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THE USE OF INJUNCTIONS IN EMPLOYMENT CASES

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THE USE OF INJUNCTIONS IN EMPLOYMENT CASES¹

FORMS AND PROCEDURE

1. There are a variety of forms of injunction which may be sought in employment disputes. There are also procedural rules, some of which apply generally to applications for injunctions, and some of which are relevant to particular types of injunction only.

General

2. They are two Parts of the Civil Procedure Rules (CPR) which are most relevant to injunction applications. Part 23 states the general rules about applications for court orders. Section I of Part 25 provides the essential guide to the court's powers and procedures when applying for interim remedies.
3. Generally, an application should be made on notice to the other parties by serving an application notice (23.3). However, an application may be made without notice (formerly "*ex parte*") if it appears to the court that there are good reasons for not giving notice (23.4(2) and 25.3(1)). Where an application is made without notice to the respondent, the evidence must set out why notice was not given (25PD3.4).
4. A person served with a without notice order may apply to have the order set aside or varied. Such an application must be made within 7 days after the date on which the order was served on the person making the application (23.10).
5. Part 25 sets out:
 - (1) the types of interim remedies that may be granted (25.1);
 - (2) the time when an order for an interim remedy may be made (25.2);and

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- (3) how to apply for an interim remedy (25.3).
6. Parts 23 and 25, the notes to them, and the Practice Directions (23PD and 25PD) should be consulted carefully before any application for an injunction is made.

Search Order

7. Search orders were formerly known as Anton Piller orders (from the case of *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA)). They are provided for in Part 25.1(1)(h) as follows:
- “an order (referred to as a “search order”) under section 7 of the Civil Procedure Act 1997 (order requiring a party to admit another party to premises for the purpose of preserving evidence etc.)”
8. A search order is draconian. It should only be sought in a compelling case. There are particular conditions to be satisfied and procedures to be followed both before and after such an order is made.
9. The purpose of a search order is to preserve evidence that a defendant, warned of impending litigation, would be likely to conceal or destroy so that it would not be available as evidence supporting a claimant’s cause of action. It is an order obtained in secrecy requiring the defendant to permit his business premises and often his home as well to be entered and searched. It could have the effect that the defendant’s business would be destroyed without the defendant being in a position to apply to the court for the order to be set aside before it was executed. Therefore, applicants for an order of such severity are under a strict duty to make to the court a full and frank disclosure of all matters that could be relevant and, having obtained the order, neither to act oppressively nor abuse their power in executing the order (*Columbia Pictures Inc v Robinson* [1987] Ch 38 (Scott J)).
10. It should be noted, however, that 25PD3.3 requires that the evidence in support of an interim remedy (apparently, whether the application is made with or without notice) must set out the facts on which the applicant relies for

the claim being made against the respondent, including all material facts of which the court should be made aware.

11. In the early cases, three essential pre-conditions were identified for the making of a search order:

- (1) an extremely strong prima facie case;
- (2) the damage, potential or actual, must be very serious for the applicant; and
- (3) there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

(Anton Piller, above, per Ormrod LJ at p62).

12. For a recent restatement of these principles, see *Dyno-Rod Plc v Debel Ltd* [2004] EWHC 1100 (Ch) per Laddie J at paragraphs 4, 5 and 8, where he said:

"...the Claimant must show a strong prima facie case. It must show damage, potential or actual damage, which must be of a very serious nature and it must show that there is clear evidence that the Defendants have in their possession incriminating documents. It must also show that there is a real possibility that the Defendants might destroy such material before an application inter partes can be made, and it must show that harm likely to be caused by the execution of the order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order. Those are the criteria for the grant of search and seize orders, but similar factors apply to freezing orders."

