by the defendant. It was 15 miles from Gatwick airport. The claimant asked the defendant surveyor to deal with the possibility of aircraft noise. The defendant reported that the property was unlikely to suffer to any great extent from aircraft noise. After moving in, the claimant found that there was substantial interference from aircraft noise. A claim for breach of contract was made. Damages for disappointment at the loss of a pleasurable amenity and disappointment at the loss of pleasure, relaxation and peace of mind were asked for. The Court of Appeal refused the claim because the contract was not for the supply of a pleasurable amenity but for a property survey.

On appeal the House of Lords ruled that a sum of £10,000 was recoverable in the circumstances of the case even though the contract did not have the provision of pleasure as its object.

Damages: remoteness; loss must be proximate and not too remote

240 *Hadley* v *Baxendale* (1845) 9 Exch 341

The claimant was a miller at Gloucester. The driving shaft of the mill being broken, the claimant engaged the defendant, a carrier, to take it to the makers at Greenwich so that they might use it in making a new one. The defendant delayed delivery of the shaft beyond a reasonable time, so that the mill was idle for much longer than should have been necessary. The claimant now sued in respect of loss of profits during the period of additional delay. The court decided that there were only two possible grounds on which the claimant could succeed.

(*a*) That in the usual course of things the work of the mill would cease altogether for the want of the shaft. This the court rejected because, to take only one reasonable possibility, the claimant might have had a spare.

(*b*) That the special circumstances were fully explained, so that the defendant was made aware of the possible loss. The evidence showed that there had been no such explanation. In fact, the only information given to the defendant was that the article to be carried was the broken shaft of a mill, and that the claimant was the miller of that mill.

Held – the claimant's case failed, the damage being too remote.

Comment (i) The loss here did not arise *naturally* from the breach because there might have been a spare. The fact that there was no spare was not within the contemplation of the defendant and he had not even been told about it, much less accepted the risk. The defendant did not know that there was no spare nor as a reasonable man ought he to have known there was not.

(ii) Damage caused by a supervening event may also be too remote. In *Beoco* v *Alfa Laval Co, The Times*, 12 January 1994, Alfa installed a heat exchanger at Beoco's works. It developed a crack and a third party, S, was brought in to repair it. The work was done negligently and shortly afterwards the exchanger exploded, causing damage to property and economic loss of profit until it was put right. It was held that Alfa was liable in damages for the costs of replacing the heat exchanger and for loss of profit up to the time of the repair but not subsequently. Although the matter is not raised in the report, presumably S would be liable for the subsequent loss. The position in regard to supervening events is, therefore, the same in contract as in tort. For the latter see *Jobling* v *Associated Dairies* (1980) in Chapter 20.

241 *The Heron II (Koufos* v *Czarnikow)* [1967] 3 All ER 686

Shipowners carrying sugar from Constanza to Basra delayed delivery at Basra for nine days during which time the market in sugar there fell and the charterers lost more than £4,000. It was *held* that they could recover that sum from the shipowners because the very existence of a 'market' for goods implied that prices might fluctuate and a fall in sugar prices was likely or in contemplation.

Comment (i) The existence of a major sugar market at Basra made it within the *contemplation* of the defendants that the claimant might sell the sugar and not merely use it in a business.

(ii) As Lord Hodson said in his judgment: 'Goods may be intended for the purpose of stocking or consumption at the port of destination and the contemplation of the parties that the goods may be resold is not necessarily to be inferred.' He went on to decide, however, that resale must be inferred as in contemplation because Basra was a well-known sugar market. Damages of £4,183 were awarded, this being the fall in price of sugar between the date when the ship did arrive and the date when it should have arrived.

(iii) The contemplation test was, of course, set out in *Hadley* as the comment at (i) to the summary of the case shows. So what is new about the ruling of the House of Lords in *The Heron II*? *The Heron II* deals with a problem that had arisen following the interpretation by subsequent courts in subsequent cases that the test in *Hadley* was foreseeability of damage. *The Heron II* merely restores in an authoritative way the *Hadley* rule of contemplation. This is a tighter test for loss. A person may *foresee* all sorts of things in terms of damage but not actually *contemplate* them. This makes the ruling in, say, negligent personal injury, where the claim is in tort and the foreseeability test applies, different from contract,

where the test for breach of contract damages is in contemplation.

242 ***Horne* v *Midland Railway Co*** (1873) LR 8 CP 131

The claimant had entered into a contract to sell 4,595 pairs of boots to the French Army at a price above the market price. The defendant railway company was responsible for a delay in the delivery of the boots, and the purchasers refused to accept delivery, regarding time as the essence of the contract. The claimant's claim for damages was based on the contract price, namely 4s per pair, but it was *held* that he could only recover the market price of 2s 9d per pair unless he could show the defendant was aware of the exceptional profit involved, and that it had undertaken to be liable for the loss of that profit.

Comment In *Simpson* v *London & North Western Rail Co* (1876) 1 QBD 274 the claimant entrusted samples of his products to the defendant for it to deliver them to Newcastle for an agricultural exhibition. The goods were marked 'Must be at Newcastle on Monday certain'. The defendant did not get them to Newcastle on time and was *held* liable for the claimant's prospective loss of profit arising because he could not exhibit at Newcastle. The railway company had agreed to carry the goods knowing of the special instructions of the customer.

