[EMPLOYMENT APPEAL TRIBUNAL]

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DRINKWATER SABEY LTD. v. BURNETT AND ANOTHER

1994 Oct. 5

Judge Hull Q.C., Mr. T. C. Thomas and Ms D. Warwick

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Industrial Relations—Industrial tribunals—Complaint—Amendment—Application to join additional respondent after expiration of time limit—Whether at discretion of tribunal—Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993 (S.I. 1993 No. 2687), Sch. 1, r. 17(2)

On 22 August 1993 the applicant, a plant operator at a council refuse tip, was dismissed by the council following a transfer of part of the council's refuse disposal operation to the respondent company. On 16 November 1993 the applicant made a complaint of unfair dismissal against the council who resisted the complaint on the ground, inter alia, that, if there had been a transfer of the undertaking, it was the company as transferee and not the council who would be liable for any compensation. On 10 January 1994 the applicant's request for an order joining the company as a second respondent was granted by the industrial tribunal. The company applied to be dismissed from the proceedings, pursuant to rule 17(2) of Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993,[1] on the ground that the industrial tribunal had had no power to join the company as a respondent outside the three-month time limit for making a complaint prescribed by section 67(2) of the Employment Protection (Consolidation) Act 1978.[2] The tribunal held that the company had been properly joined and should remain a party to the proceedings.

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On appeal by the company:—

Held, dismissing the appeal, that it was a matter of discretion for the industrial tribunal whether to add a respondent to an originating application which had been lodged within the prescribed time limit; that, in exercising that discretion, the tribunal were not bound by time limits and were permitted to add a party, notwithstanding that the time limit for an application against that party had expired; and that the tribunal had exercised their discretion properly and their decision not to dismiss the company from the proceedings would be upheld (post, pp. 337D–F, 338D–E).

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Gillick v. B.P. Chemicals Ltd. [1993] I.R.L.R. 437, E.A.T. followed.

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Cocking v. Sandhurst (Stationers) Ltd. [1974] I.C.R. 650, N.I.R.C., and *Watts v. Seven Kings Motor Co. Ltd.* [1983] I.C.R. 135, E.A.T. considered.

[1] Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993, Sch. 1, r. 17(2): see post, p. 331B.

[2] Employment Protection (Consolidation) Act 1978, s. 67(2): "... an industrial tribunal shall not consider a complaint under this section unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months."

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A The following cases are referred to in the judgment:

Allan v. Stirling District Council [1994] I.C.R. 434, E.A.T.
British Newspaper Printing Corporation (North) Ltd. v. Kelly [1989] I.R.L.R. 222, C.A.
Cocking v. Sandhurst (Stationers) Ltd. [1974] I.C.R. 650, N.I.R.C.
Gillick v. B.P. Chemicals Ltd. [1993] I.R.L.R. 437, E.A.T.
Litster v. Forth Dry Dock & Engineering Co. Ltd. [1989] I.C.R. 341; [1990] B 1 A.C. 546; [1989] 2 W.L.R. 634; [1989] 1 All E.R. 1134, H.L. (Sc.)
Watts v. Seven Kings Motor Co. Ltd. [1983] I.C.R. 135, E.A.T.

No additional cases were cited in argument.

INTERLOCUTORY APPEAL from an industrial tribunal sitting at Ashford.

By an originating application presented on 16 November 1993, the C applicant, David Burnett, made a complaint of unfair dismissal against the first respondents, Kent County Council. On 10 January 1994, an industrial tribunal made an order joining Drinkwater Sabey Ltd. as second respondents to the complaint. On 10 June 1994, the second respondents' application to be dismissed from the proceedings pursuant to rule 17 of Schedule 1 to the Industrial Tribunals (Constitution and Rules of D Procedure) Regulations 1993 was refused.

The second respondents appealed by a notice of appeal dated 29 July 1994 on the ground that the tribunal had erred in law in finding that they had a discretion to join Drinkwater Sabey Ltd. as second respondents and, alternatively, if there was such a discretion, they had reached a conclusion which no reasonable tribunal could reach on the evidence before them.

E The facts are stated in the judgment.

Thomas Linden for the respondent company.
Ian Scott for the applicant.
John Bowers for the council.