13. The duty on an applicant applying for a search order is onerous. It is well-established that an applicant who applies for relief without notice is under a duty to investigate the facts and fairly present the evidence on which he relies (*Marc Rich v Krasner*, 15 January 1999 (CA), per Morritt LJ, who reviewed the earlier authorities including *Bank Mellat v Nikpour* [1985] FSR 87; *Lloyds*

Bowmaker v Britannia Arrow [1988] 1 WLR 1337; *Brinks Mat v Elcombe* [1988] 1 WLR 1350; and *Behbehani v Salem* [1989] 1 WLR 723). The duty of disclosure extends not just to material facts which were or ought to have been known to the applicant; it also includes the effect of the order which is being applied for. More generally there is a duty to present a without notice application fully and fairly (*The Gadget Shop Ltd v The Bug.Com Ltd* [2001] FSR 383 (Rimer J)).

14. A failure in the duty of full and fair disclosure may result in the search order being set aside (*Kuwait Oil Tanker Co*, 27 November 1995 (CA; *Worldcom International v Home Communications Ltd*, 16 September 1998 (Timothy Walker J)); *The Giovanna* [1999] 1 Lloyd's Rep 867 (Rix J); *St Merryn Meat Ltd v Hawkins*, 29 June 2001 (Geoffrey Vos QC); *Elvee Ltd v Taylor* [2002] FSR 738 (CA)).
15. However, sometimes a defendant's reliance on alleged non-disclosure may be seen as an act of desperation, as Slade LJ pointed out in the *Brink's Mat* case at p1359:

"In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rex v Kensington Income Tax Commissioners [1917] 1 KB 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."

16. A useful summary of the principles relevant to the exercise of the court's discretion to set aside a without notice order for non-disclosure was recently given by Alan Boyle QC, sitting as a deputy judge of the Chancery Division, in *The Arena Corporation Ltd v Schroeder* [2003] EWHC 1089 (Ch) at paragraph 213 as follows:

- (1) If the court finds that there have been breaches of the duty of full and fair disclosure on the *ex parte* application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.

- (2) Notwithstanding that general rule, the court has jurisdiction to continue or regrant the order.
 - (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
 - (4) The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
 - (5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.
 - (6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
 - (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
 - (8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.
 - (9) There are no hard and fast rules as to whether the discretion to continue or regrant the order should be exercised, and the court should take into account all relevant circumstances.
17. It is also the duty of counsel and solicitors, when they make a without notice application for relief, to make in the course of the hearing a full note of the hearing, or, if this is not possible, to prepare a full note as soon as practicable after the hearing is over, and to provide a copy of that note with all expedition

to all parties affected by the grant of relief on that without notice application. This is essential so that the parties affected may know exactly what occurred and the basis and material on which the order was made, and so that in this way they may be provided with the material to make an informed application for discharge (*Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd*, 23 September 1999 (Lightman J); *Thane Investments Ltd v Tomlinson*, 6 December 2002 (Neuberger J)).

18. Anyone considering applying for a search order would be well-advised to consider with care the structures of Hoffman J in *Lock International Plc v Beswick* [1989] IRLR 481. At p481, Hoffman J said:

“Even in cases in which the plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the court must employ a graduated response...there must be proportionality between the perceived threat to the plaintiff’s rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an Anton Piller order. People whose commercial morality allows them to take a list of the customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them.”

Immediate Delivery Up Order

19. Where the strict preconditions for the grant of a search order are not satisfied, a less draconian yet still effective order is for the defendant to deliver up immediately (or forthwith) property belonging to the claimant. This is sometimes known as a doorstep Piller. This signifies that the claimant’s representatives may serve the order at the defendant’s premises, seek immediate delivery up, but without any requirement on the defendant’s part to permit access to the premises.

20. However, an applicant for a “doorstep Piller” should carefully consider *Adams Phones Ltd v Goldschmidt* [2000] FSR 163. In that case, Jacob J made the following observations:

(1) Because the order did not require the defendants to permit entry or a search, a standard requirement of search orders, namely that there be a supervising solicitor, was not included and was not considered at the time of the without notice application. That was a mistake. In future, the claimant and the court should more carefully consider requiring a supervising solicitor for orders which approximate to full seizure, such as orders requiring immediate positive action by a party, particularly if the required action is at all complex.

