the Reasons). In this context he referred to the "*officious bystander*" and whether anything turns on the introduction of that hypothetical personality and the issue of whether any term should be implied has been one of the themes of the appeal.

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14. By the expression "*unambiguous*", I would understand EJ Hunter to be saying that it was clear from the rubric of the terms and conditions that the shift allowance was to be arrived at by applying the relevant percentage increase to the basic rate of pay. The critical question is what is meant by "*Basic Pay*"? EJ Hunter expressed this in the following terms at paragraph 4.4 of the Written Reasons:

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> **"… Prima facie, therefore, the shift allowance is to be calculated by applying the appropriate percentage multiplier to the sum of the previous basic pay, £200 of the red book bonus and the productivity bonus unless either (1) there was an agreement, express or implied, between the respondent and the RMT that the respondent should exclude the former productivity bonus from the calculation of the shift allowance or (2) the tribunal should amend the Terms and Conditions of Contract by inserting a clause to that effect."**

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The first of part of the alternative would seem to me to be plainly an issue of contractual construction. I am not clear as to how the second part of the alternative arises either in terms of the issue raised before the Employment Tribunal or in terms of its jurisdiction (although cf. below at paragraph 41 of this Judgment). If it is meant to be an expression of the approach to be adopted by the Employment Tribunal in relation to Part I of the **Employment Rights Act 1996** ("ERA"), apart from making the obvious point that this case did not involve Part I, as will become apparent later in the discussion in this Judgment, decided authority would suggest that Part I does not afford the Employment Tribunal the power to insert clauses into contracts of

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employment. But I need not spend any more time on this specific issue because it was not the way in which EJ Hunter dealt with this case.

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15. EJ Hunter did not accept the argument put forward that the parties had agreed the offer was to be "*cost neutral*" and that this had been accepted on behalf of the Claimants by the RMT in its description of the offer sent to the Claimants (see paragraph 2.10 of the Reasons). His reasoning was that *Nexus* had never suggested that the agreement had to be cost neutral only

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that it should be "*appearing cost neutral to Nexus*" and therefore the RMT had accepted only that it had the appearance of cost neutrality (see paragraph 4.5 of the Reasons). Secondly, however viewed, the offer could never have been cost neutral, having regard to the fact that

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increasing the basic rate of pay by amalgamating part of the Red Book bonus into it inevitably increased pension fund contributions and shift allowances. Thirdly, it was not obvious from the perspective of the "*officious bystander*" that the use of the expression "*cost neutral*" in the

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RMT letter of 10 October 2012 meant agreement to the proposition that it must be "*cost neutral*" for *Nexus*. The "*bystander might conclude*" that the RMT meant it would be "*cost neutral*" from the point of view of the Claimants, who would not have to pay any additional pension contribution (see paragraph 4.5 of the Reasons).

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16. EJ Hunter thought that (see paragraph 4.6 of the Reasons):

> **"[The] officious bystander … would have concluded that the offer was deliberately lacking in particularity because there was an attempt to provide workers with a reward at a time of national austerity and to give the appearance that the offer was cost neutral when the respondent and the RMT knew that it was not … [and] … would have recognised that the effect of the consolidation on the calculation of the shift allowance was an unintended consequence of the consolidation, but … could not have concluded that there had been an agreement to vary the Terms of the Contract to redefine the definition of basic pay so as to exclude the element formerly represented by productivity bonus for the purposes of the calculation of the shift allowance."**

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17. At paragraph 4.7 EJ Hunter considered whether it was necessary to imply a "*term that the definition of basic pay should be amended to make it clear that the element formerly*

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represented by the productivity bonus is excluded when calculating the shift allowance". He took into account that "*the construction of the contract is clear*" and recognised that the consolidation led to "*a consequence that was not intended by the respondent and was not*

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realised by the claimants until they raised a grievance over a year later" and that the effect was to give them "*a pay rise significantly in excess of the Government's pay restraint policy*". He concluded as follows:

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> **"… But the authorities make it clear that the tribunal's function is to declare what the parties agreed, not what they ought to have agreed. I cannot say that it is necessary to include an implied term into the 2012 pay settlement and the Terms and Conditions to give them business efficacy: they are not incoherent. There is clear evidence that whatever bonuses and allowances have been consolidated with basic pay in the past, the shift allowance has been calculated on the consolidated sum. That applies to red book workers on grade 4 and above."**

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The New Point

18. In the skeleton argument prepared for the hearing of this appeal Ms Bone drew attention to a judgment of a division of this Tribunal comprising Slade J, handed down on 22 March 2017, in the case of **Agarwal v Cardiff University and Another** UKEAT/0210/16/RN. This

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decides that just as authority in the Court of Appeal precludes any Employment Tribunal from construing a contract in relation to the provisions of Part I of the **ERA**, by parity of reasoning the same principle applies to Part II. Ms Bone submitted that meant neither the Employment

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Tribunal nor this Tribunal had any jurisdiction to consider the meaning of the contract in the context of Part II. Despite the point not having been raised at the Employment Tribunal, because it was a matter going to jurisdiction I should permit it to be raised at this stage (see paragraph 50 of the judgment of a division of this Tribunal in **Secretary of State for Health v**

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Rance [2007] IRLR 665).

19. Mr Stubbs did not accept firstly that **Agarwal** was correctly decided and secondly, even

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if it was, that it inevitably resulted in this Tribunal having to allow the appeal. That it was not correctly decided was illustrated by the later decision of another division of this Tribunal,

namely that of His Honour Judge Richardson sitting alone, in **Weatherilt v Cathay Pacific Airways Ltd** UKEAT/0333/16/RN, in which a judgment taking an opposite view had been handed down on 25 April 2017. Alternatively, and in any event, however that conflict between previous decisions of this Tribunal was resolved; properly understood the decision of the Employment Tribunal had not really been an exercise in construction of contractual terms but rather it amounted to an identification of contractual terms, an exercise permissible in Part II of the **ERA**, as had been acknowledged by **Agarwal**.

20. Having heard submissions as to whether this new point should be entertained, I accepted that it should, that draft amended grounds of appeal raising it should be submitted in due course and that, in the meantime, I would hear argument as to how an Employment Tribunal should approach Part II and how this Tribunal should approach the scope of an appeal against a decision of the Employment Tribunal made under Part II. I will come back to that argument in due course. Firstly, however, it is important to recognise the situation with which I am now faced.

Previous Decisions of this Tribunal

21. Within a very short space of time two divisions of this Tribunal, **Agarwal** and **Weatherilt**, have accepted opposite conclusions as to the correct approach to Part II of the **ERA**. In **Lock and Another v British Gas Trading Ltd (No 2)** UKEAT/0189/15/BA, [2016] IRLR 316 a division of this Tribunal comprising Singh J was invited to take a different course to that which had been adopted by another division of this Tribunal. At paragraphs 72 to 75 of his judgment there is a very helpful exposition of, and explanation as to how, what used to be called "*the hierarchy of precedent*" applies to this Tribunal. Normally, previous decisions of this Tribunal are of persuasive authority and will generally be followed by subsequent divisions

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of this Tribunal unless one of the established exceptions applies. Those are identified in paragraphs 72 to 75. It seems to me that the first two exceptions are obviously engaged here. These are firstly where a decision can be said to be "*per incuriam*", which means made without proper consideration of relevant legislation or another binding authority, and secondly where there are two or more inconsistent decisions of this Tribunal. Also the fourth consideration - namely where it is possible to say a previous decision is manifestly wrong - may, at least potentially, also have some application in the present context.

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22. Before coming to the two decisions of **Agarwal** and **Weatherlilt** I think it would be helpful to step back and consider firstly the legislative provisions and their historical origins and secondly identify and consider at least some of the relevant previous authorities. Whilst I would have liked to have been able to consider all this before what Lord Bridge referred to as "*the statutory presumption of senility*" arrived in my case, that proved not to be possible and I regret and apologise for the delay, which has resulted from my inability to deal with this before now. Even though I have taken pains to identify the jurisprudential landscape I cannot be sure that the cases I have identified below represent all that might be relevant.

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Part I *ERA*

23. Although, as I pointed out above at paragraph 14 of this Judgment, this case was not decided under Part I of the **ERA**, a very brief sketch of that Part is necessary in order to have a complete perspective. Part I is entitled "*Employment Particulars*". Section 1 deals with the duty imposed upon the employer to supply "*a written statement of particulars of employment*" and states what information should be contained in those particulars. Sections 2 to 7B (with the exception of section 7) deal with alternative means of compliance, supplementary material and scope. Section 8 gives an employee the statutory right to be provided with an "*itemised pay*

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statement" by the employer. Included in the itemised pay statement must be particulars of fixed or variable deductions from pay. Section 9 provides the alternative of aggregated deductions, where a separate "*standing statement of fixed deductions*" has been provided. Sections 7 and 10 give powers to the Secretary of State to make regulations about what particulars are to be supplied under section 1 and what particulars are to be included in the section 8 statement. The Employment Tribunal is given jurisdiction by section 11 to hear references by employees or employers to determine "*what particulars ought to have been included or referred to in a statement so as to comply with the requirements of*" sections 1, 4 and 8.

