Appeal No. UKEAT/0210/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 December 2016
Judgment handed down on 22 March 2017

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MISS M AGARWAL — APPELLANT

(1) CARDIFF UNIVERSITY
(2) CARDIFF AND VALE UNIVERSITY LOCAL HEALTH BOARD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALTHEA BROWN (of Counsel) Instructed by: Bindmans LLP 236 Gray's Inn Road London WC1X 8HB
For the First Respondent	MR DAVID MITCHELL (of Counsel) Instructed by: Eversheds LLP Solicitors 1 Callaghan Square Cardiff CF10 5BT
For the Second Respondent	MR GILES POWELL (of Counsel) Instructed by: Blake Morgan Solicitors One Central Square Cardiff CF10 1FS

SUMMARY

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

UNLAWFUL DEDUCTION FROM WAGES

The decision of the Court of Appeal in **Southern Cross Healthcare Co Ltd v Perkins** [2011] ICR 285 that the Employment Tribunal has no jurisdiction to construe a Statement of Written Particulars in a claim under **Employment Rights Act 1996** ("ERA") section 11 applies equally where it is necessary to construe a contract in order to determine a claim under **ERA** section 13 not to suffer an unauthorised deduction from wages. For these purposes a decision on whether terms are to be implied into the contract also falls within the **Southern Cross** prohibition on construction. **Marks & Spencer v BNP Paribas Securities Services Trust** [2016] AC 742 considered.

As it was necessary in determining the Claimant's claim under section 13 for wages referable to clinical duties to decide on the construction of her contract of employment with the First Respondent for academic work for them and clinical work for the Second Respondent including whether it contained implied terms regarding her ability to perform such duties the Employment Judge did not err in deciding that the Employment Tribunal had no jurisdiction to determine her claim. Such a claim would have to be pursued in the Civil Courts.

A **THE HONOURABLE MRS JUSTICE SLADE DBE**

1. Ms Agarwal ("the Claimant") is a urological surgeon. At the material time she was employed under what is described as a "clinical academic contract" performing lecturing duties for Cardiff University ("the First Respondent") and clinical duties for Cardiff and Vale University Local Health Board ("the Second Respondent"). For both duties she was paid by the First Respondent. Following a period of sickness absence on 1 October 2014 she returned to perform her academic duties. She did not return or was not permitted to return to perform her clinical duties in circumstances which are disputed between the Claimant and the Second Respondent. From the date of her return to her lecturing duties the First Respondent paid the Claimant half her total salary. By an ET1 on 19 May 2015 the Claimant brought a claim under **Employment Rights Act 1996** ("ERA") section 13 alleging that she had suffered unauthorised deductions from her wages in respect of clinical sessions since 1 October 2014.

2. By a Judgment with Reasons sent to the parties on 22 March 2016 ("the Judgment") following a Preliminary Hearing Regional Employment Judge Clarke ("the EJ") dismissed the Claimant's claim on the basis that the Employment Tribunal does not have jurisdiction to hear it. The Claimant appeals that decision. As before the EJ before me, counsel were Ms Brown for the Claimant, Mr David Mitchell for the First Respondent and Mr Giles Powell for the Second Respondent. For reasons which appear from the evidence before the EJ and his findings of fact Ms Brown rightly conceded that the Claimant's claim lies against the First Respondent.

3. All counsel stated that the arrangements under which the Claimant was engaged and remunerated in respect of academic and clinical duties are widely used and are of general

interest. It is not in dispute between the parties that in a claim under **ERA** section 13 which applies during the subsistence of a contract an Employment Tribunal has no jurisdiction to construe or construct the terms of the contract relied upon. The issue for determination on this appeal is therefore whether the EJ erred in holding that it was not possible to determine the Claimant's claim without having to engage in construction of her contract of employment with the First or Second Respondent.

Relevant Statutory Provisions

4. Employment Rights Act 1996

Section 13. Right not to suffer unauthorised deductions:

"(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.**

(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.**

(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 23. Complaints to employment tribunals:

"(1) 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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),**
>
> **..."**

Section 24. Determination of complaints:

"(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer -

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

..."

Section 25. Determinations: supplementary:

"(1) Where, in the case of any complaint under section 23(1)(a), a tribunal finds that, although neither of the conditions set out in section 13(1)(a) and (b) was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction shall for the purposes of section 24(a) be treated as reduced by the amount with respect to which that condition was satisfied."

5. Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994

Article 3. Extension of jurisdiction:

"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment."

6. Employment Tribunals Act 1996

Section 3. Power to confer further jurisdiction on employment tribunals:

"(2) Subject to subsection (3), this section applies to -

(a) a claim for damages for breach of a contract of employment or other contract connected with employment,

(b) a claim for a sum due under such a contract, and

(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,

..."