(2) It was also a mistake for the claimant to serve the order on a Saturday morning. There was no urgency calling for this, but by serving on a Saturday, it was near certain that the defendants would not be able to take legal advice.

(3) The presence, even nearby, of the claimant or his employee at execution is a matter which might operate oppressively, particularly on a defendant deprived of legal advice and unprotected by a supervising solicitor. The court should be told of an intention to bring along such a person when the order is sought.

Interim Injunction

21. An application may be made for an injunction pending trial, such as to enforce restrictive covenants. The courts have frequently considered the correct approach to such applications.

22. The court is not precluded from considering the strength of each party’s case when deciding whether to grant an application for interlocutory relief, but should rarely attempt to resolve difficult issues of fact or law, and any view as to the strength of the parties’ cases should be reached only where it is apparent from the affidavit evidence and any exhibited contemporary documents that one party’s case was much stronger than the other’s. It

follows that the major factors relevant to the court's discretion are (a) the extent to which damages are likely to be an adequate remedy for each party, and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court was able to reach as to the relative strength of the parties' cases (*Series 5 Software Ltd v Clarke* [1996] 1 All ER 853 (Laddie J) explaining and applying *American Cyanamid Co v Ethicon* [1975] 1 All ER 504; *CMI-Centers for Medical Innovation GmbH v Phytopharm Plc* [1999] FSR 235 (Laddie J)).

23. A defendant who has entered into a contractual restraint should seriously consider offering an appropriate undertaking until trial, provided that a speedy trial can be fixed and the claimant can satisfy the cross-undertaking in damages. It is only if a speedy trial is not possible and the action cannot be tried before the period of the restraint has expired or has run a large part of its course, that it will be necessary to have a contested interlocutory application: *Lawrence David Ltd v Ashton* [1989] IRLR 22 (CA); *Lansing Linde v Kerr* [1991] IRLR 80.

Springboard Injunction

24. Where an employee has used confidential information belonging to his employer in his new business, and thereby gained "an unfair start" or "springboard", the court may grant an injunction to prevent the employee from taking unfair advantage of the springboard. The term of any such injunction should not extend beyond the period for which the advantage may reasonably be expected to continue (*Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 135 (Roxburgh J); *Roger Bullivant Ltd v Ellis* [1987] FSR 172 (CA); *PSM International Ltd v Whitehouse* [1992] IRLR 279 (CA); *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 (Sir Donald Nicholls VC); *Sun Valley Foods Ltd v Vincent* [2000] FSR 825 (Jonathan Parker J)).

Disclosure Order

25. The court may, in an appropriate case, order a defendant to disclose contacts he has made with clients both before and after the termination of his employment (*Intelsec Systems Ltd v Grech-Cini* [2000] 1 WLR 1190).

Norwich Pharmacal orders

26. The *Norwich Pharmacal* case [1974] AC 133 established that where a person, albeit innocently, and without incurring any personal liability became involved with the wrongful act of another, that person came under a duty to assist the person injured by those acts by giving him information which he was able to give by way of discovery that disclosed the identity of the wrongdoer (*Ashworth Security Hospital v MGN Ltd* [2003] FSR 311 (HL)).
27. As Lord Woolf stated in *Ashworth* (paras 57-73), “new situations are inevitably going to arise where it will be appropriate for the [*Norwich Pharmacal*] jurisdiction to be exercised where it had not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.” See, also, *Camelot v Centaur Communications Ltd* [1998] IRLR 80.
28. The jurisdiction of the court is not confined to the case of identifying wrongdoers (*CHC Software Care Ltd v Hopkins & Wood* [1993] FSR 241 (Mummery J)). It also extends to cases where there is a good indication of wrongdoing, but not every piece of what the claimant needs to plead a case is fully in position (*Carlton Film Distributors Ltd v VCI Plc* [2003] FSR 876 (Jacob J)).