F JUDGE HULL Q.C. delivered the following judgment of the appeal tribunal. In this case Mr. Burnett, the applicant, claims compensation for unfair dismissal. He was employed by Kent County Council from 2 April 1979, when his employment began, and eventually he was employed at Shawstead Road tip in Chatham as a plant operator. He is a man now approaching 40. He lost his job when that part of the operation in which he was engaged at the tip was put out to tender and the well known firm G of Drinkwater Sabey Ltd. tendered successfully for the operation. He was dismissed by the council on the occasion of the transfer of that operation on 22 August 1993 and he made a complaint on 16 November 1993, against the council, of unfair dismissal. The council, when they put in their answer, made an important submission or contention. They said that the applicant was dismissed for redundancy and then went on to say:

H "The reasons why the application is resisted are as follows. (1) The part of the operation in which the applicant worked at Shawstead Road tip . . . was subjected to a competitive tendering exercise. An independent company, Drinkwater Sabey Ltd., won the tender to run

that part of the operations in which the applicant was employed. (2) The department consequently ceased to carry on its operations . . . on 22 August 1993. As a result the applicant was made redundant on that day. . . . (4) If it is the applicant's case that the Transfer of Undertakings (Protection of Employment) Regulations 1981 applied to the situation, and that the dismissal was unfair because it was in breach of regulation 8 . . . then the [council] will contend as follows. (5) The [council's] primary contention is that the Shawstead Road tip was not run on any view as something in the nature of a commercial venture. It is accordingly denied that there was a transfer within the meaning of [the Regulations of 1981]. (6) In any event, though, the proper respondent to an applicant for unfair dismissal brought under regulation 8 of [the Regulations] is the transferee. . ."

and they refer to *Litster v. Forth Dry Dock & Engineering Co. Ltd.* [1989] I.C.R. 341 and the Acquired Rights Directive (77/187/E.E.C.) and they say the same would be true if the application was made under the Directive. So to paraphrase: what the council are saying in the notice of appearance is, first and foremost, that there was no unfair dismissal here, it was redundancy, but that, if they are wrong about that, if anybody is liable, you have got the wrong man. You should have made a claim against Drinkwater Sabey Ltd.

So, confronted by that, the applicant, who was represented by his trade union, thought about it, or his representative did. It was of course too late by then for him to commence separate proceedings against Drinkwater Sabey Ltd. He had used up almost the whole of the three months under section 67 of the Employment Protection (Consolidation) Act 1978 before he had issued his application. What he did was apply to the industrial tribunal to join Drinkwater Sabey Ltd. as a second respondent. That application was granted on 10 January 1994, and, therefore, more than four months after the dismissal, Drinkwater Sabey Ltd. were notified by the industrial tribunal that that had been done and that they were now parties added to the application.

Drinkwater Sabey Ltd. objected to being joined in that manner. They wished to be, as I think they put it, "disjoined," and they applied to the industrial tribunal. A hearing was conducted on 10 June 1994, when the industrial tribunal sat at Ashford under the chairmanship of Mr. G. Davis with two industrial members and held a preliminary hearing on the point. In their extended reasons the industrial tribunal set out the facts and considered the relevant statutory and other provisions. They said that Mr. Linden, who appeared for Drinkwater Sabey Ltd., had applied for the company to be disjoined and dismissed from the proceedings. They went on to say:

"5. He says that the application to join the second respondent was made outside the time limit. He submits that the tribunal can only add a second respondent if it is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading. He submits the tribunal has to exercise its powers in the same way as the High Court exercises its jurisdiction under R.S.C., Ord. 20, r. 5. He submits that the tribunal did not have the power to join the second respondent . . ."

A The tribunal then referred to section 67(2) of the Employment Protection (Consolidation) Act 1978, which provides for a time limit, and to rule 17 of Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993:

> "(1) A tribunal may at any time, on the application of any person made by notice to the Secretary or of its own motion, direct any person against whom any relief is sought to be joined as a party, and give such consequential directions as it considers necessary. (2) A tribunal may likewise, on such application or of its own motion, order that any respondent named in the originating application or subsequently added, who appears to the tribunal not to have been, or to have ceased to be, directly interested in the subject of the originating application, be dismissed from the proceedings."

