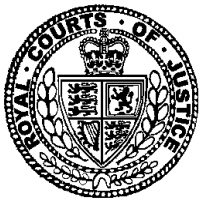

Neutral Citation Number: [2019] EWCA Civ 1707

Case No: A2/2018/1051
A2/2018/1343

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HH Judge Eady QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE IRWIN
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

BATH HILL COURT (BOURNEMOUTH) MANAGEMENT COMPANY LIMITED	**Appellant**
- and -	
ANTHONY COLETTA	**Respondent**

- -
- -

Mr Timothy Brennan QC and **Mr Mark Green** (instructed by **Ashfords LLP**) for the **Appellant**
Ms Betsan Criddle and **Mr Ben Jones** (instructed through **Advocate**, with the assistance of **Paris Smith LLP**) for the **Respondent**

Hearing date: 25th July 2019

- -

Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. There are before us both a substantive appeal and an application for permission to appeal, out of time, from separate decisions at different stages of the same proceedings in the employment tribunal ("the ET").

2. The Claimant, who is the Respondent before us, was employed from February 2000 until his dismissal on 4 August 2015 as a live-in porter in a block of flats in Bournemouth, of which the Appellant ("BHC") was the management company. In November 2014 he brought proceedings in the ET claiming that BHC had paid him less than the national minimum wage ("the NMW"): the essence of his case was that it was necessary for NMW purposes to take into account periods when he was "on-call" at night, albeit in his flat on the premises and permitted to sleep. The claim was treated as a claim for unlawful deductions from wages contrary to Part II of the Employment Rights Act 1996. By a Judgment promulgated on 9 September 2015 the ET found in his favour; and that decision was upheld by the EAT (Judge Eady QC sitting alone) on 2 June 2016. The application for permission to appeal relates to that decision ("the liability decision"); it is almost two years' out of time, and BHC will accordingly need an extension.

3. Following a remedy hearing in the ET, on 23 December 2016 the Claimant was awarded £44,603 by way of arrears in respect of the period of six years prior to the commencement of proceedings: the ET applied a cut-off of six years on the basis that the claim was caught by the provisions of the Limitation Act 1980. He appealed to the EAT contending that the 1980 Act had no application and that he was entitled to arrears in respect of the whole period of his employment. On 29 March 2018 Judge Eady allowed his appeal, and judgment was substituted in the agreed sum of £100,252.42. The substantive appeal relates to that ("the quantum decision").

A. THE LIABILITY DECISION: APPLICATION FOR EXTENSION

4. For the purpose of the liability decision the ET and EAT followed a number of authorities which were thought to establish that, in (broadly speaking) cases like the Claimant's, on-call hours had to be taken into account for NMW purposes. In the conjoined appeals in *Royal Mencap Society v Tomlinson-Blake* and *Shannon v Rampersad* [2018] EWCA Civ 1641, [2019] ICR 241, ("*Royal Mencap*" for short), which was handed down on 13 July 2018, this Court disapproved the approach taken in those authorities. In reliance on that decision BHC wishes to appeal against the liability decision of the EAT. Permission has in fact been given to the claimant in *Royal Mencap* to appeal to the Supreme Court; but for the present BHC is entitled to proceed on the basis that it is authoritative.

5. As I have said, the proposed appeal would be almost two years out of time. It should have been filed by 23 June 2016 (i.e. 21 days after the EAT's decision – see CPR 52.12), and it was not in fact filed until 4 May 2018. Mr Timothy Brennan QC, who appears for BHC in this Court (though he did not appear below), submits that the necessary extension should be granted pursuant to CPR 3.2 (1). In his oral submissions he frankly acknowledged that an application for an extension of that length would normally be hopeless, but he said that the circumstances in the present

case were unusual in two respects. First, the decision in *Royal Mencap* had effected a complete change in the landscape as regards the treatment of on-call workers for NMW purposes and had rationalised what had previously been the confused state of the case-law. Secondly, and importantly, the proceedings were still ongoing because of the dispute as to quantum. In that connection Mr Brennan suggested (though only in his oral submissions) that it would be open to the Court to grant an extension on the condition that if the appeal were successful the Claimant would not be required to re-pay the £44,000 already paid, so that the real effect of the extension would only be to deprive him of the benefit of the further £55,000-odd to which he would be entitled if the quantum appeal failed[1]. Those features taken together meant that justice required the grant of an extension.