243 ***Victoria Laundry Ltd* v *Newman Industries Ltd*** [1949] 2 KB 528

The defendants agreed to deliver a new boiler to the claimants by a certain date but failed to do so, being 22 weeks late, with the result that the claimants lost (*a*) normal business profits during the period of delay, and (*b*) profits from dyeing contracts which were offered to them during the period. It was *held* that (*a*) but not (*b*) were recoverable as damages.

Comment The general loss of profit in this case arises naturally from the breach and no further 'contemplation' or 'notice' test need be applied. The loss of profit on the dyeing contracts was not *known* to the defendants nor as reasonable men *ought* they to have had it in *contemplation.*

Damages: the injured party must mitigate his loss

244 ***Brace* v *Calder*** [1895] 2 QB 253

The defendant partnership, consisting of four members, agreed to employ the claimant as manager of a branch of the business for two years. Five months later the partnership was dissolved by the retirement of two of the members and the business was transferred to the other two who offered to employ the claimant on the same terms as before but he refused the offer. The dissolution of the partnership constituted a wrongful dimissal of the claimant and he brought an action for breach of contract seeking to recover the salary that he would have received had he served the whole period of two years. It was *held* that he was entitled only to nominal damages since it was unreasonable to have rejected the offer of continued employment.

Injunction: of a negative stipulation

245 ***Warner Brothers Pictures Incorporated* v *Nelson*** [1937] 1 KB 209

The defendant, the film actress Bette Davis, had entered into a contract in which she agreed to act exclusively for the claimant corporation for 12 months. She was anxious to obtain more money and so she left America, and entered into a contract with a person in England. The claimant now asked for an injunction restraining the defendant from carrying out the English contract.

Held – an injunction would be granted. The contract contained a negative stipulation not to work for anyone else, and this could be enforced. However, since the contract was an American one, the court limited the operation of the injunction to the area of the court's jurisdiction, and although the contract stipulated that the defendant would not work in any other occupation, the injunction was confined to work on stage or screen.

Comment (i) Even where, as here, there is a negative stipulation, the court will not grant an injunction if the pressure to work for the claimant is so severe as to be for all practical purposes irresistible. In this case it was said that Bette Davis could still earn her living by doing other work.

(ii) The idea that persons such as Bette Davis or others subjected to injunctions of negative stipulations would take other work was challenged by the Court of Appeal in *Warren* v *Mendy* [1989] 3 All ER 103 on the grounds of 'realism and practicality'. The Court of Appeal said that it was unrealistic to suppose that such persons would take up other work, i.e. that boxers would become clerks and actresses secretaries. Thus, the making of an injunction of a negative stipulation in this sort of case was, in general terms, likely to operate as a decree of specific performance. This means that it is in modern law less likely that such injunctions will be granted or that the *Warner Brothers* case will be followed, though it is not overruled.

246 ***Whitwood Chemical Co* v *Hardman*** [1891] 2 Ch 416

The defendant entered into a contract of service with the claimant company and agreed to give the whole of his time to them. In fact, he occasionally worked for others, and the claimant tried to enforce the undertaking in the service contract by injunction.

Held – an injunction could not be granted because there was no express negative stipulation. The defendant had merely stated what he would do, and not what he would not do, and to read into the undertaking an agreement not to work for anyone else required the court to imply a negative stipulation from a positive one. No such implication could be made.

Comment It is because of the fact that the granting of an injunction of a negative stipulation is so close to specific performance that it is restricted to cases where the negative stipulation is express.

Quantum meruit: as a quasi-contractual remedy

247 ***Craven-Ellis* v *Canons Ltd*** [1936] 2 All ER 1066

The claimant was employed as managing director by the company under a deed which provided for remuneration. The articles provided that directors must have qualification shares, and must obtain these within two months of appointment. The claimant and other directors who appointed him never obtained the required number of shares so that the deed was invalid. However, the claimant had rendered services, and he now sued on a *quantum meruit* for a reasonable sum by way of remuneration.

Held – he succeeded on a *quantum meruit*, there being no valid contract.

Limitation of actions: effect of fraud, concealment and mistake

248 ***Lynn* v *Bamber*** [1930] 2 KB 72

In 1921 the claimant purchased some plum trees from the defendant and was given a warranty that the trees were 'Purple Pershores'. In 1928 the claimant discovered that the trees were not 'Purple Pershores' and sued for damages. The defendant pleaded that the claim was barred by the current Limitation Act.

Held – the defendant's fraudulent misrepresentation and fraudulent concealment of the breach of warranty provided a good answer to this plea, so that the claimant could recover.

Comment (i) The present jurisdiction is s 32 of the Limitation Act 1980.

(ii) In *Peco Arts Inc* v *Hazlitt Gallery Ltd* [1983] 3 All ER 193 the claimants bought from the defendants in November 1970 what purported to be an original drawing in black chalk on paper, *Etude pour le Bain Turc* by JAD Ingres, for the price of $18,000. In 1976 it was revalued by an expert for insurance purposes. No doubts were cast upon its authenticity. However, on a valuation in 1981 it was discovered that the drawing was a reproduction. The claimants sought rescission and recovery of the purchase price plus interest on the grounds of mutual, common or unilateral mistake of fact. The trial was adjourned on the first day because the parties wished to simplify the issues. After this the only defence was the Limitation Act 1980, i.e. that the claimants' claim was statute-barred. It was *held* that it was not and judgment was given for the claimants. Webster, J decided that a prudent buyer in the position of the claimants would not normally have obtained an independent authentication but would have relied on the defendant's reputation, as the claimants had done. Further, the claimants were entitled to conclude that the drawing was an original as the valuers who had examined it in 1976 had not questioned its authenticity. There was no lack of diligence on the part of the claimants. Accordingly, the action was not time barred and there would be judgment for the claimants.