Evidence

29. Careful consideration should be given to the methods of obtaining evidence. The court has power to exclude admissible evidence (CPR 32.1) and may exercise this power in the case of evidence unlawfully obtained.
30. In relation to evidence gathering, regard should be had to the Regulation of Investigatory Powers Act 2000 (especially sections 1, 2 and 4), The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (especially Regulation 3), and the Data Protection Act 1998 (especially section 35(2)). Human rights considerations may also arise in this context, notably the article 8 right to privacy.

Section 12 of the Human Rights Act 1998

31. Special considerations arise when the grant of an injunction may interfere with the exercise of the Convention right to freedom of expression. This may occur where it is sought to restrain publication of confidential information.

32. Section 12 of the Human Rights Act 1998 provides as follows:

“No such relief [which might affect the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.”

33. For some time, the meaning of the word “likely” in this section has been unclear. The matter was recently considered by the House of Lords in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44. The House rejected the submission that “likely” here means “more likely than not” or “probable”. Lord Nicholls of Birkenhead, with whom the other members of the House agreed, adopted a flexible approach when he stated (paragraph 20):

“The intention of Parliament must be taken to be that “likely” should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace American Cyanamid standard of “real prospect” but permits the court to dispense with this higher standard where particular circumstances make this necessary.”

34. Lord Nicholls explained this further (paragraph 22):

“...the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably (“more likely than not”) succeed at the trial...But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include...where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed

to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

Effect of breach of confidence injunction on third parties

35. It is a well-established principle that if a person, with knowledge of an order of the court, does some act which has the effect of interfering with or wholly undermining the manifest purpose of such an order then he will be guilty of contempt even though the order was not made against him ("the *Spycatcher* principle"): *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191. The essence of the contempt consists in the interference by the third party with the course of justice in the proceedings in which the order was made.
36. It has recently been held that the *Spycatcher* principle is limited to interlocutory, and does not extend to final, injunctions: *Jockey Club v Buffham* [2003] 2 WLR 178. Gray J stated (paragraph 26):

"I accept that a claimant in a confidence action enjoys ... a windfall consisting in protection pending trial against invasion of his right of confidentiality by third parties. But the reason for the existence of that windfall is the need for the court to be able to enforce, through the machinery of the law of contempt, the object for which the interlocutory injunction was granted and not to protect the confidential information as such... at the end of the trial in a confidence action the claimant would be entitled to invite the court to make an injunction contra mundum. Such injunctions can be granted, at least in the exercise of the protective jurisdiction of the court: see Venables v News Group Newspapers Ltd [2001] Fam 430."

INJUNCTIONS TO RESTRAIN TERMINATION

The general rule against specific performance

37. It is well established that a contract of employment will not, as a general rule, be specifically enforced on the application of either the employer or employee. The rationale underlying this general rule has been identified as being variously that it would be impossible for the court to supervise such a

contract (*C H Giles & Co Ltd v Morris* [1972] 1 WLR 307 at 318 per Megarry J) and that it would represent an undue interference with the employee's personal liberty. As Geoffrey Lane LJ put it in *Chappell v Times Newspapers Ltd* [1975] IRLR 90 at : para.42

"Very rarely indeed will a court enforce, either by specific performance or by injunction, a contract for services, either at the behest of the employers or the employee. The reason is obvious: if one part has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster."

38. This general principle has been given legislative force by s.236 of the *Trade Union and Labour Relations (Consolidation) Act 1992*, which provides that no court shall compel an employee to do any work by ordering specific performance of a contract of employment or by restraining the breach of such a contract by injunction. Although this section was intended to prevent an employer seeking the court's assistance in breaking a strike by those means, the breadth of its terms mean that it is no so limited. Equally,

38.1. Whilst a Tribunal may order re-instatement or re-engagement following an unfair dismissal, the employer cannot ultimately be compelled to comply with such order but may instead be ordered to pay (additional) compensation (*Employment Rights Act 1996* ss.113 - 117).

38.2. The *Employment Rights Act 1996* contains no provision whereby the statutory right to return to work after maternity may be specifically enforced (ss. 79-85).

