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Court of Appeal

Agarwal *v* Cardiff University and another

Tyne and Wear Passenger Transport Executive (trading as Nexus) *v* Anderson and others

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[2018] EWCA Civ 2084

2018 June 6, 7; Sept 27

Underhill, Bean, Hamblen LJJ

Employment — Wages — Deductions — Claims of unauthorised deductions from wages raising issues as to meaning of employment contract — Whether employment tribunal having jurisdiction to resolve issues — Employment Rights Act 1996 (c 18), s 13

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The claimants in two separate cases made claims in the employment tribunal that their employers had made unauthorised deductions from their wages, contrary to section 13 in Part II of the Employment Rights Act 1996[1]. In the first case, the claimant was employed as a lecturer in the medical school of a university, performing academic sessions for the university and clinical sessions for a health board, which, pursuant to a separate arrangement with the university, reimbursed the university for the clinical duties. Her claim under section 13 related to clinical sessions for which she had not been paid. In the employment tribunal, after being referred by the employment judge to a case that appeared to constitute binding authority at employment tribunal level, the claimant conceded that the tribunal would not have jurisdiction to determine any issues raised by the claim as to the meaning and effect of her employment contract, but she contended that no such issues arose. The tribunal concluded that, in order to determine whether the claimant was entitled to be paid for the relevant clinical sessions, it would be necessary to construe the terms of her employment contract, and that it had no jurisdiction to determine the claim. The Employment Appeal Tribunal dismissed an appeal by the claimant.

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In the second case, the claimants were employed on the maintenance of a railway transport system. Their claim under section 13 related to shift allowances which they said had been underpaid, a central issue being whether the term "basic pay" meant as increased by the incorporation of a productivity bonus pursuant to an agreement between the employer and the trade union in 2012. The employment tribunal upheld the claims, finding that the term "basic pay" had not been redefined by the agreement so as to exclude the productivity bonus. The Employment Appeal Tribunal dismissed an appeal by the employer, rejecting its contention that the employment tribunal had no jurisdiction to consider the meaning of an employment contract in a claim under Part II of the 1996 Act.

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On an application by the claimant in the first case for permission to appeal, and on an appeal by the employer in the second case—

Held, (1) that an employment tribunal had jurisdiction to resolve any issue necessary to determine whether a sum claimed under section 13 of the Employment Rights Act 1996 was "properly payable" within the meaning of section 13(3), including an issue as to the meaning of the contract of employment; that there was no conflict between that position and the position on a claim under Part I of the 1996 Act to determine what ought to have been included in a statement of employment particulars, where an employment tribunal had no jurisdiction to interpret the contract of employment, since the two provisions differed in their origins and purpose;

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[1] Employment Rights Act 1996, s 13; see post, para 7.

that employment tribunals were well capable of construing the terms of employment contracts governing remuneration and had to do so in many other contexts; and that, accordingly, the employment tribunals in both cases had had jurisdiction to resolve disputes about the construction of the claimants' contracts arising in the context of their claims under section 13 (post, paras 18–21, 27–28, 72, 73).

Delaney v Staples (trading as De Montfort Recruitment) [1991] ICR 331, CA followed.

Weatherilt v Cathay Pacific Airways Ltd [2017] ICR 985, EAT approved.

Southern Cross Healthcare Co Ltd v Perkins [2011] ICR 285, CA distinguished.

Somerset County Council v Chambers (unreported) 25 April 2013, EAT overruled.

(2) Granting the application for permission to appeal and allowing the appeal in the first case, that, given the circumstances in which the claimant's concession was made, and that the issue on the appeal was a pure point of law, it would be a plain injustice if the claimant was not now permitted to advance the argument that the employment tribunal in fact enjoyed the jurisdiction which it held that it could not exercise; that, moreover, it might be thought to be a particularly serious injustice where a tribunal did not simply get the answer to an issue of law wrong but wrongly declined to determine the dispute before it at all; and that, accordingly, the claim could be determined by the employment tribunal (post, paras 37, 72, 73).

(3) Dismissing the appeal in the second case, that the employment tribunal and the appeal tribunal were plainly correct in assuming jurisdiction to resolve the dispute as to how shift allowances should be calculated following the collective agreement in 2012; that the relevant words of the agreement read simply "consolidate the productivity bonus . . . into basic salary", with no qualification and, more particularly, no provision for two different kinds of basic pay; that, reading the contractual document as a whole, the natural meaning of those words, read in isolation, was not modified by other passages; and that, accordingly, the agreement did not provide for two kinds of basic pay, one to be used for shift allowance calculation and one for other purposes (post, paras 27, 28, 55–59, 64, 67, 70, 72, 73).

Decision of the Employment Appeal Tribunal [2017] ICR 967 reversed.

Decision of the Employment Appeal Tribunal [2018] ICR 1207 affirmed.

The following cases are referred to in the judgment of Underhill LJ:

Alsop v Star Vehicle Contracts Ltd [1990] ICR 378, EAT

Anderson v London Fire and Emergency Planning Authority [2013] EWCA Civ 321; [2013] IRLR 459, CA

Arnold v Britton [2015] UKSC 36; [2015] AC 1619; [2015] 2 WLR 1593; [2016] 1 All ER 1, SC(E)

Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714, CA

Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] AC 1101; [2009] 3 WLR 267; [2009] Bus LR 1200; [2009] 4 All ER 677; [2010] 1 All ER (Comm) 365, HL(E)

Coors Brewers Ltd v Adcock [2007] EWCA Civ 19; [2007] ICR 983, CA

Delaney v Staples (trading as De Montfort Recruitment) [1991] ICR 331; [1991] 2 QB 47; [1991] 2 WLR 627; [1991] 1 All ER 609, CA; [1992] ICR 483; [1992] 1 AC 687; [1992] 2 WLR 451; [1992] 1 All ER 944, HL(E)

Glennie v Independent Magazines (UK) Ltd [1999] IRLR 719, CA

Jones v Governing Body of Burdett Coutts School [1999] ICR 38, CA

Jones v MBNA International Bank (unreported) 30 June 2000, CA

Kumchyk v Derby City Council [1978] ICR 1116, EAT

Mears v Safecar Security Ltd [1982] ICR 626; [1983] QB 54; [1982] 3 WLR 366; [1982] 2 All ER 865, CA

New Century Cleaning Co Ltd v Church [2000] IRLR 27

Somerset County Council v Chambers UKEAT/417/12 (unreported) 25 April 2013, EAT

Southern Cross Healthcare Co Ltd v Perkins [2010] EWCA Civ 1442; [2011] ICR 285, CA
Tradition Securities and Futures SA v Mouradian [2009] EWCA Civ 60; [2009] ICR Part 5, Recent Points, CA
Weatherilt v Cathay Pacific Airways Ltd [2017] ICR 985, EAT
Wood v Sureterm Direct Ltd [2015] EWCA Civ 839, CA; sub nom *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173; [2017] 2 WLR 1095; [2017] 4 All ER 615; [2018] 1 All ER (Comm) 51, SC(E)

The following additional cases were cited in argument:

Bennett v Southwark London Borough Council [2002] EWCA Civ 223; [2002] ICR 881, CA
Fairfield Ltd v Skinner [1992] ICR 836, EAT
Jafri v Lincoln College [2014] EWCA Civ 449; [2014] ICR 920; [2015] QB 781; [2014] 3 WLR 933; [2014] 3 All ER 709, CA
Kilraine v London Borough of Wandsworth [2016] IRLR 422, EAT
Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742; [2015] 3 WLR 1843; [2016] 4 All ER 441, SC(E)
Mears Ltd v Salt UKEAT/522/11 (unreported) 1 June 2012, EAT
O'Kelly v Trusthouse Forte plc [1983] ICR 728; [1984] QB 90; [1983] 3 WLR 605; [1983] 3 All ER 456, CA
Parker v Northumbrian Water Ltd [2011] ICR 1172, EAT
Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465; [2002] LGR 51, HL(E)
R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2) [2017] UKSC 51; [2017] ICR 1037; [2017] 3 WLR 409; [2017] 4 All ER 903, SC(E)
Ritchie v Shawcor Inc UKEATS/40/07 (unreported) 6 March 2008, EAT(Sc)
Segor v Goodrich Actuation Systems Ltd UKEAT/145/11 (unreported) 10 February 2012, EAT
Shirlaw v Southern Foundries(1926) Ltd [1939] 2 KB 206; [1939] 2 All ER 113, CA
Tattersall v Liverpool Women's NHS Foundation Trust UKEAT/276/16 (unreported) 20 July 2017, EAT
Watt (formerly Carter) v Ahsan [2007] UKHL 51; [2008] ICR 82; [2008] AC 696; [2008] 2 WLR 17; [2008] 1 All ER 869, HL(E)

APPEALS from the Employment Appeal Tribunal

Agarwal v Cardiff University

By a judgment sent to the parties on 22 March 2016, an employment judge sitting in Cardiff dismissed a claim of unauthorised deduction of wages by the claimant, Miss Meena Agarwal, against the first respondent, Cardiff University, and the second respondent, Cardiff and Vale University Local Health Board, on the ground that the employment tribunal had no jurisdiction to determine her claim. On 22 March 2017 the Employment Appeal Tribunal (Slade J sitting alone) dismissed an appeal by the claimant [2017] ICR 967.