6. The Court did not require to hear submissions from Ms Betsan Criddle, who appeared for the Claimant (as she also did in the EAT). In my view it is clear that this would not be a proper case for an extension. There is no need to recapitulate the well-known case-law about the principles applying to applications for the grant of an extension of time for appealing to this Court: see principally *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472. Mr Brennan was right to accept that an extension of the length sought in this case would be quite exceptional. The features on which he relies are not sufficient to justify it, whether considered individually or together.

7. As to the first, as Mr Brennan himself submitted, at the time of the liability decision in the EAT the case-law in this area was indeed confused, and by no means all the decisions favoured workers (see the discussion at paras. 83-84 of my judgment in *Royal Mencap*). An example of a case in which the worker's claim was rejected was the decision of the EAT in *Shannon v Rampersad* itself, which was upheld in *Royal Mencap*: in fact BHC itself relied on it in its submissions in the EAT. There was no reason for BHC to think that a further appeal would be futile, and it would have been open to it to appeal if it had chosen, as the respondent in *Royal Mencap* did.

8. Nor do I believe that the fact that the proceedings are ongoing makes a difference in this case. The liability and quantum decisions are self-contained. Even if we had imposed a condition of the kind suggested by Mr Brennan as regards the £44,000, the normal consequence of the Claimant succeeding on the quantum appeal would be that he would thereupon become entitled to the further £55,000, since liability had been determined. The quantum proceedings would ordinarily have been concluded prior to the decision in *Royal Mencap*. It is only the delay caused by BHC's initial (unsuccessful) liability appeal, coupled with the Claimant's (successful) quantum appeal and BHC's further appeal to this Court, which meant that they were still alive in July 2018. If the appeal were to be permitted to proceed and were to succeed (which could not occur before next year at earliest, since it would be necessary to await the decision of the Supreme Court), the Claimant would be deprived of a sum which in the ordinary course he should have received without question long before that.

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1 We were told that the £55,000 sum has not been paid to the Claimant but is being held by his solicitors pursuant to an undertaking given to HH Judge Eady in response to an application for a stay made to her by BHC.

B. THE QUANTUM DECISION

THE STATUTORY PROVISIONS

The National Minimum Wage Act

9. The right to the NMW derives from the National Minimum Wage Act 1998, section 1 (1) of which provides:

> "A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage."

10. The 1998 Act does not itself provide a mechanism for enforcement of the right conferred by section 1 (1), but section 17 (1) provides:

> "If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time ('the time of determination') be taken to be entitled *under his contract* [emphasis supplied] to be paid, as additional remuneration in respect of that period, whichever is the higher of -
>
> (a) the amount described in subsection (2) below, and
>
> (b) the amount described in subsection (4) below."

11. I need not set out the terms of sub-sections (2) and (4), but the effect of section 17 (1) when read with them is to provide the worker with a contractual entitlement to be paid at the specified rate. It follows that any underpayment can be recovered by ordinary civil proceedings in the County Court – or, if the claim arises or is outstanding on the termination of the employment, in the ET pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order") – although it is much more common for claimants to proceed under the 1996 Act, as explained below, as happened in this case.

Part II of the Employment Rights Act

12. Part II of the Employment Rights Act 1996 substantially re-enacts the provisions of the Wages Act 1986. It has been amended since the date with which we are concerned (see para. 35 below), but the relevant provisions as at the material date are as follows.

13. Section 13 confers on workers a right "not to suffer unauthorised deductions" from their "wages". That term is defined by section 27 (1) as (so far as relevant):

> "… any sums payable to the worker in connection with his employment, including -

> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,
>
> …"

That language plainly covers a claim to unpaid sums to which the worker is contractually entitled under the 1998 Act.