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The tribunal said that there was an issue between the parties as to whether or not there was a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (S.I. 1981 No. 1794) but that there was no dispute that for the purposes of that argument Drinkwater Sabey Ltd. were a proper party to the proceedings. And they referred then to *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650, a case on which Mr. Linden has founded his argument to us today as he did to the industrial tribunal. The tribunal also referred to *Watts v. Seven Kings Motor Co. Ltd.* [1983] I.C.R. 135, in which the *Cocking* case was followed, and to R.S.C., Ord. 20, r. 5(3). The tribunal purported to apply "the rules" in *Cocking v. Sandhurst (Stationers) Ltd.* as they called them. They said, among other things:

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> "The unamended originating application was presented in the correct form."—It was presented within time—"In deciding whether or not to exercise our discretion we find that the mistake sought to have been corrected was a genuine mistake, it was not misleading or such as to cause reasonable doubt of the identity of the person to be claimed against. We have also to consider any hardship to any party. In this connection the joinder of the second respondent was made some seven weeks outside the expiration of the three-month limit. Mr. Linden has conceded that this delay does not prejudice the second respondent in any way. We find that, since this matter does concern the Transfer of Undertakings (Protection of Employment) Regulations 1981, and since the applicant's claim may turn out to be against the second respondent, then we have no hesitation in finding that to deny the applicant the chance to bring his claim against the second respondent might cause him hardship."

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The tribunal referred to *Allan v. Stirling District Council* [1994] I.C.R. 434, and then said:

> "Having listened to the submissions we have no hesitation in finding that the second respondent was properly joined in these proceedings and notwithstanding the time limit contained in section 67(2) the second respondent is properly joined and should remain in these proceedings as the second respondent."

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If the matter was one of pure discretion it may well be that it would be very hard to fault that reasoning. The industrial tribunal addressed themselves to the submissions made to them. They considered, of course, questions of hardship, delay and so forth. They decided that it was proper that Drinkwater Sabey Ltd. should remain as a respondent to the application, and one could say that nothing could be much more sensible than that. The applicant clearly was not acting in a devious or deliberately misleading way when he joined his employer as the only respondent. When he was alerted to the point, he applied, with reasonable expedition, to the industrial tribunal and secured that Drinkwater Sabey Ltd. be made a respondent in addition and they, when they applied to be "disjoined," were met with the arguments which I have referred to.

It is from that decision that Drinkwater Sabey Ltd. appeal and, through Mr. Linden, have put in a most helpful skeleton argument, as indeed have the other counsel in the case. The skeleton argument refers to the time limit in section 67 of the Act of 1978, to *Cocking v. Sandhurst (Stationers) Ltd.* [1994] I.C.R. 650 and *Watts v. Seven Kings Motor Co. Ltd.* [1983] I.C.R. 135 and then says:

> "Accordingly, the tribunal only had discretion to *correct* the name of a party. Moreover, it could only take this step if the applicant had misnamed or misdescribed the party he intended to sue and not where, because of an error of law, he had mistakenly decided to sue the wrong party and correctly described them. Accordingly, the mistake which the applicant's representatives had made, although genuine, was not the type of mistake which the tribunal had power to correct and it therefore erred in law in granting the original application."

The argument then refers to the fact that Drinkwater Sabey Ltd. had no prior notice until the tribunal notified them, that is to say, a couple of months outside the time limit of three months, and continues: "the tribunal ought to have reached the conclusion that [Drinkwater Sabey Ltd.] could not be, and never should have been, joined to the proceedings," and then refers to R.S.C., Ord. 20, r. 5(3).

So on that view of the matter the industrial tribunal had in effect no discretion whatever. They were not being asked, as in *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650, to correct a matter of misnomer. They were asked to add a party and to add a party after the relevant limitation period had expired, and so, says Mr. Linden, in those circumstances they had no discretion to act in the way that they did and accordingly it is not a matter of discretion, it is an error of law which they made.

In *Cocking v. Sandhurst (Stationers) Ltd.* the applicant was a director of a subsidiary firm, but he was in fact employed by the principal firm of whose subsidiary he was director, and he began his complaint against the subsidiary firm. He then applied to substitute the principal firm, the parent company as it was called, for the subsidiary and of course the actual facts are very different. There, it was a case of substitution and it was a case really of misnomer, there was no doubt at all that he had intended to claim against his employers and not against anybody else. He was simply mistaken about the identity of his employers: and they were in fact the

A parent company and not the subsidiary. That case is referred to by Mr. Linden because he says the principles dealt with by the National Industrial Relations Court apply here. Sir John Donaldson, the President, said, at p. 656: "In every case in which a tribunal is asked to amend a complaint by changing the basis of the claim or by adding or substituting respondents they should proceed as follows . . ." and then referred to various matters to which the tribunal referred in the present case: is the B claim presented timeously, is it in the correct form? Sir John Donaldson turned to matters which are material here, at p. 657:

> "(6) In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or C such as to cause reasonable doubt as to the identity of the person intending to claim or, as the case may be, to be claimed against. (7) In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment D were allowed or, as the case may be, refused."