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24. Where the Employment Tribunal determines that particulars ought to have been included then by section 12 those particulars are deemed to have been included. Section 12 also confers on the Employment Tribunal powers to confirm, amend, or substitute particulars and gives a discretionary power, in the case of "*unnotified deductions*" made where sections 8 or 9 had not been complied with, to order the employer to pay the employee "*a sum not exceeding the aggregate of the unnotified deductions so made*" irrespective as to "*whether or not the deductions were made in breach of the contract of employment*".

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25. Part I of the **ERA** has a long pedigree dating back to the **Contracts of Employment Act 1963**. That Act was repealed by, and its provisions taken into, the **Contracts of Employment Act 1972**. Itemised pay statements were introduced by the **Employment Protection Act 1975**. Both Acts were repealed and their respective provisions taken into the **Employment Protection (Consolidation) Act 1978**. Some alterations were made by Schedule 4 of the **Trade Union Reform and Employment Rights Act 1993** and the amended provisions relating to written statements of particulars of employment and to itemised pay statements were

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then repealed and re-enacted in Part I of the **ERA**, the introductory text of which reads "*An Act to consolidate enactments relating to employment rights*".

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Part II *ERA*

26. Part II of the **ERA** comprises fifteen sections but not all of it is relevant to the present appeal. The whole Part is entitled "*Protection of Wages*" and the sub-heading to sections 13 and 14 is "*Deductions by employer*". The section heading to section 13 is entitled "*Right not to*

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suffer unauthorised deductions". A deduction is defined by section 13(3) as a "*deficiency*" arising where "*the total amount of wages paid on any occasion … is less than the total amount of the wages properly payable … on that occasion*". Such a deduction will be unauthorised

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unless it is either "*required or authorised by virtue of … a relevant provision of the worker's contract*" or where the worker's prior agreement or consent to the deduction has been "*signified*" in writing (see sections 13(1)(a) and (b)). A "*relevant provision*" means a

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"*provision comprised*" either "*in one or more written terms of the contract of which … a copy*" has been given to the worker by the employer before the deduction in question has been made (see section 13(2)(a)) or "*in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in*

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relation to the worker the employer has notified to the worker in writing on such an occasion" (i.e. the occasion of the deduction) (see section 13(2)(b)). The likelihood of variations of contract in the employment context was recognised by Parliament in section 13(5), which

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provides that where a "*relevant provision*" has effect by a variation of the contract, it cannot authorise a deduction before the variation takes effect.

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27. Section 14 provides for the exception of certain deductions from the scope of section 13 in a series of specified circumstances. Sections 15 and 16 deal with the worker's right not to

have to make payments to the employer and exceptions to that right. Sections 17 to 22 deal with deductions in relation to cash shortages and stock deficiencies in employments in the retail trade. None of them apply in the instant appeal and it is not necessary to consider them in detail.

28. Section 23 confers jurisdiction on the Employment Tribunal to hear complaints of breaches of the various rights not to suffer deductions from wages given by Part II and section 24 deals with remedies when such complaints are upheld. By section 24(1) upon finding that a complaint is "*well-founded*" the Employment Tribunal "*shall make a declaration to that effect and shall order the employer ... to pay to the worker the amount of any deduction*" made contrary to section 13(1) and since 2009 by section 24(2) (inserted by the **Employment Act 2008**) the Employment Tribunal has had the power to order the payment of an additional amount "*to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of*". Finally, there is an extended definition of "*wages*" at section 27.

29. The origins of Part II are explained succinctly by His Honour Judge Clark at paragraph 8 of the judgment of a division of the Tribunal presided over by him in **Tradition Securities & Futures SA v Mouradian** UKEAT/0570/07/RN in these terms (paragraph 8):

> **"As Mr Linden QC reminds me, the protection for workers under Part II ERA owes its origins to the Truck Acts 1831 to 1940, initially passed to ensure that Victorian artificers were paid in coin of the realm. That absolute requirement was softened by the Payment of Wages Act 1960 and the present provisions replaced the Wages Act 1986."**

There is a similar summary in the judgment of His Honour Judge Richardson at paragraph 11 of **Weatherilt**. Section 13 of the **ERA** re-enacted section 8 of the **Wages Act 1986** and, with the exception of some subsequent amendments and additions (e.g. section 24(2) referred to above), the whole of Part II is the re-enactment of legislation, which had started with the **Truck Acts**

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and ended in its present form in the **Wages Act 1986**. So, although they are juxtaposed in the **ERA**, Part I and Part II have completely different statutory origins.

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The Authorities

30. In **Southern Cross Healthcare Co Ltd v Perkins and Others** [2010] EWCA Civ 1442, [2011] ICR 285 the Court of Appeal held that the function of the Employment Tribunal in exercising its jurisdiction under section 12(2) of the **ERA** was confined to identifying the terms of the contract and did not extend to interpreting the terms, which was a matter for the civil courts and, therefore, where questions of interpretation arose the matter had to be dealt with in a breach of contract action brought in the civil courts. This conclusion reached in the judgment of Maurice Kay LJ, with which Stanley Burnton and Jackson LJJ agreed, followed an analysis of the jurisdiction of the Employment Tribunal in respect of breach of contract (see paragraph 2 at page 287C-D), an analysis of Part I of the **ERA** (see paragraphs 10 to 13 of the judgment) and a discussion of two cases in this Tribunal (**Leighton v Construction Industry Training Board** [1978] ICR 577 and **Brown v Stuart Scott & Co** [1981] ICR 166) and consideration of the judgments of the Court of Appeal in **Mears v Safecar Security Ltd** [1982] ICR 626 and **Eagland v British Telecommunications plc** [1993] ICR 644. In the **Leighton** case a division of this Tribunal presided over by Kilner Brown J had said (see page 581) the following as set out by Maurice Kay LJ at paragraph 22 of his judgment (see page 291G-H):

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> **"It was a case of the parties not being of the same mind as to the application of the words 'basic' and 'supplementary'. In effect the … tribunal was exercising the power of the civil courts to declare what a contract meant or to rectify an error manifest in an otherwise binding contract. We are unanimously of the opinion that the words of the statute do not mean and were not intended to mean that an industrial tribunal could rewrite or amend a binding contract which had one small area of misunderstanding between the parties."**

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That passage was expressly approved in **Mears** by Stephenson LJ at page 644C. He went on to add (obiter dictum) at page 644E-F that the powers now to be found in sections 11 and 12 of Part I of the **ERA** gave what is now the Employment Tribunal "*no power to interpret*

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particulars which have been given". The conclusion drawn by Maurice Kay LJ is to be found at paragraphs 27 to 30 of his judgment (see page 293A-E). Because this is the basis of the reasoning by analogy of the division of this Tribunal in **Agarwal**, I set it out in full:

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> **"27. Although the present case does not concern the invention of the term, I have included these passages because it seems to me that they stem from the same doctrinal strand as Stephenson LJ's earlier passage (which has not been criticised) on the lack of a power to interpret particulars which have been given.**
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> **28. Since the hearing of this appeal, I have had the opportunity to consider the treatment of this issue in *Harvey on Industrial Relations and Employment Law*, Division AII, paras [119]-135]. The exposition and analysis is unequivocally supportive of the doctrinal strand to which I have just referred. For example, at para [120]:**

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>> **"The tribunal has no jurisdiction to interpret the agreement - that is a matter for the ordinary courts. Still less does the tribunal have jurisdiction to amend the agreement. It can only amend the statutory statement to ensure that it corresponds with the agreement."**
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> **29. In other words, the reference in section 11(1) of the 1996 Act to a determination of "what particulars *ought* to have been included", is not an invitation to judicial creativity, even under the rubric of "construction".**

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> **30. In my judgment this approach is both established and correct. The alternative, expansive approach would open the door to a multitude of cases advanced on a contractual basis in a manner totally at variance with the consistent reluctance to enlarge the breach of contract jurisdiction of employment tribunals to embrace workplace disputes during the currency of a contract of employment. This may be regrettable but it is, as regards both law and policy, well settled."**

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31. **Southern Cross** binds this Tribunal so far as Part I of the **ERA** is concerned and the division of this Tribunal presided over by Slade J in **Agarwal** regarded the above reasoning as equally applicable to Part II. But as the division of this Tribunal presided over by HHJ

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Richardson in **Weatherilt** made clear there is authority about Part II which needs to be considered and because of the situation in which I find myself, namely facing diametrically opposed decisions in this Tribunal, I propose to consider rather more of it than was considered in either **Agarwal** or **Weatherlilt**.

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32. The starting point is the judgment of the Court of Appeal in **Delaney v Staples (trading as De Montfort Recruitment)** [1991] ICR 331. One of the points raised on behalf of the

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Appellant, who was the worker, and rejected by the Court of Appeal, namely whether a payment in lieu of notice was "*wages*" within the meaning of the **Wages Act**, was the subject of

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a further appeal to the House of Lords, where it was rejected again (see [1992] 1 AC 687). Strictly speaking, therefore, the decision of the House of Lords might be thought not to be of direct relevance to the instant appeal, although one remark made by Lord Browne-Wilkinson in his speech, namely that Part II claims amount to a summary procedure (see page 494C), has proved to have had some resonance. The other issue before the Industrial Tribunal, this Tribunal and the Court of Appeal related to unpaid commissions and holiday pay. Obviously, given the first issue, both issues arose after the termination of the worker's contract.

