Appeal No. UKEAT/0079/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 5 August 2019
Judgment handed down 22 August 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR D BARRASSO APPELLANT

NEW LOOK RETAILERS LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Curzon Green Solicitors 40 Gracechurch Street London EC3V 0BT
For the Respondent	MR SPENCER KEEN (of Counsel)

SUMMARY

JURISDICTIONAL POINTS - excluded employments – employee shareholder -

Section 205A Employment Rights Act 1996

In September 2015, the Claimant had entered into a section 205A employee shareholder agreement. It was agreed that this had met the requirements provided such that the Claimant thereby became an employee shareholder and was thus excluded from the statutory right to claim unfair dismissal or a redundancy payment. At the same time, however, the parties entered into a separate agreement ("the September 2015 deed") which gave him a contractual means of seeking equivalent remedies should he subsequently consider he had been unfairly dismissed or was entitled to a redundancy payment. In March 2017, the Claimant entered into a new service agreement with the Respondent, which included a "whole agreement" clause (clause 27.5) stating that it superseded all previous agreements between the parties dealing with the same matters, save for the contractual "reinstatement" of rights in the September 2015 deed. In February 2018, the Claimant was dismissed in circumstances that he regarded as unfair. The Respondent paid him a statutory redundancy payment and, in replying to his pre-action correspondence, did not seek to rely on the section 205A agreement until it entered its response in the ET proceedings. At a Preliminary Hearing, the ET found that the Claimant was an employee shareholder for the purposes of section 205A **Employment Rights Act 1996** and was thus excluded from the right to claim unfair dismissal. The Claimant appealed.

Held: dismissing the appeal

The Claimant argued that section 205A must be construed purposively, in accordance with the restrictions on contracting out of statutory rights (under section 203) and consistently with his rights under the **ECHR** and other international instruments laying down a right not to be unjustifiably dismissed. Adopting that approach, he contended that the ET had erred in failing to require that the parties had affirmed the conditions laid down for section 205A to apply as at the date of the statutory contravention in issue (here, dismissal). He further argued that the March

2017 service agreement had superseded the section 205A agreement, evincing the parties' intention that the Claimant's statutory rights were reinstated.

It was not accepted that the Claimant's construction arguments were assisted by reference to section 203 **ERA** or by the provisions of the **ECHR** or other international instruments. A section 205A agreement did not fall to be considered under section 203; the Claimant had not demonstrated that any article under the **ECHR** was engaged; and UK law provided for protection from unjustified dismissal but the Claimant had contracted out of that protection (something not prohibited by any of the international provisions relied on). A purposive construction of section 205A meant no more than interpreting the exemption from statutory protection narrowly and ensuring strict compliance with the pre-conditions for employee shareholder status. In this case, it was common ground these were met when the Claimant entered into the section 205A agreement and the ET did not err in failing to require that the conditions laid down by section 205A were re-affirmed by the parties at the date of dismissal.

As for the effect of the March 2017 service agreement, although section 205A did not state how employee shareholder status might be lost, this might arise as a result of some subsequent inconsistent agreement between the parties. The question thus became one of construction of the March 2017 service agreement. In this regard, the ET had permissibly found that the factual background (the context in which it was construing the agreement) was not as the Claimant had contended: rather, the facts suggested that the parties' intention was that the only "reinstatement" of rights was by contract – as provided in the September 2015 deed. That position was not undermined by the parties' subsequent failure to reference the section 205A agreement when the Claimant was dismissed (something the ET had found arose from inadvertent error and was not reflective of any intention that the section 205A agreement no longer applied). The March 2017 service agreement did not supersede the section 205A agreement because it did not deal with the same matters. In any event, the express reservation in respect of the September 2015 deed made clear that the parties intended the Claimant's contractual rights to complain of unfair dismissal

and redundancy would continue, something that was only consistent with the Claimant continuing to be an employee shareholder and thus excluded from the ability to pursue such claims under the statute.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the application of section 205A **Employment Rights Act 1996** (the "ERA"); specifically, it raises the question how such an agreement might come to an end. This appears to be the first appellate consideration of section 205A **ERA**.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the London Central Employment Tribunal (Employment Judge J S Burns, sitting alone on 8 January 2019; "the ET"), by which the Claimant's claim of unfair dismissal was struck out. Representation before the ET was as now.

3. At the outset of the hearing before me there was a dispute between the parties as to whether it was appropriate for me to refer to the Claimant's witness statement in determining the issues raised by this appeal. In the event, I have considered those passages in the Claimant's statement to which I have been referred but have not found these of material assistance in reaching my Judgment.

The Background

4. The Claimant started his employment with the Respondent on 1 November 2012, then employed to be the Respondent's Head of Multichannel Digital Marketing and Innovation. He was promoted on several occasions thereafter and, by June 2014, had been appointed UK Managing Director.