(iii) The *Peco* case does not decide what the effect of the mistake was, and to that extent does not go contrary to *Leaf* and *Bell* (see Chapter 12). These matters were not contested by the defendants. In *Leaf* the court was deciding how soon an action must be brought for rescission for *innocent misrepresentation*. The issue here was how soon must an action be brought where the claimant sought relief for the consequences of an operative mistake.

(iv) More recently the House of Lords has decided that the normal period under the Limitation Act 1980 of six years governing the start of legal claims can be extended where information relevant to the possible claim is deliberately concealed *after* the period of six years has started to run. (See *Sheldon & Others* v *RHM Outhwaite (Underwriting Agencies) Ltd and Others* [1995] 2 All ER 558.)

The claimants, being Lloyds names on Syndicates 317 and 661, brought an action against the first defendant and other members' agents. They claimed damages for alleged breach of contract, breach of fiduciary duty, and negligence. The central allegation was that the managers of the syndicates had failed properly to perform their responsibilities in regard to writing and re-insuring a number of contracts in 1981 and 1982. Ordinarily, the claims should have been made within six years of the alleged default. However, the claimants issued their writ (now claim form) in 1992, well outside the normal six-year period.

As regards this, the claimants said that the defendants had, in 1984, deliberately concealed facts relevant to the claimants' action. They had not discovered these facts until a time, less than six years, prior to the issue of the writ (now claim form), so that s 32 of the 1980 Act applied and their action was not statute-barred and could proceed. Section 32 provides:

> (1) . . . where in the case of any action for which a period of limitation is prescribed by this Act, either – (a) the action is based upon the fraud of the defendant; or (b) any fact relevant to the [claimant's] right of action has been deliberately concealed from him by the defendant; or (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the [claimant] has discovered the fraud, concealment or mistake . . . or could with reasonable diligence have discovered it . . .

The previous applications of s 32 were typically in situations where deliberate concealment has taken place at the time of the default and it was held, perhaps straightforwardly, that time did not begin to run until the claimant discovered the facts.

A typical case under earlier identical legislation and one referred to in the *Sheldon* judgment is *Beaman* v *ARTS* (1949) (see Chapter 20) where, in 1935, the claimant left some packages containing goods in store with the defendant. In 1940 the defendants disposed of them without the claimant's consent or knowledge, thus committing the tort of conversion. She was allowed to bring a claim against the defendants more than six years later when she discovered the facts.

Despite the wording of s 32 in terms of the phrase 'begin to run', the House of Lords decided that concealment *after time started to run* was within the section. As Lord Browne-Wilkinson said:

> There is no commonsense reason why Parliament should have wished to distinguish between cases where the concealment takes place at the time of commission of the wrong and concealment at a later date. In both cases the mischief aimed at would be the same – to ensure that the Act does not operate to bar the claim of a [claimant] whose ignorance of the relevant facts is due to the improper actions of the defendant.

Therefore, time now begins to run only when the claimant has discovered the facts or could, with reasonable diligence, have discovered them.

Two of the Law Lords dissented, taking the view that the words 'shall not begin to run' were inapt to cover a case where time had already started to run.

The case has major significance in regard to actions by clients of, e.g., accountants and solicitors for breach of contract and negligence where a potential dispute may take a long time to arise and where material facts might well be concealed until after the six-year period has elapsed.

EMPLOYMENT RIGHTS

Discrimination: direct discrimination: less favourable treatment of a person on grounds of race

249 ***Johnson* v *Timber Tailors (Midlands)*** [1978] IRLR 146

When the claimant, a black Jamaican, applied for a job with the defendants as a wood machinist, the defendants' works manager told him that he would be contacted in a couple of days to let him know whether or not he had been successful. Mr Johnson was not contacted and after a number of unsuccessful attempts to get in touch with the works manager, was told that the vacancy had been filled. Another advertisement for wood machinists appeared in the paper on the same night as Mr Johnson was told that the vacancy had been filled. Nevertheless, Mr Johnson applied again for the job and was told that the vacancy had been filled. About a week later he applied again and was again told that the job had been filled although a further advertisement had appeared for the job on that day. It was held by an employment tribunal that the evidence established that Mr Johnson had been discriminated against on the grounds of race.

Comment The other side of the coin is illustrated by *Panesar* v *Nestlé & Co Ltd* [1980] ICR 144 where an orthodox Sikh who naturally wore a beard, which was required by his religion, applied for a job in the defendant's chocolate factory. He was refused employment because the defendant company applied a strict rule under which no beards or excessively long hair were allowed for reasons of hygiene. The claimant made a complaint of indirect discrimination but the defendant said that the rule was justified. The Court of Appeal *held* that as the defendant had supported the rule with scientific evidence there was in fact no discrimination. There would seem to be no reason to doubt this decision even if the Religion and Belief Regulations were applied. These regulations do protect Sikhs in terms of requirements to wear helmets but provide, at any rate, no specific protection, in the circumstances of this case.

Sex discrimination: genuine occupational qualification: requirement of decency

250 ***Sisley* v *Britannia Security Systems*** [1983] ICR 628

The defendant employed women to work in a security control station. The claimant (a man) applied for a vacant job but was refused employment. It appeared that the women worked 12-hour shifts with rest

periods and that beds were provided for their use during such breaks. The women undressed to their underwear during these rest breaks. The claimant complained that by advertising for women the defendant was contravening the Sex Discrimination Act 1975. The defendant pleaded genuine occupational qualification, i.e. that women were required because the removal of uniform during rest periods was incidental to the employment. The Employment Appeal Tribunal accepted that defence. The defence of preservation of decency was, in the circumstances, a good one. It was reasonably incidental to the women's work that they should remove their clothing during rest periods.