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33. The Industrial Tribunal held that a payment in lieu of notice was not wages and that the worker's remedy in respect of unpaid sums in lieu of notice lay in breach of contract proceedings brought in the civil courts. Both in the Court of Appeal and in the House of Lords, when the appeal against this point was rejected, emphatic comments about the inconvenience of the Industrial Tribunal not being able to deal with that matter were made by Nicholls LJ (see page 346D-F), Lord Donaldson of Lymington MR (see all of his judgment) and by Lord Browne-Wilkinson (see 697H-698C). As mentioned above, the subsequent history is summarised at paragraph 2 of the judgment of Maurice Kay LJ in **Southern Cross** as follows:

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> **"… That gauntlet was not picked up until 1994 when the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) enabled the tribunals to hear specified breach of contract cases. The provision is now enshrined in section 3 of the Employment Tribunals Act 1996, which also contains an up-to-date rule-making power which facilitates further extensions. However the current position is that the breach of contract jurisdiction is confined to claims arising or outstanding on the termination of employment. It is not available during the subsistence of the contract."**

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34. In summary, on the other issue in **Delaney** (i.e. the one relevant to this appeal) the Industrial Tribunal held that the failure to pay commission and holiday pay amounted to a deduction from wages. That conclusion was reversed on a cross-appeal to this Tribunal, where, obviously, the employer did appear, but restored by the Court of Appeal, where the employer did not appear. There was no further appeal on the point to the House of Lords.

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35. In a previous decision of this Tribunal, **Alsop v Star Vehicle Contracts Ltd** [1990] ICR 378, the conclusion had been reached that "*non-payment*", a concept which it must be said may be rather difficult to pin down, was outside the scope of the **Wages Act** (see pages 380-381, as cited by Nicholls LJ in his judgment in **Delaney** at 338C-F, a passage with which both Ralph Gibson LJ and Lord Donaldson MR agreed). Having considered the terms of section 8(3) of the **Wages Act** (now section 13 (3) of the **ERA**) and identified it as a deeming provision Nicholls LJ concluded that (see pages 339F-340C):

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> **"As I see it, the answer to the first question raised by this appeal depends on the proper construction of section 8(3). As to that, whatever might be the position in the absence of section 8(3), I think that the observations in the above extract from the decision in the *Alsop* case cannot, in their entirety, survive the presence of section 8(3). Section 8(3) must have been intended to widen the ambit of the Act, because it is a deeming provision …**
>
> **The Act is, indeed, concerned with unauthorised deductions. But section 8(3) makes plain that, leaving aside errors of computation, any shortfall in payment of the amount of wages properly payable is to be treated as a deduction. That being so, a dispute, on whatever ground, as to the amount of wages properly payable cannot have the effect of taking the case outside section 8(3). It is for the industrial tribunal to determine that dispute, as a necessary preliminary to discovering whether there has been an unauthorised deduction. Having determined any dispute about the amount of wages properly payable, then the industrial tribunal will then move on to consider and determine whether, and to what extent, the shortfall in payment of that amount was authorised by the statute or was otherwise outside the ambit of the statutory prohibition: for example, by reason of section 1(5). To the extent that the shortfall is found to be a contravention, the industrial tribunal will make an appropriate declaration and orders, in accordance with section 5(4) to (6)."**

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In the rest of his judgment Nicholls LJ goes on to consider and reject the arguments for a different and contrary interpretation of the **Wages Act** (see pages 340G-341H).

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36. It is unnecessary for me to set out the whole of that passage but the fourth, fifth and sixth of his points for rejecting the earlier and narrower construction, which had been adopted by this Tribunal in **Alsop**, are pertinent to the present appeal and so I will set them out in full (see page 341D-H):

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> **"Fourth, I am unable to discern any underlying policy reason why Parliament should have intended to draw such a distinction[1]. Indeed, the distinction would give rise to undesirable practical consequences, rather than the reverse. According to this distinction, the underpaid employee may have resort to an industrial tribunal if the employer is asserting a claim against**

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[1] i.e. the distinction between "non-payments and deductions" (see page 341B).

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the employee, but he must go to the county court in cases where the employer is simply refusing to pay. This hardly seems sensible. Moreover, the application of the distinction to the facts of particular cases would give rise to difficulty and uncertainty and niceties which would be peculiarly undesirable in this field.

Fifth, as already noted, one item in the calculation prescribed by section 8(3) is the "total amount of wages that are properly payable" by the employer to the employee. It is implicit in this that in the event of dispute, this amount will be determined by the industrial tribunal when a complaint has been made under the Act. This must be so in a case where the employer claims that no wages are properly payable as well as in a case where the employer admits that something is due.

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Sixth, it is pertinent to keep in mind that the wider construction of the Act does not have the consequences that employees are obliged to bring all claims for unpaid wages, as defined in the Act, by way of complaint to an industrial tribunal. Under section 6(1), an industrial tribunal has exclusive jurisdiction to entertain complaints of alleged contraventions of the statute. But an employee is not compelled to assert a contravention of the statute and advance a claim for unfair paid wages on that footing. If he so wishes, he may disregard any question of contravention of the statute, and bring a simple claim in contract for unpaid wages in the county court or exceptionally, if the sum involved is above the county court limits, in the High Court."

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37. Six months later in the case of **Dunlop Tyres Ltd v Blows and Others** [2001] EWCA Civ 1032, [2001] IRLR 629 the Court of Appeal restored the decision of an Employment Tribunal in an unlawful deduction from wages case. Because issues as to the ambit of the **Wages Act** did not arise in the case, **Delaney** was not cited and the parties agreed that the outcome depended upon construction (see the judgment of Tuckey LJ at paragraph 24). If the judgment has any interest at all the significance of the case lies in the fact that the resolution of the issue as to what rate of pay employees were entitled to if they worked statutory holidays plainly involved construction of the provisions of a collective bargain and, thus, of the terms and conditions of individual contracts of employment. This was clearly the basis of the judgment of Lord Woolf LCJ (see paragraphs 22 and 23). Nevertheless, I recognise that, without any jurisdictional point having been taken, its value in the current debate must be regarded as slight.

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38. A decision of this Tribunal made just over a year later than that, **Fairfield Ltd v Skinner** [1993] IRLR 4, perhaps commands rather more attention. There the issue was whether various deductions relating to an ex-employee's use of a company vehicle had been lawfully

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made after his employment terminated. The Employment Tribunal held that two of the sums deducted could not be deducted pursuant to the terms of the contract because the factual basis for making such deductions had not been made out. The employer appealed to a division of this Tribunal presided over by Hutchison J, relying on the judgment of Nicholls LJ in **Delaney** on the grounds that the Employment Tribunal's jurisdiction did not extend to considering whether the deductions had been made in accordance with the contractual provision and that, having identified what the contractual provision was, the correct forum for deciding whether it had been breached was the County Court.

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39. The Employment Appeal Tribunal rejected that argument. Having quoted part of the judgment of Nicholls LJ set out above, at paragraphs 13 and 14 of his judgment Hutchison J said this:

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> **"13. Mr Purdy suggests, but we disagree, that in that passage Nicholls LJ is to be taken to [be] laying down that it is merely a matter of construing the contract and the statute against the employer's professed reason for the deduction and does not contemplate an enquiry into the facts of the case. There is no justification for construing that passage, where Nicholls LJ plainly was not addressing a problem such as we are concerned with in this case, in that way. One has only to reflect on the extraordinary results that would follow - which it is unnecessary to elaborate - if Mr Purdy's suggestion were correct to realise that it cannot be.**
>
> **14. As a matter of simple language it seems to us that s.1(1)(a) contemplates that the Industrial Tribunal must, where there is a dispute as to the justification of the deduction, embark upon the resolution of the dispute. They have done so here: they have concluded that, in the absence of any evidence that the sums deducted were due from the employee they were not satisfied that the contract entitled the employers to make either deduction. In the circumstances their conclusion is unimpeachable and there exists no good ground for allowing this appeal on the main argument that has been presented."**

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Fairfield, whilst addressing a somewhat different problem, arguably does so in a way consistent with **Delaney**.