5. In June 2015, it was agreed the Respondent would be sold to Top Gun BidCo Limited ("BidCo"), a subsidiary of the investment company Brait SE. As part of that transaction, the Claimant was offered the opportunity to be granted 7000 Ordinary D shares in BidCo. In exchange for the shares, however, it was required that the Claimant become an employee shareholder, as contemplated by section 205A **ERA**, which (relevantly) provides as follows:

> **"205A Employee shareholders**
>
> **(1) An individual who is or becomes an employee of a company is an "employee shareholder" if—**
>
> **(a) the company and the individual agree that the individual is to be an employee shareholder,**
>
> **(b) in consideration of that agreement, the company issues or allots to the individual fully paid up shares in the company, or procures the issue or allotment to the individual of fully paid up shares in its parent undertaking, which have a value, on the day of issue or allotment, of no less than £2,000,**
>
> **(c) the company gives the individual a written statement of the particulars of the status of employee shareholder and of the rights which attach to the shares referred to in paragraph (b) ("the employee shares") (see subsection (5))…, and**
>
> **(d) the individual gives no consideration other than by entering into the agreement.**
>
> **(2) An employee who is an employee shareholder does not have—**
>
> **…**
>
> **(c) the right under section 94 not to be unfairly dismissed, or**
>
> **(d) the right under section 135 to a redundancy payment.**
>
> **…**
>
> **(5) The statement referred to in subsection (1)(c) must—**
>
> **(a) state that, as an employee shareholder, the individual would not have the rights specified in subsection (2),**
>
> **(b) …,**
>
> **(c) state whether any voting rights attach to the employee shares,**
>
> **(d) state whether the employee shares carry any rights to dividends,**
>
> **(e) state whether the employee shares would, if the company were wound up, confer any rights to participate in the distribution of any surplus assets,**
>
> **(f) if the company has more than one class of shares and any of the rights referred to in paragraphs (c) to (e) attach to the employee shares, explain how those rights differ from the equivalent rights that attach to the shares in the largest class (or next largest class if the class which includes the employee shares is the largest),**
>
> **(g) state whether the employee shares are redeemable and, if they are, at whose option,**
>
> **(h) state whether there are any restrictions on the transferability of the employee shares and, if there are, what those restrictions are,**

(i) state whether any of the requirements of sections 561 and 562 of the Companies Act 2006 are excluded in the case of the employee shares (existing shareholders' right of pre-emption), and

(j) state whether the employee shares are subject to drag-along rights or tag-along rights and, if they are, explain the effect of the shares being so subject.

(6) Agreement between a company and an individual that the individual is to become an employee shareholder is of no effect unless, before the agreement is made—

(a) the individual, having been given the statement referred to in subsection (1)(c), receives advice from a relevant independent adviser as to the terms and effect of the proposed agreement, and

(b) seven days have passed since the day on which the individual receives the advice.

(7) Any reasonable costs incurred by the individual in obtaining the advice (whether or not the individual becomes an employee shareholder) which would, but for this subsection, have to be met by the individual are instead to be met by the company.

…

(9) The reference in subsection (2)(c) to unfair dismissal does not include a reference to a dismissal—

(a) which is required to be regarded as unfair for the purposes of Part 10 by a provision (whenever made) contained in or made under this or any other Act, or

(b) which amounts to a contravention of the Equality Act 2010.

(10) The reference in subsection (2)(c) to the right not to be unfairly dismissed does not include a reference to that right in a case where section 108(2) (health and safety cases) applies.

(11) The Secretary of State may by order amend subsection (1) so as to increase the sum for the time being specified there.

(12) The Secretary of State may by regulations provide that any agreement for a company to buy back from an individual the shares referred to in subsection (1)(b) in the event that the individual ceases to be an employee shareholder or ceases to be an employee must be on terms which meet the specified requirements.

(13) In this section—

"company" means—

(a) a company or overseas company (within the meaning, in each case, of the Companies Act 2006) which has a share capital, or

(b) a European Public Limited-Liability Company (or Societas Europaea) within the meaning of Council Regulation 2157/2001/EC of 8 October 2001 on the Statute for a European company;

"drag-along rights", in relation to shares in a company, means the right of the holders of a majority of the shares, where they are selling their shares, to require the holders of the minority to sell theirs;

"parent undertaking" has the same meaning as in the Companies Act 2006;

"relevant independent adviser" has the meaning that it has for the purposes of section 203(3)(c);

"tag-along rights", in relation to shares in a company, means the right of the holders of a minority of the shares to sell their shares, where the holders of the majority are selling theirs, on the same terms as those on which the holders of the majority are doing so.

(14) The reference in this section to the value of shares in a company is a reference to their market value within the meaning of the Taxation of Chargeable Gains Act 1992 (see sections 272 and 273 of that Act)."