39. The effect of this rule is that the court will generally not grant an injunction in respect of a negative obligation that would have the effect of enforcing a positive obligation. Hence, the court may refuse to grant an injunction to enforce an obligation not to work for another employer in circumstances where, as a matter of practical reality, the defendant would not have any alternative to performing the contract with the existing employer, particularly where the contract requires for its proper performance the very highest degree

of trust and confidence. See for example *Lumley v Wagner* (1852) 1 De G M & G 604; *Warner Bros. v Nelson* [1937] 1 KB 209; *Page One Records v Britton* [1968] 1 WLR 157; *Chappell v Times Newspapers* [1975] IRLR 90; *Warren v Mendy* [1989] 3 All ER 103, [1989] IRLR 210; *Nichols Advanced Systems Inc v. de Angelis* (Oliver J., 21 December 1979); *Subaru Technical Inc & anr v Burns & ors* (Nicholas Strauss QC, 12 December 2001).

40. However, whilst the general rule normally prevents a court from granting injunctive relief to restrain a threatened wrongful dismissal or to order the reinstatement of an employee having been wrongfully dismissed, an increasing number of exceptions have emerged, which to an extent reflect the less personal nature of the modern relationship of employer and employee from that previously of master and servant.

Relevance of subsisting trust and confidence

41. In *Hill v Parsons & Co Ltd* [1972] Ch 305 the employer was forced by union pressure to dismiss an employee, in breach of contract. The court granted injunctive relief to the employee to restrain the breach, in effect thereby reinstating the employee. The crucial factor justifying a departure from the general rule was that the employer and employee were willing to maintain their relationship, and there was no question of what would now be characterised as mutual trust and confidence having broken down. Whilst the injunction was therefore on its face directed to the employer, its effect calculated to prevent interference in the contract by third parties, in that case, the union.
42. *Hill* was followed in *Irani v Southampton & South-West Hampshire HA* [1985] IRLR 203, in which case Mr Irani had been issued with a dismissal notice following the finding of a panel of enquiry that the differences between him and his immediate superior were irreconcilable and that he, as junior, should be dismissed. Mr Irani sought an injunction requiring the Authority not to implement the dismissal notice without first applying and exhausting the disputes procedures incorporated into his conditions of service by the Whitley Council provisions.

43. The court granted an interlocutory injunction, (on condition that Mr Irani undertake not to work pending final resolution of his claim) finding that *Hill* was very strong authority in his favour, on the basis that whilst the employee's relationship with his immediate superior had broken down, the employer itself had continued faith in Mr Irani's honesty, integrity and loyalty. Further, there was substantial evidence that termination of his contract would lead him to be denied access to National Health Service facilities, causing him substantial harm in circumstances where the court was satisfied that damages would not be an adequate remedy. According to Warren J., to have reached an alternative decision would be to conclude that 'an authority in the position of the defendant is entitled to snap its fingers at the rights of its employees' under their contracts.
44. The Court of Appeal considered the nature of the required confidence in *Powell v London Borough of Brent* [1987] IRLR 466, [1988] ICR 176. Mrs Powell had been informed that she had been selected for promotion and undertook the duties of the new position for two months before being informed that the appointment had not been confirmed and the position was being re-advertised, which decision was taken following a complaint by an unsuccessful candidate that there had been a breach of relevant equal opportunities practice. The Court of Appeal held that an injunction would not be granted to compel an employer to let an employee continue in employment *unless* it is clear on the evidence that:
- 44.1. It is otherwise just to make such an order;
- 44.2. There exists sufficient confidence on the part of the employer in the servant's ability and other necessary attributes for it to be reasonable to make the order. Sufficiency of confidence must be judged by reference to the circumstances of the case, including the nature of the work, the people with whom the work must be done and the likely effect upon the employer and the employer's operations if the employer is required by injunction to suffer the employee to continue in the work (per Ralph Gibson LJ at 194A-C).