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40. So too does the judgment of the Court of Appeal in **Camden Primary Care Trust v Atchoe** [2007] EWCA Civ 714. Like the **Blows** case, and by contrast with **Delaney v Staples** and **Fairfield**, **Atchoe** related to a dispute arising between employer and employee whilst the

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contract of employment was still subsisting. But, although the case was not mentioned, the approach at paragraph 33 of the judgment of Sir Peter Gibson was clearly consistent with **Delaney**:

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> **"As the ET rightly said, the correct starting point must be to consider what wages were properly payable to Mr Atchoe within Section 13(3), and this requires consideration of all the relevant terms of his contract of employment. However, that requires consideration also of any implied terms. …"**

41. Later cases also seem to be consistent with **Delaney**. In **Mears Ltd v Salt and Others** UKEAT/0522/11/LA a division of this Tribunal presided over by Wilkie J concluded that the Employment Tribunal had jurisdiction to consider an unlawful deduction from wages claim in respect of a travel allowance, which the Employment Tribunal found had become a contractual payment unrelated to actual travel. The Employment Tribunal had investigated the historical origins of the allowance. This included consideration of a number of contractual changes, despite which a separate travel allowance payment had continued to be made, and the change in the nature of the allowance from being an actual travel allowance to being a kind of daily premium. A number of issues were raised on appeal to this Tribunal but I only need consider the argument that the Employment Tribunal had no jurisdiction to "*construe or interpret contractual language, or to invent a term*" (see paragraph 16 of the judgment of this Tribunal) and although, possibly, this is something which EJ Hunter had in mind in the passage set out above at paragraph 14, I do not think that Wilkie J intended to use the verb "*invent*" to suggest that Part II allows the Employment Tribunal to decide what it thinks a term ought to be, as opposed to deciding what it actually is.

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42. The conclusion in **Mears** was supported by reference to the judgment of the Court of Appeal in **Southern Cross**. Reference was also made to another decision of this Tribunal in **Parker v Northumbrian Water** UKEAT/0221/10/CEA, [2011] ICR 1172, which, according to

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paragraph 18 of the judgment in **Mears**, was suggested as providing a basis for arguing "*that the role of the Employment Tribunal in part II, adjudicating on an alleged deduction of wages, can be no greater than the jurisdiction of the Employment Tribunal in paragraph 1*[2]". **Parker** is a judgment of mine in respect of various estoppel and abuse of process issues. The only reference to **Southern Cross** appears at paragraph 58 of my judgment and, for my part, I do not discern anything there or elsewhere to support the proposition at paragraph 18 of the judgment in **Mears**. I ought to say, however, that I do refer at paragraph 11 of my judgment in **Parker** to a passage from the Reasons of the Employment Tribunal which is in these terms:

> **"It seems to him, prima facie, that the Claimant is seeking to disguise a breach of contract case, or a claim for declarations of the terms of a contract, as a wages claim, which he cannot do in a Tribunal. The projected amendments cause even more concern.**
>
> **… If this is really a breach of contract claim or a claim seeking a declaration of the true terms of the contract, it might an abuse of process to seek to disguise it as a wages claim. Wages claims are meant to be simple actions which can be dealt with by a Chairman alone in a matter of an hour or two."**

43. Whilst this represented the views of one Chairman of Employment Tribunals in 2006 and may be an interesting vignette of a more general view about the nature of the process (something to which I will need to return) my further reference to that passage at paragraph 58 of my judgment does not seem to me to provide any platform for the argument that in **Parker** I was endorsing the extension by analogy of **Southern Cross** to Part II **ERA**. In any event, the Employment Tribunal in **Mears** rejected the argument by reference to the statutory language of sections 13(3) and 23 of the **ERA** (see paragraphs 18 to 20 of the judgment in **Mears**) and at paragraph 20 of the judgment in **Mears** this Tribunal accepted as correct that "*the exercise of its jurisdiction under section 23 requires an assessment by the Tribunal whether the wages claimed for are "properly payable"*". Then at paragraphs 27 and 28 the judgment continues:

> **"27. In our judgement, the Employment Tribunal, in each case, was entitled, having considered the evidence of each Claimant and the other witnesses, to conclude that the predecessors of the Appellant had, through their various managers, agreed to make those payments by way of express agreement, or, by their conduct in making payments against**

[2] Plainly a misprint for Part 1.

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> **those claims, in some cases backdating them, similarly agreed expressly by virtue of that conduct. In those circumstances, it is in our judgement wrong to suggest that what the Tribunal was doing was in any way interpreting, or inventing, a contract; it was simply finding what the agreement was in circumstances where the Claimant provided the information to the employer and the employer, acting on that information, and applying (as was obviously the case) the standard hourly rate to that information, made the ETTA payment as a matter of express contractual agreement.**
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> **28. In our judgement, there is no this question of the Employment Tribunal mistakenly going beyond the limits of their jurisdiction as identified in *Southern Cross*, nor acting perversely in concluding that there were express agreements. It is trite law that an express agreement need not be in writing; it can be oral, and it can also be made by virtue of the conduct of the parties. That can either be as an express agreement or it can be as an agreement implied in the way described by Elias J (as he then was) in *Solectron Scotland Limited v Roper* [2004] IRLR 4 at paragraphs 19 to 21, under the heading: "Custom and Practice". …"**

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Although the case is not mentioned in **Mears**, the above seems to me to be consistent with **Delaney**.

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44. I should also mention the decision of a division of this Tribunal presided over by HHJ Clark in **Somerset County Council v Chambers** UKEAT/0417/12/KN. In that case he said this at paragraph 17:

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> **"… The ET had no jurisdiction to embark on an enquiry into what he ought to have been paid if he was to be regarded as an employee in the context of a WA claim, any more than it would be appropriate under a s.11/12 reference: see *Southern Cross Healthcare v Perkins* [2011] ICR 285; *Mears v Safecar* [1982] ICR 626, both CA (assuming that he was an employee and therefore entitled to make such a reference). Any such claim lies in breach [of] contract."**

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It seems to me that this does not purport to extend the ambit of **Southern Cross** to Part II of the **ERA**. But if I misread either then the matter seems to me to be settled by the Court of Appeal in 2013.

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45. In **Anderson and Others v London Fire & Emergency Planning Authority** [2013] EWCA Civ 321 a collective bargain between unions and the employer made in 2007 dealt with pay increases for that year and for 2008 and 2009. In respect of the latter the agreement

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stipulated an alternative; either pay would rise by 2.5% or by a formula that resulted in pay being 1% above the negotiating committee settlements made in the same period. Difficulties

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arose over the 2009 payment and an employee commenced proceedings under Part II claiming an unlawful deduction from wages. The Employment Tribunal accepted the argument raised by the employer that the agreement had only been "an agreement to agree" and thus was not a binding contractual agreement. The employees appealed unsuccessfully to a division of this Tribunal presided over by Slade J. She did not uphold the reasoning of the Employment Tribunal but instead concluded that the employers were not in breach because they had fulfilled one limb of the alternative.

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46. The employees appealed again and succeeded in the Court of Appeal. The main judgment was given by Maurice Kay LJ, by then Vice President of the Court of Appeal, Civil Division, although both Davis LJ and Moses LJ gave short additional judgments. What is most striking about all of them is that, long or short, each comprises a construction of the terms of the contract. There is no hint of hesitation as to whether that was an exercise the Court of Appeal should undertake in the context of Part II. Indeed, the judgment of Maurice Kay LJ contains at paragraphs 14 to 16 what seems to me an entirely conventional summary of the approach to be adopted towards construction of a contract, in this case a collective bargain, in an employment context and paragraphs 17 to 25 represents the practical application of those principles to the factual context of the case. At paragraph 25 the learned Judge poses a question - "*So what is the real meaning of the 2009 provision?*" - which is unmistakably the language of the construction of a contract.

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47. In a subsequent judgment of a division of this Tribunal presided over by Singh J in **Cabinet Office v Beavan and Others** UKEAT/0262/13/BA questions arose as to the terms of a letter written in 2008 containing an offer as to pay, which fell to be construed against the public sector pay freeze. Negotiations had traditionally taken place at regular intervals between

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the Cabinet Office and Trade Unions representing the employees but on this occasion no agreement was reached and the Cabinet Office imposed the terms of the offer. It was common ground that by the conduct of continuing to work the employees must be taken to have "*affirmed*" the offer "*by conduct*" (see paragraph 5 of the judgment) and that the issue to be determined was the meaning of aspects of the letter. At paragraph 16 of the judgment Singh J referred to the judgment of Maurice Kay LJ in **Anderson** and, as the succeeding paragraphs make clear, his division of this Tribunal went on to apply the principles of construction enunciated by Maurice Kay LJ to the consideration as to whether the construction of the meaning of aspects of the letter by the Employment Tribunal had been correct. At paragraph 34 they concluded that it had been.

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48. Another problem, which has some relevance to the present discussion was addressed in a series of cases culminating in the Court of Appeal decisions in **Coors Brewers Ltd v Adcock and Others** [2007] ICR 983 and **Tradition Securities & Futures SA v Mouradian** [2009] EWCA Civ 60. These decide the question as to whether an unquantified loss can be recovered under Part II. **Coors** related to a profit share scheme, which was altered to become a growth target when the ownership of the brewery changed hands, with the result that in 2003 no payment was made when the growth target was not achieved. Some of the affected employees brought proceedings in the Employment Tribunal complaining of unlawful deductions from wages, which, if successful would have resulted in liability of around £600,000.00 in terms of all affected employees. In the event the claim did succeed. That decision was reversed partly on appeal to this Tribunal but another part of the appeal to the effect that the Employment Tribunal had no jurisdiction to hear a claim for unquantified damages in breach of contract was rejected. That point, however, went on to the Court of Appeal, which set aside the decision in this Tribunal and restored the decision of the Employment Tribunal.