6. The Claimant duly entered into an agreement for the purposes of section 205A, which was signed on 25 September 2015 ("the section 205A agreement"). Before doing so, on 26 August 2015, the Claimant had been given a statement that provided the information required by sub-section 205A(1)(c) and, on 3 September 2015, he had received independent legal advice (as required by sub-section 205A(6)) from Kingsley Napley solicitors; the Respondent paid for the cost of that advice, as required by sub-section 205A(7).

7. The share allotment under sub-section 205A(1)(b) was confirmed on 7 October 2015. By 31 March 2016, it was the Claimant's belief that these shares were worth over £7 million; in any event, as the ET noted, at the material time, the shares were clearly worth at least £2,000.

8. It was common ground before the ET that the section 205A requirements were thus met, such that the Claimant became an employee shareholder for those purposes by October 2015 at the latest.

9. Before entering into these arrangements, however, the Claimant and other directors of the Respondent had been concerned about the prospect of losing their statutory employment rights. In mid-2015, prior to entering into the section 205A agreement, the Claimant had attended a meeting where this issue was raised and at which assurances were provided that the employee shareholder arrangement was simply intended to avoid tax and that, after the tax advantages had been realised, employment rights would be reinstated. These assurances were, however, vague and gave no detail as to how and when employment rights would be restored. That said, at or

around this time, the accountancy firm Deloittes produced a document which contained various proposed steps that might be undertaken during the process, including:

> **"Stage 8 Shortly thereafter, the same individuals enter into contractual variations to their employment agreements to re-instate the statutory right given up when acquiring employee shareholder status."**

10. By the time the Claimant received independent legal advice from Kingsley Napley however, he had been provided with a further draft document – in the form of a side letter to the section 205A agreement - that it was proposed he should sign. This letter explained that the Respondent agreed that he should have the right, as a matter of contract, to be paid the equivalent of an unfair dismissal award under section 94 **ERA** and a statutory redundancy payment under section 135 **ERA**, provided that - within three months of the termination of his employment - the Claimant wrote to request the Respondent to appoint an independent ET Judge to determine, as an expert, whether the Claimant had been unfairly dismissed and/or was entitled to a statutory redundancy payment. The costs of the appointment of the expert were to be met by the losing party to any such procedure. This letter was available to the Claimant's adviser from Kingsley Napeley before he entered into the section 205A agreement and he and the Respondent subsequently executed it, as a deed, also on 25 September 2015 ("the September 2015 deed").

11. At the same time, the Respondent had wanted to introduce new service agreements for its senior directors (including the Claimant), which would impose new restrictive covenants and ensure that all were on similar standard terms. In January 2016, the Respondent's then Group Human Resources Director, Ms Murphy, took on the responsibility for progressing this. She drafted a standard letter, which was intended to be sent out by the Respondent's Chief Executive, Anders Kristiansen, and which included the following statement:

> **"… as you will remember, during the Employee Shareholder Process you waived some of your statutory employment rights in order to fulfil the criteria for becoming employee shareholder. I am now pleased to enclose an up-to-date director's employment contract…**

which reinstates contractually the statutory employment rights that were previously waived. …"

It was further intended that the letter would be sent out with both a copy of the September 2015 deed and a new draft service agreement.

12. In fact, this letter was not sent out as intended; the process became bogged down and Ms Murphy had to attend meetings with each of the directors to explain the new contract and try to persuade them to sign it. For his part, the Claimant could not remember receiving a copy of the letter but he did meet with Ms Murphy (who explained to the ET that she used the draft letter as an aide memoire in such meetings) and he received a copy of the new draft service agreement, which he and the Respondent then executed as a deed in March 2017 ("the March 2017 service agreement").

13. The March 2017 service agreement did not contain any express or direct reference to the Claimant being an employee shareholder under section 205A **ERA**. It did, however, include the following provision, at clause 27.5:

"This Agreement supersedes any previous written or oral Agreement between the parties in relation to the matters dealt with in it. This Agreement, along with the side letter dated 26 August 2015 reinstating certain contractual rights, contains the whole Agreement between the parties relating to the Employment at the date the agreement was entered into (except for those terms implied by law which cannot be executed by the Agreement of the parties). …"

14. It was accepted before the ET that the reference to the "*side letter dated 26 August 2015*" was meant to refer to the September 2015 deed.

15. In February 2018, the Respondent dismissed the Claimant in circumstances that he regarded as unfair. On 22 February 2018, he was sent a letter by the Respondent's interim Human Resources Director, Ms Wendy Stroud, in which she advised the Claimant that he was "*entitled to a statutory redundancy payment of £2445*"; this was in addition to a non-contractual

discretionary redundancy payment of £42,307.71. The ET found that this was done "*because Ms Stroud did not know or had forgotten at the time that the Claimant was an employee shareholder*" (ET Reasons para 21).