14. Section 23 (1) gives the employment tribunal jurisdiction to determine a complaint by an employee that his employer has made a deduction from his wages in contravention of section 13.

15. A claim under section 13 (1) must be brought within the period prescribed by sub-sections (2)-(4), which read (so far as relevant):

> "(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
>
> (b) ….
>
> (3) Where a complaint is brought under this section in respect of -
>
> (a) a series of deductions or payments, or
>
> (b) ….
>
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
>
> (3A) …
>
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

16. Sub-section (3) is important because, depending on the facts of the particular case, it may, as the present case illustrates, permit a claim to be brought in relation to a deduction which occurred many years in the past. I will refer to it for convenience as "the series of deductions provision".

17. Section 205 (2) provides that the remedy for a worker in respect of any breach of section 13 is by way of complaint to an ET and not otherwise. But that does not mean

that an employee may not in the ordinary way pursue a claim for sums due under the contract in the civil courts (or under the 1994 Order) – see *Rickard v P.B. Glass Supplies Ltd* [1990] ICR 150; and that will of course be the case even if the contractual claim in question derives from section 17 of the 1998 Act (see para. 11 above).

The Limitation Act 1980

18. Part I of the Limitation Act 1980 prescribes the ordinary limitation periods as regards a number of types of cause of action. I need set out only sections 5 and 9. Section 5 provides:

> "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Section 9 reads (so far as relevant):

> "(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.
>
> (2) …"

19. Part II contains a number of provisions relating to the extension or exclusion of the time limits provided for in Part I. For our purpose the only relevant provision is section 39, which reads (so far as material):

> "This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any enactment (whether passed before or after the passing of this Act) … ."

THE ISSUES

20. The starting-point is that it is common ground that the Claimant's claim involves a "series of deductions" within the meaning of section 23 (3) (a) of the 1996 Act, going back to the start of his employment in 1990, so that, so far as that Act itself is concerned, he is entitled to claim in respect of the whole series. The fundamental issue in this appeal is whether that claim is limited by the provisions of the 1980 Act.

21. As to that, it was Mr Brennan's case that the Claimant's claim in the ET proceedings is "an action founded on simple contract" within the meaning of section 5 of the 1980 Act, alternatively "an action to recover [a] sum recoverable by virtue of [an] enactment" within the meaning of section 9, and thus in either case has to be brought within six years of the accrual of the cause of action. Ms Criddle pointed out that the ET based its decision exclusively on section 9, and that that was the basis on which BHC defended its decision in the EAT; she submitted that Mr Brennan should not be permitted to rely on section 5 for the first time in this Court.

22. Subject to that objection, Ms Criddle's response to BHC's case, whether based on section 5 or on section 9, was twofold:

(a) First, she submitted that neither section can have any application in these proceedings since a claim in the employment tribunal is not an "action". It is fair in turn to say that this point too was not taken in the ET or the EAT: it appears to have been advanced as a result of the Court drawing the parties' attention to the decision of the EAT in *Brennan v Sunderland City Council* [2012] UKEAT 0286/11, [2012] ICR 1183, which held that a claim in the employment tribunal was not an "action" within the meaning of section 1 (6) of the Civil Liability (Contribution) Act 1978 (see paras. 22-25 of my judgment (pp. 1193-5)).[2]

(b) Secondly, she submitted that, even if the Claimant's claim is an "action" caught by either section 5 or section 9, those provisions are disapplied by section 39, since "a period of limitation is prescribed" for it by sub-sections (2)-(4) of section 23.