Outline Relevant Facts

The Contract of the Claimant with the First Respondent

7. The Claimant had been employed as a Clinical Senior Lecturer in the medical school of the First Respondent (and its predecessors) since 1 February 2003 under what is described as a "clinical academic contract". The initial appointment was described as "locum" and for a fixed

A term of two months. The Statement of Terms of the Claimant's employment incorporated by reference in the letter of offer of 5 February 2003 signed by her on 25 February 2003 included the following:

> **"28. Honorary Contract:**
>
> **28.1. It is expected that, in accordance with the normal practice of the relevant NHS Trust or Directly Managed Unit relating to appointments of this kind, an appropriate honorary contract will be awarded, to which such of the appropriate NHS terms and conditions will apply as do not contradict the terms and conditions set out in this Statement.**
>
> **...**
>
> **28.3. The withdrawal of a clinical honorary contract with a Trust or Directly Managed Unit may constitute grounds for the College to terminate this appointment in accordance with your contractual terms of notice."**

8. The First Respondent continued the employment of the Claimant from 27 October 2003 in the substantive post of University Clinical Senior Lecturer in Urology, initially on a probationary period.

9. By letter dated 26 February 2004 the Claimant was offered appointment to the substantive post of Clinical Senior Lecturer in Urology which commenced on 27 October 2003 at a salary of £70,715 on the terms in the enclosed Statement of Terms and Conditions. The Claimant signed the Terms and Conditions on 26 February 2004. The 2004 Terms included the following:

> **"10. Duties:**
>
> **Your duties are summarised in the job description attached to this Statement. These may vary from time to time to reflect the requirements of the College.**
>
> **...**
>
> **15. Absence through sickness or injury:**
>
> **If you are absent through sickness or injury you must comply with the College's requirements for reporting your absence, as contained in the College's Sick Pay Regulations, and explained in the College's Staff Induction Package.**
>
> **...**
>
> **28. Honorary Contract:**
>
> **28.1. It is expected that, in accordance with the normal practice of the relevant NHS Trust or Directly Managed Unit relating to appointments of this kind, an appropriate honorary**

contract will be awarded, to which such of the appropriate NHS terms and conditions will apply as do not contradict the terms and conditions set out in this Statement.

...

28.3. The withdrawal of a clinical honorary contract with a Trust or Directly Managed Unit may constitute grounds for the College to terminate this appointment in accordance with your contractual terms of notice.

...

32. Variation

The College may make alternations to the conditions of employment from time to time due to changing circumstances. Such alterations where appropriate shall be made after consultation with staff associations and trade unions recognised by the College or agreed with you. All changes shall be notified to you in writing within one month of the change."

10. In an undated letter the Claimant was informed by the First Respondent that new contractual arrangements for Clinical Academics in Wales had been agreed. The implications of the new contract in Wales for Clinical Academics holding Honorary Consultant contracts were set out. The relevant changes were:

- A nominal full time working week of 10 sessions (37.5 hours).
- New arrangements for commitment and clinical excellence awards.

The Claimant was informed that from 1 December 2003 her base salary would be £76,910. Additional awards which may be made referable to her clinical work were also listed.

11. By letter dated 23 April 2004 the Claimant was informed that a revised set of terms and conditions had been agreed. The Claimant was told that apart from the listed changes all the other terms and conditions of her contract of employment remained unchanged.

12. On 4 November 2004 the Claimant was informed that her probationary period had been satisfactorily completed and the appointment by the First Respondent confirmed.

13. The Terms and Conditions of Employment with the First Respondent as varied by the letter of 23 April 2004 remained in place and applied at the time of the claim for deduction from wages made by the Claimant.

14. On 29 January 2013 the Second Respondent approved an NHS Wales Sickness Absence Policy. It was to apply to all employees. By paragraph 10.3 a manager can refer an employee to the Occupational Health Service at any stage of the policy. The Occupational Health report may include advice on fitness or otherwise of the individual to return to work.

Contract of the Claimant with the Second Respondent

15. By letter dated 22 December 2003 the Second Respondent confirmed the appointment of the Claimant to "an honorary (unpaid) post as Honorary Consultant Urologist within the Cardiff and Vale NHS Trust for five sessions per week with effect from 27th October 2003". The Claimant was informed that her employment was with the First Respondent and was tenable only whilst she held the appointment with the Second Respondent. Amongst the conditions of appointment to the Second Respondent was the statement that:

> **"The appointment is in accordance with agreements entered into between the University of Wales College of Medicine and this Trust with regard to the above appointment. ..."**

16. In 2013, negotiations between the Welsh Government exercising devolved powers in relation to health, and the BMA resulted in a model "Honorary Consultant Contract" for clinical academics. The preamble records:

> **"(ii) This honorary contract should be read in conjunction with your contract of employment with your substantive employer. Taken together they provide the full contractual framework in which you are expected to deliver your agreed duties. ..."**

The Model Honorary Consultant Contract further provided:

> **"13.** ***Sickness absence and medical examinations***

A

...

13.2. The Health Board/Trust may require you at any time to undergo a medical examination by a medical practitioner nominated by the Health Board/Trust, including the Health Board/ Trust's Occupational Health Physician. ...

14. *Pay and expenses*

B

14.1. Your basic salary will be paid by your substantive employer, under the terms set out in your substantive contract.

...

