Appeal No. UKEAT/0100/15/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 September 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR U AND MRS F SCHWARZENBACH
T/A THAMES-SIDE COURT ESTATE — APPELLANTS

MR D JONES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants

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For the Respondent

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SUMMARY

JURISDICTIONAL POINTS - Continuity of employment

Continuity of employment - Sections 210(5) and 218(6) ***Employment Rights Act 1996*** *("ERA")*

In circumstances involving a change of employer, the Employment Tribunal ("the ET") had been wrong to consider that the presumption of continuity of employment provided by section 210(5) **ERA** applied (section 218(1) **ERA**). That did not, however, render the decision unsafe. The ET's conclusions were ultimately founded not upon a presumption of continuity but upon permissible findings of fact.

Furthermore, in deciding that the Respondents and the Claimant's previous employer were "associated" for the purposes of section 218(6) **ERA**, the ET applied the correct test, that is one of legal control.

In this case, the Respondents had chosen not to attend the ET and had given only limited disclosure as to the ultimate ownership of the previous employer. The ET had been entitled to conclude that the Respondents were better placed that the Claimant to discover the true position (not least as this was consistent with the Respondents' own position in disclosure). There was no clearly transparent evidence as to where ultimate legal control vested. In these circumstances, the ET was entitled (following the approach allowed in **Secretary of State for Employment v Chapman and Payne** [1989] ICR 771 CA) to have regard to the surrounding facts and to draw an inference as to the position in terms of legal control.

Appeal dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondents, as below; save where it is necessary to distinguish between the Respondents, in which case I do so by name. This is the hearing of the Respondents' appeal against a Judgment of the Reading Employment Tribunal (Employment Judge Lewis, sitting alone, on 22 July 2014; "the ET"). Representation before the ET was as it has been before me.

2. The Claimant's underlying claim was one of unfair dismissal. It was common ground that he had been employed by the Respondents from 3 June 2013 until his dismissal on 6 January 2014. Taken alone, however, that would not give him sufficient continuity of employment to pursue an unfair dismissal claim. From 20 June 2011 until 31 May 2013 - the working day preceding the commencement of his employment with the Respondents - the Claimant had been employed by a company called Culden Faw Limited. He relied on that prior employment as giving him the requisite continuity of employment for his unfair dismissal claim; specifically, he contended that the Respondents and Culden Faw Ltd were associated employers as defined by section 231(A) of the **Employment Rights Act 1996** ("the ERA") and he had continuity of employment as provided by section 218(6) of that Act. The ET agreed.

3. The Respondents appeal that ruling. Their proposed grounds were initially considered by HHJ Shanks on the papers to disclose no reasonable basis for the appeal to proceed. At a subsequent hearing under Rule 3(10) of the **EAT Rules** before Langstaff P, the appeal was permitted to proceed on the following bases: (1) the ET erred in placing the burden of proof on the Respondents for the purposes of section 210(5) of the **Employment Rights Act 1996**; (2) it

further erred in finding that Culden Faw Ltd was under the "indirect control" of the Respondents and that, accordingly, they were associated employers; (3) and also in making findings of fact, absent any evidential foundation. For the purposes of the third ground of appeal, extracts of the Employment Judge's notes of evidence have been provided.

The Background Facts and the ET's Conclusions

4. The ET heard from the Claimant and from a Ms Vernon, Estate Administration Manager for the Respondents. The Respondents did not attend the ET and did not give evidence themselves, save that they disclosed certain, albeit limited, documentary evidence and Mrs Schwarzenbach gave instructions by telephone during the course of the ET hearing.

5. The ET found that the Respondents, who are Swiss citizens, were owners either in their own names or through the medium of companies, of substantial property in Berkshire and Surrey (see paragraph 7.1). Specifically, their property consisted of a residential estate and an estate managed for business purposes with around 50 people being employed on each. I pause to note it was clarified before me that the residential estate in fact is sited in Oxfordshire, albeit it may be that some part of the estate - and we are talking about a very large landholding - also crosses into other counties. In any event there is a residential estate, which includes the property used by the Respondents (from time to time) as their home, and then substantial lands around or adjoining that, which contain various properties, a deer park, countryside used for shooting, and so on, which is used (in whole or in part) for business purposes.

