

## **INJUNCTIONS BROUGHT BY EMPLOYEES**

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1. In this paper we examine the law relating to injunction applications brought by employees. The paper is in the following parts:
  - (1) In Part 1, we set out the basic legal framework for injunction applications, and other possible forms of relief which should be considered together with, or as an alternative to, an injunction.
  - (2) In Part 2 we discuss the use of injunctions in cases where the employment relationship is continuing and which are not concerned with dismissal or related events, such as disciplinary procedures.
  - (3) Part 3 concerns the use of injunctions in the context of dismissal. We examine each of the elements relevant to the granting of an injunction, and in particular consider the case-law on the need for continuing confidence in the employee.
  - (4) Part 4 deals with judicial review, a remedy which may be available for public sector workers in certain restricted circumstances.
  
2. Few injunction applications are brought by employees. The reasons for this are unclear. The expense of litigation, the availability of claims in the employment tribunal and the need to act with urgency are partial explanations. But practitioners' lack of knowledge of the potential use of an injunction may be another. We hope this paper will help to overcome the last problem.

### **Part 1: Introduction**

3. Without limiting the court's powers, s.37(1) SCA 1981 says that the "High Court may by order (whether interlocutory or final) grant an injunction...in all cases in which it appears to the court to be just and convenient to do so".<sup>1</sup> The procedure on the grant of an interim injunction is set out in CPR 25.1. The question of procedure is dealt with in another talk. It is usual for the common lawyer to apply for an injunction in the QBD but in fact the Chancery procedure is more conducive to injunction applications and Chancery Judges are, as a rule, better versed in the considerations required for such equitable relief than QBD Judges whose experience of injunctions may be limited.

#### **Interim negative injunctions**

4. Most of the cases concern applications for interim injunctions, negative in form. At that stage the guiding principles remain, broadly, those set out in *American Cyanamid v Ethicon* [1975] AC 396 and *Lansing Linde* [1991] ICR 428. In order to grant an injunction, the Court must be satisfied that:
- (1) There is a serious question to be tried;
  - (2) Damages will not be an adequate remedy;
  - (3) That the balance of convenience (or the "balance of the risk of doing an injustice" if the outcome at final trial is different<sup>2</sup>) favours the injunction; in this the preservation of the *status quo* is often material

Where the interim application may in effect decide the issue, the court will consider whether the claimant is likely to succeed at trial.<sup>3</sup> In any event, in reality, the court is always interested in investigating (though not determining) the merits of a claim and will be more likely to grant an injunction in a strong case than one which is no more than arguable whilst paying lip service to *American Cyanamid*.

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<sup>1</sup> The County Court has a similar power: see s.37 County Courts Act 1984.

<sup>2</sup> Per May LJ in *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 at 237 and see Eveleigh LJ at 232.

<sup>3</sup> See *NWL v Woods* [1979] ICR 867, especially Lord Diplock at 880.

### **Interim mandatory injunctions**

5. The usual injunction sought in employment cases is the negative injunction. This is partly out of deference to the old principle that injunctions will not be granted to enforce contracts of employment (see later), and partly because the employee is almost always seeking to restrain some unwanted act or proposed act by the employer. Thus it is usual for the employee to be seeking to maintain the *status quo*. This is not always the case and, as discussed later, if a dismissal has taken place, the employee may be wishing to seek an injunction to restore the contract. Careful drafting to couch the relief in negative terms is advised here, for a mandatory order requires much higher hurdles to be surmounted: see *Zockoll Group v Mercury Communications Ltd* [1998] FSR 354 CA<sup>4</sup> in which Phillips LJ approved the four principles set out by Chadwick J in an earlier case which, paraphrased, may be said to be :<sup>5</sup>
- (1) Which course is likely to involve the least risk of injustice if it turns out to be ‘wrong’ at final trial;
  - (2) A mandatory injunction may well carry a greater risk of injustice if ‘wrong’ than a prohibitory injunction;
  - (3) A “high degree of assurance” should be felt that the claimant will succeed at trial in order to negate the greater risk of injustice in (2);
  - (4) If no high degree of assurance is felt, there may be circumstances where the risk of injustice if the injunction is granted outweighs the risk if it is not.

### **Generally**

6. In the context of threatened dismissal, interim relief may be necessary to prevent dismissal. Where dismissal has already occurred it may be necessary to prevent the dismissal being acted upon. In cases not concerned with dismissal, it may be sensible to apply for an immediate interim injunction - for example, to counter any argument that employees affirmed changes to their contracts, or because the claimant must only

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<sup>4</sup> Which followed Lord Jauncey in *R v S of S for Transport ex p. Factortame Ltd (No.2)* [1991] 1 AC603 at 683 which approved Megarry J in *Shepherd Homes v Sandham* [1971] Ch 340 Hoffman J in *Films Rover g Cannono Film Sales* [1987] 1 WLR 670 at 680, Dillon LJ in *Leisure Data v Bell* [1988] FSR 367 at 372.

<sup>5</sup> *Nottingham Building Society v Eurodynamics Systems* [1993] FSR 468 at 474.

demonstrate an arguable case at that stage. But before applying for interim relief it is important to assess carefully the prospects of success, which inevitably turn on all the circumstances. In the employment context, the existence of continuing trust and confidence between the parties is often relevant to the balance of convenience. Delay is also a relevant factor. An injunction is a discretionary remedy and the claimant must therefore come to the court 'with clean hands.' This is not usually a problem in disciplinary case; the alleged conduct of the employee in the employment relationship is not as relevant here as his or her conduct in the proceedings or use of the proceedings.

### **Final injunctions**

7. Claims may be brought for final injunctions, granted at full trial. AN interlocutory injunction application, it was emphasised in *American Cyanamid*, is not the place for resolution of disputed facts or difficult questions of law. For such disputes full trial is required. The grant of an injunction is an equitable remedy, so that the court has a discretion whether to grant it. The factors relevant to the exercise of this discretion at the final stage are similar to those which apply to the balance of convenience. The primary difference is in the burden of proof in the sense that on an interim application for a negative injunction, the claimant only has to show a serious issue to be tried whereas at the final trial he or she must succeed, in the usual way, on the balance of probabilities. A further difference is that almost invariably an interim injunction is determined on statements and documents exhibited to them. There is no live evidence (and hence no cross-examination – save, rarely, where a party or parties apply and the court so orders) and no order for disclosure of documents (in the usual case). Sometimes the lower standard of proof in an interlocutory injunction is a particular benefit to the claimant in obtaining temporary relief which, in reality, leads to a situation or negotiations which ultimately resolve the dispute.<sup>6</sup>

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<sup>6</sup> Though it should not nowadays be assumed that the trial of the action will inevitably be many months away. The tactic of exploiting the low standard of proof to obtain an interlocutory injunction in a volatile situation in which the injunction may instrumental in engineering a favourable resolution of the underlying dispute is more frequently seen in industrial action injunctions.