It is quite clear to us that parts of that judgment do refer to the case of misnomer, as it has been called. The National Industrial Relations Court was there looking at a case where the applicant had claimed against the subsidiary company when there was no doubt at all that he was intending to claim against his employers. That language cannot be applied literally, E or as if it were a statute, to the facts of the present case. If it did, clearly the result would be fatal to the applicant, because he started off against his former employers and the whole purpose of the amendment is to enable him to claim against a party who never had been his employer. Mr. Linden refers to *Watts v. Seven Kings Motor Co. Ltd.* [1983] I.C.R. 135, another case of misnomer, decided by this appeal tribunal under the F chairmanship of Browne-Wilkinson J. He referred to *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650 and then to the Industrial Tribunals (Rules of Procedure) Regulations 1980 (S.I. 1980 No. 884), and said, at p. 137:

> "which shows that, in relation to the misnomer or misjoinder of parties, the industrial tribunal should exercise its powers to amend under rule 14(1) of Schedule 1 to the Industrial Tribunals (Rules of G Procedure) Regulations 1980 in exactly the same way as the High Court exercises its jurisdiction under R.S.C., Ord. 20, r. 5. In particular, there is no absolute bar to the joinder of a new party by amendment after any statutory period of limitation has expired."

Mr. Linden says, "well, there you have it." The discretion is to be exercised in the same way under what is now rule 17 of Schedule 1 to the H Regulations of 1993 as it would be exercised under R.S.C., Ord. 20, r. 5(3). When one looks at Ord. 20, r. 5(3) one sees:

> "An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the

amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued."

That rule is dealing only with the case of misnomer, and it is important in those circumstances to see whether it is a genuine misnomer or whether in fact it is an attempt to mislead or whether it is not made in good faith or something of that sort. But, if there is no doubt about the true identity of the person who is to be sued and all that has happened is that they have been wrongly named, then the court will normally be expected to correct it, if the application is made reasonably and in good faith. It may, of course, be said in any particular case that in fact it means altering the identity of the defendant, because there is a person of the name of the first defendant and another person with the name of the defendant is proposed to be substituted. R.S.C., Ord. 20, r. 5 says that even in such a case, if it is a genuine mistake, the mere fact that the effect will be to substitute a new party will not necessarily prevent the court from making the order for substitution. However one looks at it, that rule is dealing with a case of misnomer and, at most, substituting a party by correcting the name when there is a bona fide mistake made as to name.

One asks how, in a case like the present where there is no question of misnomer, it can be submitted that the tribunal is to give effect to Ord. 20, r. 5 as a principle, following *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650, when in the High Court there would be no question of applying Ord. 20, r. 5. If this application was made in the High Court, the High Court would have to apply the statute, section 35 of the Limitation Act 1980, then go to R.S.C., Ord. 20, r. 6 and, having looked at that, would have to ask itself whether this fell within one of the very limited classes of case in which, notwithstanding that the limitation period has expired, nonetheless the party who would have the benefit of that period can be added as a defendant, not on the ground under Ord. 20, r. 5 that there has been a misnomer, but on the quite different ground that it is one of those exceptional cases in which the new defendant can be added as a defendant; there being no question about a misnomer or anything like that, it is simply that the plaintiff has discovered that he should have added a defendant earlier and now belatedly he tries to do so.

Under section 33 of the Limitation Act 1980, there is power to extend time in a limited type of case—I will not go into that any further—and under R.S.C., Ord. 15, r. 6(5) it is provided that no person should be added or substituted as a party after the expiry of any relevant period of limitation unless certain exceptions apply, and one of the exceptions is (*a*) the relevant period was current at the date when proceedings were commenced—that would of course be this case—and it is necessary for the determination of the action that the new party should be added or substituted. What does "necessary for the determination of the action" mean? Ord. 15, r. 6(6) specifies certain cases in which it shall be treated as necessary for the determination of the action that the new party should be added, for example, if the new party is a necessary party to the action

A in that property is vested in him in law or in equity and the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined.

It appears to be common ground, and we certainly deal with the case on this basis, that if that rule is to be applied by analogy then, since the application was made out of time, there could be no question of allowing the addition of Drinkwater Sabey Ltd. under that rule. So we ask ourselves B whether it is to be applied. There is a difficulty for Mr. Linden in that, because he has to accept that under the principle in such cases as *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650 the necessary amendment may be made notwithstanding that the three months' limit has expired. But nonetheless, he says that the principles in *Cocking* were said by Sir John Donaldson to be principles which should be applied in every case C in which it is proposed to add a party.