Comment It should be noted that the SDA imposes a duty on employers to take reasonable steps to avoid relying on GOQ exceptions. Thus in *Wylie* v *Dee & Co (Menswear) Ltd* [1978] IRLR 103 a woman was refused employment in a men's tailoring establishment in which the remainder of the staff were men because it was inappropriate for her to measure the inside legs of male customers. She complained to an employment tribunal and succeeded on the basis that this particular task could have been carried out by one of the male employees.

There is no presumption that a contract of employment contains an implied term that sick pay will be provided

251 *Mears* v *Safecar Security* [1982] 2 All ER 865

Mr Mears was absent from his employment through sickness for six months out of some 14 months' employment. He then resigned because of ill-health. During the period of his sickness he made no claim for wages, and the written statement of his terms of employment under the EPCA, s 1 (see now s 1 of the ERA 1996) made no mention of sick pay. Indeed, he was told by other employees who visited him while he was sick that the employer did not pay wages during periods when employees were off work through sickness. After resigning Mr Mears applied to an employment tribunal to determine what particulars regarding sick pay should have been included in the s 1 statement. The tribunal *held* that the contract of employment included an implied term under which the employer would pay wages during sickness, subject to deducting any sickness benefit. There was an appeal against that decision by both parties. However, it is the employer's appeal which is of concern here. The employer alleged that the term relating to sick pay should not be implied at all. The Employment Appeal Tribunal upheld the employer's contention. The employment tribunal was not right in assuming that a contract of employment must contain an implied term about sick pay. All the facts must be considered and here the implied term was that wages were not paid during sickness.

Comment The Employment Appeal Tribunal did not follow an earlier decision, i.e. *Orman* v *Saville Sportswear Ltd* [1960] 3 All ER 105, under which it was said that the court could imply a term relating to sick pay and that, indeed, in modern law there seemed to be a presumption in favour of the employee being entitled to sick pay unless an employer could bring evidence to show that this was not the case.

A man and a woman will be regarded as engaged in 'like work' even though there may be some differences between the jobs, but not if these differences are 'material'

252 *Capper Pass* v *Lawton* [1976] IRLR 366

A female cook who worked a 40-hour week preparing lunches for the directors of Capper was paid a lower rate than two male assistant chefs who worked a 45-hour week preparing some 350 meals a day in Capper's works canteen. The female cook claimed that by reason of the EPA (as amended) she should be paid at the same rate as the assistant chefs since she was employed on work of a broadly similar nature.

It was held by the EAT that if the work done by a female applicant was of a broadly similar nature to that done by a male colleague, it should be regarded as being like work for the purposes of the EPA unless there were some practical differences of detail between the two types of job. In this case the EAT decided that the work done by the female cook was broadly similar to the work of the assistant chefs and that the differences of detail were not of practical importance in relation to the terms and conditions of employment. Consequently, the female cook was entitled to be paid at the same rate as her male colleagues.

253 *Navy, Army and Air Force Institutes* v *Varley* [1977] 1 All ER 840

Miss Varley worked as a Grade E clerical worker in the accounts office of NAAFI in Nottingham. NAAFI conceded that her work was like that of Grade E male clerical workers employed in NAAFI's London Office. However, the Grade E workers in Nottingham worked a 37-hour week, while the male Grade E clerical workers in the London office worked a 36½-hour week. Miss Varley applied to an employment tribunal

under the EPA for a declaration that she was less favourably treated as regards hours worked than the male clerical workers in London and that her contract term as to hours be modified so as to reduce it to $36\frac{1}{2}$ hours a week. The employment tribunal granted that declaration and NAAFI appealed.

It was *held* by the EAT that the variation in hours was genuinely due to a material difference other than the difference of sex. It was due to a real difference in that the male employees worked in London where there was a custom to work shorter hours. Accordingly NAAFI's appeal was allowed and Miss Varley was *held* not to be entitled to the declaration.

> There is a geographical distinction between the conditions operated by NAAFI in respect of their employees in London and those outside London. That is by no means a unique situation; it is common to the Civil Service and to all sorts of other employment. . . . In other words, the variation between her contract and a man's contract is due really to the fact that she works in Nottingham and he works in London. It seems to us that it is quite plain that that is the difference between her case and his case, namely that she works in Nottingham where this old custom operates and he works in London where the custom of a shorter working week operates. (*Per* Phillips, J)

Comment (i) Another common example of a sensible material difference occurs where, for example, employee A is a new entrant of, say, 21 and employee B is a long-serving employee of, say, 50 and there is a system of service increments; then it is reasonable to pay B more than A though both are employed on like work. Obviously, it is not enough to say that because at the present time men are on average paid more than women this is a material difference justifying paying a woman less in a particular job. This was decided in *Clay Cross (Quarry Services) Ltd* v *Fletcher* [1979] 1 All ER 474.

(ii) It was decided in *Rainey* v *Greater Glasgow Health Board* [1987] 1 All ER 65 that it is in order to pay more to a man if this is necessary to meet skill shortages. In that case a man skilled at fitting artificial limbs was brought in from the private sector because of skill shortage and paid more than a female doing the same job who went straight into the public sector after training.