### **Other avenues**

8. It is always important to consider the use of other, alternative or additional, forms of relief. They may be more attractive than an injunction.
  - (1) **Expedited trial.** In recent times listing problems have eased and the High Court both QBD and Chancery has the capacity to hear contested cases quickly if there is a good reason for expedition. If the court is prepared to hear an expedited trial, it may be preferable to opt for this, with appropriate undertakings in the meantime. An expedited trial may be sensible if, for instance, if the balance of convenience is against an interim application or if a claimant is only likely to succeed if he or she can establish facts which are in dispute. Likewise, an expedited trial may be the necessary course where cross-examination is necessary or full disclosure required.
  - (2) **Declarations.** As an alternative to an application for an injunction, or more commonly as an additional form of relief, an employee may seek a declaration as to his or her rights.<sup>7</sup> Such a claim may be brought to establish, for example, if the employer was in breach of contract. The court has an inherent jurisdiction to issue a declaration.<sup>8</sup> It has that power “whether or not any other remedy is claimed”.<sup>9</sup> It may grant a declaration as an interim remedy under CPR 25.1(1)(b) (as well as at final trial).
  - (3) **Summary judgment.** CPR 24.2 permits the court to give summary judgment if the defendant has no real prospects of successfully defending the claim. On an application based on former RSC Order 14A in *Jones v Gwent CC* [1992] IRLR 521 the court granted a declaration that a purported dismissal which breached the conditions for termination in an employee’s contract was not a valid and effective dismissal. (The court also granted an interim injunction,

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<sup>7</sup> Such a claim may be necessary against the Crown because of s.21 of the Crown Proceedings Act 1947.

<sup>8</sup> Cf the express power in judicial review proceedings: see s.31 Supreme Court Act 1981.

<sup>9</sup> See CPR 40.1.

restraining the employer from dismissing the claimant unless proper grounds existed)..

(4) **Action for damages.** It is important to assess whether the employee could bring an action for damages which will provide adequate compensation, because this may cause a court to refuse injunctive relief; or it may offer a more straightforward means of recovery. Conversely, the more the law fails to compensate for a loss, the more likely it is that the court will grant an injunction and the more an injunction is of practical importance. In this regard, the rules on damages for wrongful dismissal and on compensation for unfair dismissal are very limiting. This subject is dealt with more fully below. The limit on remedies is a strong reason for at least considering an injunction application.

9. Because most applications in an employment context are likely to be for interim injunctions, the focus below is principally on them.

### **Part 2: Injunctions where no dismissal**

10. Many of the reported cases concern applications to prevent dismissals in breach of contract or are concerned with breaches of procedure in connection with possible dismissals. But injunctions may be sought in other cases in which the employer breaches a duty owed to employees or infringes a right of its employees. Some examples are set out below.

11. In each case, at the interim stage the court would need to be satisfied that, first, that there was a serious issue to be tried - e.g. that the employer was proposing to act, or was acting, in breach of contract. It is critical that the breach has not been accepted or affirmed by the employees. Second, the court will need to be satisfied there is continuing confidence between employer and employee, though this is readily shown

where there is no question of dismissal.<sup>10</sup> Third, the court will consider the adequacy of damages. Fourth, other factors relevant to the balance of convenience will be considered.

12. **Breach of express contractual right.** An employer might threaten to change the working hours of employees, in breach of express terms of their contracts of employment. As a consequence the employees might suffer no financial loss - their wages may be the same after the changes - so that damages would not be an adequate remedy.<sup>11</sup> In theory the employees might be able to resign and claim constructive unfair dismissal, but they will often not wish to do so. An application for an injunction, combined with a claim for a declaration, is an alternative legal means of challenge.
  
13. An example of an application in the context of a continuing employment relationship is *Hughes v Southwark* [1988] IRLR 55. The Council instructed social workers to move from Maudsley Hospital to a new place of work. Accepting that it was arguable the instruction was in breach of contract, Taylor J granted an injunction. The employer had full confidence in the employees, and mutual confidence did not end merely because of the existence of a dispute between the parties; if the employees were required to move from the Maudsley they would suffer loss of job satisfaction and distress which could not be compensated in damages; and in the circumstances - e.g. where there was evidence that a crisis might arise at the Maudsley if the workers were moved - the balance of convenience was in favour of an injunction. (It should be noted that the last factor was an unusual feature of the case: often a court will be reluctant to second-guess a management decision of this kind).

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<sup>10</sup> Though much depends on what is meant by “dismissal”: see e.g. *Powell v Brent*, discussed below, in which the Council sought to move Mrs Powell from her post but not to end her employment. This move involved the termination of one contract, although not the termination of the employment relationship.

<sup>11</sup> In cases where there is loss, employees can simply claim this, because a unilateral alteration in the contract is not a deemed termination: see *Rigby v Ferodo* [1988] ICR 29. If, however, the effect of the change is sufficiently radical so that the former contract has ended, there may be a termination: see *Morris v Baron & Co* [1918] AC 1, HL.

14. In *Powell v LB Brent* [1987] ICR 466 affirmed [1988] ICR 176 CA, the employee was informed that she had succeeded in her application for Principal Benefits Officer. When one of the unsuccessful candidates complained about a possible breach of the equal opportunities policy, the council decided to re-advertise the post and told her to return to her former post, as Senior Benefit Officer. Her application for an injunction was granted. She had a good arguable case that she had a contract in the new post.
15. If instead of unilaterally changing contractual terms or conditions of work, the employer proposes to dismiss the employees by giving lawful notice and then to make offers to re-engage the employees on new terms as to hours, there is unlikely to be a breach (or arguable breach) of contract upon which to base an application for an injunction. A dismissal on lawful notice is not likely to be a breach of contract (save where the contract requires some prior steps to be taken first – see below). In these circumstances, however, there are other possible legal actions, such as unfair dismissal or claims under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992.
16. **Breaches of trust and confidence and procedural rights.** It is well-known that an employer owes an implied duty in relation to the maintenance of the trust and confidence of the employee. In the House of Lords decision of *Malik v BCCI International SA* [1997] ICR 606 Lord Steyn put it thus(at paragraph 54):

‘The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’.
17. Depending upon the circumstances, it is arguable that the implied duty may impose procedural requirements on the employer. Again, breaches of the duty may not be capable of adequate compensation in damages. Some possible means of challenge based on the implied term are set out below.
18. In *Gogay v Hertfordshire CC* [2000] IRLR 703 a child became obsessed with Mrs Gogay, her residential care worker. Mrs Gogay became concerned and asked not to be

left alone with the child. The child made some statements made by a child to a therapist which fell short of amounting to allegations of sexual abuse. Instead of transferring Mrs Gogay to another workplace, the employer suspended her while it investigated the matter. The Court of Appeal held that it was a breach of the implied term to suspend an employee without reasonable and proper cause, so that Mrs Gogay recovered damages in a personal injury action for the psychiatric harm she suffered as a result of her suspension.