DISCUSSION AND CONCLUSION

23. I prefer to start with the last of the issues identified above. The question is whether the provisions of section 23 (2)-(4) of the 1996 Act can properly be described as prescribing "a period of limitation". Mr Brennan submitted that they could not. His primary reason was that there is, he submitted, a fundamental distinction between a provision which places a temporal limit on the enforceability of a substantive right and one which places such a limit on the jurisdiction of a court or tribunal to determine a claim based on that right. Only the former, he submitted, involved a "period of limitation" in the sense in which that phrase is used in section 39; but the relevant provisions of section 23 were of the latter kind. As he put it in his skeleton argument:

> "… [Section] 23 … says nothing about the enforceability, with regard to time, of the debts to which the 'unauthorised deduction' claim relates. The provision addresses the jurisdiction of the ET – the forum for adjudication of the dispute, not the liability for the debt."

24. I am not sure whether the distinction advanced by Mr Brennan is the same as that between "barring the right" and "barring the remedy" which is well established in the context of Part I of the 1980 Act. Most (but not all) of the provisions in that Part are treated as doing the latter but not the former, and the distinction may have real consequences in a few very specific circumstances: see *McGee on Limitation Periods* (8th ed) at paras. 2.038-047. I think the distinction probably is the same one, but it is possible that Mr Brennan was also making the point that where, as is almost always the case, a deduction in respect of which a claim is advanced under section 23 reflects a contractual right, the claimant can still pursue that underlying debt in the ordinary courts. If so, that is, with respect, a red herring. The relevant right here is the right

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2 As will appear below, I do not in fact believe that the Court has to consider this issue, and I do not do so. It may be unlikely in practice to arise in any other context. But I note, in case it does, that, as Mr Brennan helpfully pointed out, whereas the term "action" is not defined in the 1978 Act, section 38 (1) of the 1980 Act defines it as including "any proceeding in a court of law": the real question would therefore be whether an employment tribunal is, for these purposes, a "court of law".

under the 1996 Act, and that right can indeed only be pursued by a claim under section 23: see para. 17 above.

25. In any event I cannot accept that the distinction between a bar on the right and a bar on the jurisdiction of the tribunal to enforce it has any relevance to the issue before us. Sub-sections (2)-(4) provide for a period – namely, three months from the deduction in question, or from the last deduction in any series of which it forms part – after which proceedings may not be brought to enforce a claim under Part II of the Act. That seems to me plainly to constitute a "period of limitation". In ordinary legal language that phrase (or its cognate, "limitation period") denotes a period following the expiry of which a person with a legal right is unable to assert that right in legal proceedings. It is equally applicable to a case where the bar is expressed as a provision that the right ceases to be enforceable after the expiry of the period as to a case where the provision takes the form that the tribunal in which it would have to be enforced ceases to have jurisdiction to do so. The distinction relied on by Mr Brennan is in this context a distinction without a difference. Provisions using the same formulation as section 23 (2)-(4) – that the tribunal "shall not consider" a complaint presented after the specified period – apply to all the substantive rights conferred by the 1996 Act (the most familiar example being section 111 (2), which applies to unfair dismissal claims); and they are invariably referred to by tribunals as limitation provisions.

26. That understanding of the phrase is also apparent from two of the leading textbooks. Ms Criddle in her clear and helpful submissions referred us in particular to *McGee*. This adopts, at para. 1.001, the working definition "any provision which specifies a time-limit within which legal proceedings … must be brought". The work is principally concerned with the 1980 Act (and the complementary provisions of the Latent Damage Act 1986 and the Consumer Protection Act 1987); but chapter 27 reviews in summary the limitation provisions of a number of other statutes. The chapter begins (para. 27.001):

> "In addition to the Limitation Act 1980, the Latent Damage Act 1986 and the Consumer Protection Act 1987, there are a number of other statutes that impose time-limits on the bringing of an action. The more important of these are dealt with in this chapter. It should be observed that s.39 of the Limitation Act 1980 declares the general provisions of that Act to be subject to any specific provision in any other Act. Consequently, all the various provisions dealt with in this chapter take precedence over the 1980 Act in their own particular spheres of applicability."

The statutes which it goes on to review include the 1996 Act (see paras. 27.030-34). Although the view expressed in that passage is not specifically reasoned it reflects a natural, and in my view correct, understanding that provisions of the kind with which we are concerned here prescribe periods of limitation within the meaning of section 39. Likewise *Chitty on Contracts* (32nd ed): see para. 28-020, read with paras. 28-028-9.