(iii) Experience can be rewarded by giving a man with greater experience higher pay (*McGregor* v *General Municipal Boilermakers and Allied Trade Unions* [1987] ICR 505) and an employer may also pay a man more for doing the same job if the man works nights and the women do not (*Thomas* v *National Coal Board* [1987] IRLR 451).

(iv) The fact that there is no sex discrimination is not relevant in turning down an equal pay claim. There must be a 'material difference'. Thus, if in a collective agreement made with a trade union, but with no element of sex discrimination, group A (mainly men) receives a higher hourly rate than group B (mainly women), the employer cannot successfully defend an equal pay claim by the women merely because there is no sex discrimination. There must be 'material difference'. This was decided in *Barber* v *NCR (Manufacturing) Ltd* [1993] IRLR 95.

(v) In *Ratcliffe* v *North Yorkshire County Council* [1995] 526 IRLB 12 the House of Lords decided that a local authority was not justified in cutting women school catering assistants' pay in order to tender for work at a commercially competitive rate. 'Market forces' do not necessarily amount to a genuine material factor other than sex. The result of this case is likely to have ramifications for public-sector competitive tendering exercises by council agencies. If these agencies cannot reduce wages in this way, the chances of a private-sector employer who is paying staff less are greatly enhanced.

Part-time firefighters: less favourable treatment

253a *Matthews* v *Kent and Medway Towns Fire Authority* (2006) 2 All ER 171

The House of Lords has considered the right of part-time workers to equal treatment with full-time workers in terms of pension and sick pay rights. The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) provide in essence that a part-time worker must not be treated less favourably than a comparable full-time worker who at the time of the alleged less favourable treatment is employed by the same employer under the same type of contract and engaged in the same or broadly similar work. Very often in the past, part-timers have been unable to satisfy the comparison requirements because, among other things, full-timers undertake extra tasks and there may be differences in qualifications and skills. However, while accepting this, the House of Lords has ruled that a tribunal should concentrate on the similarities in the work rather than merely the differences in concluding whether part-timers are engaged in the same or broadly similar work.

Part-time firefighters represented by the Fire Brigades Union contended that they were suffering discrimination in comparison with their full-time colleagues in terms of the right to join the Firefighters Pension Scheme and in terms of sick pay conditions. The claim failed before a tribunal and the

Employment Appeal Tribunal and the Court of Appeal, all of these ruling that the part-time retained firefighters were not engaged in the same or broadly similar work. However, the House of Lords allowed their appeal, though two out of the five Law Lords dissented. In broad terms, the judgment of the House of Lords had two main planks. The first was that in the lower court and tribunals there had been an over-concentration on differences instead of similarities. It had been accepted by the original tribunal that both sets of firefighters' work at the site of a blaze was in effect the same and that work was central to the work of a firefighter and to the enterprise of the Fire Brigade as a whole. Secondly, while accepting that the full-timers carried out measurably additional job functions and that there could be material differences in qualifications and skills, this did not prevent the work of the part-timers in terms of *the core function of a firefighter*, being the same or broadly similar. The case was remitted to the tribunal for reconsideration at a second hearing, which should also decide how to remedy the situation.

Comment The conditions on which, for example, the part-timers should be admitted to the pension scheme in terms of back-dating remained to be looked at. In general terms, however, the ruling gives a green light to many other part-time workers in other employments to bring discrimination claims on the basis of the 'core function' ruling.

Sex discrimination: direct discrimination; less favourable treatment of a person on grounds of sex or race

254 ***Coleman* v *Skyrail Oceanic Ltd*** (1981) 131 NLJ 880

The claimant, who was a female booking clerk for Skyrail, a travel agency, was dismissed after she married an employee of a rival agency. Skyrail feared that there might be leaks of information about charter flights and had assumed that her dismissal was not unreasonable since the husband was the breadwinner. The Employment Appeal Tribunal decided that the dimissal was reasonable on the basis that the husband was the breadwinner. However, there was an appeal to the Court of Appeal which decided that those provisions of the Sex Discrimination Act 1975 which dealt with direct discrimination and dismissal on grounds of sex had been infringed. The assumption that husbands were breadwinners and wives were not, was based on sex and was discriminatory. The claimant's injury to her feelings was compensated by an award of £100 damages.

Comment The claimant was also held to be unfairly dismissed, having received no warning that she would be dismissed on marriage. The additional and discriminatory reason regarding the breadwinner cost the employer a further £100. It was not the totality of the claimant's award.

Sexual and racial discrimination: indirect discrimination; requirements or conditions applied to all workers but the ability of some persons to comply because of sex or race is considerably smaller and cannot be justified

255 ***Price* v *The Civil Service Commission*** [1977] IRLR 291

The Civil Service required candidates for the position of executive officer to be between $17^{1}/_{2}$ and 28 years. Belinda Price complained that this age bar constituted indirect sex discrimination against women because women between those ages were more likely than men to be temporarily out of the labour market having children or caring for children at home. It was *held* by the Employment Appeal Tribunal that that age bar was indirect discrimination against women. The court *held* that the words 'can comply' must not be construed narrowly. It could be said that any female applicant could comply with the condition in the sense that she was not obliged to marry or to have children or to look after them – indeed she may find someone else to look after them or, as a last resort, put them into care. If the legislation was construed in that way it was no doubt right to say that any female applicant could comply with the condition. However, in the view of the court to construe the legislation in that way appeared to be wholly out of sympathy with the spirit and intention of the Act. A person should not be deemed to be able to do something merely because it was theoretically possible, it was necessary to decide whether it was possible for the person to do so in practice, as distinct from theory.