16. Before the Claimant commenced his ET proceedings, his solicitors wrote to the Respondent indicating his intention to bring claims in the ET, including a claim of unfair dismissal. As the ET noted, the Respondent's lengthy rebuttal letter of 2 March 2018 made no reference to the Claimant having signed away his right to bring such a claim; this was a point taken by the Respondent for the first time in its ET3, served in September 2018. By the time the point was raised, it was too late for the Claimant to invoke any right to refer the matter to an expert as provided by the September 2015 deed. As the ET found, this was done "*either because the in-house lawyer who wrote the rebuttal letter did not want to alert the Claimant to his contractual rights before they expired, or because he/she also did not know or had forgotten at the time that the Claimant was an employee shareholder*" (ET Reasons para 22).

17. As for the Claimant, although he accepted that he was used to dealing with, and understanding, complicated contracts, he told the ET that he had forgotten about the details of the 26 August 2015 statement and the September 2015 deed when he issued his claim; he thought he must have left these documents in the office when he was dismissed and only remembered them then he saw them in the bundle for the ET hearing. He argued that, in any event, his employee shareholder status had been terminated by the March 2017 service agreement: that was what both he and the Respondent thought at the time and it necessarily followed from the opening sentences of clause 27.5 of the March 2017 service agreement. Yet further, the Claimant contended that section 205A must be interpreted restrictively, allowing for a purposive construction that would protect an employee's right to claim unfair dismissal; on that basis, he submitted that both parties

would need to intend and agree that it continued when termination of employment occurred. That, he argued, had not occurred in his case.

The ET's Decision and Reasoning

18. The ET did not accept the Claimant's submissions as to the need for a purposive construction of section 205A **ERA**. Noting there were numerous well-recognised limitations to the right to claim unfair dismissal, the ET considered the provision already included numerous safeguards to protect those – mainly sophisticated businesspeople, such as the Claimant – to whom it was likely to apply. As for the argument that it should be a condition for continuing employee shareholder status that both parties should intend and agree that it continued when termination of employment occurred, that: (i) would require the ET to read-in wording into section 205A that had not been included by Parliament, and (ii) would be a nonsense because, at that stage, the employee wishing to claim unfair dismissal would never agree that it did continue. In any event, in the present case, at the date of the Claimant's dismissal, the parties had not agreed that the Claimant was *not* an employee shareholder; both sides appeared simply to have overlooked the matter.

19. Noting that section 205A **ERA** did not state how an employee shareholder agreement, or section 205A status, might be terminated, the ET mooted that this might arise if the parties entered into a subsequent inconsistent agreement; it did not, however, consider that the March 2017 service agreement was such a document or that there was any other such agreement between the parties in this case.

20. Given its primary findings of fact, the ET was satisfied that, by the time he signed the section 205A agreement, the Claimant ought reasonably to have been aware that the Respondent's

intention to "*reinstate*" his employment rights meant only that he would have the contractual right of referral to an expert and that the agreement itself meant that his statutory rights would be taken away.

21. As for the January 2016 draft letter, the ET found that was of limited significance as it was not sent to the Claimant; in any event, its content was unclear – suggesting that the March 2017 service agreement would reinstate employment rights when such reinstatement as the Respondent intended had already occurred through the means of the September 2015 deed. Although Ms Murphy had based her oral explanations to the Claimant (in early 2017) on the draft letter, that had referred to "*reinstating <u>contractually</u> the statutory employment rights that were previously waived*" (emphasis added by the ET); it did not refer to any changes to the status quo pertaining to the right to claim unfair dismissal. Furthermore, the ET did not consider that Ms Murphy would have given assurances to the Claimant that the March 2017 service agreement would reinstate his statutory right to claim unfair dismissal and it rejected the Claimant's argument that this was what the Respondent understood at the time. In any event, the ET considered any attempt by the Claimant to rely on the draft January 2016 letter or on Ms Murphy's assurances would be excluded by the concluding wording of clause 27.5 in the March 2017 service agreement. Yet further, even if the Claimant could – notwithstanding the wording of clause 27.5 – make a claim for breach of contract or misrepresentation, this would not restore his right to pursue a claim of unfair dismissal in the ET.

22. More specifically, the ET found that the March 2017 service agreement did not deal with, or refer to, employee shareholder status or to the subject matter of the section 205A agreement. These were, therefore, not matters that could be seen as having been "*superseded*" under clause 27.5. The ET considered it was clear that it was mutually intended that the Claimant would

A continue to have the benefit of the September 2015 deed and would not have restored to him the statutory employment right to claim unfair dismissal before the ET; had that not been so, there would have been no need to preserve the September 2015 deed.

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The Appeal and the Claimant's Submissions in Support

23. The appeal has been pursued on the following three grounds:

C (1) The ET erred in its construction of section 205A; in particular, in failing to hold that the requirements of this provision had to be met at the point of dismissal.