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49. The main judgment in **Coors** was given by Wall LJ although Chadwick LJ gave a further short judgment. Wilson LJ agreed with both. It was common ground between the parties that if, on analysis, the claims were "*for unquantified damages for the breach or*

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breaches of express or implied terms in the claimants' contracts of employment, then the tribunal [did] not have jurisdiction to entertain them" (see paragraph 7 of the judgment of Wall LJ at page 986E, effectively repeated again at paragraph 20 at page 992C).

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50. In the part of his judgment sub-headed "*Discussion*", Wall LJ says this at paragraph 46:

> **"In my judgment, the underlying facts of *Delaney v Staples* are a paradigm of the circumstances in which Part II of the Employment Rights Act 1996 is designed to operate. The employee complains that there has been an unlawful deduction from his wages. He has not been paid an identified sum. He makes a claim under Part II. The employer may have a number of defences. These defences may raise issues of fact. Those issues will be for the**

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> **tribunal to determine. But the underlying premise on which the case is brought is that the employee is owed a specific sum of money by way of wages which he asserts has not been paid to him. That, it seems to me, is the proper context both of *Delaney v Staples* and Part II of the 1996 Act."**

And he goes on to explain at paragraphs 50 to 52 how this would work in practice:

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> **"50. In my judgment, therefore, the first question which falls to be addressed in this appeal can be articulated as follows: what (if anything) was the nature of the obligation incurred by Coors as a consequence of the inevitable cessation of the BEPSS scheme? On the assumption that there was an obligation to replace the BEPSS scheme, the second question then becomes: was the scheme identified in paras 17 and 18 of the Employment Appeal Tribunal's judgment a proper implementation of Coors's obligation to its workforce?**

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> **51. I agree with Chadwick LJ … that if the scheme put in place by Coors was not a proper implementation of its obligation to its workforce, the critical question in this appeal is that which I have identified in para 42 above, namely whether the claim for damages which arises from Coors's failure to perform its obligation can be said to be an identifiable sum, failure to pay which is to be treated as an unauthorised deduction from wages.**
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> **52. In answering these questions, and in particular the critical question identified in paras 42 and 51, I have to say that I prefer the submissions made by Mr Linden. In my judgment, the highest the case can be put for the claimants is that Coors was under an obligation to put in place a scheme which, properly and fairly operated, was capable of replicating the benefits of**

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> **the BEPSS scheme. Whichever way one examines the case, however, the result is that any payment due to the workforce under the 2003 incentive scheme was incapable of quantification in the *Delaney v Staples* sense. To put the matter another way, none of the claimants could properly say that on any given date in 2004, let alone the March date operated under the previous scheme, Coors had made an unlawful deduction of a quantified amount from their wages. …"**

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Finally, he echoed the brief remark made by Lord Browne-Wilkinson in **Delaney** (see above at paragraph 33 of this Judgment) about the nature of the Part II procedure at paragraph 56 by saying this:

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> **"Part II of the Employment Rights Act 1996, as I read it, is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be a swift and summary procedure. Of course such claims would throw up issues of fact. The example canvassed in argument was of an employee being paid piece work, asserting that his employer deducted sums properly payable to him for work undertaken on the grounds that some of the items produced by the employee were defective. *Delaney v Staples* … provides another example. Such a dispute would not take the case outside Part II of the Act. I also accept that Part II is capable of expansion along *Farrell Matthews & Weir v Hansen* [2005] ICR 509 lines as envisaged by section 27(3) of the Act. However, in my judgment to extend it to the present case is a step too far."**

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51. In his judgment Chadwick LJ characterises the limit of Part II in this way at paragraph 71:

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> **"As I have said, I am content to assume for the purposes of this appeal that the claimants have claims against the employer company for breach of contract. But, on a true analysis, those claims are, as it seems to me, claims for damages by way of compensation for the loss of the chance that, if the employer company had put in place a substitute scheme which met the requirement imposed by the claimants' employment history, the effect of such a scheme, when applied to the company's actual financial performance for the year 2003, would have been that the claimants received some benefit which (absent such a scheme) they did not receive. I have no reason to doubt that, in the context of a claim for damages advanced on that basis, a court could measure the loss of chance by an appropriate award. But that task is outside the jurisdiction which (in the case of a claimant whose employment has not come to an end) the legislature has chosen to confer on an employment tribunal by the 1996 Act. I agree with Wall LJ that, if and for so long as the claimants remain in the company's employment, they must seek their remedy in the county court."**

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52. In the case of **Tradition Securities** a similar issue, as to whether the claim was for unliquidated damages, arose. The case concerned a bonus calculated by reference to a written formula and allocated to a team of traders headed by the Respondent, which he had the ability to apportion "*in consultation with the Chief Executive Officer whose reasonable decision will be final*". The Employment Tribunal concluded that in reality the Respondent had apportioned the bonus "*at his absolute discretion*" and that the dispute as to whether there had been a deduction was within its jurisdiction.

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53. It was argued in this Tribunal on appeal by the employer that decision was wrong. A division of this Tribunal presided over by HHJ Clark concluded that it was not saying at paragraph 26 of the judgment:

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> **"Thus, it seems to me, where the real issue is whether a purported variation to the contract in writing authorizes the relevant deduction before it is made, that issue falls to be considered in the course of a Part II claim. Applying the dictum of Nicholls LJ in *Delaney*, it is for the employment tribunal to determine whether the relevant variation contended for by the Respondent was notified to the Claimant before the date of the alleged deduction (January 2007) as a necessary preliminary to deciding whether there had been an unauthorised deduction."**

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54. That decision was upheld by the Court of Appeal. The Appellant's argument is recorded at paragraph 15 of the judgment of Hooper LJ as follows:

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> **"Mr Linden QC took us through a history of the legislative provisions and reminded us that they have been described as a summary procedure and that they offer a remedy to an employee in circumstances where he might have no such remedy in contract. For example, a deduction agreed only orally by the employee or a deduction agreed retrospectively would not make the deduction authorised for the purposes of the Act. He submitted that claims of the kind in the present case were more suited to be heard in the County or High Court where the employer was more likely to be able to defeat the claim."**

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Nevertheless, it was common ground that the real issue was whether the claim was quantified or unquantified and, if it was of the latter kind, then the Employment Tribunal had no jurisdiction over it. The Court of Appeal accepted that the Employment Tribunal had been entitled to conclude that the claim was quantified and so the appeal failed.

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Agarwal

55. After a period of illness a doctor, who had been working part of her time as an academic for the Respondent University and part of the time for a parallel Health Board as a surgeon,

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returned to work at the University. She had always been paid by the University but when she returned to work she was not permitted to resume her duties as a doctor and so the University only paid half her salary. Consequently, she brought a claim under section 13 of Part II. The

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Employment Tribunal concluded that it did not have jurisdiction to hear her case. This was on

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the basis that the parties agreed that the Employment Tribunal was bound by the decision of this Tribunal in **Somerset County Council v Chambers** (see paragraph 29 of the judgment in **Agarwal**).

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56. Ms Agarwal appealed to this Tribunal and her case was heard by Slade J sitting alone. It was conceded on the appeal that "*in a claim under **ERA** section 13 which applies during the subsistence of a contract an Employment Tribunal has no jurisdiction to construe or construct the terms of the contract relied upon*" (see paragraph 3 of the judgment of this Tribunal) and this was, albeit in extended terms and with some initial typographical errors, reiterated in a passage at paragraph 31 to 34 of the judgment, which I am afraid it is necessary to set out in full:

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> **"31. All counsel rightly agreed that if a Claimant's entitlement to wages depended upon the construction of the contract of employment, the claim brought … by an employee continuing in employment would fall outside the jurisdiction of the Employment Tribunal. It would have to be brought as a contract claim in the Civil Courts and not as a deduction from wages claim under the ERA section 13 in the Employment Tribunal. The legislative provisions giving Employment Tribunals jurisdiction to determine a claim for unauthorised deductions from wages under ERA section 13 and claims for a sum due under a contract or damages for breach of contract are different. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 Article 3, a claim for a sum or for damages under a contract of employment may only be brought in the Employment Tribunal if the claim arises or is outstanding on the termination of the employee's employment. A claim under the 1994 Order may only be heard in an Employment Tribunal if a Court would have jurisdiction to determine the claim. The right not to suffer unauthorised deduction from wages is conferred by ERA section 13 and such a claim may only be brought in the Employment Tribunal.**
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> **32. Counsel did not seek to suggest that *Chambers* was wrongly decided. They agreed that a Tribunal did not have jurisdiction to hear and determine a claim under ERA section 13 if it required a decision on the construction of the contract of employment.**
>
> **33. With due respect to the EJ, in my judgment it is not the judgment in *Chambers* which is material to the issue of whether the Employment Tribunal had jurisdiction to determine the Claimant's section 13 claim but *Southern Cross*. In *Chambers* the Claimant's level of pay was set out in a letter to him from the Council. His claim was based on an argument that he would have been paid at a higher rate if he had been full time rather than working about one-third of a full timer's hours. The issue was not one of a construction of a contract.**
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> **34. In *Southern Cross* the Claimants claimed to be contractually entitled to five days' long service uplift on top of increased statutory holiday entitlement of 28 days. They brought their claims under ERA sections 11 and 12 contending that the Statement of Particulars of Employment given by their employer under ERA section 1(4)(d)(i) should have so provided. The Employment Tribunal and the EAT upheld the claims. Maurice Kay LJ in the Court of Appeal explained that the question before the Court was whether Employment Tribunals have jurisdiction to construe contractual terms and conditions contained or referred to in a written statement of particulars."**

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57. Then at paragraph 35 of her judgment Slade J quotes from paragraphs 28, 29 and 30 of the judgment of Maurice Kay LJ, which I have set out above at paragraph 30 of this Judgment. At paragraph 36 of her judgment Slade J completes her analysis of the **Southern Cross** case with a reference to paragraph 34 of the judgment of Maurice Kay LJ where he says that only the ordinary civil courts have jurisdiction over what he describes as "*the construction issue*".