Guidance on dependants' leave

255a ***Qua* v *John Ford Morrison Solicitors*** (2003) 153 New Law Journal 95

The claimant began work as a legal secretary in January 2000. She was dismissed in October 2000. She then complained to an employment tribunal that her dismissal was because she had taken time off to deal with her son's medical problems. It was agreed that the reason for her dismissal was her high level of absence. The employer contended that many absences had been unauthorised. She maintained that the majority of the absences were concerned with her

son and that on each occasion she had informed the employer and that the time taken off was reasonable so that there had been no unauthorised absences. The tribunal ruled that she had not informed her employer as soon as was reasonably practicable and so dismissed her claim. The tribunal went on to hold that the time taken off was unreasonable. The claimant appealed to the Employment Appeal Tribunal.

The EAT allowed the appeal and remitted it for a rehearing. In doing so it pointed to errors made by the tribunal in construing the relevant legislation. The EAT first laid down that it was not possible to specify maximum periods of time that were reasonable and that it all depended on a study of the circumstances of the case. The EAT then stated that although the tribunal had found that the claimant had been absent for a total of 17 days it had wrongly regarded it as unnecessary to further identify those occasions and the extent to which the claimant had over that period complied with the notice requirements. The tribunal had also suggested that there was a duty on the employee to report to her employer 'on a daily basis' while off work. The EAT noted that there was no such duty under the relevant legislation.

Perhaps most importantly as leading to an understanding as to the purpose of the leave the EAT said that it was to find a carer in the emergency and then return to work. The leave was not intended to be used over a period so that the employee could provide the care. It is to deal with an emergency and then put in place arrangements that will obviate absence for an extended period. If this is not possible obviously time off will have to be taken but it will not qualify as dependants' leave.

The Health and Safety at Work Act 1974 Section 3 provides that it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety

256 ***R* v *Mara***, *The Times*, 13 November 1986

In this case it was alleged that the director of a company was in breach of his duty under the Health and Safety at Work Act where machinery belonging to his cleaning and maintenance company was left at a store which the company was under contract to clean, and the cleaning company agreed that employees of the store could use the machinery for part of the cleaning and one of the employees of the store was electrocuted because of a fault in the cable of one of the machines. The Court of Appeal *held* that the director concerned was in breach of his duty and dismissed his appeal from the Warwick Crown Court where he had been fined £200. Mr Mara was the director of a small company, Cleaning & Maintenance Ltd (CMS). In December 1983 CMS made a contract with International Stores plc (IS) to clean its premises. The work required the use of certain electrical cleaning machines provided by CMS and these were left on the IS premises when CMS employees were not there. The machines included a polisher/scrubber.

The cleaning of the loading bay for the store in the morning was inconvenient and it was agreed that its cleaning should be removed from the ambit of the contract and at that time CMS agreed at the request of IS that its cleaning machines could be used by IS employees for cleaning the loading bay, and to Mr Mara's knowledge they were so used.

On 10 November 1984 an employee of IS was using a CMS polisher/scrubber for cleaning the loading bay when he was electrocuted because of the defective condition of the machine's cable.

The legal point was one of construction of the relevant section of the Health and Safety at Work Act which is set out in the headnote to this case. Mr Mara claimed that when the electrocution took place his company, CMS, was not conducting its undertaking at all; the only undertaking being conducted was that of IS whose employees were using the machine to clean the IS premises. The Court of Appeal did not accept this. The undertaking of CMS was the provision of cleaning services. So far as IS was concerned, the way in which CMS conducted its undertaking was to do the cleaning and to leave its machines and other equipment on the premises with permission for IS employees to use the same, with the knowledge that they would use the same. The equipment included an unsafe cable. The failure to remove or replace that cable was clearly a breach by CMS of its duty both to its own employees as well as under the Health and Safety at Work Act to the workers of IS.

Comment (i) This case shows the wide ambit of the Health and Safety at Work Act 1974. The liability of a director for offences by the company is set out in the 1974 Act which provides that where an offence under any of the provisions of the Act is committed by a body corporate, then should it be proved to be committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary, or similar officer of the body corporate, or a person who is purporting to act in such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded

against and punished accordingly. It should also be remembered that there is a civil claim for damages for this kind of breach. This case is concerned solely with the criminal offence.

(ii) It should be noted that fines are now much higher than the one in this case, both on the company and its directors. Six-figure sums are not uncommon.

(iii) There is a particular difficulty for the proprietor of a business in cases under s 3 of the 1974 Act in that the Court of Appeal ruled in *Davies* v *Health and Safety Executive* [2003] IRLR 170 that where an offence has been committed under the section there is a reverse burden of proof on the employer. This means that a prosecution will succeed under the section unless the proprietor can show, on a balance of probabilities, that it would not have been reasonably practicable for him or her to have done more to ensure safety. If he or she cannot produce such evidence the conviction stands. The allegation by Mr Davies that this reversed burden of proof was contrary to the Human Rights Convention (Art 6 (fair trial)) failed because, among other things, the proprietor was likely to have a unique knowledge of the risk and the special measures needed to avoid it. Mr Davies's conviction resulted from the death of a self-employed sub-contractor who was crushed by a JCB being reversed by an employee after Mr Davies had instructed him to put it into a garage and had then gone away to get on with his own work leaving the employee unsupervised. The rear arm of the JCB was retracted thus obscuring the driver's visibility. Mr Davies was fined £15,000 and had to pay £22,500 prosecution costs.