6. From June 2011, the Claimant was employed as an Estate Maintenance Worker by Culden Faw Ltd, a company which is registered in England and Wales and which the ET found managed the business estate (paragraph 7.2). Culden Faw Ltd is wholly owned by an entity

called Hambleden Estate Incorporated, which is incorporated in the British Virgin Islands and is, in turn, wholly owned by a further corporate entity, Black Bear Holdings SA. There was no evidence before the ET as to the ownership of Black Bear Holdings SA, save that Mrs Schwarzenbach apparently provided information by telephone that it was "managed" by another company (paragraph 7.2). The Respondents are both directors of Culden Faw Ltd. Mr Schwarzenbach is also its Company Secretary. Neither is a director or shareholder of Hambleden Estate Inc (paragraph 7.3).

7. The Claimant was dismissed from his employment with Culden Faw Ltd on Friday, 31 May 2013. From the following Monday he was directly employed by the Respondents (paragraph 7.4). On the evidence before it, the ET found:

> **"8.1. The two entities, Culden Faw Ltd and the respondents, issued letters of appointment, which were very similar if not identical …**
>
> **8.2. Both sets of terms and conditions of employment appeared to have been professionally drafted. Both set out the majority of the material required by Part 1 of the Employment Rights Act 1996. It was however a striking curiosity that both omitted to name the identity of the employer, as required by section 1(3)(a).**
>
> **8.3. Both contained an identical sick pay provision, which described sick pay as being "in the discretion of the family". That phrase struck me as unremarkable in the respondents' contract of employment, but noteworthy in that of Culden Faw Ltd, which purported to be a company at arm's length from the Schwarzenbach family. I inferred it to mean that those employed by Culden Faw Ltd understood clearly who "the family" was, and that the Schwarzenbach family was active in managing the employees of Culden Faw Ltd.**
>
> **8.4. I noted that there was an overlap in line management of the company and the respondents, and that managers undertook tasks for both Culden Faw Ltd and for the residential estate. In that context, I noted in particular Ms Vernon's letter to the claimant of 9 June 2011, which stated:- "You will be employed by the business side of the organisation, however all administration of your employment will be dealt with by me on the private side." That seemed an entirely honest, significant phrase, implying a single organisation with two separate sides.**
>
> **8.5. The claimant and Ms Vernon both gave a piece of evidence which although differently expressed struck me as similar and significant. In reply to my question, the claimant said that he had once met Mrs Schwarzenbach, and understood that she was "Mrs Schwarzenbach as in the family we worked for." When I asked Ms Vernon about this answer, she candidly replied, "Across the board, people would think, I worked for the Schwarzenbach family." Those two pieces of evidence struck me as capturing the human truth that everybody felt that they worked in one family's business.**
>
> **8.6. There was no evidence of anyone other than the Schwarzenbach family and their employees or agents being involved in any decision-making aspect of any part of the estates. There was no evidence of any member of the family other than the above two named respondents being so involved.**
>
> **8.7. Although the terms and conditions referred to the discretion of the family, and although Ms Vernon mentioned that there was an extended family, I heard no evidence which referred**

> **by name to any member of the Schwarzenbach family other than the two named respondents."**

8. Considering the question whether the Claimant had continuity of employment going back to June 2011, the ET took the view that section 210(5) of the **ERA** placed the burden of proof on the Respondents. As a matter of principle:

> **"10. … Detailed information about corporate or organisational structure is, in general, not available to a claimant, and is, in general, available to a respondent. … especially if the information (eg about shareholding) is held in a jurisdiction, such as the BVI, which is well known for preserving confidentiality, and which is beyond the powers of the tribunal to compel."**

9. Turning to section 218 **ERA** - which deals with continuity of employment in cases where, as here, there is a change of employer - the ET stated that the case had not been advanced by the Claimant as one of direct control (paragraph 11). It thus considered whether Culden Faw Ltd was under the *in*direct control of the Respondents, observing that this was not a case where voting control could provide the right approach (paragraph 14); on that issue the Claimant had no information and no evidence had been provided by the Respondents. The ET concluded the presumption of continuity had not been rebutted, reasoning as follows:

> **"15.1. Culden Faw Ltd is owned through a chain of companies, two of them at least incorporated abroad. Although the information is available to Mr and Mrs Schwarzenbach, the tribunal was not told how many companies are in the chain; where they are incorporated; what they are called; who are their shareholders, and what their voting arrangements [sic].**
>
> **15.2. It is reasonable to infer that these arrangements have been put in place for the ultimate benefit of an identifiable human beneficiary or beneficiaries or class of beneficiary or beneficiaries. I had no evidence that any such person came from outside the Schwarzenbach family.**
>
> **15.3. In each of the chain of companies, as in any other, there must be an identifiable individual or individuals with executive decision-making authority.**
>
> **15.4. I heard no evidence that any executive decision-maker in any company involved in this case came from outside the Schwarzenbach family, or was a person acting wholly independently of the family.**
>
> **15.5. I heard no evidence of business activity by any member of the Schwarzenbach family other than the two respondents, who were the directors of Culden Faw Ltd.**
>
> **15.6. Mr findings [sic] at 8.1 to 8.7 above are all consistent with control resting directly or indirectly with the respondents. I had no evidence which was inconsistent with that proposition.**
>
> **15.7. I draw the inference to which Mr Wyeth invited me, which was that Culden Faw Ltd was, at the material time, under the indirect control of Mr and Mrs Schwarzenbach, who were**