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58. At paragraph 37, having considered all that, Slade J extends the analysis to section 13 claims in the following terms:

> **"In my judgment the decision of the Court of Appeal that the Employment Tribunal has no jurisdiction to construe a statement of written particulars in a claim under ERA section 11 applies equally to the construction of a contract in a claim not to suffer unauthorised deduction from wages under ERA section 13. The statement of particulars given under section 1 should record the agreement between employer and employee with regard to certain matters. Wages for the purposes of the section 13 claim are defined in section 27. These include the rate of remuneration. A claim under section 13 depends upon deciding the total amount of wages properly payable. This should be ascertainable from the statement of particulars given under section 1."**

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She then asked herself whether the Appellant's case required construction of the contract, including whether or not it contained an implied term, and concluded at paragraph 58 of the judgment that it did saying:

> **"… Deciding whether the contract of the Claimant with the First Respondent contains such obligations requires construing its terms including whether it included implied terms requiring her to take part in mediation with her clinical colleagues and to co-operate with the Second Respondent in enabling them to obtain their Occupational Health report. The need for decisions on the construction of the contract including whether it contained implied terms leads to the conclusion that the Employment Tribunal did not have jurisdiction to determine the Claimant's claim under ERA section 13. The venue for pursuing a claim for an alleged shortfall in her wages is in the Civil Courts. …"**

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Weatherilt

59. Around a month after the judgment in **Agarwal** was handed down, another division of this Tribunal, this time presided over by His Honour Judge Richardson sitting alone, handed down judgment in the **Weatherilt** case. This concerned an unlawful deductions from wages claim under section 13 of Part II **ERA** in respect of the sick pay of a pilot employed by Cathay

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Pacific Airways. The issue was whether certain components of what might be described as his normal pay should be included in the sick pay provided for by his terms and conditions of employment. As HHJ Richardson observed at paragraph 9 of his judgment the answer to that depended upon the meaning of various provisions in the Aircrew Conditions of Service. In other words it depended on contractual construction. Relying on the judgment in **Agarwal**, the Respondent sought to raise a new point on the appeal, namely that construction of a contract or the implication of terms into a contract could not be considered in a section 13 claim. HHJ Richardson allowed an amendment to the Respondent's cross-appeal enabling the point to be raised before him but then rejected it and in doing so declined to follow the judgment in **Agarwal**.

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60. The starting point of his reasoning was the origin of Part II **ERA** (see paragraph 11 of his judgment) but the essence of his analysis was that the Court of Appeal decisions in **Delaney** (discussed above at paragraphs 34 to 36 of this Judgment) and **Atchoe** (see above at paragraph 40 of this Judgment) clearly sanctioned a degree of contractual construction and were both binding on him (see paragraph 19 of his judgment). He put it this way paragraph 20 of his judgment:

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> **"I do not think there is any basis within Part II of the 1996 Act for carving out questions of contractual interpretation and implication and holding that the ET has no jurisdiction to determine them. As Nicholls LJ held, the ET is required to determine a dispute "on whatever ground" as to the amount of wages properly payable as a necessary preliminary to discovering whether there has been an unauthorised deduction. This must include a dispute as to the interpretation of a contract or the existence of an implied term. It would be surprising if the ET could not construe a provision of the contract to see whether it authorised a deduction when this very question is central to the operation of section 13. Indeed in my experience it is not unusual for cases it ET level and EAT level to decide such questions in an application under Part II (see for a recent example *Cabinet Office v Beavan* UKEAT/0262/13)."**

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61. In the following paragraph, paragraph 21, he acknowledged that there was an overlapping jurisdiction in respect of the construction of contract with the Civil Court and he contemplated that in some cases the ET may well stay proceedings pending the resolution of

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what he described as "*an important issue*". But his admirably lucid and concise decision was that the Employment Tribunal could construe contractual provision in a Part II claim in order to decide whether there had been an unauthorised deduction and, unlike the Employment Tribunal, he went on to construe the Aircrew Conditions of Service. Having done so he concluded that on their true construction they did not support the Appellant's argument and he dismissed the appeal.

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Submissions

62. Ms Bone sought permission to amend her grounds of appeal to argue that the Employment Tribunal had been wrong to attempt any contractual construction or to consider whether or not a term ought to be implied into the contract. As set out above I permitted her to argue these matters and I will allow her permission to amend.

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63. Her argument was that the analysis of Slade J in **Agarwal** is correct and is to be preferred to that of HHJ Richardson in **Weatherilt**. In essence she justified this submission on the basis that the logical analysis of **Agarwal** was manifestly the superior. If I accepted that argument then plainly the Employment Tribunal erred and the Appellant must succeed on that basis. If I did not and regarded myself as bound by higher authority, as HHJ Richardson had done in in **Weatherilt**, then she reserved her argument to press it again on a further appeal.

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64. But she also put a variety of submissions on the alternative basis that even if I accepted that contractual construction or consideration of the application of the term is acceptable in an unlawful deduction from wages claim under section 13 of Part II **ERA**, nevertheless, having regard to the orthodox canons of contractual construction, the Employment Tribunal had gone wrong.

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65. Firstly, she submitted that the Employment Tribunal had erred by considering the wrong issue. What was set out at paragraph 1.4 of the Reasons, namely that the issue was "*whether by implication that agreement changed the basis on which the respondent was entitled to calculate the shift allowance*" differed from the issue identified at the Preliminary Hearing conducted in August 2015. This had identified the issue as being "*whether or not the guaranteed productivity bonus should be considered as basic pay for the purposes of calculating the claimants' shift allowances*". The result of this had been an erroneous concentration by the Employment Tribunal on implication of a term as opposed to construing whether it had been agreed that the new consolidated basic pay should no longer be used in the calculation of shift allowances. Moreover, it had resulted in the Employment Tribunal failing to recognise that there was an ambiguity in the agreement. Another consequence of addressing the wrong issue had been that the Employment Tribunal had approached the matter from the point of view that there was a burden of proof on *Nexus*.

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66. This also led onto her second criticism of the approach of the Employment Tribunal which she characterised as looking at the matter from the point of view of whether the Claimants had established a prima facie case. In this context as she referred to the second sentence of paragraph 4.4 of the Reasons, which starts with the words "*Prima facie*".

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67. Thirdly, she challenged the conclusion of the Employment Tribunal in the first sentence of paragraph 4.2 of the Reasons that the "*Terms and Conditions of employment concerning the shift allowance are unambiguous*". In her submission the terms relating to the shift allowance were capable of more than one meaning.

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68. Fourthly, although she accepted that there was no evidence the Employment Tribunal had adopted this canon of construction, she was concerned that the outcome might have been influenced by the argument put forward on behalf of the Claimants at the Employment Tribunal that the terms should be construed "contra proferentem" *Nexus*. This would be an erroneous approach because *Nexus* was not proffering anything but was engaged in an arm's length negotiation with the RMT.

69. Fifthly, she complained that the Employment Tribunal had not adopted the correct perspective when construing the contractual terms. It had left out of account the vital factual matrix of austerity and its impact upon the public sector and those in what might be described as the quasi-public sector.

70. Sixthly, the Employment Tribunal had wrongly taken account of the subjective intention of the parties. At paragraph 4.5 of the Reasons it had wrongly considered the motivation of *Nexus* and of the Trade Union. This was at odds with the correct approach to the construction of a contractual term. At this point she relied upon various authorities, reference to which and discussion of which I will postpone until later in this Judgment.

71. Seventhly, and allied to her third point above about ambiguity, she submitted that the meaning obviously given to the contract by the Employment Tribunal produced a commercially nonsensical conclusion. The commercial common sense of this transaction, Ms Bone submitted, was to reach an agreement that did not breach the prevailing austerity pay policy in the public sector. Plainly if this agreement was construed in the way preferred by the Employment Tribunal it must be inconsistent with that policy, which was a commercially nonsensical outcome. A significant part of this error resulted from the fact that the

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Employment Tribunal have failed to adopt an "*iterative approach*" as suggested by some of the authorities.