16. *Effects of termination of your substantive contract of employment*

Should your substantive contract of employment be suspended, or terminated, at any time, this will result in a review of the terms and conditions of your honorary appointment with this organisation.

C

...

19. *Terms of employment*

This honorary contract replaces entirely any previous honorary contract or equivalent and sets out the entire terms and conditions of your appointment with this organisation, such that all previous agreements, practices and understandings between us (if any) are suspended and of no effect.

D

20. *Application of terms and conditions for honorary NHS consultants*

20.1. The terms and conditions of service which apply to the duties under this honorary contract are those which apply to medical and dental staff employed in Wales, as amended from time to time.

..."

E

17. At paragraph 32 of his Judgment the EJ recorded that:

> **"32. During her oral evidence the claimant confirmed that she did not sign up to the new model contract. ..."**

F

Arrangements between First and Second Respondent regarding Clinical Academic Staff

18. The evidence referred to by the EJ regarding the arrangement between the Respondents regarding the clinical academic staff was a document titled "Memorandum of Understanding Joint Staff of Universities and NHS Organisations in Wales 2012". The stated background to the Memorandum was a response to a decision of a VAT Tribunal in 2005:

G

> **"1.2. ... that there had been a supply of staff from the University to the NHS, where University employed clinical academic staff provided patient care in NHS organisations. Such supplies are liable to VAT at the standard rate. ..."**

H

A For the avoidance of doubt it was stated that the Memorandum of Understanding did not change or modify contracts of employment or terms and conditions of service. The Memorandum of Understanding included the following:

> **"6.3. Joint working arrangements including job planning and appraisal provide for individual employers to take decisions on matters concerning, amongst other things, pay progression, annual and other leave and disciplinary matters.**
>
> **...**
>
> **7. *Contracts of Employment***
>
> **...**
>
> **7.1.2. ... This Memorandum of Understanding clarifies that:-**
>
> > **• The substantive and honorary contracts, or their equivalent, in the University and NHS organisation(s) constitute two or more separate contracts of employment.**
> >
> > **...**
> >
> > **• Each employer should follow its own procedures regardless of any decisions/action taken by the other(s) (e.g. dismissal by one employer does not automatically result in dismissal by the other(s)).**
>
> **8. *Remuneration***
>
> **8.1. Where an employee has two or more University and NHS employers under a single job plan, the total remuneration is expected to comprise payment from each employer in agreed proportions. It is usual for one employer to pay the total ... employer's/employers' share, including the employer pension contribution.**
>
> **8.2. There is no requirement, for this purpose, to calculate on a detailed basis the actual amount of time spent in each employment and the actual recharge between organisations may operate at the level of net cost in the context of the joint working arrangements between the University and the NHS.**
>
> **...**
>
> **10.1. ... a model protocol has been provided by UCEA to Universities which provides a basis for co-operative working between Universities and NHS organisations in relation to a number of issues.**
>
> **10.2. Four key elements of such a protocol should be:-**
>
> > **...**
> >
> > **• The express written permission of the member of staff involved is obtained for the exchange of both personal data and sensitive personal data between University and partner NHS organisation.**
> >
> > **..."**

Annex A which sets out documents relating to joint management of staff by Universities and their NHS Wales Partner organisations includes:

> **"New Consultant Clinical Academic Contract:**
>
> **Revised Documentation compromising:-**

1. Model Consultant Clinical Academic Honorary Contact New Consultant Clinical

Contact Welsh Government for further information"

19. The Memorandum of Understanding between the NHS and the First Respondent resulted in a document produced in September 2012 titled "Protocol for the joint arrangements for the employment of clinical academic doctors and dentists". The protocol included the following:

> **"2. The substantive academic contract and the honorary NHS contract are both contracts of employment. The clinical academic will therefore have two employers, each of whom will have obligations to the employee under its respective contract of employment and arising (for example under statute) from the employment relationship generally.**
>
> **...**
>
> ***Disciplinary and other Procedures***
>
> **7. The University and the NHS body acknowledge that as employers of the clinical academic member of staff, each may wish, during the employment of the clinical academic concerned, to take action (whether in terms of dismissal or action falling short of dismissal) in respect of allegations or matters such as:**
>
> > **...**
> >
> > **c) assessing medical fitness to undertake all or part of the duties of employment (including consideration of the making of reasonable adjustments under the Disability Discrimination Act 1995 or the Equalities Act 2010 where the obligation to make such adjustments applies)**
> >
> > **...**
>
> **9. The University and the NHS body acknowledge that:**
>
> > **a). there may be occasions on which the University has grounds for considering such action under its appropriate procedures, and the NHS body does not (and *vice versa*);**
> >
> > **...**
>
> **10. The University and the NHS body therefore agree that:**
>
> > **...**
> >
> > **b) the following issues of conduct and capability are matters which would ordinarily fall to be dealt with under the NHS body's disciplinary or equivalent procedures:**
> >
> > > **• any disciplinary or capability issue arising in connection with a clinical academic's clinical/NHS duties**
> >
> > **...**
>
> ***Potential disciplinary action***
>
> **11. Where either the University or NHS body has grounds for considering formal procedures with a member of clinical academic staff on the grounds on misconduct, performance, absence or ill health, up to [and] including dismissal, each will advise the other of that fact, via the respective Directors of Human Resources, and:**
>
> > **...**