(2) The ET erred in concluding that the requirements of section 205A(1)(a) were met at the material time in this case.

D (3) Further/alternatively, the ET erred in its approach to the question of rectification.

24. Before turning to the individual grounds of appeal, the Claimant makes the following introductory observations: (a) section 205A was a controversial provision, of limited utility and lifespan (see the observations made at paras 7.1-7.2 IDS Handbook *Atypical and Flexible Working*, 2018 edn. and para J[130] *Harvey on Industrial Relations and Employment Law*); (b) whilst there was a clear and multi-layered set of necessary steps in order for an employee to enter employee shareholder status, the provision was silent as to what was to be done to leave it (although sub-section 205A(12) provided that the Secretary of State "*may*" provide additional regulations to set down more formal requirements for withdrawing from the scheme, this had not been done); (c) that could not mean, however, that the parties could not renege from a section 205A agreement: the regime was ostensibly founded upon informed agreement and once such agreement (or any aspect of the pre-conditions at sub-section 205A(5)) dissipated, so too must employee shareholder status end.

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25. Turning to ground (1), the Claimant argues the construction of section 205A is an access to justice issue: it restricts the right not to be unfairly dismissed and must be read so as not to contravene the general prohibition on contracting out (section 203(1) **ERA**). In addition, the right not to be unjustifiably dismissed can be seen as recognised within a suite of international provisions, which compel a narrow interpretation of section 205A (specifically: the article 8 **European Convention on Human Rights** ("ECHR") right to respect for private and family life, which encompasses the right to pursue a profession without an unjustified dismissal (see **Turner v East Midlands Trains** [2013] ICR 525 CA), and the bar to the pursuit of such civil rights and obligations would contravene article 6 **ECHR**; the right to protection in cases of termination of employment provided by article 24 **EU Social Charter**; the right to protection against unjustified dismissal under article 30 **EU Charter of Fundamental Rights**; and article 8-10 **ILO Convention 158 Concerning Termination of Employment at the Initiative of the Employer** (1982), as interpreted by Judge Pinto de Albuqerque in the **ECHR** Decision **KMC v Hungary** Appn. 19554/11). Whilst not contending that these provisions have direct effect or (at least, at this stage) should lead to the disapplication of section 205A, the Claimant argues that a purposive construction requires section 205A to be appropriately curtailed, particularly where the parties conducted themselves in the material period in a manner contradicting the Claimant's continuing status as an employee shareholder. In this regard, the Claimant relies on Underhill LJ's summary as to the interpretive obligation in respect of **ECHR** rights at para 48 in **Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust** [2016] ICR 903, and on Lord Hoffman's observation at para 27 in **R v Lyons** [2003] 1AC 976, that "*there is a strong presumption in interpreting English law … in a way which does not place the United Kingdom in breach of an international obligation*".

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26. Within that context, the Claimant argues: (i) although there may be exemptions to the right to pursue a complaint of unfair dismissal, these must not be overstretched; (ii) section 205A must be construed narrowly and its requirements must be continuously satisfied, including at the date of statutory contravention (here, dismissal); (iii) an ET must not introduce excessive formalism as to the means of departing from a section 205A agreement - the focus should be on the reality of the working relationship and the conduct of the parties, the written terms should not be regarded as determinative; (iv) by failing to adopt a purposive construction, the ET erred in its approach as a matter of law and in its conclusion in this case.

27. In particular, as identified by ground (2), the Claimant submits that the ET erred in concluding that sub-section 205A(1)(a) was satisfied at the material time. Accepting that the conditions of sub-sections 205A(1) and (5) were met at one stage, the Claimant argues that, on a proper analysis: (i) employee shareholder status was a temporary measure for tax purposes and the parties conducted themselves on the assumption that ordinary service would resume (see the assurances, before the Claimant entered the section 205A agreement, that the status quo of enforceable rights in the ET would revert; see also the surrounding documentation that made clear statutory rights would be reinstated; note the oral evidence of Ms Murphy that she was of the firm view that rights would again become enforceable in the ET following the March 2017 service agreement); (ii) this position was not changed by reason of the September 2015 deed, not least as that was void for uncertainty as the procedure was silent as to which party bore the costs of the ET Judge's appointment; (iii) the variation introduced in the March 2017 service agreement was an effort to restore the right to pursue claims before the ET and clause 27.5 thus superseded the section 205A agreement, reviving the Claimant's entitlement to pursue a complaint of unfair dismissal (and the ET was required to consider the status of the relationship in a "*realistic and worldly-wise*" manner, see **Uber v Aslam** [2019] ICR 845 at paras 39-50); (iv) that understanding

of the position was consistent with the parties' conduct thereafter (not an irrelevant consideration, see per Lord Neuberger at para 33 **Secret Hotels 2 Ltd v HMRC** [2014] 2AER 685 SC): neither treating the Claimant as an employee shareholder after 2017 (e.g. the statutory redundancy payment made to the Claimant; the initial engagement with the Claimant's arguments about unfair dismissal on the merits); (v) accordingly, by the point of dismissal, section 205A had ceased to apply and the ET had erred in law in failing to hold that this remained a necessary condition for the exemption at sub-section 205A(2)(c) to have effect: specifically, the ET erred in thinking it was sufficient that the parties "*did not both agree … that the Claimant was not an employee shareholder*" (ET para 41) – there needed to be positive agreement that the Claimant continued to be so regarded.