Unfair dismissal: is the court or tribunal dealing with an employee?

257 *Massey* v *Crown Life Insurance Co* [1978] 2 All ER 576

Mr Massey was employed by Crown Life as the manager of its Ilford branch from 1971 to 1973, the company paying him wages and deducting tax. In 1973, on the advice of his accountant, Mr Massey registered a business name of J R Massey & Associates and with that new name entered into an agreement with Crown Life under which he carried out the same duties as before but as a self-employed person. The Inland Revenue was content that he should change to be taxed under Schedule D as a self-employed person. His employment was terminated and he claimed to have been unfairly dismissed. The Court of Appeal decided that, being self-employed, he could not be unfairly dismissed.

Comment (i) It should also be noted that the EAT has held that a director, even with a service contract, who controls the votes in general meeting cannot be an employee for the purposes of employment legislation. The EAT distinguished the case of *Lee* v *Lee's Air Farming Ltd* [1960] 3 All ER 420 where the director/controlling shareholder's widow was claiming, in effect, against an insurance company which had insured the company in respect of the death of its employees in the course of employment. Employment claims are met by the state and not by a company backed by insurers (see *Buchan* v *Secretary of State for Employment* [1997] IRLB 2).

(ii) In addition to the public policy point, i.e. who is the paymaster, there is also the legal point that the relationship of employer and employee requires an element of control by the employer over the employee and there is no way an employee who is the controlling shareholder can be dismissed except by his agreement.

(iii) Nevertheless, the Court of Appeal in *Secretary of State for Trade and Industry* v *Bottrill* (1999) 615 IRLB 12 ruled that while a controlling shareholding is likely to be a significant factor in all situations and in some may be decisive, it is only one of the relevant facts and is not to be taken as determining the relationship without taking into account all the relevant circumstances. Even so, in most cases it is likely that a controlling shareholder will not be regarded as an employee.

Conduct justifying dismissal may be the way in which an employee dresses

258 *Boychuk* v *H J Symons (Holdings) Ltd* [1977] IRLR 395

Miss B was employed by S Ltd as an accounts audit clerk but her duties involved contact with the public from time to time. Miss B insisted on wearing badges which proclaimed the fact that she was a lesbian, and from May 1976 she wore one or other of the following: (*a*) a lesbian symbol consisting of two circles with crosses (indicating women) joined together; (*b*) badges with the legends 'Gays against fascism', and 'Gay power'; (*c*) a badge with the legend 'Gay switchboard' with a telephone number on it and the words 'Information service for homosexual men and women'; (*d*) a badge with the word 'Dyke', indicating to the initiated that she was a lesbian.

These were eventually superseded by a white badge with the words 'Lesbians ignite' written in large letters on it. Nothing much had happened in regard to the wearing of the earlier badges, but when she began wearing the 'Lesbians ignite' badge there were discussions about it between her and her employer. She was told that she must remove it – which she was not willing to do – and that if she did not she would be dismissed. She would not remove the badge and was dismissed on 16 August 1976 and then made a claim for compensation for unfair dismissal.

No complaint was made regarding the manner of her dismissal in terms, e.g., of proper warning. The straight question was whether her employer was

entitled to dismiss her because she insisted on wearing the badge. An employment tribunal had decided that in all the circumstances the dismissal was fair because it was within an employer's discretion to instruct an employee not to wear a particular badge or symbol which could cause offence to customers and fellow employees. Miss B appealed to the Employment Appeal Tribunal which dismissed her appeal and said that her dismissal was fair. The EAT said that there was no question of Miss B having been dismissed because she was a lesbian or because of anything to do with her private life or private behaviour. Such a case would be entirely different and raise different questions. This was only a case where she had been dismissed because of her conduct at work. That, the EAT said, must be clearly understood.

Comment (i) The decision does not mean that an employer by a foolish or unreasonable judgement of what could be expected to be offensive could impose some unreasonable restriction on an employee. However, the decision does mean that a reasonable employer, who is, after all, ultimately responsible for the interests of the business, is allowed to decide what, upon reflection or mature consideration, could be offensive to customers and fellow employees, and he need not wait to see whether the business would in fact be damaged before he takes steps in the matter.

(ii) In *Kowalski* v *The Berkeley Hotel* [1985] IRLR 40 the EAT decided that the dismissal of a pastrycook for fighting at work was fair though it was the first time he had done it.

(iii) On the issue of conduct, it was decided in *Dryden* v *Greater Glasgow Health Board* (1992) 447 IRLIB 11 that employees had no implied right under their contracts of employment to smoke at work. If, as in Ms Dryden's case, the employee leaves because he or she is not allowed to smoke there is no constructive dismissal. The employer had in this case offered counselling but without success.

Dismissal on a transfer of business

259 *Meikle* v *McPhail (Charleston Arms)* [1983] IRLR 351

After contracting to take over a public house and its employees, the new management decided that economies were essential and dismissed the barmaid. She complained to an employment tribunal on the grounds of unfair dismissal. Her case was based upon the fact that the 1981 Regulations state that a dismissal is to be treated as unfair if the transfer of a business or a reason connected with it is the reason or principal reason for the dismissal. The pub's new management defended the claim under another provision in the 1981 Regulations which states that a dismissal following a transfer of business is not to be regarded as automatically unfair where there was, as in this case, an economic reason for making changes in the workforce. If there is such a reason, unfairness must be established on grounds other than the mere transfer of the business.

The Employment Appeal Tribunal decided that the reason for dismissal was an economic one under the Regulations and that the management had acted reasonably in the circumstances so that the barmaid's claim failed.