19. The case of *Gogay* is the first reported successful challenge<sup>12</sup> to a suspension and it may be relied upon by other suspended employees, particularly where there are clear contractual procedural requirements for suspension and they have been breached.<sup>13</sup> If suspension is on full pay the employee will suffer no loss of wages and in the absence of personal injury (for, e.g., stress) no claim could be brought for distress or suffering, so that damages will not be an adequate remedy for the breach. In each case, however, careful thought must be given to the balance of convenience: depending upon the nature of the allegations or what kinds of arrangement can be made, it may or may not count in favour of an injunction. Allegations against the suspended employee of serious acts against third parties are likely to weigh in favour of refusing relief unless a convincing case can be made for his or her return to limited duties.
  
20. The application of the implied term in the context of pension schemes is illustrated by *Imperial Group Pension Trust v Imperial Tobacco* [1991] ICR 524 in which the High Court held that the duty of good faith applied to the employer's exercise of its rights and powers in relation to a pension scheme. The term is not equivalent to a duty to act reasonably, but it offers some constraint to an employer's actions. Depending upon the circumstances, it may be arguable that a proposed action - for example, an

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<sup>12</sup> Though see *Jones v Gwent CC* [1992] IRLR 521 (dismissal held invalid and hence suspension pending it).

<sup>13</sup> Thus for senior hospital grades in the NHS, there are the procedural requirements of HSG (94)49 (now superseded), paragraph 3 of which provided:

Suspension is a measure which has potentially serious consequences in both human and financial terms especially where the suspension proved to be lengthy one. It is therefore in the interests of all concerned to ensure that alternatives to suspension, for example, the practitioner continuing to work on limited and alternative duties where practicable are carefully considered.

amendment to the pension scheme - breaches the term. A court may also consider that the term requires warning of and consultation with employees before the action is taken.<sup>14</sup> Thus the term may provide the foundation for an application for an injunction or declaration.

21. **Breaches of health and safety law.** There may be scope for injunction applications in relation to breaches of health and safety law based either on a breach of the duty of care in tort or on a breach of statutory duty, although we are unaware of their use in practice.<sup>15</sup>
  
22. In *Khorasandjian v Bush* [1993] QB 727 threatening phone calls were held to amount to a species of the tort of nuisance by the Court of Appeal which granted an injunction to restrain them on the ground that there was an “obvious risk” that psychiatric injury might result. The case was overruled by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655 on the application of the tort of nuisance but not in relation to the grant of an injunction, had an appropriate cause of action been identified.<sup>16</sup> Injunctions to prevent the risk of physical injury are, of course, common in ‘domestic’ and family cases. In circumstances where there is good evidence that the employer is in breach of its duty and there is a significant risk of personal injury, justice favours granting an injunction. No court is likely to accept an argument that employees have the adequate alternative remedy of suffering a personal injury and then claiming damages.
  
23. In relation to breaches of regulations passed under the Health and Safety at Work Act 1974, s.47(2) states that a breach of a duty imposed by such regulations “shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise”. For this purpose “damage” is defined as including “the death of, or injury to, any person (including any disease and any impairment of a person’s physical or

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<sup>14</sup> In the context of pension schemes, from 6 April 2006 this will be required by the Occupational and Personal Pension Schemes (Consultation by Employers) Regulations 2006, currently in draft.

<sup>15</sup> On this, see Hendy and Ford *Munkman on Employer’s Liability* (13<sup>th</sup> edition), paras.27.06 – 27.13

<sup>16</sup> See also *Wong v Parkside Health NHS Trust & Anor* [2001] EWCA Civ 1721.

mental condition)”.<sup>17</sup> If the evidence demonstrated that an employer was in breach of a duty imposed by a regulation and that either “damage” as defined was being suffered or there was an obvious risk it would be, there is the possibility of injunctive relief. But a court might well refuse relief either if employees had not first sought alternative remedies by requesting the health and Safety Executive Inspectorate to issue an improvement or prohibition notice to prevent the relevant breaches, or if the health and safety inspectors investigated the matters but concluded there was no breach.<sup>18</sup>

24. **Judicial review.** In the context of public sector employees, judicial review remedies may be applicable under CPR 54. In particular, employees may have the right to be consulted before decisions affecting the body of employees are taken. This subject is dealt with further below.

### **Part 3: Dismissal and discipline: contractual remedies**

25. Most of the decided cases concern applications in the context of threatened dismissal and disciplinary action. The law remains somewhat undeveloped, certain central questions are still unresolved, and the principles from the cases are often far from clear. But we have tried to summarise the key principles.
26. Before *Hill v Parsons* [1972] 1 Ch D 305, there was a widespread view that an injunction could not be granted to enforce continued employment as a logical consequence of the common law principle that a court would not enforce specific performance of a contract for personal services.<sup>19</sup> In fact injunctions to restrain dismissals have long-established but rarely cited antecedents: see *Crisp v Holden* (1910) Sol J & Wkly Rep. 784; *Smith v McNally* [1912] 1 Ch D 816. *Hill* made clear that the so-called rule against injunctions to restrain dismissals is subject to exceptions, and that the underlying principle is flexible and depends upon the

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<sup>17</sup> See s.47(6) HSWA 1974.

<sup>18</sup> See ss 21-22 HSWA 1974.

<sup>19</sup> See Lord Reid in *Ridge v Baldwin* [1964] AC 40 at 65.

circumstances. The “rule” is not an immovable bar to an injunction.<sup>20</sup>

27. In *Hill*, the employers gave Mr Hill and 37 other employees one month’s notice of termination because of their refusal to join the union in a closed shop. Finding that a reasonable contractual notice period was six months notice, by which time the closed shop arrangement would be an unfair industrial practice under the Industrial Relations Act 1971 and Mr Hill would be protected from dismissal, and holding that a short notice was not effective termination unless accepted by the employee, a majority of the Court of Appeal granted an injunction restraining the dismissal.<sup>21</sup> Though accepting that in an ordinary case it was inconsistent with the trust and confidence required in employment that the relationship should continue against the will of one of the parties, Denning LJ said that the rule was not inflexible and in a proper case the court could grant an injunction. Here confidence existed between the employer and employee and the imminent introduction of rights under the IRA 1971 meant that damages would not be an adequate remedy.
28. Since *Hill*, it is possible to derive some general principles from the cases. But it should be emphasised that the law is often unclear, there have still been relatively few reported cases, particularly in the higher courts, and much turns on the circumstances of the particular case, and what view a judge takes of the fairness of intervention: in the words of one judge, “Perhaps because fairness cannot be categorised, such exceptional cases as there are give no very clear picture of the criteria for intervention”.<sup>22</sup> The following is a broad summary of the relevant principles:
- (1) The employer must be in breach of contract, or at least there must be a serious issue to be tried on that point for the purpose of interim relief;
  - (2) The employee must not have accepted the breach. In this regard there is long-

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<sup>20</sup> Note that TULRCA s.236 prevents a court, whether by way of specific performance or an injunction, from compelling an employee to do any work. It does not effect the granting of an injunction against an employer.