d) (in cases of sickness absence or medical incapacity) the University and the NHS body shall consider whether it is necessary to obtain a medical report (or further medical reports) from an Occupational Health adviser or from an independent medical expert on the ability of the employee to perform the duties of his/her employment. The University and the NHS body shall discuss the questions/issues to be raised with such medical adviser, in particular any issues arising under the Equalities Act 2010 or the Disability Discrimination Act 1995 (if it relates to a period before October 2010), including any duty to make reasonable adjustments."

Events Leading to the Claimant's Claim

20. The Claimant was off sick between 5 August 2013 and 30 September 2014. The EJ noted at paragraph 3:

> **"3. ... For the purposes of this judgment it is relevant to note that the reasons for the claimant's lengthy sickness absence included stress and anxiety resulting from difficult relationships with her clinical colleagues. This had prompted her to bring an unsuccessful grievance about their conduct."**

21. Following an Occupational Health report obtained by the First Respondent the University were satisfied that the Claimant was fit to return to work for which she was employed by them, the academic sessions. She resumed such work on 1 October 2014 and was paid for these. The First Respondent was not put in funds by the Second Respondent to pay the Claimant. She had not resumed performing clinical work for them. The First Respondent did not make any payments to the Claimant in respect of clinical sessions not worked from 1 October 2014. She was paid 50% of her normal pay.

22. The Second Respondent was not satisfied that the Claimant was fit to return on 1 October 2014 to work her clinical sessions. The EJ found that the Second Respondent was:

> **"5. ... particularly concerned that her relationship with her clinical colleagues remained strained and that this might impact upon her clinical judgment. ..."**

In later correspondence, the Medical Director of the Second Respondent stated that in October 2014 the Claimant informed him that her illness was 'work related stress' related to 'personal relationships with' her colleagues. The Second Respondent regarded cooperation between

clinical colleagues as extremely important and did not agree with the Claimant that she was able to work without engaging in mediation with them. Further, the Claimant withheld permission for the Occupational Health report provided to the First Respondent to be released to the Second Respondent although an email before the EJ on 13 October 2014 shows that she agreed that there could be a general discussion about recommendations in the Occupational Health report.

23. A letter dated 27 November 2014 from the Second Respondent to the Claimant refers to a meeting with her on 20 October 2014 at which she was asked whether she would be prepared to enter into "some form of process, potentially mediation, to enable you to rebuild working relationships". It was asserted in the letter of 27 November that the Claimant had later resiled from her willingness to participate in mediation.

24. In a letter of 19 May 2015 to the Claimant, the Medical Director of the Second Respondent referred to her refusal to participate in mediation with her colleagues until after further investigation of complaints she had raised. He stated that he had significant concerns about the potential effect of the current state of working relationships on the clinical working environment including on patient safety. The Medical Director concluded by formally asking the Claimant to let him know by 26 May 2015 whether she was now willing to take part in the mediation process. He also asked the Claimant to confirm that she was willing to attend an Occupational Health assessment with the Second Respondent's department to consider her health and ability to carry out clinical duties.

25. On 19 May 2015 the Claimant issued her claim in the Employment Tribunal.

The Issues before the Employment Judge and the Positions of the Parties

26. The EJ observed at paragraph 17 that the issues to be resolved:

> **"17. ... continued to evolve throughout the hearing. The closest we got to an agreed list (as proffered by counsel) was as follows:**
>
> **(1) Did the claimant have a legal entitlement to wages in respect of her clinical work for the period after 1 October 2014, as per the *Beveridge* case (i.e. was she ready, willing and able to perform clinical work)?**
>
> **(2) If so, which of the university or the health board bore liability to pay her such wages? This broke down as follows:**
>
> **(a) Did the claimant have an entitlement to wages from the health board?**
>
> **(b) If so, on what terms?**
>
> **(c) Did the tribunal have jurisdiction to determine the claimant's entitlement to wages from the health board or the applicable terms for that purpose?"**

27. The EJ summarised the respective positions of the parties as follows:

> **"34. For the claimant, Ms Brown has now accepted that the claimant has no right to wages from the health board. ... The university is responsible for paying the claimant and, once she was ready, willing and able to perform clinical work for the health board after 1 October 2014, the university was responsible for paying her in that regard. It was not the concern of the claimant and should not now be the concern of the tribunal as to whether the university was able to secure those funds from the health board. She avers that the tribunal cannot construe by implication terms into the honorary contract between the claimant and the health board by which the claimant was under a duty to co-operate with an occupational health referral and/or submit to mediation.**
>
> **35. For the university, Mr Mitchell maintains that it played in no part in managing the claimant in respect of her clinical work and no role in deciding whether or not she was fit (in the sense of ready, willing and able) to return to clinical work. In respect of the claimant's clinical work, it was simply the health board's paymaster. As to the dispute between the claimant and the health board, it has consistently adopted a position of neutrality.**
>
> **36. For the health board, Mr Powell maintains that it is impossible for the tribunal to determine the issues underlying the claimant's claim without construing the contractual relationship between her and the university and/or health board. As the employment relationship is a continuing one, the tribunal has no jurisdiction to engage in such construction - and, it can be inferred, the health board considers that the case is properly one for the civil courts. If the tribunal were to accept jurisdiction over the case, all pertinent matters relevant to the claimant's fitness for work should be held over for the final hearing."**