45. However, the court cannot simply speculate as to whether a workable relationship would arise: see *Wishart v National Association of Citizens Advice Bureaux Ltd* [1990] IRLR 393. Mr Wishart was made an offer of employment 'subject to the receipt of satisfactory written references' which was withdrawn following receipt references which the employer considered to be unsatisfactory (in respect of his level of sickness absence). At first instance the judge considered the case to be substantially similar to *Powell* and granted an injunction on basis that there was no reason why, if Mr Wishart took up his post pending trial, he should not perform to the employer's entire satisfaction. The Court of Appeal discharged the injunction, on the basis that the case was not similar to *Powell*, and hence fell within the exceptional category, since,

45.1. There was no evidence that the employer had or had expressed confidence in Mr Wishart; and

45.2. There was no established employment relationship.

46. In certain circumstances, an employer might seek to argue that they have lost trust and confidence, but nevertheless injunctive relief may be granted against them. In *Ali v London Borough of Southwark* [1988] IRLR 100, Millett J. held:

"The court will intervene by way of injunction in an employment case to restrain dismissal only where it is satisfied that the employer still retains confidence and trust in the employee or, if he claims to have lost such trust and confidence, does so on some irrational ground."

47. Further, it will not be enough for an employer to assert that trust and confidence has broken down in circumstances where that very issue has not been determined pursuant to disciplinary procedures incorporated into the contract of employment: see *Barros D'Sa v University Hospital Coventry and Warwickshire NHS Trust* [2001] IRLR 691.

48. It is not enough simply to rely on the fact that trust and confidence has **not** broken down to displace the general principle: see *Subaru Tecnica International Inc. & Anr v Burns & ors* (12 December 2001, Nicholas Strauss QC sitting as a Deputy High Court Judge, Chancery Division). Mr Burns was a racing

driving who had entered into a 2 year agreement to drive for Subaru. He gave notice to terminate the agreement during the second year of the contract as he was entitled to do for material breach by Subaru, but Subaru relied upon the contractual term that such notice was of no effect where, as here, the driver had won the World Rally Championships. Subaru sought injunctions restraining Mr Burns from driving for another team, even if the effect of that injunction was that he was compelled to drive for Subaru, on the basis that the principle that the court would not enforce negative obligations in a contract for services if the effect would be to compel performance of the positive obligations applied only if the court was satisfied that trust and confidence had broken down.

49. Whilst the court noted the force in this argument, it rejected it as being inconsistent with earlier authorities such as *Warren v Mendy* [1989] IRLR 210, and held that the general principle is applicable in any case of a contract for personal services inseparable from the exercise of some special skill or talent. It therefore refused to continue the injunctions on the basis that the practical effect would be to compel the performance of a contract involving the exercise of a special skill or talent and a close relationship between the parties and there were no 'unusual circumstances' to displace the general rule.

Absence of Trust and Confidence?

50. In the absence of sufficient mutual trust and confidence it may still be possible to obtain injunctive relief where the purpose is to preserve the contractual relationship but not to compel the employer to allow the employee to resume his duties: see *Robb v LB of Hammersmith and Fulham* [1991] IRLR 72. Mr Robb was suspended on full pay during an investigation into his capability, during the course of which the parties attempted to negotiate his termination. In the light of the negotiations, the employer decided that there was no useful purpose in continuing to follow the disciplinary procedure, and, after negotiations broke down, Mr Robb was summarily dismissed. The Court granted his application for an injunction restraining his employer from giving effect to the purported dismissal until the contractual disciplinary procedure

had been followed, despite the fact that the employer had lost trust and confidence in Mr Robb, on the basis that:

50.1. The all important criterion was whether the Order was workable. Where an injunction is sought to reinstate an employee so that he can actually carry out the job for which he was employed, trust and confidence are relevant. However, Mr Robb did not seek reinstatement so that he could actually perform his duties, but in order that the disciplinary process could be followed. Trust and confidence had no relevance to the workability of that order.

50.2. Although damages would be an adequate remedy for Mr Robb, in that he would be entitled to damages representing loss of salary during notice and the period for the probable length of completion of the disciplinary procedure, damages would not be an adequate remedy for the manner of his unlawful dismissal and his deprivation of the disciplinary procedure.