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72. Eighthly, Ms Bone submitted that the Employment Tribunal had found at paragraph 4.5 of the Reasons that even looked at from the point of view of the Claimants' preferred construction, the agreement was not cost neutral because it involved an increase in pension contribution as a result of the basic rate of pay having increased even in the category

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characterised by the *Nexus* as "*Basic 1*". Here the Employment Tribunal had failed to recognise the significance of evidence called by *Nexus* that the relevant productivity business was already part of pensionable pay so that although a small increase of cost might be incurred it was by no

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means substantial.

73. Finally, Ms Bone submitted that the Employment Tribunal had simply lost its way in a

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confusion between the correct approach to implication of a term not expressed in the contract and the construction of an express term. This was really a departure by the Employment Tribunal from the submissions being presented to it. Neither side had pressed an implied term analysis on the Employment Tribunal and the reference by EJ Hunter at paragraph 3.5 of the

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Reasons to **Marks and Spencer plc v BNP Paribas Securities Services Trust Co Jersey Ltd** [2015] UKSC 72 was a gratuitous introduction into the case of the concept that neither party was arguing. In any event the Employment Tribunal had failed to apply that case properly.

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74. I should add that in her oral submissions Ms Bone did not press an amendment to allow her to argue the estoppel points discussed by HHJ Shanks although she referred to the

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subsequent conduct of the Claimants in accepting the "*Basic 1*" and "*Basic 2*" pay slips without demur for some time at paragraph 14 of her skeleton argument, albeit in a passage about

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ambiguity. I confess to being somewhat uncertain as to whether this point was being pursued. Certainly I did not receive any draft of a proposed amendment.

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75. In his submissions on the new point Mr Stubbs emphasised two things about **Agarwal**. Firstly, that it was a case which had proceeded on a concession. There had been agreement between the parties that the reasoning in **Southern Cross** must be applied to Part II **ERA** as well as Part I. Secondly, that in **Agarwal** Slade J had failed to recognise the significance of the different statutory origins and the subject matter of Parts I and II **ERA**. Once the difference is recognised it becomes more difficult to accept that what applies to Part I must, therefore, apply to Part II by parity of reasoning.

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76. In any event, he submitted that **Weatherilt** was correctly decided and was to be preferred to **Agarwal** as an analysis. Moreover, it could not be doubted that I was bound by the authorities of **Delaney** and **Atchoe**.

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77. On the alternative submissions of Ms Bone, Mr Stubbs accepted that there were imperfections in the Reasons but he argued that did not mean the conclusion of EJ Hunter was wrong. The first thing to recognise, he submitted, was that the division of basic pay into "*Basic 1*" and "*Basic 2*" was not part of the pre-contractual negotiation nor of the documents that might be regarded as constituting the written part of the agreement. These concepts had suddenly emerged in April 2013 after the agreement had been concluded. The second thing to recognise was that both parties were already making pension contributions before the 2012 agreement was reached. The third thing to recognise was that EJ Hunter had plainly taken account of the factual matrix. He had considered the negotiations from the point of view of recognising the positions of each party; unsurprisingly, the Trade Union side had wanted a pay

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increase, which *Nexus* had suggested was difficult to meet. This was by no means novel and EJ Hunter had correctly considered what had been synthesised as a result.

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78. Fourthly, EJ Hunter had been quite correct to regard the written parts of the contract as clear and unambiguous. There was no need to have recourse to "*business common sense*", a concept which might provide a useful tool for resolving ambiguity. But here there was no ambiguity to resolve. One significant fact which EJ Hunter had recognised, although, perhaps,

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he might have given it more prominence, was that the concepts of "*Basic 1*" and "*Basic 2*" were not part of the documentary material in circulation before the referendum but only emerged several months later from *Nexus*.

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79. Mr Stubbs accepted that paragraphs 4.6 and 4.7 of the Reasons conflated construction and the implication of a term and that the inclusion of the latter meant the outcome was

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somewhat oddly expressed. Nevertheless, he submitted that it was the outcome, which mattered and that it was possible to read these as a conclusion that as a matter of construction the parties had not agreed to the "*Basic 1*" and "*Basic 2*" solution, which was an artificial concept used by *Nexus* to describe an agreement that it wished it had entered into rather than

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what had been agreed. In other words, this was a classic case of a contracting party realising after an agreement that it had made a bad bargain and seeking to describe it in a way that did not represent what had been decided but what it wished had been decided. For all its infelicity

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of expression this is what paragraphs 4.4 to 4.7 of the Reasons really seek to express and is what they really mean and, accordingly, the appeal ought to be dismissed on that basis.

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80. Finally, he did not accept that any concepts of estoppel had been raised before the Employment Tribunal and he submitted they ought not to be entertained now.

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Discussion and Conclusion

81. I am not clear whether, as well as the proposed amendment to the grounds of appeal dealing with the jurisdiction point, which I have already indicated I will permit, I am considering others dealing with the suggestions floated by HHJ Shanks as to estoppel and variation by conduct (see above at paragraph 12 of this Judgment). If I am I can dispose of them latter by saying that if any permission to amend is still being sought I refuse it. This is a new point (or points) not raised before EJ Hunter. If a point exists at all I think a better characterisation of it might well be as affirmation rather than either estoppel or variation. But whatever the concept, in my view it would require a further evidential investigation to resolve it and I think such a new departure should not be countenanced on this appeal.

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82. I turn then to the new point on jurisdiction. In my judgment this must rejected. Firstly, **Southern Cross** binds me in relation to Part I **ERA** but it does not deal with Part II **ERA** with which this case is concerned. Secondly, in my judgment there ought to be no extension by analogy of that decision to Part II **ERA**. The two Parts have entirely different and separate statutory antecedents and very different aims. There is no true analogy between them. Thirdly, **Delaney v Staples**, **Atchoe** and **Anderson** (all decided by the Court of Appeal), and **Mears v Salt** and **Cabinet Office v Beavan** (decided at this level) stand four square in the path of extension by analogy. **Coors** and **Tradition Futures**, although decisions of the Court of Appeal, are dealing with the difficult but different problem of whether an unquantified claim can be brought under Part II and in my judgment provide limited support for the argument that investigation of the meaning of the terms of a contract is impermissible in a Part II claim. Like HHJ Richardson I do not see how one can avoid construction of contractual terms in deciding whether a deduction is unauthorised and I would follow **Delaney**, **Atchoe** and **Anderson** rather than **Coors** and **Tradition Futures**, if they are at variance. These seem to me to be

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distinguishable because they rest primarily on the premise that Part II cannot apply where the loss cannot be quantified other than by judicial decision, a somewhat different problem to that in the instant appeal. Fourthly, I do not regard **Somerset County Council v Chambers** as establishing a platform for the extension of the reasoning in **Southern Cross** to Part II cases. To my mind its significance was misunderstood by both the Employment Tribunal and this Tribunal in **Agarwal**. Fifthly, I regard **Agarwal** as having been decided per incuriam **Delaney**, **Anderson** and **Atchoe** and for that reason, like HHJ Richardson in **Weatherilt**, I ought not to follow it; alternatively, for all the above reasons I regard **Agarwal** as wrongly decided and also will not follow it for that reason.

83. One aspect of my investigation of the authorities, however, does give me pause for thought and that is the view expressed by Lord Browne Wilkinson in **Delaney** in the House of Lords and by Wall LJ in the Court of Appeal in **Coors** that Parliament intended Part II to provide something of a summary procedure in which simple points could be investigated in a short period of time. The **Parker** case illustrates that was also the approach being applied by the Employment Tribunal in 2006. But this is at best a procedural argument and I wonder how valid it is now? The volume of work in the Employment Tribunal has, of course, waxed and waned in the last decade but there are indications it may be waxing again and hiving off questions of construction, which may take some time, as did the instant case, to the Civil Courts may be regarded by some as desirable. But the Senior Court is busy enough and whether the County Court has any more room for, or any greater aptitude to deal with, such matters than the Employment Tribunal seems to me to be debatable. Employment Judges nowadays deal with complicated matters and I do not think that contractual construction is any more complicated than other matters that they deal with routinely. On balance, therefore, I do not think there is a

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procedural argument in favour of an exclusionary rule preventing the Employment Tribunal from dealing with questions of contractual construction in Part II claims.

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84. I turn now the question as to whether the approach of EJ Hunter to the construction of this contract betrays any error of law? But by way of preamble it is necessary for me to set out some of the principles established by the authorities.

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85. Lord Neuberger PSC observed at paragraph 14 of his judgment in the Supreme Court in **Arnold v Britton** [2015] 1 AC 1619 (see 1627F) that:

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> **"14. Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with *Prenn v Simmonds* [1971] 1 WLR 1381 and culminating in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900."**

86. He then stated what he understood to be the result of all that jurisprudence at paragraph 15 (see 1627G):

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> **"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. …"**

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The case concerned, of course, the construction of a lease but for the word "*lease*" in the above passage one can substitute the word "*contract*" because plainly the President never intended the passage to be confined only to leases.