the employers at the time of the dismissal. Accordingly, I find that the claimant has the continuity of service to bring a claim of unfair dismissal."

The Relevant Legislative Provisions and Legal Principles

10. Under Part 14 of the **ERA** (headed "Interpretation"), the first chapter concerns the question of continuous employment. Section 210, an introductory provision, relevantly states:

> **"(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.**
>
> **…**
>
> **(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous."**

11. Section 218 concerns those cases where, as here, there is a change in the identity of the employer. It relevantly provides:

> **"(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.**
>
> **…**
>
> **(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer -**
>
> > **(a) the employee's period of employment at that time counts as a period of employment with the second employer, and**
> >
> > **(b) the change of employer does not break the continuity of the period of employment."**

12. Where section 218(1) speaks of employment by the one employer, that is to be construed as the same employer (**Harold Fielding Ltd v Mansi** [1974] ICR 347 NIRC). It is common ground between the parties at this stage that this provision must mean that the presumption allowed by section 210(5) does not apply to section 218 cases; the ET fell into error by considering that it did.

13. What is an associated employer for the purpose of section 218(6) is then exhaustively defined by section 231 of the **Act**, which (relevantly) provides:

> **"For the purposes of this Act any two employers shall be treated as associated if -**
>
> **(a) one is a company of which the other (directly or indirectly) has control, or**
>
> **(b) both are companies of which a third person (directly or indirectly) has control;**
>
> **and "associated employer" shall be construed accordingly."**

14. Control is, thus, the crucial factor in this definition. It has been held (see **Secretary of State for Employment v Newbold** [1981] IRLR 305 EAT, **Umar v Pliastar Ltd** [1981] ICR 727 EAT and **Washington Arts Association Ltd v Forster** [1983] ICR 346 EAT) that this means *legal* control in the sense of a majority shareholding in the company. *De facto* control - looking at how the company might, in fact, be run - is not sufficient.

15. I will shortly return to the approach adopted in those cases. In the case of **South West Launderettes Ltd v Laidler** [1986] ICR 455 CA, it was allowed, however, that the determination of control might be somewhat more nuanced than merely how it looked from the register of shareholding, see per Mustill LJ at page 460 F to H:

> **"In the course of argument, the question arose as to the manner in which the possessor of control is to be identified. Plainly, the register of shares cannot be conclusive on the matter, for the person registered as owner of the majority might be a nominee or trustee, or might be a party to a contract which conferred the right to determine the way in which the voting rights were exercised. Whether anything short of a legally binding agreement to this effect would ever justify the conclusion that the control resided in someone other than the registered owner is to my mind debateable; but it is unnecessary to decide this point …"**

16. That observation was made in the context of it being common ground that day to day control over the business would not be sufficient (per **Newbold**).

17. In **Secretary of State for Employment v Chapman and Payne** [1989] ICR 771 CA it was also allowed that there might be a an exception to the test of control by reference to shareholder voting power, Balcombe LJ stating:

> **"For my part I would accept that normally voting control is the issue which has to be decided … However, since it is not necessary for the purposes of this case, I would not wish not to go as far as Mr Griffiths, for the Secretary of State, invites us to do, and to say that in *no* circumstances can any other matters be relevant. Suffice it to say that whereas undoubtedly voting control is the usual and normal test, exceptionally there may be (and I go no further than this) other circumstances to be taken into account."** (Balcombe LJ's emphasis; page 776A-B)

And further allowing that:

> **"… it *might,* in certain circumstances, be relevant to know about de facto control. …"** (Balcombe LJ's emphasis; page 778B)

18. In that case, however, Balcombe LJ was satisfied that one of the two 50% shareholders - the wife of the other 50% shareholder - in fact held those shares merely as nominee for her husband (the other shareholder), who thus had full control of the company. The Court of Appeal in **Chapman**, therefore, did not determine where the boundaries might fall in terms of any exception to the strict voting power of the shareholder's approach to control. That was regretted by Staughton LJ, who observed:

> **"… So it must be left to another case, where on the facts it is shown that one person can direct the voting of another by force of personality, or for economic reasons, or by some other such means, without any legal right to do so."** (Pages 778H-779A)

19. The possibility of a less strict approach being taken to the issue of control was permitted by the EAT, HHJ McMullen QC, sitting alone, in **Da Silva v Composite Mouldings & Design Ltd** [2009] ICR 416. That was in the context of the insolvency of one of the companies, its business being taken over eventually by another company controlled by the same person. **Da Silva** drew upon the approach of an earlier decision by a different division of the EAT in **Tice v Cartwright** [1999] ICR 769, HHJ Colin Smith QC presiding. In **Tice**, in what was described as special circumstances (where the company was owned equally by two brothers on the one

hand, and a partnership consisting of those two brothers on the other), the EAT was prepared to uphold the ET's finding of associated employers. In so doing, the EAT noted:

> **"… For so long as the brothers acted in concert together, between them they had the voting strength to control the company."** (Page 771E)

20. The EAT's reasoning in this regard did not depend upon a finding of legal agreement but simply the factual reality:

> **"… We have concluded that we should prefer the approach, at least in the very particular factual circumstances of the present case, of the appeal tribunal in *Zarb*, namely that the word "control" in section 231 of the Employment Rights Act 1996 is dealing with practical rather than theoretical matters. No doubt the question of voting control is central in the context of company law. However, we consider that in the employment protection field it is legitimate to give the words a purposive interpretation consistent with the intention of Parliament as described by Popplewell J in *Harford v Swiftrim Ltd* [1987] ICR 439."** (See page 773A-B)

21. In that passage the EAT stated its preference for the approach laid down in a yet earlier EAT case of **Zarb & Samuels v British & Brazilian Produce Co Ltd** [1978] IRLR 78. In **Zarb** it had been held that control by a person might include control by a group of persons, provided that they in fact act as one. In giving the Judgment of the court, Phillips J observed:

> **"12. It seems to us that the expression 'has control' … is dealing essentially with practical rather than theoretical matters, and that the words are satisfied, if it is shown that in fact one person has control, or that a group of persons acting together, if that be the case, have control; in other words, that it involves an examination of what happens, and, in this present case in particular, what has happened in practice in that respect. It will be necessary for the Industrial Tribunal to look at all the circumstances which the parties may be able to put before them as to the way in which the control of these two companies has in practice been exercised. … It may be helpful to say a word about the onus of proof. It seems to us that where it has been proved that two or more persons who are related, between them own more than 50% of the shares in both companies, an Industrial Tribunal would be entitled - we do not say they would be bound - … in all the circumstances, and in the absence of any evidence to the contrary, to conclude … that those persons do control the two companies. Thus the employers, in circumstances of this kind, cannot, where that has been established, expect safely to take refuge by not putting the relevant information before the Industrial Tribunal. …"**

22. In **Newbold** a subsequent division of the EAT, Bristow J presiding, did not dissent from **Zarb** but expressly ruled:

> **"11. The context in which the word 'control' is used is the context of the limited company, so that it is in the sense in which the word is normally used in that context that you would expect the draftsman to use it here. …**
>
> **12. In the law affecting companies, control is well recognised to mean control by the majority of votes attaching to shares, exercised in general meeting. It is not how or by whom the**

> **enterprise is actually run. Control rests in those who by the constitution of the company can say to the management, 'Thou shalt do this; thou shalt not do that; thou art no longer the management'. …**
>
> **13. In our judgment the decision of this Court in *Zarb*'s case is entirely consistent with this fundamental principle of law involving companies. There, there were two shareholders whose share holdings, if used together, gave them control of each company in the 'associated employer' equation. It was held that together they could be a third person who had control, and the case was referred to the Industrial Tribunal to find out whether they did in fact act together so as to control both companies."**

23. Reliance on **Zarb** as providing authority for a broad *de facto* control test was also rejected by the EAT in **Umar v Pliastar Ltd** [1981] ICR 727 EAT, Browne-Wilkinson J (as he then was) presiding. That saw the **Zarb** case as one concerned with joint voting control:

> **"… that decision provides no foundation for the proposition that … the reference to one company directly or indirectly having "control" of another refers to anything other than the normal legal concept of control by control of voting. …"** (Pages 730H-731A).

24. Subsequently, in the **Laidler** case, Mustill LJ expressed *obiter* reservations about the approach in **Zarb**, specifically as to any endorsement of the possibility of group control.