51. Even where it was impossible to conclude that a workable situation between the parties would arise, the court may still be prepared to grant injunctive relief: see *Wadcock v London Borough of Brent* [1990] IRLR 223, in which an injunction was granted on the employee's undertaking that he would work in accordance with the orders, instructions and wishes expressed by his employer.

52. The decision in *Jones v Gwent County Council* [1992] IRLR 521 is something of an anomaly in this context. Mrs Jones had been suspended during two sets of disciplinary proceedings, in which she was ultimately cleared. A third set of proceedings was brought to consider the charge that her return to work would cause an irrevocable breakdown in relationships between management and staff based on her past behaviour. In her absence, it was determined that Mrs Jones should be dismissed and remain suspended in the meantime. She sought an injunction restraining the council from dismissing her unless proper grounds existed and a proper procedure had been carried out. It was granted by Chadwick J., who concluded under RSC Order 14A that the letter

of dismissal was not valid and effective, and that an injunction should be granted on the basis that “this is not a case in which this defendant council can be relied upon to act fairly and rationally in relation to the plaintiff’s employment”.

53. Different approaches have been taken to the situation in which an injunction has been sought to restrain an employer from giving effect to a dismissal by reason of redundancy until the terms of the redundancy procedure had been complied with.

53.1. In *Alexander v Standard Telephones & Cables plc* [1990] IRLR 55 the application was rejected, on the basis that the exceptions established by cases such as *Irani* and *Powell* were inapplicable in a case where (a) there was no work for the claimants (b) it could not be said that the employers had complete confidence in the employees (c) the employer would suffer detriment if the employees’ employment was continued, as it would have to dismiss other employees whom it considered more capable of doing the work.

53.2. In *Anderson v Pringle of Scotland Ltd* [1998] IRLR 64 an interim injunction was granted where the employee contended that a LIFO policy had been incorporated into his terms and conditions. The Court of Session held that injunctive relief was appropriate where it could be granted before the dismissal took effect, and that, as it was a redundancy case there was no suggestion of mistrust between the parties.

INJUNCTIONS IN SUPPORT OF EMPLOYMENT RIGHTS GENERALLY

Discrimination

Discrimination legislation

54. The use of injunctions in the employment field is significantly restricted by the jurisdictional provisions of the relevant discrimination legislation which

provide that complaints of unlawful discrimination in the employment field may be presented to an employment tribunal (SDA 1975 s.63(1), RRA 1976 s.54(1), DDA 1995 s.8(1)). In contrast, an application for an injunction may be made in respect of proceedings under Part III (goods and services) which may be brought in a county court where all remedies are obtainable in such proceedings as, apart from s.66 would be obtainable in the High Court.

55. There are, though, limited circumstances in which an application for an injunction may be made under the discrimination legislation. Where either a non-discrimination notice has been served following a formal investigation conducted by the EOC, or a tribunal has found that a respondent has done an unlawful discriminatory act or an act in breach of a term modified or included by virtue of an equality clause, within 5 years thereof the EOC may apply for an injunction in the county court to restrain persistent discrimination (s.71(1)), and in that connection can seek a preliminary ruling from a tribunal by way of complaint that the respondent has unlawfully discriminated in the employment field (s.73).
56. Similar provisions apply to the CRE under the RRA 1976 (ss.62(1) & 64). In addition, the RR(A)A 2000 amended the RRA 1976 to create new statutory duties enforceable by the CRE. First, there is now a general statutory duty on all bodies or persons specified in Schedule 1A to 'have due regard to the need (a) to eliminate unlawful racial discrimination and (b) to promote equality of opportunity and good relations between persons of different racial groups' (RRA s.71(1), as amended). Secondly, the Secretary of State may by order impose specific duties upon certain of such specified bodies or persons for the purpose of ensuring the better performance by those persons of that general duty (s.71(2)). See the *Race Relations Act 1976 (Statutory Duties) Order 2001* (SI 2001/3458), which imposes an obligation on specified bodies to publish race equality schemes by 31 May 2002; and the *Race Relations Act 1976 (Statutory Duties) Order 2003* (SI 2003/3006) which extended the obligation to further specified bodies to comply by 31 May 2004.
57. Where the CRE is satisfied that a person body has failed to comply with a statutory duty imposed by an order under s.71(2), it may serve a 'compliance

notice' on such person or body (s.71D). The CRE may enforce the compliance notice by applying to a designated county court (or sheriff court) for an order requiring a person to provide any information required under the compliance notice, and to comply with any requirement of the compliance notice (s.71E).