The claimant sought permission to appeal, and on 1 December 2017 the Court of Appeal (Underhill LJ) ordered the application to proceed to hearing, with the appeal to follow, if permission was granted. The grounds of appeal were that (1) the appeal tribunal erred in upholding the decision of the employment tribunal that it did not have jurisdiction to hear the claim; and (2) the claimant should be permitted to raise the issue of jurisdiction notwithstanding a concession made in the employment tribunal.

The facts are stated in the judgment of Underhill LJ, post, para 3.

Tyne and Wear Passenger Transport Executive (trading as Nexus) v Anderson

By a judgment sent to the parties on 21 December 2015 an employment judge sitting in North Shields upheld claims of unauthorised deductions from shift allowances and holiday pay by the claimants, Mr S Anderson and others, in a multiple action against the respondent, Tyne and Wear Passenger Transport Executive (trading as Nexus). The respondent employer appealed on the grounds, inter alia, that the employment tribunal erred in law (1) in interpreting the contract of employment or implying terms into it on a claim for unlawful deduction of wages; and (2) in holding that the terms concerning the shift allowance were unambiguous. On 15 January 2018 the Employment Appeal Tribunal (Judge Hand QC sitting alone) dismissed the appeal [2018] ICR 1207.

By an appellant's notice dated 2 February 2018, with the permission of the Court of Appeal (Underhill LJ) granted on 22 March 2018, the employer appealed on the following grounds. (1) The appeal tribunal was wrong to conclude that the employment tribunal had jurisdiction under Part II of the Employment Rights Act 1996 to determine a dispute as to the construction of a contract of employment and/or a collective agreement. (2) Once the appeal tribunal had found that the employment tribunal erred in its approach, the appeal tribunal itself erred in concluding that it could proceed to determine the dispute as to the construction of the agreement on the 2012 pay settlement and ought to have remitted the matter to the employment tribunal. (3) In any event the appeal tribunal erred in its conclusion as to the true meaning and effect of the agreement on the pay settlement and ought to have concluded that there had been no unlawful deduction from the claimants' wages.

The facts are stated in the judgment of Underhill LJ, post, para 4.

Mark Sutton QC and *Eleena Misra* (instructed by *Bindmans llp*) for the claimant in the first case.

David Mitchell (instructed by *Eversheds Sutherland llp, Cardiff*) for the university in the first case.

Giles Powell and *Adam Ross* (instructed by *Blake Morgan llp, Cardiff*) for the health board in the first case.

David Reade QC and *Joseph Bryan* (instructed by *Addleshaw Goddard llp, Manchester*) for the employer in the second case.

John Hendy QC and *Katharine Newton* (instructed by *Thompsons Solicitors, Newcastle upon Tyne*) for the claimants in the second case.

The court took time for consideration

27 September 2018. The following judgments were handed down.

UNDERHILL LJ

Introduction

1 These two appeals were heard together because they raise an issue about the jurisdiction of the employment tribunal to resolve disputes about the construction of a contract of employment in the context of a claim for unauthorised deduction of wages under Part II of the Employment Rights Act

A 1996. I will refer to this as "the jurisdiction issue". Apart from that common point each appeal raises a distinct issue of its own. In *Agarwal* there is a question as to whether it is open to the claimant to raise the jurisdiction issue at all because of a concession made in the employment tribunal ("the concession issue"): for that reason permission to appeal was not initially granted and the hearing proceeded on a rolled-up basis. In the *Tyne and Wear*
B appeal (to which I will refer as *Nexus*, that being the employer's trading name) it is necessary, subject to the outcome of the jurisdiction issue, to determine the substantive question of construction.

2 At the conclusion of the hearing we announced our decision on the jurisdiction and concession issues, as a result of which we granted the claimant in *Agarwal* permission to appeal and allowed the appeal. We said
C that our reasons would be given in due course. This judgment sets out those reasons and decides the remaining issue in *Nexus*.

3 I will set out the facts and the procedural histories only to the limited extent necessary to explain how both appeals arise. In *Agarwal* the appeal is by the claimant in the underlying proceedings, Ms Meena Agarwal, who is a consultant urological surgeon employed under a "clinical academic contract" under which she performs academic duties for the first respondent,
D Cardiff University, and clinical sessions for the second respondent, the Cardiff and Vale University Local Health Board. The university pays her in respect of both duties though it is entitled to reimbursement by the health board as regards 50% of her salary. As a result of a dispute arising from a prolonged period of sickness absence, the board believes that Ms Agarwal is not contractually entitled to be paid in respect of her clinical duties and has
E declined to fund the university to pay that part of her salary; and the university has withheld it accordingly. Ms Agarwal brought proceedings in the employment tribunal for unauthorised deduction of wages under Part II of the 1996 Act; but, following a preliminary hearing, Regional Employment Judge Clarke held that the tribunal had no jurisdiction to determine the underlying contractual dispute. That decision was upheld by Slade J in the
F Employment Appeal Tribunal, in a judgment handed down on 22 March 2017 [2017] ICR 967. Both the university and the health board are respondents to the appeal.

4 In *Nexus*, the employer operates the Tyne and Wear metro system. An issue has arisen between it and employees in grades 1–3 of its pay structure ("Red Book staff") about whether the effect of a pay agreement entered into
G in 2012 between it and the recognised trade union, RMT, was to uplift their basic pay for the purpose of the calculation of shift allowance. Seventy such employees, who are the respondents to this appeal (but to whom I will refer as "the claimants"), brought proceedings in the employment tribunal under Part II of the 1996 Act, with the support of the union, in respect of the non-payment of sums which they believed to be due under the agreement. By a decision sent to the parties on 21 December 2015 Employment Judge
H Hunter found in their favour on the issue of liability and directed a hearing to quantify the amounts due. Nexus appealed. In the Employment Appeal Tribunal a point was taken for the first time as to whether the employment tribunal had had jurisdiction to determine the underlying contractual dispute. Judge Hand QC (sitting alone) permitted the point to be taken, but

by a judgment handed down on 15 January 2018 [2018] ICR 1207 he rejected it and dismissed the substantive appeal. This is an appeal against that decision.

5 In *Agarwal* Ms Agarwal is represented by Mr Mark Sutton QC, leading Ms Eleena Misra; the university by Mr David Mitchell; and the health board by Mr Giles Powell leading Mr Adam Ross. Mr Mitchell and Mr Powell have appeared throughout, but in the employment tribunal and the Employment Appeal Tribunal Ms Agarwal was represented by Ms Althea Brown. In *Nexus* the claimants are represented by Mr John Hendy QC, leading Ms Katharine Newton, and Nexus by Mr David Reade QC, leading Mr Joseph Bryan; none of them appeared below.

6 It is arguable that as a matter of strict logic the concession issue in *Agarwal* should be taken first, but it is more convenient to start with the jurisdiction issue which is common to both appeals.