27. I need accordingly not consider whether the effect of section 23 (2)-(4) is to deprive the employment tribunal of jurisdiction rather than to extinguish the substantive right.

It is indeed the case that there are many authorities which describe the limitation provisions in the 1996 Act as going to jurisdiction; and they are probably binding at this level. But Ms Criddle referred us to *Abdulla v Birmingham City Council* [2012] UKSC 47, [2012] ICR 1419, where Lord Sumption expressed doubts whether that was correct as regards the substantially similar language of section 2 (4) of the Equal Pay Act 1970: see para. 42 of his judgment (p. 1436 E-F). Although the language of "a tribunal shall not consider" does on its face suggest a jurisdiction bar, the same might be said of the formula used in Part I of the 1980 Act – "an action shall not be brought …"; yet it is established that that has effect to bar the remedy but not the right: see above. Fortunately it is unnecessary to pursue this question further.

28. Ms Criddle referred us to two decisions of this Court about the effect of section 32 of the Limitation Act 1939, which is the predecessor to section 39 of the 1980 Act and was in identical terms. In *Leivers v Barber, Walker and Co Ltd* [1943] 1 KB 385 the issue was whether section 32 applied to a provision of the Workmen's Compensation Act 1906 to the effect that proceedings under it should not be "maintainable unless notice of the accident had been given as soon as practicable, and unless the claim for compensation has been made within six months from the occurrence of the accident causing the injury". It was held by a majority (Scott and du Parcq LJJ) that it plainly did, du Parcq LJ observing at pp. 399-400 that Parliament had not used technical language. In *Airey v Airey* [1958] 2 QB 300 the issue was whether it applied to section 1 (3) (b) of the Law Reform (Miscellaneous Provisions) Act 1934, which (so far as relevant) provided that no proceedings in respect of a cause of action in tort which, by virtue of section 1 (1), survived the victim's death should be "maintainable" unless proceedings were taken within six months of the appointment of the personal representative. Again, it was held that that provision imposed a period of limitation: Jenkins LJ, giving the judgment of the Court, observed that if the intention had been that the limitation period so specified should be subject also to the limitations under the 1939 Act the statute would have said so. I found these authorities of only limited assistance, because the Court's reasons focus on the wording of the particular provisions in issue and do not contain any general exposition of principle. But they do at least show that in considering whether a statute prescribes a period of limitation the Court is concerned with the substance rather than with precisely how the limitation is expressed.

29. Mr Brennan advanced three supporting arguments which I can take more shortly.

30. First, he submitted that it was inherent in the idea of a limitation period that it must be identifiable and certain; and he contended that the provisions of section 23 (2)-(4) do not satisfy that requirement because of the uncertainty inherent in the concept of what constitutes a "series" (an issue recently considered by the EAT in *Bear Scotland Ltd v Fulton* [2014] UKEATS/47/13, [2015] ICR 221, and by the Northern Ireland Court of Appeal in *Chief Constable of the Police Service of Northern Ireland v Agnew* [2019] NICA 32). I can accept (leaving aside for these purposes provisions for discretionary extensions) that a limitation period must be conceptually certain, but it does not follow that it must be defined in terms which depend purely on hard-edged dates and exclude any element of assessment. Ms Criddle reminded us that, under section 11 of the Limitation Act 1980 itself, in a claim for personal injury time starts to run only from the claimant's "date of knowledge", as defined in section 14 – a definition which

can raise issues every bit as difficult to resolve as whether a particular deduction forms part of a series.