<sup>21</sup> Stamp LJ dissented, in accordance with the “rule” on not granting specific performance.

<sup>22</sup> Lord Prosser in *Anderson v Pringle* [1998] IRLR 64 at para12.

standing uncertainty, still not clearly resolved, as to whether a purported termination of an employment contract in breach of contract automatically terminates the contract or whether the employee must accept it;

- (3) Trust and confidence must exist between the employer or employee or, in the particular circumstances of the case, its absence must not be a bar to the granting of an injunction;
- (4) Damages must not be an adequate remedy; and
- (5) The balance of convenience must be in favour of granting an injunction.

These principles are expanded below by reference to the case-law.

29. **Injunctions to restrain dismissals** require consideration first. An application should, if possible, be brought before employment has been brought to an end. But in principle we think an application may be brought after termination, provided there is no undue delay. Otherwise an employer could prevent any injunction application by dismissing summarily. In fact there is authority (though small in number) to show that a dismissal already purportedly put into effect will be set aside in appropriate circumstances. These cases are *Smith v McNally* (1910) Sol J and Wkly Rep 784; *Jones v Lee and Guilding* [1980] ICR 310 CA; *Wadcock v LB Brent* [1990] IRLR 223; and *Robb v Hammersmith* [1991] ICR 514. In *Jones v Gwent CC* [1992] IRLR 521 a letter giving notice of dismissal was declared not to be valid and effective and an injunction was granted. In *Gryf-Lowczowski v Hinchingsbrook Healthcare NHS Trust* [2005] EWHC 2407, a purported termination by frustration was held to be ineffective and an injunction granted to continue the employment.
30. **(1) Breach of contract in relation to dismissal.** The employee will need to show that the employer's action is in breach of the contract, or that there is a serious issue to be tried on the matter. This question gives rise to the following issues in the context of

dismissal of employees.

31. Is the action in breach of an express contractual right? It depends upon the terms of and background to an individual contract whether a disciplinary, capability, redundancy or other procedure has contractual force.<sup>23</sup> In the context of injunction applications, the courts have found that contractual disciplinary and capability procedures arguably have contractual force. So too may redundancy procedures providing, for example, for “last in first out”.<sup>24</sup> As well as relying on implied terms to import requirements of fairness (see below), there may be scope to argue that the express terms of a contractual disciplinary procedure should be interpreted to give effect to the same principles on the ground that this must have been the intention of the parties. In *Barros D’Sa v University Hospital Coventry* [2001] IRLR 691, for example, the Court of Appeal interpreted a disciplinary procedure in accordance with the obvious principle that it was designed to ensure a fair hearing.<sup>25</sup> An alternative means to the same end is reliance on implied terms.
32. Is there a breach of an implied term? Most of the cases have focussed on breaches of express terms; the precise effect of implied terms is less clear. The term generally used to limit an employer’s discretion is the implied term of trust and confidence.
33. In our view, the implied term of trust and confidence now comes close in effect to incorporating the principles of natural justice into disciplinary decisions taken by employers. Though in *McClory v Post Office* [1993] IRLR 159 the court said that the principles of natural justice are not to be implied into a contract of employment, it found that there was an implied term that an employer will not exercise its contractual powers on an unreasonable ground, though the band of discretion is wide. *Gogay* is to like effect. More interesting is the effect of *R v BBC ex p. Lavelle* [1983] ICR 99, in

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<sup>23</sup> On disciplinary procedures, see the comments of Lord Hoffman in *Johnson v Unisys* [2001] ICR 480 at 501-2. Section 30 of the Employment Act 2002, giving contractual effect to the statutory procedures, has not been brought into force. See too *Wandsworth v D’Silva* [1998] IRLR 193.

<sup>24</sup> See *Alexander v STC* [1990] ICR 291 (reversed at the full hearing on this point: see *Alexander v STC (No.2)* [1991] IRLR 286) and *Anderson v Pringle* [1998] IRLR 64.

which Woolf J, drawing on the case-law on office-holders,<sup>26</sup> held that the ordinary contract of employment now has many of attributes of an office with the result that the rules of natural justice applied and that the court could intervene by injunction in JR proceedings to prevent a breach of those rules. It appears that the means of giving effect in contract law to the public law principle of *Lavelle* is via the implied term of trust and confidence.<sup>27</sup> The net result is that, by the means of the implied term, principles of fairness can be read into the contract of employment, and the disciplinary process in particular.

34. But it remains hard to predict whether the courts will intervene when the ground of challenge is based not upon the clear breach of an express term but on the unfairness of the procedure adopted. If the courts tend to defer to decisions made by the employer, a sufficient perceived unfairness may prompt intervention. In *Ali v Southwark* [1988] ICR 567 disciplinary charges were brought against a care assistant in relation to the treatment of old people at a residential home. At his disciplinary hearing the employer proposed to rely solely on the report of an independent investigation, and to adduce no other evidence. The court declined to grant an injunction restraining the employer from dismissing until it tendered some additional evidence in support of the charges, ruling that questions as to whether the disciplinary tribunal should rely on the evidence and the weight to give it were matters for the disciplinary tribunal, and it could not be said that no tribunal acting in good faith could find the charges proved on the basis of the report alone. In *Barros D'Sa*
35. By contrast, in *R(Arthurworrey) v Haringey LBC* [2002] ICR 279 social workers involved in the care of Victoria Climbié were suspended and charged with disciplinary offences. After a decision to hold the Laming inquiry into the death of the

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<sup>25</sup> See May LJ at paras 25-28.

<sup>26</sup> See *Malloch v Aberdeen* [1971] 1 WLR 1578 and *Stevenson v United Road Transport Union* [1977] ICR 893 (rules of natural justice applied to dismissal of regional officer of union employed under (contractual) rules).

<sup>27</sup> See *R(Arthurworrey) v Haringey LB* [2002] ICR 279, in which both counsel agreed that this was the means of intervention in *Lavelle*: at para 44. See further *Gogay*, discussed above: implied term restricted power to suspend.

child had been made, the social workers were ordered to attend a disciplinary hearing. There was evidence that if the disciplinary hearings went ahead, it would exacerbate the stress-related illnesses of the claimants. Relying on the implied term of trust and confidence in the private law action,<sup>28</sup> they sought an order postponing the disciplinary hearing. The court refused the claim to adjourn the hearing pending the public inquiry, which concerned different issues from the disciplinary hearings.<sup>29</sup> It granted an injunction, however, on the alternative claim based on the effects of the disciplinary hearing on the employee's health. It postponed the disciplinary hearings until after the claimants had given evidence to the public inquiry on the ground that, if the disciplinary hearings went ahead there was a real risk that the claimants would not be able to participate in the Laming inquiry.