25. The practical difficulties of adopting an overly strict approach to control were, however, also acknowledged by the EAT (Popplewell J presiding) in **Harford v Swiftrim Ltd** [1987] IRLR 360, where it was observed as follows:

> **"23. … It seems to us that there is a clear inference to be drawn that where there are the same shareholders with identical or substantially identical shareholdings in two companies, a Tribunal is entitled to find that they are associated. If the company who would have all the information and all the documents seek to show that such has been the voting pattern that they are not associated, they should do so by calling evidence to that effect. It has to be remembered that it is difficult enough for an applicant to identify an associated company. …**
>
> **24. In some cases it may be very easy, in other cases it may be very difficult. Parliament intended that hearings before an Industrial Tribunal should be informal. To cast upon a litigant in person the task, not merely of identifying an associated company, but proving how individual shareholders actually voted may be difficult. It will almost certainly involve applications for discovery and substantial witness summons. We therefore have no hesitation in agreeing with the view of Mr Justice Phillips, that an inference can be properly drawn by a Tribunal in the absence of evidence. The company, if they wish to rebut the inference, can readily provide the voting figures. We have little doubt that in practice no difficulties will arise."**

26. Similar concerns as to an overly technical application of the burden of proof were expressed in the case of **Secretary of State for Employment v Cohen & Anor** [1987] ICR 570 EAT. That case involved a business transfer, which would now fall under section 218(2) **ERA**. There the ET had also fallen into the error of applying the statutory presumption of continuity to a case involving more than one employer. Declining to find that the employee's case must, therefore, fail, the EAT (Scott J presiding), observed as follows:

> **"The standard of proof in civil cases, including cases before the industrial tribunal, is the balance of probabilities. It was in our view incumbent on the employee, as the applicant for redundancy payment, to satisfy the industrial tribunal on the balance of probabilities of the ingredients necessary to substantiate its claim. One of those ingredients was that there had been a transfer of business from Forecrest to Wearglen and a transfer of business from Wearglen to Beaupress. It was not, however, in our judgment necessarily essential for him to place before the industrial tribunal documentary evidence of what the true transaction between employer and successive employer really was. Evidence of that character would, in the ordinary way, not be available to an employee. An employee can do no more than tell the industrial tribunal of what is within his own knowledge. That is what the employee did. It was within his knowledge that his employment had continued in the same place, under the same directors, with the same customers and with the same stock being used. All of those ingredients of his continuous employment are consistent from there having been a transfer of business. If there was no other evidence, they justify the inference of a transfer.**
>
> …
>
> **… the scheme of the Act must not be made unworkable by a rigid adherence to overstrict standards of proof. If it is necessary, and we think it is, for an employee to satisfy an industrial tribunal that there has been the transfer of business, he may well be able to discharge the onus by giving evidence on the lines of that given by the employee in the present case. An employee can do no more than give evidence of that of which he knows. To require him to do more than that in order to discharge some strict standard of proof would be, in effect, to deprive him of the chance of claiming the redundancy payments to which he might be entitled. We are not prepared to underwrite a practice of that sort, and indeed, we think that we should find against it."** (Pages 576F-578B)

Submissions

The Respondents' Case

27. The Respondents' first ground of appeal complained of the ET's approach to the burden of proof. Section 218(1) **ERA** made clear that all other provisions of the Chapter, concerned with interpretation of questions of continuity for employment, related "only to employment by the one employer". The presumption of continuity laid down by section 210(5) could, thus, not apply to cases where reliance was placed on section 218. The ET erred in approaching this as a case where there was a presumption of continuity which had to be rebutted by the Respondents.

28. Moreover, the ET's reasoning that this was the correct approach because the Respondents would have knowledge of organisational structures, etc., unavailable to the individual Claimant was itself based on an assumption that the Respondents controlled Culden Faw Ltd; that they had the knowledge in question. That presupposed that they were associated employers; it was an assumption without evidential foundation. The Respondents had provided documentary evidence confirming they were not shareholders in Culden Faw Ltd or Hambleden Estate Inc and that, although directors of the former, they were not directors of the latter.

29. Further, Mrs Schwarzenbach had given instructions by telephone during the hearing that she was not a shareholder in Black Bear Holdings SA and had very little information about that company other than that it was managed through another company. There was no proper evidential foundation for assuming the Respondents had detailed access to information regarding the relevant corporate or organisational structure. On the other hand, the Claimant - who had pleaded his case on associated employers as one of direct control - had sought disclosure regarding the shareholding of Culden Faw Ltd. It could not be said he was unable to obtain information. He had not made further applications for disclosure on the point.