28. By ground (3), the Claimant further contended that the ET erred in concluding that the Claimant's employee shareholder status could survive the March 2017 service agreement. First, clause 27.5 was an entire agreement clause; it did not preserve the particulars needed to satisfy sub-section 205A(1)(c). Second, the clause was otherwise meaningless as it referred to the September 2015 deed as "*reinstating certain contractual rights*", which it did not. Third, the ET was wrong to conclude that the Claimant's interpretation would require words to be inserted into section 205A and it had failed to explain why it was preferable to re-write the contract so as to deprive the Claimant of his statutory rights.

The Respondent's Case

29. In responding to the Claimant's arguments, the Respondent makes the following introductory points. First, an employee shareholder is a creature of statute, as provided by section 205A. Secondly, in this case, it was common ground that the Claimant became an employee

shareholder in September 2015; there was no suggestion the section 205A agreement was a sham or that the Claimant did not intend to adopt that status.

30. Turning to ground (1), the right to claim unfair dismissal was a domestic right and there was no prohibition on contracting out, merely a restriction on so doing (see section 203 **ERA**); it was not uncommon for legislation to allow for the contracting out of employment rights in defined circumstances (see, for example, section 147 **Equality Act 2010**) and there was nothing unusual or unfair about the operation of section 205A **ERA**. As for the various international instruments cited, the Claimant was not saying these required that he had an unqualified right to claim unfair dismissal; they did not. In any event: (i) article 8 **ECHR** was not ordinarily engaged by a dismissal and the Claimant had not suggested that circumstances such as those set out in **Wandsworth LBC v Vining** [2018] ICR 499 CA, at paras 43 and 47, applied, and there was nothing on which article 6 **ECHR** could bite (see **X v Y** [2004] IRLR 625 at para 63); (ii) the **EU Charter** was not relevant to the interpretation of section 205A, it only applied where national legislation falls within the scope of EU law (see **Aklagaren v Akerberg Fransson** C-617/10 at paras 19-20 and (e.g.) **Benkharbouche v Embassy of the Republic of Sudan** [2014] EWCA Civ 22 at para 73 (this part of the Decision not being the subject of appeal to the Supreme Court)); (iii) as for the **International Labour Organisation Convention**, it was noteworthy that Judge Pinto de Albuqerque's Judgment in **KMC v Hungary** Application no 19554/11. represented a divergent view from that of the other members of the Court. In any event, UK law did protect against unjustified dismissal; the Claimant had had this right, but chose - on favourable terms, after receiving legal advice – to become an employee shareholder. Even then, he retained a contractual right to complain of unfair dismissal; it could not be said he had been deprived of the right to argue his employment was unjustifiably terminated.

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31. As for ground (2), once the Claimant became an employee shareholder, his status as such could not terminate without some further act or agreement, something to be determined in accordance with normal contractual principles. Cases such as **Uber v Aslam** and **Autoclenz v Belcher** [2011] ICR 1157 were not strictly relevant, because the employee shareholder relationship did not possess a particular character that an **Autoclenz** type analysis could help identify. In any event, the ET had adopted a "*worldly-wise*" approach (assessing the subjective intention of the parties by reference to a wide range of evidence), but rejected the Claimant's argument on the facts, holding: (a) the parties did not intend the March 2017 service agreement to terminate the Claimant's employee shareholder status (ET para 35), and (b) that, as at the date of dismissal, the parties did not agree that status had ended (ET para 41). The Claimant was really running a perversity argument but did not meet the high threshold required (**Yeboah v Crofton** [2002] IRLR 634). The ET had been entitled to find that the parties had agreed that the reinstatement of rights was to be achieved by contractual means (as per the September 2015 deed, which was not void for uncertainty - express provision being made for the payment of the costs incurred in seeking the determination of an ET Judge). It had also permissibly found that clause 27.5 only related to those matters contained within the March 2017 service agreement and that did not deal with employee shareholder status, which had been dealt with in a separate deed.