That does appear to us, on its face, to be an astonishing submission based on the slender ground of dicta which are, in the nature of things, obiter in *Cocking* and the remark, illuminating indeed in the circumstances of *Watts v. Seven Kings Motor Co. Ltd.* [1983] I.C.R. 135, 137, by Browne-Wilkinson J. that in cases of substitution the discretion is to be exercised in exactly the same way as the High Court exercises its jurisdiction under D R.S.C., Ord. 20, r. 5. What Mr. Linden is saying, on that foundation, is that the Rules of the Supreme Court should be applied by analogy in circumstances such as the present; and just as the High Court could not add Drinkwater Sabey Ltd. as a party, so here the industrial tribunal should not have done so. We, therefore, have to consider the merit of that submission.

E It is pointed out to us that rule 17 of Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993 states expressly that addition or substitution may take place at any time, and Mr. Linden's submissions amount to a very severe gloss on that: saying that "at any time" means "at any time within three months of the dismissal or other cause of complaint to the industrial tribunal." But it is submitted to us, and clearly correctly, that in *Cocking v. Sandhurst* F *(Stationers) Ltd.* [1974] I.C.R. 650 it was quite clear that mere expiry of the limitation period did not prevent the substitution where it was just to do so. It was a matter of discretion.

It is submitted to us on behalf of the applicant and on behalf of the council that this elaborate structure of logical argument which Mr. Linden has addressed to us is entirely based on a misunderstanding, putting on G the words of Sir John Donaldson in *Cocking* a stress which they simply will not bear, treating them as if they were the words of a statute to be applied literally to all circumstances in which substitution or addition is to take place. Quite clearly, they are inapplicable to the case, unlike *Cocking*, where what is happening is that there is no question of mistake as to identity or anything of that sort, but the applicant, having seen what is said by the first respondent, says "I wish to add a second respondent."

H If the matter rested there, we should have to decide it as a question of principle, but it does not rest there. In *British Newspaper Printing Corporation (North) Ltd. v. Kelly* [1989] I.R.L.R. 222 the question was not, as here, whether a party may be added, but whether there may be an

amendment to raise a ground of complaint which has not already been raised and Lord Donaldson of Lymington M.R., referring to *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650, said, at p. 223:

> "[The tribunal] referred themselves to *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650, which seems to be treated as the leading case on this subject . . . The essence of that case is that: 'in deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties including those proposed to be added if the proposed amendment were allowed, or as the case may be, refused.'"

That is relied on by Mr. Scott and Mr. Bowers for saying that that is really the true ground of the *Cocking* decision and that anything else relates to the particular facts of that case and the nature of the application being made in that case.

Again, the matter does not rest there. In the still more recent case of *Gillick v. B.P. Chemicals Ltd.* [1993] I.R.L.R. 437 this appeal tribunal, sitting in Scotland under the presidency of Lord Coulsfield, had to deal with a case in which Ms Gillick had made an application in the first place against an agency which had contracted out her services to various divisions of B.P. Chemicals Ltd. The respondents were the company which had done that and in their notice of appearance they disputed that there had been an employment relationship between themselves and Ms Gillick. They said: "You were employed by B.P.," and in due course the industrial tribunal, again well outside the limitation period, following a request by Ms Gillick, added B.P. Chemicals Ltd. as second respondents to the application. The appeal tribunal held:

> "The industrial tribunal had erred in dismissing the appellant employee's complaint of unfair dismissal and sex discrimination in so far as it was directed against B.P. Chemicals Ltd., on the ground that it was time-barred because the application to add them as second respondents had been made after the time limit for presenting the complaint had expired. There is no time limit which applies as such when it is proposed to add a new or substitute respondent to an originating application which has been lodged timeously. The industrial tribunal should treat an application to amend the complaint by the addition of a new respondent as a question of discretion, having regard to all the circumstances, not as one to be settled by the application of the rules of time-bar. This was in accordance with the approach established in *Cocking v. Sandhurst (Stationers) Ltd.*, which has been regarded as authoritative and followed in a number of other cases and was expressly affirmed by the Court of Appeal in *British Newspapers Printing Corporation (North) Ltd. v. Kelly* [1989] I.R.L.R. 222. The approach set out in *Cocking* is not limited to cases in which the original and the new respondents are related as principal and subsidiary, or in some similar way. The presence or absence of a connection between the respondents is relevant, if at all, as a matter to be taken into account by the tribunal in the exercise of its

A discretion, rather than as a limitation on the circumstances in which the discretion can be exercised. Nor was there any justification for refusing to accept *Cocking* as authoritative in the present case on the ground that its guidance was influenced by matters of practice in the English courts which differ from ordinary Scottish practice."