30. Even if the Respondents were in the stronger position the ET assumed, that would not alter the position: the burden of proof was on the Claimant. He was unable to demonstrate the necessary control to show the Respondents and Culden Faw Ltd were associated employers.

31. Turning to the ET's approach to the substantive question before it, it had erred in stating (paragraph 11) that the Claimant had not advanced his case as one of direct control when that was, in fact, precisely how his case had been put in the ET1 (paragraph 6 of the Particulars of Complaint), and he had not sought to amend to put his case as one of indirect control. Thus, the

issue of direct control had been before the ET and it had been necessary to determine that question to determine the section 218(6) issue. The ET had failed to make the relevant findings of fact on this issue and that was fatal to its decision.

32. On the evidence before the ET that the Respondents were not shareholders of either Culden Faw Ltd of Hambleden Estate Inc, the only proper finding was that there was not the requisite direct control. Even if the ET was entitled to draw inferences on this question, it still had to make findings as to the primary facts. The Respondents had not been shown to have the necessary control through any shareholding of Culden Faw Ltd and that should have been the starting point for the ET.

33. In truth, the ET had reached its conclusions on the basis of a *de facto* control approach but the authorities clearly established that control means voting control by a majority shareholding in the company; *de facto* control was not sufficient (see **Newbold**, **Umar**, **Washington Arts v Forster**, **Hair Colour Consultants Ltd v Mena** [1984] ICR 671 EAT, and **Laidler**). Even allowing for the possibility of a more nuanced approach, in **Chapman** Balcombe LJ still made clear that voting control would be the starting point in determining the issue of control. To the extent that a different approach had been adopted in **Tice**, that too had been in the context of a finding of special circumstances (see page 773 C-D in that case). Even if **Tice** could be reconciled with the approach laid down by the Court of Appeal in **Laidler** and **Chapman**, it still allowed that there would need to be special circumstances to justify a departure from the strict control as shareholder voting control approach which would always provide the starting point in any event. There was no basis for concluding there were any special circumstances in the present case. The Respondents had disclosed documentation to

show they had no shareholding in Culden Faw Ltd or Hambleden Estate Inc. The ET's apparent dismissal of that as insufficient to establish the facts was absent foundation.

34. Turning to the last ground of appeal, there was further no evidence to support findings apparently relied on by the ET in reaching its conclusions. The ET purported to find (paragraph 7.1) that the Respondents owned substantial properties, presumably the estate relevant to this case but whatever connection the Respondents might have had with the residential and business estates, there was simply no evidence as to who actually owned them. Although this finding might not be relevant to the question of ultimate control in respect of Culden Faw Ltd (and, thus, to the section 218(6) question), it showed the assumptions the ET was prepared to make and supported the Respondent's view that it was wrongly prepared to assume matters on which there was no evidence, as it later did in terms of the control of the company.

35. Further, when the ET found (paragraph 8.2) that there was a striking similarity in the terms and conditions, in that both Culden Faw Ltd and then the Respondents had "omitted to name the identity of the employer, as required by section 1(3)(a)", that failed to have regard to the fact that in both cases the terms and conditions were provided on the relevant employer's headed paper and that other correspondence referred to the name of the employer.

36. Finally, there was no evidence to support the conclusion that the Respondents had access to information about the corporate structure that was unavailable to the Claimant (see the ET's findings at paragraphs 10 and 14) and it was also wrong of the ET to rely on its apparent assumption that there were no executive decision-makers "in any company involved in this case" outside the Respondents' family (paragraph 15.4), not least the evidence disclosed as to the executive directors of Hambleden Estate Inc did not suggest they were family members.

The Claimant's Case

37. The Claimant accepted that the ET had erred in its approach to section 210(5) and in thus placing a formal burden of proof on the Respondents. That, however, did not undermine its conclusion as a matter of substance.

38. The Claimant further accepted that, in approaching the question raised for section 218(6) purposes, voting control was generally the correct test. Indeed, the Claimant's case before the ET did not dissent from the need to make a finding on voting control but had invited the ET to draw an inference as to who had that control. Notwithstanding what was said at paragraph 14, that was what the ET had done at paragraph 15. Indeed, it was implicit from paragraphs 15.1 to 15.7, read in the context of the Reasons as a whole, that the ET considered that the Respondents were, on the balance of probabilities, the ultimate exclusive holders of voting control over Culden Faw Ltd. That was a conclusion the ET was entitled to reach notwithstanding the lack of clear evidence as to the voting arrangements arising from ultimate share ownership (something that was itself opaque).