The Conclusions of the Employment Judge

28. The EJ considered as binding upon him the decision of HHJ Peter Clark in the Employment Appeal Tribunal in **Somerset County Council v Chambers** UKEAT/0417/12. Mr Chambers claimed a higher rate of pay to which he would have been entitled had he been a full time employee instead of the lower rate he was paid as a locum social worker. HHJ Peter

Clark held that the agreement between the parties as to the Claimant's level of pay as a locum is contained in the letter of 31 July 2003. HHJ Peter Clark held at paragraph 17:

> **"17. ... The ET had no jurisdiction to embark on an enquiry into what he ought to have been paid if he was to be regarded as an employee in the context of a WA claim, any more than it would be appropriate under a s.11/12 reference; see *Southern Cross Healthcare v Perkins* [2011] ICR 285; *Mears v Safecar* [1982] ICR 626, both CA (assuming that he was as an employee and therefore entitled to make such a reference). Any such claim lies in breach in contract."**

29. The EJ held at paragraph 38:

> **"38. As all parties have accepted that I am bound by the EAT's judgment in the *Chambers* case, the crucial question is whether it is possible for me to determine the claimant's Section 13 ERA claim without having to engage in contractual construction. In my judgment, it is not possible."**

30. The EJ held that in order to determine whether the Claimant was entitled to wages in respect of her clinical work after 1 October 2014 it was "necessary to engage in a process of construction of the terms under which she was employed at the material time".

(1) At 40.1 the EJ held that he would be bound to hold that the Claimant was employed by two employers and that "for the purposes of her clinical work, she was employed by the health board even if remunerated by the university".

(2) At 40.2 the EJ then considered that he would have to determine whether it would:

> **"... be possible to imply an obligation on the health board to pay her wages directly for clinical sessions, notwithstanding an apparently express term that such work was unpaid? That is a clear question of construction, which is outside the tribunal's jurisdiction."**

(3) At 40.3 the EJ held that he might be required to decide the contractual arrangements between the First and Second Respondents, and that the Tribunal had no jurisdiction to construe the terms of a contract between them.

(4) At 40.4 the EJ asked whether the Claimant's contract of employment with the First Respondent was subject to an implied term that it would only pay the Claimant

when put in funds by the Second Respondent to do so. The EJ observed that would be a question of construction.

(5) At paragraph 40.5 the EJ posed the question in circumstances where the Second Respondent was required to pay the Claimant (or put the First Respondent in funds) for her clinical work when she was ready, willing and able to perform it, would that be subject to an implied term that she should co-operate with an Occupational Health referral by the Second Respondent and/or an implied term that she should submit to mediation with her clinical colleagues. The EJ considered that this again was a question of construction. The EJ concluded by holding at paragraph 41:

> **"41. ... In this case... the tribunal is required to construe the terms of a complex interdependent employment relationship involving three parties and up to three contracts (claimant-university, claimant-health board and university-health board). It is a matter for the civil courts."**

Discussion

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 would fall by an employee continuing in employment would fall outside the jurisdiction of the Employment Tribunal. It would have to be brought as a contract claim in the Civil Courts and not as a deduction from wages claim under the **ERA** section 13 in the Employment Tribunal. The legislative provisions giving Employment Tribunals jurisdiction to determine a claim for unauthorised deductions from wages under **ERA** section 13 and claims for a sum due under a contract or damages for breach of contract are different. Under the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** Article 3, a claim for a sum or for damages under a contract of employment may only be brought in the Employment Tribunal if the claim arises or is outstanding on the termination of the employee's employment. A claim under the **1994 Order**

may only be heard in an Employment Tribunal if a Court would have jurisdiction to determine the claim. The right not to suffer unauthorised deduction from wages is conferred by **ERA** section 13 and such a claim may only be brought in the Employment Tribunal.

32. Counsel did not seek to suggest that **Chambers** was wrongly decided. They agreed that a Tribunal did not have jurisdiction to hear and determine a claim under **ERA** section 13 if it required a decision on the construction of the contract of employment.

33. With due respect to the EJ, in my judgment it is not the judgment in **Chambers** which is material to the issue of whether the Employment Tribunal had jurisdiction to determine the Claimant's section 13 claim but **Southern Cross**. In **Chambers** the Claimant's level of pay was set out in a letter to him from the Council. His claim was based on an argument that he would have been paid at a higher rate if he had been full time rather than working about one-third of a full timer's hours. The issue was not one of construction of a contract.