(A) Both cases: the jurisdiction issue

7 I start with the applicable statutory provisions. The principal operative provision under Part II of the 1996 Act is section 13, which gives workers the right not to suffer unauthorised deductions from their wages. It reads (so far as material for our purposes):

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
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> "(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised— (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) 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 relation to the worker the employer has notified to the worker in writing on such an occasion.
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> "(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion . . ."

Section 14 identifies a number of types of "excepted deduction" to which section 13 does not apply: I need not set them out here.

8 Sections 15 and 16 contain provisions essentially equivalent to sections 13 and 14 covering the cognate situation where a worker is required to make payments to his or her employer. Sections 17–22 impose additional restrictions on the making of deductions or the requirement of payment in respect of cash shortages and stock deficiencies in retail employment, or the determination of the amount of wages by reference to such shortages and deficiencies. I need not set out any of those provisions here.

A **9** Sections 23–26 deal with enforcement. The primary provision for our purposes is section 23(1)(a), which reads (so far as material) as follows:

> "A worker may present a complaint to an employment tribunal—(a) that his employer has made a deduction from his wages in contravention of section 13 . . ."

B Section 24(1) (a) provides that where a tribunal finds such a complaint well founded it shall make a declaration to that effect and order the employer to pay the worker the amount of the deduction. Sections 25 and 26 contain ancillary provisions to which some reference was made in submissions before us but which do not in the end advance the argument.

10 Section 27 defines the term "wages" for the purpose of Part II. Subsection (1) sets out the primary definition in elaborate terms. For present C purposes all that is relevant is head (a), which refers to "any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise". That is subject to certain exclusions listed in subsection (2). Subsections (3)–(5) are ancillary and I need not set them out. There is no definition of "deduction"; nor, I should say, is there any such definition elsewhere in the statute.

D **11** Section 205(2) of the Act provides that "the remedy of a worker in respect of any contravention of section 13 . . . is by way of a complaint under section 23 and not otherwise".

12 The 1996 Act is a consolidation statute. The provisions of Part II re-enact, with a slightly different structure but to (necessarily) the same effect, the provisions of the Wages Act 1986. For present purposes I need E only note that subsections (1) and (2) of section 13 of the 1996 Act derive from subsections (1) and (3) of section 1 of the 1986 Act; that section 13(3) derives from section 8(3) (section 8 being the definition section); and that section 14 derives from (part of) section 1(5).

13 The effect of sections 1(1), (3) and 8(3) of the 1986 Act—i e what is now section 13(1)–(3)—was considered by this court in *Delaney v Staples (trading as De Montfort Recruitment)* [1991] ICR 331; [1991] 2 QB 47. The F applicant in that case had applied to the industrial tribunal in respect of three alleged deductions. The first two related to unpaid commission and holiday pay and the third to "pay in lieu of notice". For present purposes we are only concerned with the first two. The tribunal found that the sums in question were indeed due, but the issue was whether a mere failure to pay a sum due amounted to a "deduction" within the meaning of the statute. This G court held that it was. The leading judgment was given by Nicholls LJ, with whom Ralph Gibson LJ and Lord Donaldson MR agreed.

14 The argument for the employer was encapsulated in a passage from the judgment give by Wood J in the Employment Appeal Tribunal in *Alsop v Star Vehicle Contracts Ltd* [1990] ICR 378, 380–381, which reads:

H > "The Act is designed to give jurisdiction to industrial tribunals to decide whether deductions made are legal. It is not designed to give jurisdiction to a tribunal to decide cases based in contract which heretofore had been the subject of claims within the county court jurisdiction. It is an Act which is designed to deal with 'deductions', not with 'non-payments'. How then is a tribunal to approach a case where

the employee appears and claims that he has not been paid 'wages' as defined in section 7?

"The initial question must be to decide why the payment has not been made. Evidence of this may come orally from the parties or from the written documents. The employer's case may be: 'Under the contract I don't owe', or 'I don't owe the amount claimed', or 'I owe £X but I claim that he (the employee) owes me £Y,' or 'I won't pay for any or no other reason'. Clearly there can be an infinite variation of fact. If the answer is the first, second or the last of those possibilities, then it is almost certainly a case of non-payment and the industrial tribunal have no jurisdiction; nor would they have jurisdiction if it is simply a contractual issue of whether any sum is due. It is only if there is proved to be (a) an amount admitted or found due as 'wages' (section 7) of £X, and (b) an amount which the employer claims is due from the employee of £Y and (c) the employer seeks to recover that amount by deducting it from wages which would otherwise be due, that the tribunal have jurisdiction. The issue is legality of the deduction."

15 Nicholls LJ set out that passage at p 338 of his judgment but proceeded to reject the approach taken in it. He said, at pp 339–340:

"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, extending the scope of the expression 'deduction': 'Where the . . . amount of any wages that are paid . . . is less than the total amount of the wages . . . properly payable . . . the amount of the deficiency *shall be treated* for the purposes of this Part *as a deduction* [emphasis in original] . . .'

"This subsection provides, in express terms, that wages which are properly payable but not paid are to be treated, to the extent of the non-payment, as within the scope of the expression 'deduction'. Non-payment of the amount properly payable is to be treated as a deduction. The only exception is for a deficiency attributable to an error of computation.

"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* [emphasis supplied]. Having determined any dispute about the amount of wages properly payable, 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)."

A **16** At p 340, Nicholls LJ addressed the objections raised by the employer to that approach. The principal such objection was that

> "one would not expect to find, as the statutory provision having such a far reaching effect, a deeming provision tucked away innocuously in an interpretative section such as section 8. A deeming provision is a somewhat surprising method by which to enact such an important
B extension to what otherwise might be thought to be the intended scope of the Act."

The force of that objection is arguably to some extent diminished, in the Act as it now stands, by the translation of what was section 8(3) out of the definition section into the primary operative section (i e section 13), but it remains the case that the provision is couched in the language of
C deeming—"shall be treated as". I should set out in full Nicholls LJ's reasons for rejecting the objection. They read as follows, at p 341:

> "First, the meaning stated above accords with the natural reading of the language used. Second, I do not see what other meaning can sensibly be given to section 8(3). Third, I am not convinced that, even leaving section 8(3) altogether aside, section 1(1) does draw a clear distinction
D between non-payments and deductions. Drawing this distinction involves defining the word 'deduction' in some such terms as those suggested in the *Alsop* case [1990] ICR 378. In that case the tribunal considered that, for there to be a deduction, there must be an amount which the employer claims is due to him from the employee. I do not think that it can be right to attempt to define 'deduction' in any such
E limited way. The statute contains no definition of this expression, even though it occupies a key place in the scheme of the Act. That omission cannot have been an oversight. Parliament must have intended that the word should not have a carefully circumscribed meaning. If that is so, and 'any deduction' in section 1(1) is intended to have an extended rather than a confined area of application, this cuts away much of the ground on which the suggested distinction between deductions and non-payments
F rests.
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> "Fourth, I am unable to discern any underlying policy reason why Parliament should have intended to draw such a distinction. Indeed, the distinction would give rise to undesirable practical consequences, rather than the reverse. According to this distinction, an underpaid employee may have resort to an industrial tribunal if the employer is asserting a
G claim against 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.
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> "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
H 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.

"Sixth, it is pertinent to keep in mind that the wider construction of the Act does not have the consequence 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 unpaid 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."

17 I should mention for completeness that the court held that the claim in relation to pay in lieu of notice did not fall within the terms of the Act, because it was in its nature a claim for damages and an unliquidated claim of that nature could not constitute "wages". The case went to the House of Lords on that issue [1992] ICR 483; [1992] 1 AC 687, where the decision was upheld; but not on the issue about the first two deductions.

18 The approach required to a claim based on section 13 of the 1996 Act, in the light of the analysis of the predecessor provisions in *Delaney v Staples*, can be sufficiently summarised for our purposes as follows.