39. Ultimately, it could not be right that, in a case such as this, the Respondents could sit on their hands, not attend the ET, and simply rely on the burden of proof. They knew well what was in issue and the ET was entitled to conclude that they could have provided the relevant information. There was no prejudice to the Respondents from any lack of reference to indirect control in the pleadings. The inter-parties' correspondence made clear that both parties knew that the question for the ET was whether the Respondents were, directly or indirectly, in control of Culden Faw Ltd, and this was (without objection) identified as the correct characterisation of the point at the outset of the hearing when clarifying the issues to be determined.

40. The Claimant's case before the ET was that the Respondents must have had greater knowledge of the corporate arrangements. In declining to disclose documentation and relying on the confidentiality existing in the British Virgin Islands, the Respondents had suggested that they were in a position to provide more relevant information if required to do so "on a confidential basis", but were not prepared to disclose that information in the course of a public hearing. That was something to which the ET was entitled to have regard. Without that information the ET was entitled to look more widely at the evidence - including that of *de facto* control - to draw inferences as to voting control (see the approach to the burden of proof in the analogous situation of a business transfer in **Cohen**). In so doing, the ET had regard to the evidence of the Claimant and of Ms Vernon, who the Respondents had chosen to be their only witness. Its conclusions at paragraph 15 were based on the findings it made on that evidence and were entirely permissible. Thus, for example, the finding at paragraph 7.1 as to ownership of the property was plainly based on evidence before the ET as to the reality of the position. Ms Vernon's evidence was that, wherever anyone worked, on whichever estate, they would consider they worked for the Respondents.

The Respondents in Reply

41. As to the extent to which the ET was entitled to draw inferences, it should be noted that the cases that had permitted that this might be done in relation to voting control were ones where there was a far stronger evidential basis than this. The case of **Harford**, for example, involved the same shareholders with identical or substantially identical shareholdings. It was only in those circumstances that it was allowed that it might be appropriate to draw inferences. On direct control, it was simply unclear as to whether the ET had decided this case as one of direct or indirect control.

Discussion and Conclusions

42. It is common ground that the ET erred in approaching this as a case where the Respondents had to rebut a presumption of continuity: the presumption provided by section 210(5) **ERA** not applying to a case falling under section 218. The Respondents' first ground of appeal is thus made out. Is that fatal to the ET's decision?

43. The ET plainly relied on what it considered to be the presumption of continuity in this case, to the extent that it considered the burden must be upon the Respondents. It was plainly a matter of concern for the ET that the complex structuring of the relevant corporate arrangements meant that it was unrealistic to expect the Claimant to know the full picture. Indeed, the ET itself was unable to get any further in the chain of control by means of share ownership than the involvement of Black Bear Holdings SA. Although Mr Charles says that the ET was wrong to assume the Respondents were in a better position than the Claimant in this regard, I am not sure that is an entirely fair criticism. On anyone's case, Culden Faw Ltd - whoever ultimately owned it - ran an estate in which the Respondents had some kind of interest. It was not entirely unreasonable for the ET to consider that the Respondents might be better placed than the Claimant to put information before it which would clarify who ultimately controlled the company. Certainly that might seem to be a fair inference from the Respondents' own response in the disclosure correspondence.

44. Even if matters were so structured as to ensure that the arrangements were truly kept at arm's length from the Respondents, it is hard to criticise the ET for what might be characterised as a sense of frustration in the face of the Respondents' decision - presumably with the benefit of professional advice - not to attend and answer questions at the ET hearing. The Respondents' position is that they were entitled to adopt this position: the burden of proof was

on the Claimant; if he was unable to establish control, the ET was bound to find he had failed to demonstrate the necessary qualifying period of employment for section 218(6) purposes. The ET was required to make a clear finding as to control and it failed to do so.

45. Starting with that point, I do not accept that that is a fair characterisation of the Judgment. The ET specifically held (paragraph 15.6) that its findings at paragraphs 8.1 to 8.7 were "all consistent with control resting directly or indirectly with the respondents" and that it had "no evidence which was inconsistent with that proposition". Whilst the conclusions at paragraph 15 follow the ET's apparent rejection of voting control as the correct approach in this case (paragraph 14), the substance of that preceding paragraph is concerned with the evidential problems in establishing the voting control arising from the ownership of shares in Culden Faw Ltd. That is not a rejection of the voting control test but a (not unfair) commentary on the difficulties of applying it given the lack of transparency in this case.