36. In *Barros D'Sa v University Hospital Coventry* [2001] IRLR 691 a doctor was charged with serious professional conduct. An internal inquiry panel said that dismissal would be wholly unjustified. At the next stage of the procedure, a disciplinary hearing, management sought to raise new allegations that there had been a breakdown in the relationship of trust and confidence between Mr Barros D'Sa and his colleagues, on which the panel had made no findings. The CA upheld an injunction preventing management relying on new allegations on which the inquiry panel had made no findings because this would be contrary to the disciplinary procedure and the rules of natural justice.
37. Is the claim within the "exclusion zone" of Johnson v Unisys [2001] ICR 480 as explained in Eastwood v Magnox [2004] ICR 1064? In *Johnson* the House of Lords held that it was inconsistent with the statutory law on unfair dismissal to allow an employee to recover damages for the manner of his dismissal. The decision has been restricted by the later decision of *Eastwood*, in which the House of Lords appears to have decided that the implied term of trust and confidence could apply to decisions taken by the employer in events leading up to dismissal but could not apply to the

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<sup>28</sup> The court dismissed the claim based on judicial review.

<sup>29</sup> At paragraph 51-52.

decision to dismiss itself, because that would be inconsistent with the statutory scheme of unfair dismissal. On an alternative reading, however, the decisions simply mean that an employee cannot have a remedy for financial loss caused by such a breach, and not that the implied term does not apply at all.

38. In relation to an injunction, *Eastwood* probably precludes an employee from bringing a claim for an injunction if the alleged breach of contract is that the dismissal decision breached trust and confidence. But, as the facts before the House in *Eastwood* make clear, he or she may still base the application on other breaches of the implied term leading to dismissal, including actions based on suspension and disciplinary hearings.
39. Strictly speaking, the rules of natural justice are primarily an administrative law remedy and primarily available only in relation to judicial and quasi-judicial proceedings by public bodies: *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA); *University of Ceylon v Fernando* [1960] 1 All ER 631 (PC); *Ridge v Baldwin* [1946] AC 40 (HL); *Padfield v Min. of Ag. And Fish.* [1968] 1 All ER 694 (HL). In *R. v Panel on Take-Overs and Mergers ex p. Datafin plc* [1987] QB 815, it was held that judicial review to assert the rules of natural justice was not available where the sole source of the decision-making sought to be impeached was consensual submission to its jurisdiction. However, the principles have nonetheless been held to have application in the private sphere although the juridical basis for their incorporation is open to some doubt. They can be founded on an implied term of a contract enforceable not by judicial review but by action for breach of contract. Thus in trade union cases it is taken as a matter of course that the rules of natural justice are implied in the rules unless expressly excluded (*Lawlor v Union of Post Office Workers* [1965] Ch 712 (HC)), the rules being the content of the contract of membership. Sometimes this incorporation into the contract has been held to be based on considerations of public policy such as the need to protect the right to work in a closed shop situation. More relevantly, they have been incorporated into contracts as a matter of public policy where an individual's reputation is at stake: *Russell v Duke of Norfolk* (above); *Abbott v Sullivan* [1952] 1 KB 189 (CA); *Lee v Showmen's Guild*

[1952] 2 QB 329 (CA). But incorporation may also be founded on the usual consideration of an implied term: business efficacy, custom and practice (if the evidence supported the latter), and so on.

40. In this connection reference is sometimes made to Article 6 of the European Convention on Human Rights and Fundamental Freedoms. The Article guarantees the right to a fair trial. However, Article 6 and the Convention have no effect in the sphere of private contract law. The fact that the employer may be a public body is irrelevant; the crucial determinant is the fact that an employer's decision to dismiss does not involve the *determination of a civil right or obligation*. The latter is a prerequisite for the engagement of Article 6. The general rule is that disciplinary proceedings do not ordinarily involve disputes over civil rights or obligations: ***Albert and Le Compte v Belgium*** (1983) 5 EHRR 533, para.25. On the other hand, the right to continue in professional practice is a civil right and art.6 of the Convention will apply to a professional disciplinary body which is capable of deciding whether or not a person can continue in practice in his or her profession or trade, notwithstanding that the body is, in form, private. So, for example, the GMC is bound: ***Wickramsinghe v UK*** [1998] EHRLR 338, and analogous medical regulatory bodies in Europe: ***Gautrin v France*** (1999) 28 EHRR 196; ***Albert and Le Compte v Belgium*** (above) but not a private hospital or an NHS Trust in relation to dismissal decisions.
41. As a matter of contract, can the employee simply dismiss on notice rather than following a relevant procedure? Suppose the employer, instead of following a disciplinary or other procedure which usually would apply in the circumstance, simply gives an employee contractual notice of termination. Can the procedure restrict an apparently unconstrained notice clause? The courts have been prepared to say it can do so, depending upon the terms of the contract. In effect the contract, by requiring that certain issues must be pursued through a specified procedure, places a fetter on the otherwise free-standing provision providing that the contract can be terminated on giving so much notice. The courts are especially likely to find that an employer cannot exercise the power to dismiss on notice without observing other

procedural requirements in circumstances in which an employee is suspected of misconduct to which a contractual disciplinary procedure should apply, because if the employer could dismiss on notice it would deprive the employee of the protections of the disciplinary procedure.

42. Thus, in *Irani v Southampton and South-West Hampshire Health Authority* [1985] IRLR 203 the court granted an injunction restraining the dismissal of Mr Irani, an ophthalmologist, on six weeks' notice. The decision to dismiss was taken because of irreconcilable differences between Mr Irani and the consultant in charge of the clinic. Under the Whitley Council rules incorporated in the contract, if there was a dispute about the dismissal of an employee "the disciplinary procedure should apply".<sup>30</sup> The written contract also provided, however, for six weeks notice. Warner J considered that in the circumstances the employer was restricted as to the manner in which it could dismiss,<sup>31</sup> and granted an injunction preventing dismissal without adhering to the Whitley Council procedures.
43. The decision in *Wadcock v Brent* [1990] IRLR 223 is to like effect. There was a serious question to be treated whether the employer was in breach of contract in giving notice of termination to Mr Wadcock because of his refusal to accept an instruction when under his contract he had a right to have a disciplinary hearing. *Barros D'Sa* in the Court of Appeal (above and below) would never have got to court at all if the employer could have simply relied on the notice provision standard to NHS consultants' contracts to dismiss him.
44. But in other cases it may be less clear whether the express terms of the contract, providing for a particular form of procedure to apply, preclude giving notice to dismiss in the circumstances. Thus far the courts have not extended the principles that a disciplinary requirement cannot be evaded by a notice provision to other circumstances in which other forms of express procedure are required by the

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<sup>30</sup> See section 33 of the blue book at para 2. Note that there was no allegation of misconduct against Mr Irani.