34. In **Southern Cross** the Claimants claimed to be contractually entitled to five days' long service uplift on top of increased statutory holiday entitlement of 28 days. They brought their claims under **ERA** sections 11 and 12 contending that the Statement of Particulars of Employment given by their employer under **ERA** section 1(4)(d)(i) should have so provided. The Employment Tribunal and the EAT upheld the claims. Maurice Kay LJ in the Court of Appeal explained that the question before the Court was whether Employment Tribunals have jurisdiction to construe contractual terms and conditions contained or referred to in a written statement of particulars.

35. After consideration of **Mears v Safecar Security Ltd** [1982] ICR 626 and other authorities Maurice Kay LJ referred at paragraph 28 to a passage in *Harvey on Industrial Relations and Employment Law*, Division A11 in which at paragraph 120 it was said of **ERA** section 11:

> **"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."**

Maurice Kay LJ held:

> **"29. In other words, the reference in section 11(1) of the 1996 Act to a determination of "what particulars ought to have been included", is not an invitation to judicial creativity, even under the rubric of "construction".**
>
> **30. In my judgment this approach is both established and correct. The alternative, expansive approach would open the door to a multitude of cases advanced on a contractual basis in a manner totally at variance with the consistent reluctance to enlarge the breach of contract jurisdiction of employment tribunals to embrace workplace disputes during the currency of a contract of employment. This may be regrettable but it is, as regards both law and policy, well settled."**

36. In **Southern Cross** Maurice Kay LJ explained the difference between identifying the terms of a contract of employment and construing the terms of, in that case, the statutory statement of terms giving rise to the claim under **ERA** section 11. It was within the jurisdiction of the Tribunal to identify the relevant terms of the contract of employment but not to construe the terms of the statutory statement. Maurice Kay LJ held at paragraph 34:

> **"34. ... the only forum with jurisdiction in relation to the construction issue was and is the ordinary civil court. That may be regrettable but it is the consequence of sections 11 and 12, coupled with the unwillingness of successive governments to broaden the contractual jurisdiction of employment tribunals. ..."**

Because he held that the Employment Tribunal had no jurisdiction to construe the document said to confer a contractual entitlement to holidays, Maurice Kay LJ held that it would be inappropriate to say anything about the construction issue.

A

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 **ERA** section 11 applies equally to the construction of a contract in a claim not to suffer an unauthorised deduction from wages under **ERA** section 13. The statement of particulars given under section 1 should record the agreement between employer and employee with regard to certain matters. Wages for the purposes of the section 13 claim are defined in section 27. These include the rate of remuneration. A claim under section 13 depends upon deciding the total amount of wages properly payable. This should be ascertainable from the statement of particulars given under section 1.

B

C

D

38. As applied to the facts of this case, wages for the purposes of section 13 are sums paid to the Claimant under her contract of employment. The Claimant claims that under her contract of employment with the First Respondent she is entitled to the full amount of wages from 1 October 2014 because from that date she was "ready, willing and able" to perform her duties for the Second Respondent. Accordingly 50% of her salary should not have been withheld in respect of her clinical sessions for the Second Respondent.

E

F

39. All parties to the current appeal agree that the Employment Tribunal has no jurisdiction to determine the Claimant's claim under **ERA** section 13 if it requires construction of her contract of employment.

G

40. Ms Brown for the Claimant drew attention to the distinction drawn by Lord Neuberger in **Marks & Spencer v BNP Paribas Securities Services Trust** [2016] AC 742 at paragraphs 22 to 31 between the exercise of construing the words of an agreement and of implying terms into it. It was submitted that where the language of the contract of employment is clear the

H

A Tribunal has jurisdiction to determine a section 13 claim and does not need to stray into the arguably impermissible territory of deciding implied terms which in any event may not fall within the **Southern Cross** prohibition on construction.

B

41. The Second Respondent lodged an Answer raising additional grounds supporting the decision of the EJ that the Tribunal had no jurisdiction to determine the **ERA** section 13 claim. These included at paragraph 2.1 the need for construction of the Claimant's contract of C employment with the First Respondent as involving consideration of whether the Claimant was obliged to consent to the release of the Occupational Health Report obtained by the First Respondent to the Second Respondent to attend the Second Respondent's Occupational Health D Department as required by them and to participate in mediation with her work colleagues.

42. Mr Powell sought to uphold the decision of the EJ on additional grounds by contending E that to the extent that it is not encompassed within paragraph 40.5 of the Judgment of the EJ, the contract of employment between the Claimant and the First Respondent needed to be construed to decide whether it contained the implied terms referred to in paragraph 2.2 of the Second Respondent's Answer. The Second Respondent contended that whether express or F implied the Claimant had not complied with these terms and was therefore not entitled to payment in respect of her clinical duties.