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32. Finally, in respect of ground (3), the Respondent observes that the March 2017 service agreement was not the means by which the Claimant became an employee shareholder; accordingly, it was not required to contain or be accompanied by a written statement of the matters set out in sub-section 205A(5): it was not possible to construe section 205A as requiring a statement under sub-section 205A(5) to be provided *after* an employee becomes an employee shareholder – the purpose of sub-section 205A(1)(c) was to provide a written statement to the employee *before* entering into the section 205A agreement. The reason for these safeguards was

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A obvious but, once employee shareholder status was acquired, the legislation imposed no further obligation upon the employer. As for clause 27.5, that expressly preserved the September 2015 deed, which made sense only if the March 2017 service agreement was not purporting to affect the Claimant's status as an employee shareholder (neither party contemplated that a statutory right to complaint of unfair dismissal would exist alongside the contractual right provided by the September 2015 deed). The ET had correctly found that the March 2017 service agreement did not interfere with the Claimant's employee shareholder status and that the parties had not intended that it should.

Discussion and Conclusions

33. The right not to be unfairly dismissed is provided by section 94 **ERA**. It is a right that applies to those who are employees (as defined by section 230) but from which some employees are excluded; for example, those who have insufficient qualifying service (section 108 **ERA**) or those who have entered into an agreement as provided by sub-sections 203(2) and (3). The present case is concerned with the exclusion that applies, by virtue of section 205A **ERA**, to those who have agreed to become employee shareholders (a provision introduced by section 31 of the **Growth and Infrastructure Act 2013**). It is an exclusion that only applies to the general right to claim unfair dismissal for section 98 purposes; it does not extend to a claim of unfair dismissal for an automatically unfair reason (which would include a dismissal for refusing an offer to become an employee shareholder, see section 104G **ERA**) or to a dismissal that amounts to a contravention of the **Equality Act 2010** (sub-section 205A(9) **ERA**).

34. There are, further, particular safeguards that apply in relation to any section 205A agreement. First, in the very definition: an employee will only be an employee shareholder if the conditions set down at sub-section 205A(1) are met, that is:

"(a) the company and the individual agree that the individual is to be an employee shareholder,

(b) in consideration of that agreement, the company issues or allots to the individual fully paid up shares in the company, or procures the issue or allotment to the individual of fully paid up shares in its parent undertaking, which have a value, on the day of issue or allotment, of no less than £2,000,

(c) the company gives the individual a written statement of the particulars of the status of employee shareholder and of the rights which attach to the shares referred to in paragraph (b) ("the employee shares") (see subsection (5)), and

(d) the individual gives no consideration other than by entering into the agreement."

35. The written statement required by sub-section 205A(1)(c) is plainly designed to ensure that the employee is able to reach a fully-informed decision as to whether or not to accept employee shareholder status. This is a key procedural safeguard, the detail of which is then set out at sub-section 205A(5), which requires that the statement must:

"(a) state that, as an employee shareholder, the individual would not have the above rights…

(b) specify the notice periods that would apply in the individual's case in relation to returning from leave;

(c) state whether any voting rights attach to the employee shares;

(d) state whether the employee shares carry any rights to dividends;

(e) state whether the employee shares would, if the company were wound up, confer any rights to participate in the distribution of any surplus assets;

(f) if the company has more than one class of shares and any of the rights referred to in (c) to (e) above attach to the employee shares, explain how those rights differ from the equivalent rights that attach to the shares in the largest class (or next largest class if the class which includes the employee shares is the largest);

(g) state whether the employee shares are redeemable and, if they are, at whose option;

(h) state whether there are any restrictions on the transferability of the employee shares and, if there are, what those restrictions are;

(i) state whether any of the requirements of sections 561 and 562 of the Companies Act 2006 are excluded in the case of the employee shares (existing shareholders' right of pre-emption), and

(j) state whether the employee shares are subject to drag-along rights or tag-along rights (defined in sub-s (13)) and, if they are, explain the effect of the shares being so subject."

36. In addition, sub-section 205A(6) makes plain that a section 205A agreement will have no effect unless, before the agreement is concluded but when the employee has the sub-section 205(A)(1)(c) statement, the employee has received advice from a relevant independent adviser (the same as required for a valid settlement agreement under sub-section 203(3)) as to the terms

A and effect of the proposed agreement and they have had at least seven days thereafter to reflect on that advice before they enter into the agreement. In addition, the reasonable costs of the advice must be met by the employer (sub-section 205A(7)).

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37. In his submissions for the Claimant, Mr Milsom contends that section 205A must be afforded a purposive construction, both to respect the restrictions on contracting out of statutory employment rights under domestic law (in particular, under section 203 **ERA**) and to ensure

C compliance with international obligations. At this stage, he does not, however, suggest that section 205A must be disapplied, as being incompatible with any other (domestic or international) obligation.