<sup>31</sup> See paras 22 and 37.

contract.<sup>32</sup> As a general rule we consider that the principles should apply. If a contract lays down a procedure to apply as a pre-requisite to dismissal in certain circumstances and those circumstances in fact obtain, it must be contrary to the intention of the parties at the time the contract was made to hold that the employer may simply dismiss on notice, thus depriving the procedural provision of any effect. But the question no doubt turns on the background and meaning of the particular contract.

45. In our view the decisions in *Johnson* and *Eastwood*, based on the scope of implied terms, are not likely to affect decisions like *Irani*, *Wadcock* and *Barros D'Sa*. For in such cases the argument was not that dismissal was constrained by an implied term but, rather, that properly interpreted the express terms of the contract required the procedure to be followed and exhausted prior to and as a necessary requirement before dismissal in the particular circumstances.
46. **(2) Acceptance of the breach.** It is the logical premise of an injunction seeking to restrain dismissal that the employee has not accepted the breach of contract. This issue has given rise to an interminable legal debate, which has never been finally resolved, as to whether employment contracts are an exception to the general rule that an unaccepted repudiation is a “thing writ in water”.<sup>33</sup>
47. Here is not the place to explore this particular jurisprudential puzzle.<sup>34</sup> The following key points can be made for present purposes.
  - (1) First, the weight of authority, and in particular the majority in *Gunton v Richmond-upon-Thames* [1980] ICR 755, is in favour of the “elective” rather

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<sup>32</sup> In *Alexander v Standard Telephones (No.2)* [1991] IRLR 286, Hobhouse J, having ruled that a redundancy procedure based on LIFO was not contractually binding, added that even assuming that it was, the employer’s right to dismiss on notice was unqualified so that there could be no damages payable for the failure to follow that procedure. The case probably turns on the construction of the particular contracts. Hobhouse J accepted that in other circumstances, the employer may not have a right a contractual right to dismiss on notice, citing *Irani* as an example: see paragraph 21.

<sup>33</sup> See Asquith LJ in *Howard v Pickford Tool* [1951] 1 KB 417.

<sup>34</sup> The most recent, and probably best, discussion is in Freedland, *The Personal Employment Contract* (2003: OUP), pp 376-384.

than the “automatic” theory, so supporting the possibility of injunctive relief.<sup>35</sup>

(2) Second, while a court is likely readily to deem an employee to have accepted a breach if he brings an action for damages, it is less likely to find acceptance if an employee brings an action for an injunction which, by definition, seeks to maintain that the contract is still in force for the purpose of continuing primary obligations (and not merely secondary obligations as to damages); and, as noted above, in some cases the courts have upheld injunction applications brought after summary dismissal.

(3) Third, at the interim stage, there is clearly a serious issue to be tried on this question; and, to the extent the strength of the claim is relevant, it is an issue which is probably more in the claimant’s favour than the employer’s. In *Powell v Brent LBC* [1988] ICR 176, for example, the Court of Appeal accepted that the claimant had an arguable case on the point.<sup>36</sup>

48. **(3) Trust and confidence or other reasons supporting injunction.** If the effect of the injunction is to retain the employee working in his job,<sup>37</sup> the employer must retain trust and confidence in the employee. This issue is often critical to the grant or refusal of an injunction.

49. The existence or absence of trust and confidence must be judged in the circumstances of the case, including the nature of the work, the people with whom work was to be done and the likely effect on the employer if the injunction is granted.<sup>38</sup> There must be some rational basis for the lack of confidence in the employee, and not a mere

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<sup>35</sup> *Gunton* was followed, albeit reluctantly, in *Boyo v Lambeth* [1994] ICR 727. In relation to dismissal for the purpose of unfair dismissal claims, the theory of automatic termination by the employee’s breach has been rejected: see *LTE v Clarke* [1981] ICR 355. Cf *R v East Berkshire HA ex p. Walsh* [1984] ICR 743 per May LJ at 756. See too Lord Oliver in *Rigby v Ferodo* [1988] ICR 29 at 33-4.

<sup>36</sup> Per Ralph Gibson at 185-6.

<sup>37</sup> Cf cases where the employee is suspended and is only asking for an order that an employer follows a procedure before dismissal.

<sup>38</sup> See *Powell v Brent* [1987] ICR 176 per Ralph Gibson LJ at 194C-D. See too *Ali v Southwark* [1988] ICR 567 at 582F.

assertion to that effect.<sup>39</sup> Most of the cases turn on their own facts, but they provide illustrations of the application of the test.

50. In *Powell v Brent LBC* [1987] ICR 466 affirmed [1988] ICR 176 CA, (above) it will be recalled that the employee was informed that she had succeeded in her application for promotion. When one of the unsuccessful candidates complained about a possible breach of the equal opportunities policy, the council decided to re-advertise the post and told her to return to her former post. The injunction she sought was granted. She had a good arguable case that she had a contract in the new post. Although the opposition of an employer to an employee continuing in a job would normally indicate a lack of confidence,<sup>40</sup> in the particular circumstances there was sufficient confidence between the parties: the council was a large organisation employing many people, it was a fair-minded body which would accept the judgment of the court, Mrs Powell had been working in the new post satisfactorily for four months and she had a good relationship with her manager. See too *Irani*, above: confidence existed between Mr Irani and his employer despite his incompatibility with his superior.
51. Contrast with *Powell* and *Irani* the decision in *Alexander v STC* [1990] ICR 291, which concerned the failure to follow a contractual redundancy procedure based on LIFO. In breach of that procedure the employer selected employees for redundancy on the basis of various factors, including their skills, aptitude, performance and work approach. There was no suggestion that the employees who brought the action were untrustworthy or incompetent but, deferring to the employer's decision, Aldous J refused an injunction on the ground that the employers had less confidence that these employees could do the work available than the employees it had chosen to retain.<sup>41</sup> But in *Anderson v Pringle* [1998] IRLR 64, which again concerned selection for redundancy under a "selective scheme" in breach of a contractual procedure requiring LIFO, Lord Prosser said that he was "not persuaded that there is any true analogy

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<sup>39</sup> See *Powell*, above, per Ralph Gibson LJ at 195D-E.

<sup>40</sup> See Ralph Gibson at 193F-G; Nicholls LJ at 198F.

<sup>41</sup> At 307G-H.

between the respondents' preference for other employees and the need for confidence which is inherent in the employer/employee relationship".<sup>42</sup> The report of the case makes no reference to *Alexander*; and the cases are not easy to reconcile. We consider that the approach of *Anderson* has much to recommend it: why should an employer's preference for one set of employees lead to an absence of trust and confidence in another group who, if the contract were followed, would not lose their jobs? More particularly, the *Alexander* decision elevates the requirement of trust and confidence to a requirement of greater trust and confidence in one employee than another. In a redundancy selection on the basis of skill, it remains the fact that the employee selected would have been retained but for the diminution in the needs of the business for workers with such skills. By definition the worker was not dismissed for incapability. Hence the proposition that the employer lacked the necessary confidence in the redundant worker appears to be unjustified. The approach of *Alexander* permits, in effect, the employer's subjective preferences to override the contractual obligations to which it has agreed.