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87. Some have detected a difference of emphasis, and therefore possibly a difference of meaning, as between what had been said by the Supreme Court in **Rainy Sky** and what was

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said in **Arnold v Britton** but it is now clear that these cases say the same thing; see Lord Hodge JCS at paragraph 9 of the judgment in **Wood v Capita Insurance Services Ltd** [2017] 2 WLR 1095 at 1099A-B and further explained by him in paragraphs 10 to 15 in a passage starting at 1099B and continuing to 1100G.

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88. I do not for one moment suggest that these paragraphs alter what was said by Lord Neuberger, as cited above, and I would wish to avoid further extensive citation from authority in what is already an overlong Judgment but it seems to me that a summary or a paraphrase is no substitute for the considered words of a distinguished jurist in what ought to be the "last word" on the construction of a written or partly written contractual agreement in a commercial or quasi-commercial context and so I propose to cite these paragraphs in full (omitting only one duplicated reference to a law report):

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> **"10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen Tangen* [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extra-judicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.**
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> **11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnol*d case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.**

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> **12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corporation* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provides its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.**

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> **13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court's task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, different drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provision in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corporation* … assists the lawyer or judge to ascertain the objective meaning of the disputed provisions.**

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> **14. On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* case were saying the same thing.**

> **15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."**

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89. Therefore, the law has not changed that much. One difficult area remains the relevance of what was said during negotiations. Lord Wilberforce explained in the House of Lords' case of **Prenn v Simmonds** [1971] 1 WLR 1381 why evidence of negotiations should not be admitted into evidence in support of the construction of a contract or a contractual term. Although it might be argued that the exclusion is perhaps no longer as absolute as he suggested what he said about the negotiations (in that case negotiations between solicitors) at 1384G-1385A still makes great sense:

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> **"… There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in clause 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (though the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing**

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is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different. …"

90. Lord Hoffmann looked at this again in the House of Lords' case of **Chartbrook Ltd v**

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Persimmon Homes Ltd [2009] 1 AC 1101 and upheld what he called the exclusionary rule in a lengthy passage between paragraphs 27 and 42 pages 1115C to 1121E. The passage ends with this conclusion at paragraph 42 at 1121D:

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"The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

91. In **Oceanbulk Shipping and Trading SA v TMT Asia Ltd** [2011] 1 AC 662, in

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paragraph 39 at 681 Lord Clarke in effect reiterated this:

"Trial judges frequently have to distinguish between material which forms part of the pre-contractual negotiations which is part of the factual matrix and therefore admissible as an aid to interpretation and material which forms part of the pre-contractual negotiations but which is not part of the factual matrix and is not therefore admissible. This is often a straightforward task but sometimes it is not. …"

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92. I doubt that a rigorous taxonomy is of much value in contractual construction but if I were to attempt a categorisation of the contract in this case I would describe it as a partly oral

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and partly written contract arrived at by the process of negotiation known as collective bargaining and as a species (or perhaps subspecies) of commercial contract. The process of negotiation recurred at regular (annual) intervals and was conducted within a well-established written framework.

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93. The issue which faced EJ Hunter was that distilled by high authority over the 45 year period referred to by Lord Neuberger at paragraph 15 of his judgment in **Arnold v Britton** and

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expressed as "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the*

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contract to mean"? EJ Hunter was referred to **Arnold v Britton** but he did not expressly approach the issue in this case in that way. Instead he preferred to use the perspective of the "*officious bystander*". This is a construct, which has been prominent in the past in deciding

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whether it is necessary to imply a term into a contract not containing it expressly. Indeed, it is clear both from the language used by EJ Hunter in the Reasons and his citation from the judgment of Lord Neuberger in the Supreme Court case of **Marks and Spencer plc v BNP Paribas** that he approached this case from the point of view of whether a term should be

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implied to the contract.

94. I find it difficult to understand why he adopted this approach because it seems to me that

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the essential question is not whether a term needs to be implied into the contract but rather whether the agreement reached was that a new meaning was to be given to existing contractual language, in particular the term "*basic pay*" and what it comprised for the purpose of computing

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the value of various allowances.

95. I also find it difficult to understand the idea that questions of construction involve any kind of burden. I accept Ms Bone's argument that expressions such as "*prima facie*" might be

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potentially confusing where the real issue is what has been agreed. It is true that the "*contra proferentem doctrine*" involves consideration of who is putting forward the rubric of the contract. This might be thought to bear some fleeting resemblance to the concept that once a

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party proves something then consequences follow but on closer inspection there is no analogy and, anyway, whatever the current status of this "*canon of construction*" (paragraph 7.08 of Chapter 7 of the current edition of *Lewison on the Interpretation of Contract*) suggests that it "*still survives (perhaps with a weaker and more limited role)*", I regard the scope for it in a

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A collective bargaining situation generally as very limited indeed and as unhelpful and inappropriate in the instant case.

B 96. Consequently, I accept Ms Bone's submission that the mechanism adopted by EJ Hunter for the construction of this agreement was erroneous and that he was aiming at the wrong target. But Mr Stubbs submits that the technique is irrelevant if EJ Hunter did in fact hit the target in the end. Put somewhat less metaphorically, the question is did he in fact hit upon the

C correct construction anyway? If so, Mr Stubbs submitted this case fell into either category (i.e. "(a)" or "(b)") identified by Laws LJ in paragraph 21 of his judgment in **Lincoln College v Jafri** [2014] EWCA Civ 449, [2014] ICR 920, the pertinent part of which reads:

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> **"… The appeal tribunal's function is (and is only) to see that the employment tribunals' decisions are lawfully made. If therefore the appeal tribunal detects a legal error by the employment tribunal, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the appeal tribunal is able to conclude what it must have been. In neither case is the appeal tribunal to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the employment tribunal, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

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It was really an (a) case, submitted Mr Stubbs, but even if I could and should make up my own mind under (b) it would actually come to the same thing.

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97. On the other hand, Ms Bone submitted that this was a profound error and that the case ought to go back for a complete rehearing before a differently constituted Tribunal. I do not

G agree and I have reached the conclusion there is no point in the case being remitted. It seems to me that I can look at it in one of two ways. If, irrespective as to his mistaken approach of considering the implication of a term, EJ Hunter's conclusion was the right result then the

H answer here is a pure matter of construction against a factual matrix already established at first instance. So, to adopt the terminology of Laws LJ, the outcome would not be illegal and the

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appeal should dismissed, the error notwithstanding. Alternatively, if, as a matter of construction, requiring no further evidence, I am able to decide what the parties intended the agreement to mean then remission would be pointless. Moreover, in the context of this appeal these do not really amount to separate alternative approaches because in order to reach a conclusion as to whether the result was right I must reach a conclusion about the correct construction of the agreement.

98. So I ask myself - what more is there to be said? I recognise, of course, that the factual background is of very considerable importance in contractual construction. Furthermore, that at the heart of Ms Bone's argument was the proposition that EJ Hunter had ignored the commercial context and the commercial purpose of the agreement. This was an agreement reached against the background of a limitation on public sector pay, which *Nexus* was obliged to implement. In the correspondence this appeared to have been acknowledged by the Trade Union but the outcome, if the construction of the Claimant was to be adopted, meant a gross breach of that limitation on pay increases.

99. I do not agree that EJ Hunter left the commercial background out of account. On the contrary it seems to me that he was completely aware of it. He makes express reference to it. Nor does it seem to me that there would be any need to hear further evidence were the case to be remitted. There was evidence of the mechanism of negotiation, there was evidence of the background and there was evidence of the negotiation. All that evidence was heard by EJ Hunter who took account of it and I see no benefit in repeating it.

100. The contention being put forward by *Nexus* must have been that the meaning of the phrase "*basic salary*" had changed as a result of the agreement. In particular in the table

A

referred to above at paragraph 5 of this Judgment that phrase was intended by the parties to mean "*basic salary less the components of £200.00 of the Red Book bonus and the former productivity bonus consolidated into basic salary by the 2012 pay agreement*". There is not a word of this in any of the contemporary documents and there was no evidence that this had been discussed during the negotiations.

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C

101. Ms Bone is only left with what she called commercial common sense. But there was no evidence that reading "*basic salary*" as "*basic salary*" without qualification renders the agreement unworkable nor was there any evidence that it had such a catastrophic impact as to frustrate the commercial purpose. In fact the commercial purpose was never defined precisely, if at all, but it might be thought that part of it was to agree terms of conditions of employment for the workforce that secured their employment and thus enabled *Nexus* to maintain the service of providing transport to the population of Tyne and Wear. There was no evidence that the agreement had prevented that service from continuing or rendered it economically impossible to do so. EJ Hunter does not express the matter in that way but much of his reasoning amounts to the same thing.

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E

F

102. In fact, he plainly considered the fact this was a "*bad bargain*" for *Nexus*. It may have been a "*bad bargain*" but EJ Hunter was correct not to be deterred by that. As the authorities cited above make clear, that a party commits itself by contractual agreement to a bad bargain is not a basis for construing the contract in favour of the disadvantaged party. This appeal will be dismissed.

G

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