That headnote is supported by what Lord Coulsfield on behalf of the B appeal tribunal said, at p. 440, paras. 7 and 8. That is a decision which is completely contrary to Mr. Linden's submission to us. The tribunal said, at p. 440, para. 8:

> "The question whether an amendment should or should not be allowed becomes, as the appellant submitted, one of the exercise of discretion in the whole circumstances of the case. This approach may, at least at first sight, appear strange by comparison with the practice C of the Scottish civil courts. . . . The decision in *Cocking* has been regarded as giving the appropriate guidance for amendment of applications for a substantial period, and, even if that guidance has been influenced by matters of English practice which are foreign to Scotland, nevertheless we do not think that we would be justified in refusing to accept it as authoritative."

D In other words, in the view of this appeal tribunal sitting in Scotland, *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650 should be applied to applications to add a party as well as to substitute a party, but the matter is one of discretion for the tribunal and the tribunal are not bound by the time limits and are permitted to add a party, notwithstanding that the time limit for an application against that party has expired. Mr. Linden E is obliged to submit that that decision is wrong. But we should not depart from a decision of our own appeal tribunal, certainly one given with such authority and after such careful consideration as was given in *Gillick v. B.P. Chemicals Ltd.* [1993] I.R.L.R. 437, unless we are quite satisfied that there was a mistake and that it was indeed a wrong decision.

We have of course considered that submission. We are entirely satisfied that Mr. Linden is mistaken in submitting that the decision in *Gillick* is F wrong and inconsistent with the decision in *Cocking* and the authorities on which he relies. It appears to us that it is fully consistent. It would be most extraordinary if the industrial tribunal, who are required to proceed in an informal manner and expeditiously, should be bound, when applications are made to them involving the substitution or addition of parties, to take themselves to the Rules of the Supreme Court and consider G carefully what is said in the Limitation Act 1980, which does not apply but which Mr. Linden said might well be applied by analogy; what is said in R.S.C., Ord. 15, r. 6; what is said in sections 33 and 35 of the Act of 1980; what is said in Ord. 20, r. 5; and, having carefully considered the practice of the Supreme Court and if necessary, I suppose, the practice of the county court under the corresponding provisions, should then have to apply all that as criteria in exercising their discretion under rule 17 of H Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993. It appears to us that what was said by Sir John Donaldson in *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650, 656–657, and Browne-Wilkinson J. in *Watts v. Seven Kings*

Motor Co. Ltd. [1983] I.C.R. 135, 137, was not intended to have any such consequences. They were merely saying that in the cases with which they were concerned it was appropriate to apply the discretion in the same way as it was applied in the High Court, and there was certainly no clear authority, in those directions, for the propositions now advanced by Mr. Linden.

In those circumstances, we must follow *Gillick v. B.P. Chemicals Ltd.* [1993] I.R.L.R. 437. We are very pleased to do so, because we think that that decision is entirely consistent with our own understanding of the position. It is a matter of discretion. I have already sufficiently set out the facts. The tribunal treated it very properly as a matter of discretion, and it appears to us that they cited all the matters which they should bear in mind in exercising their discretion. It is a discretion given to them and not to us. We can interfere with the discretion of the industrial tribunal only on very special grounds. If they have plainly made an error of law, if they have declined to take into account something material which they should have considered or have, in some other way, misdirected themselves, it may be that we should feel able to exercise our own discretion to interfere. But above all there is an overriding principle, it seems to us, which affects a discretionary interlocutory decision of the tribunal. The industrial tribunal are preparing to try the case on its merits. The primary responsibility is on the industrial tribunal, and not on us, to say how they are to approach that task and what parties ought to be joined in order to enable them to arrive at a just result. We can find nothing to criticise in the way in which this industrial tribunal exercised their discretion and in particular we can find no error of law.

In those circumstances we are content to follow what was said in *Gillick v. B.P. Chemicals Ltd.* [1993] I.R.L.R. 437, to apply that case and to say that the industrial tribunal were well entitled to reach the decision that they did to join Drinkwater Sabey Ltd. as a respondent to the application and the appeal has to be dismissed.

Appeal dismissed.

Solicitors: Laytons, East Molesey; Pattinson & Brewer; County Solicitor, Kent County Council, Maidstone.

J. W.