31. Secondly, he pointed out that if the Claimant's case were correct there would be different limitation periods depending on whether a worker chose to proceed by way of a contractual claim in the ordinary civil courts, as he or she was fully entitled to do (see para. 17 above), or by bringing a claim in the employment tribunal under Part II of the 1996 Act. In the former case the limitation period would be six years, whereas in the latter it would be three months from the deduction complained of or, if it was part of a series, from the last deduction in that series. That is no doubt correct, but I cannot see that it is objectionable in principle. It is not simply that these are formally distinct rights. It is in fact far from unknown for different procedural provisions, including those relating to time, to apply to what is in substance the same claim, depending on the claimant's choice between two legal frameworks and/or jurisdictions. For example, an employee whose employment is terminated may bring proceedings for a sum owing to him or her either under the 1994 Order or in the civil courts: in the former case the claim would have to be brought within three months from the effective date of termination (see article 7 of the Order) but in the latter there would be no such bar.[3] The effect of the decision of the Supreme Court in *Abdulla* is likewise that in principle a claimant may avoid the impact of the time-bar in section 2 (4) (a) of the 1970 Act (now section 129 (3) of the Equality Act 2010), being six months from the date of termination of the employment, by bringing an ordinary contractual claim in the County Court. And in *Her Majesty's Revenue and Customs v Stringer* [2009] UKHL 31, [2009] ICR 985, the House of Lords held that a worker who has not received statutory holiday pay to which he or she is entitled under the Working Time Regulations 1998 may bring proceedings either under those Regulations themselves, which are subject to a limitation period of three months from the non-payment complained of, or under Part II of the 1996 Act in order take advantage of the series of deductions provision (to which there is no equivalent in the 1998 Regulations): although both types of claims are brought in the employment tribunal, this is nevertheless a further instance of a claimant being able to choose between two regimes with different limitation provisions.

32. Thirdly, he submitted that it could give rise to real difficulties if a claimant were entitled to make a claim in relation to a series of deductions going back to the start of his or her employment, which might be very many years previously. The further back the claim went the greater the risk that records would not be retained. I do not believe that that consideration can justify failing to adopt a construction of section 39 which is in my view otherwise perfectly clear. I would also point out that the risk on which Mr Brennan relies would be present even if there were a six-year backstop.

33. I should mention two other points for completeness.

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3 I should note that Judge Eady at para. 51 of her judgment referred to a submission from counsel that article 7 prescribed "a period of limitation" within the meaning of section 39 of the 1980 Act, so that the six-year limitation period for a contractual debt did not apply. She was not required to resolve the question and sensibly expressed no conclusion about it. Nor do I: the point which I make above is simply that different provisions about time may apply depending on the procedural route taken.

34. First, in *Alabaster v Barclays Bank Plc* [2005] EWCA Civ 508, [2005] ICR 1246, this Court proceeded on the assumption that the six-year limitation period under the 1980 Act applied to claims under Part II of the 1996 Act: see para. 30 of the judgment of the Court given by Brooke LJ (p. 1257E). But Mr Brennan accepted that the point was not argued in that case and was not the subject of a reasoned decision. It is plainly not binding on us.

35. Secondly, with effect from 8 January 2015, i.e. after the period to which the claim in these proceedings relates, section 23 of the 1996 Act has been amended by the insertion, by regulation 2 of the Deductions from Wages (Limitation) Regulations 2014, of a new sub-section (4A). This reads:

> "An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint."

The effect of the new sub-section, which was introduced in response to *Bear Scotland Ltd v Fulton*, is to place a limit on the operation of the series of deductions provision under section 23 (3): claimants may only go back two years. The Explanatory Note makes clear that the Secretary of State recognised that it was arguable that the 1980 Act did not apply to claims under Part II of the 1996 Act, and he wished in those circumstances to provide for a clear backstop. But that does not advance the argument before us: we still have to decide for ourselves what the position is.

36. I would accordingly hold, in agreement with Judge Eady in the EAT, that even if either section 5 or section 9 of the 1980 Act would otherwise apply to the Claimant's claim they are disapplied by section 39. That means that it is unnecessary to consider whether that claim constitutes an "action" for the purpose of either section or, if it does, whether it more naturally falls under section 5 or section 9.

DISPOSAL

37. I would dismiss this appeal.

Lord Justice Irwin:

38. I agree.

Lady Justice Nicola Davies:

39. I also agree.