Other potential causes of action

58. Where discrimination takes the form of harassment, in principle it may be possible to found a claim for injunctive relief not on the basis of the discrimination legislation, but under either the Protection of Harassment Act 1997 or, insofar as the situation is not covered by that Act, the common law of tort.
59. The Protection of Harassment Act is widely drawn and likely to cover most workplace situations. It prohibits a person from pursuing a course of conduct that amounts to harassment, provided that they know or ought to know that it is harassment (s1(1)). A person ought to know that it amounts to harassment if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other (s.1(2)). Harassment of a person is defined to include alarming them or causing them distress, conduct may include speech, and a course of conduct involves at least 2 incidents (s7).
60. A victim of a breach of section 1, actual or apprehended, may bring civil proceedings and may obtain compensation for anxiety and financial loss as well as injunctive relief. Where the harasser breaches any injunction to restrain his harassing behaviour, the victim may apply for a warrant for his arrest (s3).
61. Alternatively, a victim of harassment in the workplace may seek to found a claim on the tort of harassment insofar as it has been developed by the courts in cases such as *Burnett v George* [1992] 1 FLR 525, *Khorasandjian v Bush* [1993] 3 All ER 669 and *Burris v Asadani* [1995] 1 WLR 1372.

62. The issue then arises as to whether any such application for injunctive relief on these grounds would be precluded by the general principle against the enforcement of a contract of employment, directly or indirectly. Two scenarios may arise:
- 62.1. The harassment constitutes a repudiatory breach of contract by the employer.
 - 62.2. The harassment constitutes a breach of contract by the employer but is non-repudiatory, for example, where the harassment is by a co-worker and the employer's conduct whilst amounting to a breach of contract did not go to the heart of the employment relationship.
 - 62.3. The harassment does not constitute any breach of contract by the employer.
63. In the first scenario, the injunctive relief sought would amount to an obligation on the employer to allow the employee to continue to carry out his duties, and the *Hill* exception may therefore be relevant.
64. In the second scenario, however, the court would not be concerned with effectively preventing the termination of the contract but with regulating the manner in which it is to be performed. Although not entirely clear, the case of *Hughes v London Borough of Southwark* [1988] IRLR 55 appears to suggest that different considerations may apply.
65. In the third scenario, it is questionable whether the common law rule against specific performance should apply at all, as the injunction would not be sought to compel the employer to allow the employee to continue in his duties.
66. Where the employer is a public authority for the purposes of the Human Rights Act 1998 it is also arguable that a claim for injunctive relief could be based on a breach of Convention rights.

Collective Rights

67. The issue of whether an injunction is available to enforce a breach of a directly enforceable EC Directive was considered in *Griffin & ors v South West Water Services Ltd* [1995] IRLR 15. In that case 5 employees who were members of Unison sought to argue that an injunction should be granted to prevent the employer effecting any redundancies until it had consulted in accordance with the provisions of the EC Collective Redundancies Directive 75/129. Blackburne J. dismissed the application on the ground that the Directive was not directly enforceable, but that even if it were, it would not have been appropriate to grant an injunction. The Directive left the choice of remedy for its breach to Member States, and Parliament had chosen to legislate by way of s.188 of the Trade Union and Labour Relations (Consolidation) Act, which provides that a complaint may be made to an employment tribunal who may grant a protective award. As that was the exclusive remedy selected by Parliament, Blackburne J. held that it was not open to the court to disregard it and grant relief of a wholly different kind.

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