(1) The first question is whether there has been a deduction within the meaning of the section. That depends on subsection (3), and specifically on whether the sum claimed was "properly payable" (on the relevant occasion and "after deductions"[1*]). It may prima facie seem odd to start there rather than with subsection (1), which formally enacts the obligation on the employer not to make the deduction; but that is in essence the point addressed by Nicholls LJ in *Delaney v Staples*—see para 16 above. It was not in dispute before us that "properly payable" means payable pursuant to a legal obligation. Such an obligation will typically arise under the contract of employment, though it need not do so: see *New Century Cleaning Co Ltd v Church* [2000] IRLR 27, para 43, per Morritt LJ.

(2) If there is a question, of any character, as to whether the sum in question is "properly payable" that question must be resolved by the employment tribunal. That is stated explicitly by Nicholls LJ in the sentences which I have italicised in the passage quoted at para 15 above. That necessarily means that it will need, in a case where this is the issue, to resolve any dispute as to the meaning of the contract relied on: Nicholls LJ expressly rejected the statement by the Employment Appeal Tribunal in the *Alsop* case [1990] ICR 378 that it had no power to do so.

(3) Once the tribunal has decided whether there has been a deduction it must then consider whether it was authorised by either of the means specified at (a) and (b) under subsection (1), as glossed (as regards (a)) by subsection (2).

19 For the purpose of the issue before us it is the second of those propositions that is central. It has not until recently been controversial. There are a number of reported cases in which the Employment Appeal Tribunal and this court have resolved disputes as to the meaning and effect of a contract in order to determine a claim under the 1986 Act or Part II of the

* *Reporter's note*. The superior figures in the text refer to notes which can be found at the end of the judgment on p 457.

A 1996 Act: see, for example, *Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714 and *Anderson v London Fire and Emergency Planning Authority* [2013] IRLR 459[2].

20 However, those relatively clear waters have been muddied by reference to a separate line of authority concerned with what is now Part I of the 1996 Act. This Part contains provisions requiring an employer to give an B employee a written statement of particulars of the principal terms of his or her contract of employment, with a right (under sections 11 and 12 of the Act) to make a reference to the employment tribunal to determine what particulars ought to be included in the statement. Those provisions have a long pedigree, starting (at least so far as their present form is concerned) with the Contracts of Employment Act 1972 and passing though the Employment Protection (Consolidation) Act 1978. It is only in 1996 that C they have been brought under the same statutory umbrella as the provisions relating to the unlawful deduction of wages deriving from the Wages Act 1986.

21 There have been over the years a number of decisions about whether in the exercise of its jurisdiction to determine what particulars should appear in a statement a tribunal was entitled to resolve a dispute as to the meaning D of the contract whose terms were to so be included: the cases include the difficult decision of this court in *Mears v Safecar Security Ltd* [1982] ICR 626; [1983] QB 54. The position was put beyond doubt by *Southern Cross Healthcare Co Ltd v Perkins* [2011] ICR 285. At para 28 of his judgment in that case Maurice Kay LJ, with whom Stanley Burnton and Jackson LJJ agreed, quoted a statement from *Harvey on Industrial Relations and* E *Employment Law* Division AII, para 120 to the effect that:

> "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."

F He went on at para 30 to describe that approach as "both established and correct".

22 *Southern Cross*, and the line of authorities which it considered, was concerned only with Part I of the 1996 Act, and it might be thought that the court's confirmation that the employment tribunal had no jurisdiction to interpret the contract had no bearing on Part II. But in *Somerset County Council v Chambers* (unreported) 25 April 2013 the Employment Appeal G Tribunal apparently treated the authorities on Part I as equally applicable to Part II. The underlying claim was that the claimant, a locum social worker, was entitled to be paid at a higher level on the respondent's pay scale than he had in fact received. His claim appears to have been that he was entitled to the rate for a permanent worker, but on what basis the claim was advanced was not clear. At para 17 of the judgment Judge Peter Clark held that the H contract provided for payment at the locum rate. He continued:

> "The employment tribunal had no jurisdiction to embark on an inquiry into what [the claimant] ought to have been paid if he was to be regarded as an employee in the context of a [Wages Act] claim, any more than it would be appropriate under a section 11/12 reference: see *Southern Cross*

Healthcare Co Ltd v Perkins [2011] ICR 285; *Mears v Safecar Security Ltd* [1982] ICR 626 . . . Any such claim lies in breach in contract [sic]."

No reference is made to *Delaney v Staples*. The reasoning is decidedly compressed, but the most obvious reading is that the judge regarded *Southern Cross* as authoritative in the Part II context.

23 It was that line of authority which led the employment tribunal and the Employment Appeal Tribunal in *Agarwal* [2017] ICR 967 to hold that the employment tribunal had no jurisdiction to determine Ms Agarwal's claim. The two tribunals differed in the weight that they attached respectively to *Chambers* and *Southern Cross*, but both regarded themselves as bound by authority to hold that the tribunal had no jurisdiction to resolve an issue as to the construction of Ms Agarwal's contract; and that was indeed common ground before them, the only live question being whether it was indeed necessary to resolve any such issue for the purpose of determining her claim.

24 I need not set out any part of the employment tribunal's reasons, which relied straightforwardly on *Chambers*, but I should briefly summarise Slade J's analysis in the Employment Appeal Tribunal. At the start of the "discussion" section of her judgment she said, at para 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 section 13 of the Employment Rights Act 1996 in the employment tribunal."

She went on to make it clear that she regarded that concession as correct but she said that was not because of *Chambers*, where "the issue was not one of construction of a contract", but because of *Southern Cross*. After summarising the judgment of Maurice Kay LJ in that case, she said, at para 37:

> "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 section 11 [of the Employment Rights Act 1996] applies equally to the construction of a contract in a claim not to suffer an unauthorised deduction from wages under 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."

I should add for completeness, though the point is not contentious before us, that she also pointed out that the employment tribunal had no jurisdiction under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) since Ms Agarwal remained in employment.

25 In *Weatherilt v Cathay Pacific Airways Ltd* [2017] ICR 985 Judge David Richardson in the Employment Appeal Tribunal declined to follow Slade J's decision in *Agarwal*. He observed that neither the employment tribunal nor the Employment Appeal Tribunal in *Agarwal* had been referred to *Delaney v Staples* [1991] ICR 331 (in the Court of Appeal) or to *Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714. He referred at paras 14–15 of his judgment to the same passages from the judgment of Nicholls LJ in *Delaney v Staples* as I have set out above; and he quoted at para 18 a passage from the judgment of Sir Peter Gibson in *Atchoe* which demonstrated that the court in that case had undertaken the exercise of construing the claimant's contract of employment. He continued:

> "19. I consider that these cases, which are directly concerned with the provisions found in Part II of the Employment Rights Act 1996, are binding authority which the appeal tribunal and employment tribunals are required to follow.
>
> "20. 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 employment tribunal has no jurisdiction to determine them. As Nicholls LJ held, the employment tribunal 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 employment tribunal 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 at employment tribunal level and appeal tribunal level to decide such questions in an application under Part II: see for a recent example *Cabinet Office v Beavan* [2014] IRLR 434."

At para 22 he pointed out that *Southern Cross* was concerned with the "very different provisions in Part I" and that any apparent tension between it and *Delaney v Staples* was explained by "the different origins, purpose and terms of the statutory provisions".

26 Judge Hand QC in *Nexus* [2018] ICR 1207 likewise declined to follow *Agarwal*. At paras 30–61 of his judgment he carried out a painstaking review of the authorities to which I have referred (and some others). After reciting the parties' submissions he explained his reasons at para 82 as follows:

> "First, *Southern Cross Healthcare Co Ltd v Perkins* [2011] ICR 285 binds me in relation to Part I of the 1996 Act but it does not deal with Part II with which this case is concerned. Secondly, in my judgment there ought to be no extension by analogy of that decision to Part II. 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* [1991] ICR 331, *Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714 and *Anderson v London Fire and Emergency Planning Authority* [2013] IRLR 459 (all decided by the Court of Appeal), and *Mears Ltd v Salt* (unreported) 1 June 2012 and *Cabinet Office v Beavan* [2014] IRLR 434 (decided at this level) stand four square in the path of

> extension by analogy . . . Fourthly, I do not regard *Somerset County Council v Chambers* 25 April 2013 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 appeal tribunal in *Agarwal v Cardiff University*. Fifthly, I regard *Agarwal* as having been decided per incuriam *Delaney*, *Anderson* and *Atchoe* and, for that reason, like Judge David 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."