52. Where there exist allegations of misconduct, trust and confidence is less likely to be found. It was absent in *Ali v Southwark* in which the plaintiff and other care assistants were charged with gross misconduct as a consequence of an independent inquiry into the standard of care at old people's homes which found that the care given to residents was abysmal.
53. But much depends upon the precise terms of the injunction sought and the relief claimed: the underlying reason for refusing an injunction is that the relationship is not workable without trust and confidence. But an appropriately framed application may be workable. Trust and confidence may not even be a relevant consideration if the employee is no longer at work. The council's director of finance was suspended in *Robb v Hammersmith* [1991] ICR 514 following concerns about his capability. His contract incorporated a procedure relating to discipline and capability, which the council initially followed, only to abandon in the context of settlement negotiations.

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<sup>42</sup> At para 12.

Later the council summarily dismissed him. He sought an injunction not to return him to work but to restore him to the position from which he was suspended, so that the council could not dismiss him unless and until it followed the capability procedure. Morland J granted the injunction: though it is unworkable for an employee to return to work in the absence of his employer's trust and confidence, the lack of confidence in Mr Robb's ability to do his job (which Morland J accepted as wholly genuine on the part of the employer) had nothing to do with the workability of an order that the employer must follow the capability procedure while the employee was suspended.<sup>43</sup>

54. The same result was reached in relation to a suspended employee in *Peace v City of Edinburgh* [1999] IRLR 418 and *Gryf-Lowczowski v Hinchingsbrook Healthcare NHS Trust* [2005] EWHC 2407. In *Wadcock v Brent* the court considered there would be no confidence between the parties if Mr Wadcock continued to refuse to work in accordance with the instructions given to him. But, noting that he was a competent social worker, it granted an injunction on his undertaking to work in accordance with those instructions.<sup>44</sup>
55. It will be difficult for an employer to rely on an allegation of lack of trust and confidence when this is the very matter to be established in a disciplinary procedure. In *Barros D'Sa v University Hospital Coventry* [2001] IRLR 691 (above) it will be recalled that a doctor was charged with serious professional conduct. An internal inquiry panel said that dismissal would be wholly unjustified. At the next stage of the procedure, a disciplinary hearing, management sought to raise new allegations that there had been a breakdown in the relationship of trust and confidence between Mr Barros D'Sa and his colleagues, on which the panel had made no findings. The CA upheld an injunction preventing management relying on new allegations on which the inquiry panel had made no findings because this would be contrary to the disciplinary procedure and the rules of natural justice. The court rejected a submission that there was no trust and confidence between the parties for the purpose of an injunction.

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<sup>43</sup> At 520B-C and 522F-G.

<sup>44</sup> See paras 27-31.

According to May LJ:<sup>45</sup>

...it is or may be a necessary precondition to an injunction against ending an employment that there should be the existence of trust and confidence between the employee and the employer. But that, it seems to me, is quite different from the suggestion that an employee can be dismissed if trust and confidence has broken down under a disciplinary procedure when that has not been determined as a fact or, more importantly, adversely to the employee.

The decision is sensible, and accords with fairness. An employer cannot, by asserting that trust and confidence no longer exists, escape from a disciplinary procedure which is designed to decide whether the employee was guilty or innocent of the allegations said to give rise to the alleged loss of confidence. The decision has obvious implications for other cases in which employers seek to dismiss, relying on an absence of trust and confidence which may depend on allegations which have not been established in accordance with contractual procedures. Of course, a disciplinary procedure is not apt to determine whether an allegation of loss of trust and confidence is itself justified. Such an allegation is easy to make and to support by way of (often solicited) complaints. It is more difficult to refute but this may be achieved in injunction proceedings by statements of colleagues, supporters and managers in a position to comment on the qualities on which it said trust and confidence has evaporated (for an example see *Powell v LB Brent* (above)).

56. **(4) Damages are not adequate and balance of convenience.** In many cases damages will not be an adequate remedy for an employee. Though the measure of damages must be such as to place the claimant in the same situation as if the contract had been performed as it should have been: *Robinson v Harman* (1848) 1 Exch 850 at 855 cited in the well known judgment of Oliver J in *Radford v De Froberville* [1977] 1 WLR 1262 at 1268, damages are assessed on the basis that the contract-breaker terminated the contract in the way least costly to it (*Lavarack v Woods of Colchester* [1967] 1 QB 278), with the consequence that in a normal wrongful dismissal action damages only reflect the amount the employee would earn in the notice period. It is

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<sup>45</sup> At para 26.

only in exceptional cases that the courts have restricted the employers contractual right to terminate on notice - e.g. in the context where sick employees have been dismissed with the result that they lost their right to benefits under PHI policies - with the consequence damages for wrongful termination of employment have extended beyond the wages which would have been earned in the notice period.<sup>46</sup>

57. In relation to the failure to follow a contractual procedure, the courts may award damages for the time it would take to follow a disciplinary procedure but will not nowadays award damages to reflect the chance that a disciplinary procedure would or might have cleared an employee of misconduct: *Gunton v Richmond* [1980] ICR 755 CA, and more recently: *Boyo v LB Lambeth* [1995] IRLR 50; *Focsa Services (UK) Ltd. v Birkett* [1996] IRLR 63; and *Janciuk v Winerite* [1998] IRLR 63 EAT<sup>47</sup> Those cases seem to have ignored the old(ish) case of *Barber v Manchester Regional Hospital Board* [1958] 1 WLR 181 where damages were awarded for breach of a procedural requirement of a consultant's contract of employment. The damages were assessed on the basis of a continuing loss of five years income (a period far in excess of notice plus time for the procedure to be exhausted) on the basis that had the procedure been exhausted on a balance of probabilities the consultant would not have been dismissed. In the more recent cases the courts have decisively rejected the submission that where there is a disciplinary procedure which has been breached the court must consider the chances of that procedure resulting in a finding that the employment would not have been terminated so that the damages should reflect the loss of that chance. In *Janciuk* it was said (at para.10):

We regard the attempt to introduce the loss of a chance into the calculation of the damages as a heresy and it represents a misunderstanding of the process involved in quantifying a dismissed employee's damages for breach of contract.

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<sup>46</sup> See *Aspden v Webbs Poultry* [1996] IRLR 521 and *Aden v Sedco* [1997] IRLR 280, approved in *Brompton v AOC International* [1997] IRLR 639 CA. See too the exceptional case of *Jenvey v Australian Broadcasting Corporation* [2003] ICR 79 (implied term that employer could not dismiss employee on notice in circumstances of redundancy in order to deprive him of his contractual redundancy benefits).