G 43. Mr Mitchell for the First Respondent contended that the EJ did not err in law in concluding that the Claimant's section 13 claim raised issues of construction which took it out of the jurisdiction of the Employment Tribunal. He contended that the EJ was required to H consider the Second Respondent's possible liability to the Claimant in wages. The Claimant had two contracts, one with each of the Respondents. The liability of the parties to pay her

wages for the clinical sessions depends on the construction of the contracts. As was observed by Mummery LJ in **Luke v Stoke-on-Trent City Council** [2007] ICR 1678 at paragraph 4 the contract had to be construed as a whole and in the context of the surrounding circumstances. Terms would be implied if it was necessary to do so for the purposes of "business efficacy".

44. Mr Mitchell contended that it would be wrong to consider the issue of pay in a vacuum. The Claimant had an honorary contract with the Second Respondent for her clinical work. The contract with the First Respondent for her academic work and that with the Second Respondent for clinical work were interdependent. Mr Mitchell relied upon the judgment of the Court of Appeal in **Stack v Ajar-Tec Ltd** [2015] IRLR 474 to support the contention that the absence of payment terms did not prevent there being a contract of employment between the Claimant and the Second Respondent. Whilst the First Respondent considered the Claimant able to carry out academic duties after 1 October 2014 the Second Respondent had their own procedures and took their own decision about her fitness to perform her clinical duties. Mr Mitchell submitted that the EJ rightly considered at paragraph 40.5 of his Judgment that the Second Respondent's case that the Claimant's contract was subject to an implied obligation to comply with its Occupational Health and/or mediation requirements strayed into the (impermissible) territory of construction.

45. In my judgment **Paribas** does not prevent decisions on the existence of implied terms from being considered as questions of construction within the meaning of the **Southern Cross** exclusion. Thus the determination of section 13 claims which necessitate consideration of implied terms are removed from the jurisdiction of Employment Tribunals. Whilst Lord Neuberger distinguished the exercise of determining the meaning of express terms,

A construction, from that of deciding whether a contract was subject to implied terms, Lord Clarke held at paragraph 76:

> **"76. … However, like Lord Neuberger PSC (at para 26) I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. On that basis it can properly be said that both processes are part of construction of the contract in a broad sense."**

B

46. Ms Brown contended that the material contract for the purposes of the section 13 claim is that between the Claimant and the First Respondent. I agree. It is the contract under which the Claimant is entitled to receive payment. As explained in **Stack**, there may be a contract of employment without an entitlement to receive payment. The documentation in this case suggests that the Claimant had two contracts of employment; one with the First Respondent and one with the Second Respondent. The only contract which expressly provided for payment for her work was that with the First Respondent. A claim under **ERA** section 13 lies against the employer who has the obligation to pay wages to the employee. Ms Brown rightly pursues the Claimant's claim against the First Respondent and not the Second Respondent as it was the First Respondent who agreed to pay her wages.

47. The basis of the claim advanced by the Claimant is that she was "ready, willing and able" to perform her duties for the Second Respondent from 1 October 2014. Accordingly she claims she is entitled to the full amount payable under her contract with the First Respondent without the 50% deduction made as she was not performing her clinical duties for the Second Respondent.

48. Integral to her case of entitlement to wages in respect of her clinical duties is the Claimant's assertion that she was able to perform these duties. In these circumstances the first question for the EJ to determine was whether the Claimant's contract of employment with the

First Respondent contained any terms, express or implied, bearing on whether in the circumstances there were preconditions to payment for clinical sessions and whether the Claimant fulfilled these from 1 October 2014.

49. The EJ touched on such preconditions in paragraph 40.5 of his Judgment. He asked whether any obligation of the Second Respondent to pay the Claimant or put the First Respondent in funds to pay her for clinical sessions would be subject to an implied term:

> **"40.5. … that she should co-operate with an occupational health referral by the health board and/or an implied term that she should submit to mediation with her health board colleagues? …"**

50. In my judgment the relevant question is whether the contract of employment under which the Claimant was entitled to payment, that between her and the First Respondent, was subject to express or implied terms setting out relevant pre-conditions on her ability to perform clinical duties for the Second Respondent. If, for example, it was a contractual requirement that after a period of sickness absence the Claimant agreed to undertake an Occupational Health assessment arranged by and reporting to the Second Respondent, it may be said that until she had undertaken such an assessment and agreed to comply with the Second Respondent's decisions as whether she was fit to return to work having considered the assessment, although she may have been ready and willing, she was not able to perform her clinical duties for the Second Respondent and so was not entitled to payment for her clinical sessions.

51. Similar considerations apply to whether the Claimant's contract of employment with the First Respondent was subject to an express or implied term requiring the Claimant to participate in mediation with her clinical colleagues before being able to resume her duties for the Second Respondent.

52. Just as Maurice Kay LJ held at paragraph 33 in **Southern Cross** with respect to identifying the terms of the contract of employment to determine whether the statutory statement correctly reflected them, so too in this case a Tribunal would have jurisdiction to determine the section 13 claim if the extent of the necessary contractual enquiry were identifying relevant terms of the contract giving rise to the entitlement to pay. However if applying **Southern Cross** it were necessary to construe the terms of the Claimant's contract of employment with the First Respondent including any documents incorporated into that contract the Employment Tribunal would have no jurisdiction. Nor would the Tribunal have jurisdiction to decide whether the entitlement to pay was subject to implied terms.