(The passage which I have omitted concerns the authorities on claims for unquantified amounts to which I refer in note 2 below. Judge Hand's conclusion was that they are concerned with a different question; I agree.)

27 In my view Judge Richardson in *Weatherilt* and Judge Hand QC in *Nexus* were plainly correct not to follow *Agarwal*, for the reasons that they give. At the risk of repetition, but very briefly, I can summarise what seem to me to be the essential reasons as follows:

(1) *Delaney v Staples* [1991] ICR 331, to which the employment tribunal and the Employment Appeal Tribunal in *Agarwal* were not referred, is binding authority that an employment tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II is properly payable, including an issue as to the meaning of the contract of employment. In truth, that is the end of the matter, as Judge Richardson perceived; but I should say that I find Nicholls LJ's reasoning entirely persuasive.

(2) There is no conflict between that position and the decision in *Southern Cross* [2011] ICR 285. As both Judge Richardson and Judge Hand QC point out, the provisions in Parts I and II of the 1996 Act differ in their origins, purpose and terms. It is only an accident of legislative history that they are now contained in the same Act.

(3) There is no good—or even, frankly, comprehensible—policy reason for carving out from the jurisdiction of the employment tribunal one particular kind of dispute necessary in order to resolve a deduction of wages claim. On the contrary, to do so would be incoherent and would lead to highly unsatisfactory procedural demarcation disputes. Employment tribunals are well capable of construing the terms of employment contracts governing remuneration and have to do so in many other contexts.

28 Those are my reasons for deciding the jurisdiction issue in favour of the appellant claimant in *Agarwal* and the respondent claimants in *Nexus*.

(B) Agarwal: the concession issue

29 As I have said, there is an issue in *Agarwal* as to whether the claimant is entitled to challenge the decision of the employment tribunal on the jurisdiction question. That issue arises as follows. It is important to note by way of preliminary that the claimant believed it to be necessary to make both the university and the health board respondents to her claim because of the unusual arrangements referred to at para 3 above.

30 The case was originally pleaded by all three parties on the basis that the employment tribunal would have to determine any issues raised by the claim as to the meaning and effect of the claimant's contract. However, at a case management hearing on 5 August 2015 Employment Judge Beard questioned whether it would have jurisdiction to do so, referring to *Southern*

Cross [2011] ICR 285. He directed an exchange of skeleton arguments on the point. The claimant's position was that it was questionable whether *Southern Cross* applied to Part II of the 1996 Act but said that in any event her claim did not require the construction of the contract in any relevant sense. Both respondents took the position that *Southern Cross* did not apply to Part II claims.

31 A preliminary hearing was directed before Employment Judge Clarke to determine various issues about the nature and effect of the contractual arrangements between the claimant, the university and the health board, including "[whether] the tribunal [had] jurisdiction to determine the claimant's entitlement to wages from the board or the applicable terms for that purpose". (I am not sure, but it does not matter for present purposes, why that issue is framed by reference only to the potential liability of the board.)

32 At the start of that hearing Employment Judge Clarke drew the parties' attention to the decision in *Somerset County Council v Chambers* 25 April 2013, which seemed to him to constitute binding authority—at employment tribunal level—that (in effect) *Southern Cross* did apply to Part II claims. Although he was entirely right to make that intervention, it increased the difficulties of both the procedural and the substantive analysis, and the hearing lasted two days, with the parties lodging substantial written submissions thereafter. The health board reversed its previous position and asserted that the tribunal did indeed have no jurisdiction to determine the essential issues or therefore to entertain the claim. The university declared itself neutral on the issue. Ms Brown for the claimant acknowledged that the tribunal was bound by *Chambers* and accordingly could not determine any issue about the effect of her contract with the board. She argued, however, that that did not matter because the party liable for payment was the university, and that as between her and it no exercise of contractual construction was required: indeed she positively relied on *Chambers* in order to rebut any argument that the tribunal could construe into her contract with the university a term entitling it to withhold pay if she was unable to perform her clinical duties for the board.

33 In a reserved judgment sent to the parties on 22 March 2016 Employment Judge Clarke rejected the claimant's case as summarised above and accordingly dismissed the claim on the basis that the tribunal had no jurisdiction to determine it.

34 In the Employment Appeal Tribunal [2017] ICR 967 Ms Brown maintained the position that she had eventually adopted in the employment tribunal: that is, she accepted that *Chambers* was correctly decided (as recorded by Slade J at para 31 of her judgment), but she argued that the determination of her claim against the university did not require any exercise of contractual construction. Slade J, like Employment Judge Clarke, rejected that argument.

35 Before us Mr Mitchell argued that Mr Sutton should not be allowed to go back on the concession made by Ms Brown in the employment tribunal and the Employment Appeal Tribunal and argue for the first time in this court that *Chambers* was wrongly decided, particularly since Ms Brown had to some extent positively relied on it in the employment tribunal (see para 32 above). He relied on the line of authorities beginning with *Kumchyk v Derby City Council* [1978] ICR 1116 and including such decisions of this court as *Jones v*

Governing Body of Burdett Coutts School [1999] ICR 38, and *Glennie v Independent Magazines (UK) Ltd* [1999] IRLR 719, which prescribe a strict approach to the taking of new points on appeal. He referred us also to *Jones v MBNA International Bank* (unreported) 30 June 2000, and in particular to the observations of May LJ at para 54, which emphasise that it will normally be unjust for a party to rely on appeal on a point, of law as much as of fact, that could have been advanced below. He characterised the position adopted by Ms Brown before the employment tribunal as deliberate and as a tactical choice from which it was unfair that the claimant should be allowed to resile when it no longer suited her. Mr Powell advanced a similar case.

36 I am unimpressed by those arguments. Once the employment tribunal had drawn the parties' attention to *Chambers* it is hard to describe Ms Brown's decision to proceed on the basis that it was correct as "tactical" in any pejorative sense. *Chambers* was apparently binding at that level. It is true that she could have argued that it was decided per incuriam, but that would have been an ambitious course, particularly where it was the judge himself who had suggested that it was dispositive of the issue. The position is a little different as regards the hearing before Slade J, since the Employment Appeal Tribunal is not bound by its own decisions, irrespective of the per incuriam argument; but it is its established practice not normally to depart from them, and I would be slow to criticise Ms Brown for continuing to proceed on the basis that *Chambers* was correct. The most that can be said is that she should, probably in both tribunals but certainly in the Employment Appeal Tribunal, have explicitly reserved the right to argue to the contrary in this court; and Mr Mitchell did indeed submit that her failure to do so was fatal, pointing out that the university had at both levels expressed itself as neutral on the point. But I do not believe that justice requires us for that reason to exclude the point. The issue is one of pure law, which was not dependent on any factual issues that the employment tribunal would have had to determine if the point had been taken or at least flagged. Mr Powell did not suggest that the health board would have abandoned its reliance on *Chambers*, at either level, if Ms Brown had put its correctness in issue; he could hardly have done so, given that it was the board that first jumped on the *Chambers* bandwagon.

37 Given the circumstances of this case it would, in truth, be a plain injustice if the claimant were not permitted to advance the argument that the employment tribunal in fact enjoyed the jurisdiction which it held that it could not exercise. That is particularly so since (as we would in any event have held in *Nexus*) the employment tribunal's decision about that was not only wrong but plainly wrong. I also think that some weight can be placed on the fact, though I do not say it is in any way decisive, that the employment tribunal's error was about the extent of its jurisdiction: it might be thought to be a particularly serious injustice where a tribunal does not simply get the answer to an issue of law wrong but wrongly declines to determine the dispute before it at all.

(C) Nexus: the construction of the agreement

The issue

38 As already noted, the issue on which the claim depends concerns how shift allowances should be calculated for Nexus's staff in the three "Red Book" grades following a collective agreement in 2012. It arises as follows.