<sup>47</sup> See too Ford "Re-thinking the Notice Rule" (1998) ILJ 220.

So if the claimant loses the right to a disciplinary hearing this lost chance is not properly reflected in compensation. And without a hearing, the employee loses the right to explain his case and to justify his conduct, which equally cannot be compensated in damages: see *Robb*, above.<sup>48</sup> Damages may not be awarded for distress and disappointment in the absence of an injury: *Addis v Gramophone* [1909] AC 488. The courts have refused to extend the implied term of trust and confidence to cover the decision to dismiss: *Johnson v Unisys* [2001] ICR 480, HL.

58. Nor will damages be awarded for distress or loss of job satisfaction In *Powell*, damages were not an adequate remedy because they could not reflect her disappointment at losing her new job and the loss of the satisfaction of working in it. In *Irani* they were inadequate because if Mr Irani lost his post he would become unemployable in NHS. In most cases of dismissal a little imagination should suggest losses which the law cannot compensate. Strictly speaking the compensation available for unfair dismissal should not be relevant as it is not recoverable in contract but in parallel proceedings, however, claimants invariably point out that such compensation is statutorily capped and will not provide an adequate remedy and that (as the 2004 employment tribunal statistics show) reinstatement is ordered in only 0.5% of cases and is not enforceable even when ordered.

#### **Part (4): Judicial Review**

59. Here is not the place to explore when judicial review is or is not available. It is necessary to show a sufficient public law element, but there is no universal test to that end.<sup>49</sup> In the case of decisions taken about a worker with a contract of employment employed by a private body, judicial review is not available against the employer. Nor will it generally be available to a worker in the public sector employed under a contract, even if his or her terms of employment are determined by statute, because the employee's rights flow from the private law of contract: *R v East Berkshire ex p*

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<sup>48</sup> At 523B-C. The Court said that an employment tribunal was not a suitable alternative means for adjudicating on Mr Robb's capabilities in complex matters such as interest rate swaps.

<sup>49</sup> See *R v Derbyshire CC ex p. Noble* [1990] ICR 808 at 814.

*Walsh* [1985] QB 152, *McClaren v Home Office* [1990] ICR 824, *Roy v Kensington and Chelsea FPC* [1992] 1 AC 624. If there is no public law or other legal underpinning of the relationship there will be no other cause of action for termination of it save breach of contract, a point recently reiterated in the House of Lords in *Skidmore v Dartford and Gravesham NHS Trust* [2003] UKHL 27. Judicial review will, in any event, be refused if there is an adequate alternative remedy such as an action for breach of contract.

60. In a judicial review application the court has power to grant an injunction, including an interim injunction.<sup>50</sup> A decision which is *ultra vires* is, for present purposes, void so that a mandatory order or a quashing order may have the same effect.<sup>51</sup> The grounds of challenge are, of course, different from a private law action, with the court as a general rule giving greater emphasis on procedural fairness - consultation, natural justice and the like; and the effect of a successful application is typically that a decision is void.
61. Judicial review is therefore likely to be an exceptional remedy for workers.(Note that if the court refuses permission to proceed by way of judicial review because there is an insufficient public element, it may nonetheless allow the action to continue as a private law claim).<sup>52</sup>
62. The following are examples of circumstances when an application may be brought(see on this Woolf LJ in *McClaren v Home Office* [1990] ICR 824):
  - (1) Some office-holders are not employed under a contract at all. The best example is police officers, who occupy the office of constable. Decisions taken by a police authority or chief constable in relation to their employment or dismissing them may be susceptible of challenge by way of judicial review.<sup>53</sup>

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<sup>50</sup> See CPR 54.3.

<sup>51</sup> See CPR 54.2.

<sup>52</sup> See CPR 54.10.

<sup>53</sup> See e.g. *Calveley v Chief Constable of Merseyside Police* [1989] 1 All ER 1025 (disciplinary decisions) and

- (2) A decision taken by a public body which affects many employees may have a sufficient public element to be susceptible to judicial review. The best-known illustration is the challenge brought by various unions against the decision that staff at GCHQ could not be members of trade unions.<sup>54</sup>
- (3) A worker in the public sector may be able to seek judicial review of a decision taken by body established by statute or prerogative to which disputes affecting work are referred. The remedy may equally be available in respect of the decisions of professional disciplinary and capability tribunals (though there may be an alternative statutory appeal process). The court will require that decisions of disciplinary tribunals comply with the principles of natural justice.
63. ***The anomaly of office-holders.*** Lastly, we should refer to an anomalous category of worker, whose rights have become somewhat lost in the mists of legal history. In the past, the court held that persons holding offices were in a different position from normal employees. Office holders had the right not to be dismissed without a hearing incorporating the rules of natural justice and, more radically, the courts held that a dismissal which breached these rules was void.<sup>55</sup> The categorisation of persons who were and were not office-holders was described as “illogical and even bizarre”.<sup>56</sup> But the categorisation led to a critical difference in legal effect: absent an application for an injunction, a wrongfully dismissed “normal” employee was only entitled to damages based on the notice period, whereas for an office-holder the consequence of a breach of natural justice was that the dismissal was a nullity, so that the office-holder remained legally in his office, with salary and pension due.
64. The position of office-holders was considered in *Lavelle*, though that case concerned a

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in *Regina (Stunt) v Mallett* [2001] ICR 989 (police pensions). But cf *R (Tucker) v Director General of National Crime Squad* [2003] ICR 599 (no sufficient public element in decision to end secondment).

<sup>54</sup> See *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

<sup>55</sup> See *Ridge v Baldwin* [1964] AC 40 and *Malloch v Aberdeen Corporation* [1971] 1 WLR 1579.

<sup>56</sup> See Lord Wilberforce in *Malloch* at 1595.

“normal” employee; it seems that natural justice could apply to such an employee by the contract of employment (though the remedy in damages is different).<sup>57</sup> The courts have held that the dismissal of a union official (a full-time employee of the union) in breach of the contractual rule book was void because it failed to comply with the rules of natural justice: *Stevenson v URTU* [1977] ICR 893,<sup>58</sup>

65. It remains unclear (to us at least) to what extent office-holders can still contend that a dismissal in breach of the rules of natural justice is void; to what extent such a finding is or is not dependent upon a right of action in judicial review; and what are the precise boundaries of the category of office-holder. But, as yet, the public law remedy of deeming a dismissal to be a nullity is not a regular feature of the contractual dimension of employment law.

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<sup>57</sup> See *Arthurworrey*, above, in which counsel agreed that the means of giving effect to the unfairness recognised in *Lavelle* was via the implied term of trust and confidence.

<sup>58</sup> The decision might be explained by the curious application of the *ultra vires* doctrine to trade unions.