46. What it seems to me the ET has done is to make the (fair) point that the simple identification of control through the share ownership of Culden Faw Ltd did not provide a complete answer. Observing that the shares were vested in Hambleden Estate Inc and then, in turn, in Black Bear Holdings SA does not - contrary to what the Respondents urge - necessarily determine the question of voting control. That would depend on who controlled the shares in Black Bear Holdings SA.

47. That the position might be more nuanced than appears from the simple identification of the apparent share ownership was allowed by the Court of Appeal in **Chapman**. There may well be further layers to unpeel before voting control is actually determined. As a matter of substance, that is the point I consider the ET was making at paragraph 14.

48. Absent clear evidence as to the underlying layers of share ownership and voting rights, the ET then (paragraph 15) looked back at its findings of fact on the material that was before it. The Respondents say it should first have made a clear finding as to voting control on the basis of the information it had; specifically the information that the Respondents themselves were neither shareholders of Culden Faw Ltd or Hambleden Estate Inc. The ET plainly had that point in mind but did not find it determinative of the voting control question. I do not see that it was bound to do so. The Respondents say that the ET then fell into the error of determining the question as one of *de facto* day to day control. In my judgment, that is confusing the ET's reliance on that factor as part of the evidential context with a conclusion that it was determinative of the issue under section 218(6).

49. Paragraph 15 shows that the ET kept its focus on the proper question of legal control. At 15.1 it identified that the Respondents had chosen not to shed light on the issue of ultimate legal control. At 15.2 it recorded its inference that there was an ultimate human beneficiary or beneficiaries and that any such person or persons were within the Respondents' family. On the evidence before it I cannot see that was a perverse conclusion. It considered the question whether there was evidence of any other decision taker, either outside the family or independent of it. As Mr Charles has accepted before me, it was entitled to conclude there was no such evidence. Paragraphs 15.6 and 15.7 then record the ET's inference that control - which I understand to refer to legal control, whether exercised directly or indirectly - vested in the Respondents.

50. On this basis, I agree with the Claimant: it is not right to see this as a case where the ET decided the issue on the basis of *de facto* control. It was prepared to have regard to that issue but only to the extent appropriate when drawing inferences as to what was the position in terms

of *de jure* control in terms of the ultimate shareholding and voting control. Given the lack of transparency, following **Chapman** (and thus allowing that it can be relevant to know about *de facto* control), it seems to me that this was a permissible approach.

51. I return then to the question whether the ET's conclusions in this regard are rendered unsafe by its incorrect assumption that there was a presumption of continuity. I am satisfied that they are not. In my judgment, what the ET was doing was no more than was allowed in **Cohen**. Recognising the real difficulties facing the Claimant in this case, the ET drew a permissible inference given the lack of transparency in the arrangements in question. In so doing, the ET did not base that inference on a presumption of continuity or on findings of fact that were absent a proper evidential base.

52. On the specific points relied on by the Respondents in respect of the ET's findings of fact, I turn first to the finding at paragraph 7.1, that they "owned" substantial properties. Even if that statement wrong, I cannot see that it would undermine the decision. The question for the ET was not who owned the land but who owned (or, more properly, controlled, through the relevant share ownership) the company Culden Faw Ltd. At paragraph 7.1, the ET was simply recognising that the Respondents had some interest in the properties. Of itself (whatever the precise nature of the Respondents' interest might have been), that was not in dispute.

53. Second, the Respondents object to the finding (paragraph 8.3) that there was a striking similarity in the two statements of terms and conditions - both omitting to name the employer. Having seen both section 1 statements, that was plainly true. That does not entirely deal with the point because it is also right to say that the statements were sent out on different-headed paper in each instance. Putting terms and conditions on headed paper is, however, not the same

as actually identifying the employer (although it might be good evidence as to who the employer is). Of itself, the omission in both cases might not have been particularly significant but I cannot say it was a factor that the ET was not entitled to take into account.

54. As for the account taken of the fact that the Respondents had access to information about the corporate structure that was unavailable to the Claimant, that was a permissible, "real-world" conclusion, consistent with the Respondents' position on disclosure.

55. Finally, on the question whether the ET wrongly considered that there were no executive decision-makers in any company involved in this case outside the Respondents' family (paragraph 15.4), the objection fails to take account of the remaining part of that sentence, which went on to say "or was a person acting wholly independently of the family". As Mr Charles acknowledged, the ET was perfectly right to say that no evidence had been established to satisfy it on that point.

56. In all the circumstances and for those reasons I dismiss the appeal.