A **39** Up to 2012 Red Book staff were, in addition to their basic pay, eligible for various allowances, including a productivity bonus of 25·5%, and a "Red Book bonus". The productivity bonus was a bonus only in name. It had in practice been paid automatically for many years, and payments under it were taken into account for pension purposes (specifically, in calculating Nexus's pension contributions): I will for convenience refer to it as "guaranteed", though that label was not used at the time. The Red Book B bonus depended on the performance of the business and was genuinely variable: the maximum in practice payable was of the order of £400 per year.

40 The terms governing shift allowances are set out in clause 1.4 of a document dated 27 February 2009 entitled "Conditions of Service for Metro Staff", which is incorporated into the individual employees' contracts of C employment. This specifies, by reference to a table, that shift allowances will be paid at the rate of "Basic pay plus [a percentage uplift]": the uplift varies between $12\frac{1}{2}$% and 33% according to the nature of the shifts concerned.

41 By the 2012 agreement it was agreed to consolidate the productivity bonus and part of the Red Book bonus (amounting to £200 per year) into basic pay: I give more details below. When the agreement came into effect in D April 2013, Nexus purported to implement it by distinguishing between two rates of "basic pay", denominated as "basic 1", which incorporated the agreed part of the Red Book bonus, and "basic 2", which incorporated also the productivity bonus. Basic 2 was used for the calculation of pension contributions but shift allowance was calculated by reference to basic 1.

42 It was not until over a year later that the claimants objected to that E method of calculation of shift allowance, but they did then claim that it failed to give effect to the agreement. It is their case that Nexus was obliged to apply the uplift to the basic pay as increased by the consolidation of productivity bonus as well as by the £200 on account of the Red Book bonus. If they are right the arrears at the date of the employment tribunal's decision were calculated at over £500,000: they will be a good deal more by now.

43 That account omits one refinement, namely that any increase in the F level of shift allowance has a consequential impact on the calculation of holiday pay, but that gives rise to no distinct issue and is an irrelevant complication for our purposes.

The 2012 agreement

44 At a meeting in May 2012 the RMT sought a 3·6% overall pay G increase, reflecting the increase in RPI, but weighted towards lower-paid employees. Nexus's initial response, by letter dated 25 May, was that there could be no general increase at all, because of public sector austerity, but that the parties should explore the possibility of "an alternative means of rewarding Red Book employees" along the lines of what had occurred the previous year, when an attendance allowance was consolidated into basic H pay. However, the letter emphasised that "in the current climate we will have to be mindful that any arrangement we make appears cost-neutral to Nexus".

45 There were further meetings of the joint negotiating committee, but we were not taken to the evidence or findings about them (subject to one point which I note at para 61 below). Following those meetings Nexus

wrote to the RMT on 10 October 2012 with a formal offer. Section 1 of the letter started by recapitulating the union's demand for an overall 3·6% increase. It then continues:

> "As discussed previously, the current economic climate is having a huge impact on public sector funding. The Local Government Association has notified UNISON that pay will be frozen in our sector for a third consecutive year and this is also the case with respect to the other [passenger transport executives].
>
> "At Nexus we have to be mindful of precedents being set in similar organisation from which we derive the majority of our funding. Any increase in overall employment costs would have a detrimental impact on our ability to reduce this deficit against the wider objective of maintaining services as far as practically possible.
>
> "However, it has always been our aim to reach an agreement that, whilst appearing cost-neutral to Nexus, would produce a result that is of benefit to all. With this in mind our offer is as follows: (a) To consolidate £200 of the Red Book bonus into basic salary for employees at Nexus Rail . . . 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. (b) To consolidate the productivity bonus (25·5%) into basic salary. This will benefit employees by having an official higher basic salary."

Other items are addressed in sections 2–4 of the letter but I need not set them out here. The letter concluded:

> "At the outset of our negotiations for the pay claim this year Nexus made it clear that it was unable to offer any general increase to pay. However, the trades union and management representatives of JNC have been committed to working together to find an alternative means of rewarding Red Book employees and I believe that this final offer achieves that aim."

46 It was common ground that that letter constitutes, as a matter of formal contractual analysis, Nexus's offer, and since the offer was in due course accepted it contains the definitive statement of the agreed terms. I shall have to return to it later, but it is convenient to note three points at this stage:

(1) The structure is clearly that the first two paragraphs quoted, and the first sentence of the third, are essentially introductory to the offer which is then made—"*With this in mind* our offer is . . ." Their purpose is to explain why the offer is being made (which includes why the union's demand is being rejected). In a more formal document they would be described as part of the preamble.

(2) In respect of both elements the offer is to consolidate the payments in question "into basic salary". That phrase is literally distinct from "basic pay", but it was not suggested that the distinction is significant.

(3) The second sentence in element (b) adds a gloss—i e the observation that the consolidation produces "an official higher basic salary"—which does not appear in (a). I will have to consider the significance of this in due course.

A **47** The RMT agreed to put the offer to a referendum. Its letter communicating its terms to members for that purpose, dated 22 November, summarised the relevant parts of the offer as follows:

> "—Partial consolidation of the Red Book bonus . . . into basic salary to the sum of £200 which will reflect a 1% increase in line with the Treasury's November 2011 announcement.
>
B —Consolidation of the productivity bonus into basic salary (cost-neutral, fully pensionable and provides a greater basic salary)."

Although that letter has no formal contractual status, and I consider below its admissibility as an aid to construction, I should make two points about it by way of clarification.

(1) The reference in the first bullet is to a Treasury announcement which
C we were told had been made subsequent to Nexus's October offer. The view was apparently taken that this did not require or justify any further increase, since the value of this element of the offer (given that the Red Book bonus had been genuinely discretionary) was 1% in any event.

(2) The basic salary as increased by the consolidation of productivity bonus is said to be "fully pensionable", i e to form the relevant salary for the
D purpose of any pension calculations. That was not in fact said expressly in Nexus's offer, but it was common ground before us that it was correct. It was not, however, a benefit of consolidation since the employment tribunal found that pensionable salary had been calculated on a basis including productivity bonus (though not Red Book bonus payments) for many years.

48 The members in due course decided that they were willing for the RMT to accept the offer, and it accordingly did so. We were not shown any
E formal letter of acceptance, but in any event the terms, as I have said, are to be found exclusively in the terms of Nexus's letter of 10 October.

The parties' cases

49 The claimants' case is straightforward. They say that the effect of the consolidation of the productivity bonus was explicitly to increase basic pay,
F by 25·5%, without any qualification as to the purposes for which it would do so; and since basic pay is specified as the base to which the uplift for shift allowance is applied the allowance must be calculated on the increased figure.

50 Nexus's principal answer to that is that it ignores its express, and clearly acknowledged, stipulation about cost-neutrality. It is self-evident that the raising of the base figure for the calculation of shift allowance could not be
G cost-neutral. The evidence before the employment tribunal, as summarised at para 2.13 of the reasons, was that "it would mean that the 2012 pay settlement resulted in a pay increase of 6·5% for some employees and an average pay increase of 5%". For the agreement to be construed in a way which produced that result would be contrary both to what the offer said and to commercial common sense. Mr Reade advanced some additional points, but they are essentially ancillary, and it is more convenient if I address them later.

H

The reasoning of the employment tribunal and the Employment Appeal Tribunal

51 It was common ground before us that the issue of the construction of the 2012 agreement—in practice, of Nexus's letter of 10 October—is one of

law. It is not necessary in those circumstances to review in detail the decisions of the employment tribunal and the Employment Appeal Tribunal, but their views, particularly since both are specialist tribunals, must be accorded proper respect, and I should summarise their reasoning.

52 As regards the employment tribunal, it was accepted before us that the judge's reasoning was incorrectly expressed, since at more than one point he referred to the "officious bystander" as the arbiter of a reasonable objective interpretation. But that does not necessarily undermine the substance of his reasoning, which was essentially that the language of the letter of 10 October 2012, as applied to clause 1.4 of the terms, was clear: the letter increased basic pay, and basic pay is the amount to which the shift allowance uplift is applied. As for the references to cost-neutrality, he believed that any mistake by Nexus as to the effect of the offer did not justify reading its words in anything other than their natural sense: as he put it, "the authorities make it clear that the tribunal's function is to declare what the parties have agreed, not what they ought to have agreed". He advanced at para 4.5 of the reasons three particular reasons why the union might in any event not have understood what Nexus said about cost-neutrality in the way now contended for. These were:

(1) The letter did not say that the offer *was* cost-neutral, only that it should *appear* cost-neutral. The judge says: "The respondent wished to increase the claimants' wages in a way that gave the impression that they were not breaching the Government's pay restrictions."