Comment It should be noted that in *Gateway Hotels Ltd* v *Stewart* [1988] IRLR 287 the Employment Appeal Tribunal decided that on a transfer of business dismissal of employees of the business transferred prior to the transfer at the insistence of the purchaser of the business is not an 'economic' reason within the Regulations so that the dismissals are unfair.

An employee who unreasonably refused an offer of alternative employment is not entitled to a redundancy payment

260 *Fuller* v *Stephanie Bowman* [1977] IRLR 7

F was employed as a secretary at SB's premises which were situated in Mayfair. These premises attracted a very high rent and rates so SB moved its offices to Soho. These premises were situated over a sex shop and F refused the offer of renewed employment at the same salary and she later brought a claim before an employment tribunal for a redundancy payment. The tribunal decided that the question of unreasonableness was a matter of fact for the tribunal and F's refusal to work over the sex shop was unreasonable so that she was not entitled to a redundancy payment.

Comment (i) It should be noted that in *North East Coast Ship Repairers* v *Secretary of State for Employment* [1978] IRLR 149 the Employment Appeal Tribunal decided that an apprentice who, having completed the period of his apprenticeship, finds that the employer cannot provide him with work, is not entitled to redundancy payment. This case has relevance for trainees and others completing contracts in order to obtain relevant practical experience.

(ii) In *Elliot* v *Richard Stump Ltd* [1987] IRLR 215 the EAT decided that a redundant employee who is offered alternative employment by an employer who refuses to accept a trial period is unfairly dismissed.

(iii) In *Cambridge and District Co-operative Society Ltd* v *Ruse* [1993] IRLR 156 the EAT held that it was reasonable for an employee to refuse alternative work if the new job involved what he reasonably believed to be a loss of status. In that case the manager of a Co-op mobile butcher's shop was offered a post in the butcher's section of a Co-op supermarket which he refused to accept because he was under another manager; quite reasonably, he felt it involved a loss of status. He was successful in his claim for a redundancy payment.

LAW OF TORTS: GENERAL PRINCIPLES

Nature of tort: not all harm is actionable

261 ***Perera* v *Vandiyar*** [1953] 1 All ER 1109

The claimant was the tenant of a flat in Tooting, and the defendant was the landlord. On 8 October 1952, the landlord cut off the supply of gas and electricity to the flat in order to induce the claimant to leave. As a result, the claimant was forced to move out of the flat and lived elsewhere until the services were restored on 15 October 1952. The claimant sought damages for breach of implied covenant for quiet enjoyment, and for eviction.

Held – the claimant was entitled to damages for breach of the implied covenant, but punitive damages on the purported tort of eviction were not recoverable because the defendant had not committed a tort. It had not been necessary for the defendant to trespass on any part of the demised premises in order to cut off the services, and mere intention to evict was not a tort.

Comment This kind of conduct by a landlord is now a criminal offence under s 1 of the Protection from Eviction Act 1977. However, there is no civil action for breach of the statutory duty (*McCall* v *Abelesz* [1976] 1 All ER 727).

262 ***Hargreaves* v *Bretherton*** [1958] 3 WLR 463

The claimant pleaded that the defendant had falsely and maliciously and without just cause or excuse committed perjury as a witness at the claimant's trial for certain criminal offences, and that as a result the claimant had been convicted and sentenced to eight years' imprisonment. A point of law arose because the claimant's case was, in effect, based on the purported tort of perjury.

Held – no action lay on this cause, since there was no tort of perjury, and, therefore, the claimant's claim must be struck out.

263 ***Roy* v *Prior*** [1969] 3 All ER 1153

The claimant, a doctor, sued the defendant, a solicitor, for damages alleging, amongst other things, that the defendant had caused his arrest and forcible attendance at court to give evidence in a criminal case by saying falsely in court that the claimant was evading a witness summons. The action failed, Lord Denning, MR saying in the course of his judgment:

> It is settled law that, if a witness knowingly and maliciously tells untruths in the witness box, and as a result an innocent person is imprisoned, nevertheless no action lies against that witness. . . . The reason lies in public policy. Witnesses must be able to give their evidence without fear of the consequences. They might be deterred from doing so if they were at risk of being sued for what they said. So the law gives a witness the cloak of absolute immunity from suit. This applies not only to statements made by a witness in the box, but also to statements made whilst he is giving his proof to his solicitor beforehand. The reason is because the protection given to the witness in the box would be useless to him if it could be got round by an action against him in respect of his proof. . . .

Comment The Criminal Justice Act 1988 gives prisoners whose convictions are quashed or pardoned a *right* to monetary compensation from the government. The matter of compensation was formerly a matter for the discretion of the Home Secretary.

Nature of tort: no tort of invasion of privacy: effect of the law of confidence

263a ***Douglas and Others* v *Hello! Ltd*** [2005] 4 All ER 128

The first two claimants are well-known film stars. They married in November 2000. Before the ceremony they made a contract with the third claimant, *OK!* magazine, under which that magazine acquired exclusive photographic rights to the event. Unauthorised photographs were taken at the event and sold to *OK!*'s rival magazine *Hello!* which published them on the same day as *OK!* magazine. The claimants asked for damages for breach of confidence and the film stars claimed additionally for breach of the law of privacy.

The High Court ruled in 2003 that there was no existing tort of breach of privacy and refused to extend the common law into this area. There was furthermore no need to introduce Art 8 of the Convention on Human Rights (right to respect for private and family life) because English law was not