53. A mere assertion that a section 13 claim gives rise to construction issues or questions of whether terms should be implied into a contract of employment would not take the claim outside the jurisdiction of the Employment Tribunal. However where the conditions of entitlement to pay or those requiring or authorising deductions from pay are not clear and require construing the contract of employment and/or a decision on implying terms, the claim would fall outside the jurisdiction of the Employment Tribunal. As observed by Maurice Kay LJ in **Southern Cross** it is not the role of this Court to embark upon a construction of the Claimant's contract of employment. That may be for another Court on another occasion. The following observations are made in considering whether the determination of the Claimant's claim required construing her contract of employment with the First Respondent and/or whether it included implied terms. It is not the role of the Employment Tribunal or this Court to decide on how the contract is to be construed or what terms, if any, are to be implied.

54. It is not necessary for deciding the issues raised on this appeal to express a view on the charging and "paymaster" arrangements between the two Respondents. It appears from the

Memorandum of Understanding reached in 2012 that previous arrangements may have given rise to VAT charges. Unlike the EJ I do not consider a decision about the contractual arrangements between the two Respondents in respect of payments to the Claimant material to her claim.

55. In my judgment the EJ erred in failing to focus his considerations on the terms express or implied of the contract of employment under which the Claimant was entitled to remuneration, that with the First Respondent. The Statement of Terms and Conditions of Employment dated 26 February 2004 provided by paragraph 28.1 that it was expected that an appropriate honorary contract would be awarded to the Claimant and to which such of the appropriate NHS terms and conditions were to apply as do not contradict the terms in the First Respondent's statement. Consideration of NHS Terms would no doubt include scrutiny of the provision in the model honorary consultant contract entitling the NHS Trust to require an honorary consultant to undergo a medical examination. The fact that the Claimant was entitled to and did withhold her consent to disclosure to the Second Respondent of the Occupational Health report obtained by the First Respondent may be said to be another factor indicating that it was an express or implied term of the contract of employment with the First Respondent that the Claimant was obliged to comply with the health procedures of the Second Respondent in respect of her clinical work. Further it may be said that different criteria would be relevant in assessing fitness for the different tasks of lecturing and of clinical work.

56. Recognition in the First Respondent's contract of employment that the Claimant would be subject to non-conflicting NHS Terms and Conditions applicable to performance of duties under the honorary consultant contract is unsurprising given the mutually dependent and

A symbiotic co-existence of the two contracts of employment notwithstanding that one is described as substantive and the other honorary.

B 57. Whilst the EJ rightly referred to a question of whether there was an implied term that the Claimant should co-operate with an Occupational Health referral by the health board and/or that she should submit to mediation with her health board colleagues, in my judgment he erred in considering whether this was a term of an obligation of the Second Respondent (if there were C found to be such) to pay the Claimant. The correct analysis is that advanced by Mr Powell in the Second Respondent's Answer as an additional ground for supporting the decision of the EJ, that consideration of whether the Claimant's contract of employment with the First Respondent D should be construed to include such terms or whether they are to be implied in that contract is necessary for determination of her claim.

E 58. The Claimant has advanced her claim under section 13 on the basis that she is entitled to be paid by the First Respondent for her clinical sessions which she had wished to work for the Second Respondent from 1 October 2014 saying that she was not just ready and willing but also able to work them. The Second Respondent did not regard the Claimant as able to resume F clinical duties without mediation with her clinical colleagues. The Claimant failed to comply with requests that she engage in such mediation. Further and arguably related to her failure to engage in mediation with her clinical colleagues, difficulties with whom she had attributed G stress and sickness absence. By letter dated 19 May 2015 the Claimant was asked to consent to undertake an Occupational Health assessment by the Second Respondent. She failed to give such consent. Whether the Claimant was contractually obliged to consent to mediation with her clinical colleagues and/or to undertake an Occupational Health assessment by the Second H Respondent is central to the question of the Claimant's entitlement to payment for clinical

sessions after 1 October 2014 which she did not perform. Deciding whether the contract of the Claimant with the First Respondent contains such obligations requires construing its terms including whether it included implied terms requiring her to take part in mediation with her clinical colleagues and to co-operate with the Second Respondent in enabling them to obtain their Occupational Health report. The need for decisions on the construction of the contract including whether it contained implied terms leads to the conclusion that the Employment Tribunal did not have jurisdiction to determine the Claimant's claim under **ERA** section 13. The venue for pursuing a claim for an alleged shortfall in her wages is in the Civil Courts. Parliament has conferred a limited contractual jurisdiction on Employment Tribunals in the **Extension of Jurisdiction Order**. Other contract claims can only be pursued in the Civil Courts. As observed by the EJ in this case and by Maurice Kay LJ in **Southern Cross** this may be regrettable but is established law and policy.

Conclusion

59. The decision that the Claimant's claim of unauthorised deduction of wages is dismissed on the basis that the Employment Tribunal does not have jurisdiction to hear it is upheld on different grounds.

60. The appeal is dismissed.