(2) The offer was not on any view cost-neutral because the consolidation of (part of) the Red Book bonus increased the amount both of shift allowance and of pension contributions.

(3) When the RMT in its own letter to members described the offer as "cost-neutral" it might not have been thinking of the cost to Nexus but rather have been making the point to its members that the consolidation of productivity bonus would not increase their own pension contributions (since they had to pay them on productivity bonus already).

53 As for the Employment Appeal Tribunal [2018] ICR 1207, Judge Hand QC found some errors in the employment tribunal's legal analysis but I need not specify them here. His own reasoning at paras 100–102 of his judgment was brief and in truth not in the end very different from that of Employment Judge Hunter. He took the view that Nexus's case involved the proposition that the 2012 agreement had introduced a qualification to what was otherwise the straightforward concept of basic pay in clause 1.4 of the terms and that there was no basis for that proposition in the contemporary documents or the other facts found. As for "commercial common sense", he said that the fact that Nexus had made a bad bargain, by making an agreement which cost far more than it intended, was not a sufficient basis for construing it otherwise than in accordance with its natural meaning.

Discussion and conclusion

54 Mr Reade advanced some criticisms of the details of the reasoning of the employment tribunal and the Employment Appeal Tribunal, but, as I have said, the essential question of construction is one which this court must decide for itself. As to that, his case remained as below, namely that the claimants' construction of the contract could not be right because its effect was that the agreement was self-evidently not cost-neutral.

A **55** The starting point must be the words of the offer itself. These read simply "consolidate the productivity bonus (25·5%) into basic salary". If the analysis stopped there the answer would be clear, since the result of any increase in basic salary is necessarily to increase the base for shift allowance purposes; and any industrial relations professional would understand that. There is no qualification: more particularly, there is no provision for two different kinds of basic pay, as in the scheme that Nexus adopted when purporting to implement the agreement (para 41 above).

B **56** However, it is trite law that a contractual document must be read as a whole. The real question is whether the natural meaning of the first sentence of element (b) of the offer, read in isolation, is modified by the other passages in the letter.

57 As to that, Mr Reade essentially relied on two features of the rest of
C the letter, namely the reference to cost-neutrality in the sentence immediately preceding the offer (repeating a similar reference in the May letter); and the observation about the consolidation of the productivity bonus providing an "official" higher basic salary. He also appealed to "commercial common sense". I take those points in turn.

"Cost-neutral"

D

58 It is of course not uncommon for one party to a contract to enter into it under a mistake as to what the financial effect of one or more of its provisions is: for example, they may get their arithmetic wrong, or they may (to come closer to what may have happened here) overlook the effect of one provision on the workings of a different provision. There are certain limited circumstances in which that mistake may allow them to rescind the contract;
E but no such argument was advanced before us, and the general rule is that they must take the consequences of their own error, however expensive it may turn out. However, in the present case the evidence of Nexus's understanding and intention that the effect of consolidation of the productivity bonus would be (or appear) "cost-neutral" is not extraneous but is spelt out in the very document which contains the terms of the
F contract. That makes a difference. The rule that a document must be read as a whole means that it would be wrong to disregard a statement by the offeror in the preamble to an (accepted) offer letter of what it understands the effect of its offer to be: such a statement cannot of course be determinative, but it must be given weight in an objective determination of the meaning of that offer.

59 Approaching the issue in that way, I have come to the same
G conclusion as the employment tribunal and the Employment Appeal Tribunal. My reasons are as follows.

60 First, although the whole of the offer letter must be considered, its structure cannot be ignored. A statement in the preamble of what the offeror intends the effect of his offer to be cannot have the same status as the formulation of the actual term being offered: it is an important aid to
H construction but it is not a condition in its own right. Although the court should strive to construe the offer in a way which reflects the declared intent, if in the end there is an irreconcilable conflict, the latter would have to prevail. In fact, as will appear, I do not think the present case is as stark as that, but the point still needs to be made. It might be said that to make a distinction of this kind between the "preamble" and the substance of

Nexus's offer letter is over-technical: we are concerned with an offer made in the course of an annual pay round and not a lawyer-drafted commercial contract. I quite accept that we should not take an over-technical approach; but parties to an industrial relations negotiation, just as much as businessmen, rightly attach importance to the formal record of what is offered and accepted. Nexus's letter of 10 October was evidently drafted with some care and clearly distinguishes between the introductory observations and the offer itself. The reasonable recipient of the letter would rightly afford some primacy to the latter.

61 Secondly, while if the claimants' construction were correct the consolidation of productivity bonus would not be literally "cost-neutral", because the knock-on effect on shift allowance would inevitably increase the overall wage-bill, I am not sure that it is appropriate to read the reference to cost-neutrality in that literal sense. It is not clear that the parties were thinking of the impact on shift allowances at all. There is no reference to them in the letter itself, and Mr Hendy pointed out that the employment judge made an express finding at para 2.12 of the reasons that there was "no debate or discussion at any stage [of the negotiations] about how the consolidation of the bonuses with basic pay should impact on the shift allowances"[3]. The reference to "cost-neutrality" may thus be focusing only on the fixed element in employees' pay, which would indeed only go up "officially" (i e not in substance, because the bonus was already guaranteed). This point overlaps with that considered at paras 66–67 below.

62 Thirdly, as the employment judge observed (see para 52(1) above), and as Mr Hendy emphasised, the letter does not say that the offer should *be* cost-neutral but only that it should *appear* cost-neutral. The reasonable recipient would regard that choice of words (which also appears in the May letter) as deliberate. It can only sensibly be understood as a signal by Nexus that it was prepared to make an offer that did at least arguably involve some extra cost as long as that was not apparent in the headline figures, so that it could plausibly say to its paymasters, being the relevant local authorities, that it was observing the Government's freeze on any increase in public sector pay. That would be consistent with an offer that produced no increase in the fixed element in employees' earnings (i e what had previously been the aggregate basic pay plus guaranteed productivity bonus, and would now be simply basic pay of the same amount). The fact that there would be a knock-on effect on overall earnings because of the raising of the base for shift allowance would not be immediately apparent. Mr Reade submitted that a reasonable recipient of the letter would not understand Nexus to be prepared to do anything so questionable as presenting a false picture to its public sector paymasters. I do not regard that as a realistic objection. It is well known that at times of pay restraint employers and unions may look for ways of presenting their agreements in a way which may at least arguably conceal the reality, and I do not believe that such a reading of the letter is implausible.

63 Fourthly, I note that when it came to implement element (a) in the agreement—that is, the consolidation of (part of) the Red Book bonus into basic pay—Nexus both treated the uplift as pensionable and, perhaps more significantly, took it into account in the calculation of shift allowance to create the so-called "basic 1" rate (see para 41 above). That necessarily produced an increase in overall wage costs. But the reference to cost-

A neutrality applied to *both* elements in the offer. If the term is given its literal meaning, the additional wage costs thus generated by element (a) meant that the offer was not in fact cost-neutral, irrespective of the meaning of element (b). That would suggest that "cost-neutral" ought to be interpreted, as I have already suggested for other reasons, as referring only to the fixed element in pay. This is the point made by the employment judge summarised at para 52(2) above. I do not think it has as much weight as might appear at
B first sight, because of the well-established (though sometimes counter-intuitive) rule that the subsequent conduct of a party in relation to a written agreement is inadmissible as an aid to construction: the terms of the offer letter itself say nothing either way about the impact of consolidation of (part of) the Red Book bonus on shift allowance (or indeed pension). But in my view it retains some weight as evidence at least that it is not outlandish to
C read the reference to cost-neutrality—or, rather, apparent cost-neutrality—as being concerned only with the fixed element in the employees' remuneration[4].

64 In the light of those points, taken cumulatively, I do not believe that the reference in the preamble to Nexus's intention that the offer should "appear cost-neutral" is sufficient to modify what would otherwise be the clear meaning of element (b) in the offer.

D **65** I should say that Mr Reade also put some weight on the reference to cost-neutrality in the union's letter to its members: see para 47 above. On a strict view I do not believe that that letter is admissible as an aid to construction, since at most it is evidence of the union's subjective understanding of the offer. But in any event it does not advance the argument. Even if the employment judge's suggestion that the union was referring to the
E cost to members rather than the cost to Nexus (see para 52(3) above) is not accepted, it casts no light on what cost-neutrality to Nexus actually means.

"Official"

66 The second sentence of element (b) in the offer says that the consolidation of productivity bonus will benefit employees "by having an
F official higher basic salary". Mr Reade submitted that what that referred to was the fact that an element in an employee's remuneration which is labelled as bonus, even if payment may be guaranteed in practice (or indeed in law), will often not be treated by a third party as an absolute entitlement: "bonus" would, for example, be likely to be disregarded if an employee was applying for a mortgage. Consolidation would avoid that disadvantage by removing the problematic label and making the amount of the bonus part of "official"
G basic pay. But he submitted that that point only needed to be made by Nexus because it was understood that the ostensibly "higher basic pay" would not confer any *other* benefit; and that meant that the offer could not have been understood to have any knock-on effect on shift allowance. He pointed out that the same point was not made in connection with element (a)—the consolidation of part of the Red Book bonus—and submitted that
H was evidently because, by contrast, that consolidation *would* have an effect on shift allowance.

67 Mr Reade's argument was persuasively advanced, and I see some force in it. But in the end I do not think that the implication that he seeks to draw from the second sentence of element (b) is sufficiently strong to overcome the natural expectation that an increase in basic salary would be

effective for all purposes. In the first place, his explanation of the force of the word "official", though plausible, is not the only possible explanation: it might equally be understood to refer to the fact that the 25·5% previously paid by way of bonus was now part of pay, with the "official" consequences of that, which would include increasing the base for shift allowance. But even if his explanation were correct, it would not necessarily mean that there was no other benefit. It is, I acknowledge, rather odd that Nexus, in trying to sell the benefits of consolidating productivity bonus, did not make the point—if this were its intention—that it would lead to increased shift allowances. But it is dangerous to read too much into what is not said. The omission is not in my view sufficiently obvious for the reasonable reader to draw the conclusion that there would thereafter be two kinds of "basic pay"—an "official" figure quotable to third parties (and used for pension purposes) and a special figure used for calculating shift allowance. On the contrary, one would expect such an unusual state of affairs to be clearly spelt out.

Commercial common sense

68 There is of course nothing contrary to commercial common sense in an enhancement in basic pay producing an increase in other entitlements which are calculated by reference to basic pay: on the contrary, that would be the normal expectation. Mr Reade's submission depends, rather, on the amount of the consequential increase—a 5% average pay increase for the employees affected (see para 50 above)—which he contends plainly made no sense, particularly in the context of the prevailing public sector pay constraints.

69 The extent and nature of the relevance of "commercial common sense" in the construction of a contract has of course been discussed in very numerous authorities, many of them recent. I do not think it is a useful exercise for me to review them here. It is sufficient to say that it has been clear since *Arnold v Britton* [2015] AC 1619, if it was not before, that while the commercial good sense of the potential outcomes which a particular construction might produce is certainly a relevant consideration when choosing between that construction and another, that cannot justify rejecting a construction simply on the basis that if the party in question had appreciated its effect it would not have agreed to it. As Christopher Clarke LJ put it in his judgment in *Wood v Sureterm Direct Ltd* [2015] EWCA Civ 839[5]:

> "30. Businessmen sometimes make bad or poor bargains for a number of different reasons such as a weak negotiating position, poor negotiating or drafting skills, inadequate advice or inadvertence. If they do so it is not the function of the court to improve their bargain or make it more reasonable by a process of interpretation which amounts to rewriting it. Thus: 'A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed . . . The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed . . . when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party': *Arnold* at para 20.

A "31. In effect a balance has to be struck between the indications given by the language and the implications of rival constructions . . ."

70 In my judgment the language of the offer as discussed under the previous heads is sufficiently clear that it is not right to "construe" them so as to provide for two kinds of basic pay, one to be used for shift allowance calculation and one for other purposes. I appreciate that the result is
B expensive for Nexus and, I am willing to assume, does not correspond to what it intended. I dare say that it could have negotiated a cheaper outcome if it had raised the issue of impact on shift allowance with the union (though that is not the same as saying that the union would have agreed to a deal corresponding to the contract as Nexus seeks to construe it); and in that sense the deal which, as I would hold, it in fact made was, from its point of
C view, contrary to business common sense. But that only means that this is a case of the kind identified by Christopher Clarke LJ in the passage quoted where it made a bad bargain. Although the employment tribunal made no findings about what Nexus's thinking was (rightly, because it was not concerned with subjective intention), the likelihood is either that those responsible for the offer simply failed to consider the possible impact on shift
D allowance of increasing basic pay ("inadvertence", in Christopher Clarke LJ's terminology) or that they did consider it but wrongly thought that the terms of the offer gave effect to their intention ("poor . . . drafting skills"). Whatever the reason, as the employment judge said, the function of the tribunal was "to declare what the parties have agreed, not what they ought to have agreed".

E *Conclusion*

71 I would accordingly dismiss Nexus's appeal.

Notes

1. The word "deductions" in the phrase "after deductions" must, it seems, be being used in a different sense from in the rest of the section. In ordinary parlance that
F phrase usually refers to the deduction of tax and national insurance under PAYE, and I am inclined to think that that is what must be being referred to here: so far as I can see, such deductions do not clearly fall within any of the heads of "excluded deductions" in section 14. The use of the same term in a different sense in the same provision is undoubtedly clumsy, but it was not argued before us that resolution of this conundrum was relevant to the issues which we have to decide.

2. I should note for completeness that it has been confirmed by a separate line of
G cases that the ratio of the decision of the House of Lords in *Delaney v Staples* (see para 17 above) means that a sum which cannot be quantified except by the exercise of some judgment by the tribunal—e g a discretionary bonus—is not "payable" within the meaning of the section: see *New Century Cleaning Co Ltd v Church* [2000] IRLR 27 (referred to at para 18(1) above); *Coors Brewers Ltd v Adcock* [2007] ICR 983 and *Tradition Securities and Futures SA v Mouradian* [2009] EWCA Civ 60; [2009] ICR Part 5, Recent Points (though in that case the bonus claimed was held to be
H quantifiable). But that is not an issue in these cases.

3. Although this was a finding about the prior negotiations Mr Reade did not object that it was inadmissible on that basis. That accords with common sense, but it has to be said that the law in this area is not straightforward, even after the reaffirmation of the traditional rule in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, and the point may be debatable. However, I need not reach a view

on the point: even if the evidence were inadmissible it is not necessary to my overall conclusion.

4. In fact, the consolidation of (part of) the Red Book bonus must in principle have had the potential to impact even on the fixed element, since it gave employees a guaranteed £200 when the bonus for 2013 or subsequent years might have been less. If that were the only respect in which the offer was not cost-neutral it would not have any significance for our purposes; but it perhaps marginally reinforces the impression that the concept of (apparent) cost-neutrality was not being applied with much rigour.

5. *Wood* was upheld in the Supreme Court, sub nom *Wood v Capita Insurance Services Ltd* [2017] AC 1173, and there is nothing in the judgment of Lord Hodge JSC that casts doubt on the passage quoted.

BEAN LJ

72 I agree.

HAMBLEN LJ

73 I also agree.

Appeal in the first case allowed.
Appeal in the second case dismissed.

ALISON SYLVESTER, Barrister

Supreme Court

Ayodele *v* Citylink Ltd and another

2018 Nov 29 Baroness Hale of Richmond PSC, Lady Black, Lord Kitchin JJSC

APPLICATION by the claimant for permission to appeal from the decision of the Court of Appeal [2017] EWCA Civ 1913; [2018] ICR 748

Permission to appeal was refused.