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38. To the extent that a purposive construction means that the exclusion from statutory protection under section 205A ought to be read narrowly and that the conditions required for

E employee shareholder status must be strictly applied, I would agree. That, I accept, is the approach that is to be adopted when construing a legislative exception from a protective statutory right. I do not, however, consider that the Claimant's reliance upon section 203 **ERA** or on the **ECHR** or other international instruments takes matters any further. Section 205A is an entirely

F separate provision, which sets down quite distinct requirements for an employee shareholder agreement; it does not fall to be considered as an agreement for section 203 purposes. Furthermore, the rights to which it relates (relevantly in the present case, unfair dismissal) are

G limited to those derived from domestic law. More specifically, I am unable to see that any rights under the **ECHR** are engaged in this case (the mere fact of dismissal from employment being insufficient to bring article 8 **ECHR** rights into play, see **Martinez v Spain** (2015) 60 EHRR 3, as discussed at paras 43 - 47 **Wandsworth LBC v Vining** [2018] ICR 499 CA) and the Claimant

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A does not suggest that UK law fails to make provision for claims to be pursued in respect of unjustified dismissals, as required by the other international instruments on which he relies.

B 39. In any event, it is hard to see where the Claimant's construction arguments can go once it is accepted (as it is) that the strict and detailed conditions laid down under section 205A were all met in this case and that the parties entered into a valid section 205A agreement. In truth, the real focus of this appeal has to be less on the construction of section 205A than on the approach C to that which the section does not address – the termination of employee shareholder status and the reinstatement of statutory employment rights.

D 40. In this regard, the Claimant seeks to contend that it is at the point of the statutory contravention in issue (here, dismissal) that the requirements of section 205A must be satisfied. The ET rejected that argument: first, because that is not what the statute says; second, because E that would give rise to an unrealistic requirement that the employee agree that the section 205A exemption continues at the very time when he wishes to pursue a claim such as unfair dismissal. That, it seems to me, must be correct. The sub-section 205(2)(c) exclusion from the right to make a claim of unfair dismissal applies to those who are employee shareholders as defined by F subjection 205A(1). Section 205A lays down a number of pre-conditions that must be met if the employee is to become an employee shareholder but it does not require the parties to confirm each of those conditions as at the date of the prospective cause of action. To the extent the G Claimant's argument requires the parties to make some further positive averment of employee shareholder status at the date of dismissal, I am unable to see any justification for this from the language of section 205A.

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41. The more interesting point raised by this appeal is, I would respectfully suggest, one that depends upon the applicable factual matrix rather than a point of statutory construction as such. Assuming that (as here) employee shareholder status has been achieved, in what circumstances, during the continuation of the employment, would that come to an end? It is apparent that Parliament had in mind the possibility that an individual might cease to be an employee shareholder. That much is plain from the fact that sub-section 205A(12) allows that the Secretary of State may, by regulation, provide for the terms of any agreement to buy back the shares should the employee cease to be an employee shareholder (or, indeed, an employee). That power has not been utilised but it must still be possible that an employee shareholder might revert to employee status, with the consequent reinstatement of statutory rights that would entail.

42. In seeking to address this question, the ET mooted the possibility that employee shareholder status might be terminated if the parties entered into a subsequent inconsistent contractual arrangement. I would agree. The most obvious means of rebutting employee shareholder status would be an agreement for the employee to sell or give back the shares to the company, but there may be other possible forms of agreement between the parties that would lead to the same result.

43. Allowing for that possibility, the question is whether that happened here; specifically, did the parties signify their intention to no longer recognise the Claimant as an employee shareholder for section 205A purposes by entering into the March 2017 service agreement?

44. The Claimant contends that, applying a purposive construction, an agreement to revert to employee status should be readily inferred. That, however, will depend upon the ET's primary findings of fact and it is apparent that, in the present case, the ET did not find the facts to be as

A the Claimant contended. Thus, although the Claimant argued that the parties always intended that he should revert to employee status (with the resumption of his statutory rights), the ET found as a fact that this would not reasonably have been his understanding of the position as at the date he entered into the section 205A agreement:

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> **"The Claimant, acting reasonably, should have been fully aware by the time that he signed the employee shareholder agreement that it was by means of a contractual referral to an expert (only) that the Respondent intended to 'reinstate' …" (ET para 25)**

C 45. On appeal, the Claimant has further contended that the September 2015 deed (which set out the contractual 'reinstatement' of his unfair dismissal and redundancy rights) must have been void for uncertainty as it did not provide for who would meet the costs of the expert who would adjudicate upon any such claim. That, however, is incorrect as the September 2015 deed made

D clear that the expert's costs would be met by the losing party.

46. As for what happened thereafter, the ET noted that the March 2017 service agreement

E was preceded by a discussion led by Ms Murphy, who sought to explain (to the Claimant and other directors) what was proposed. Given that Ms Murphy based her oral explanations on the draft letter of January 2016, which referred only to reinstating rights on a contractual basis, the ET did not accept the Claimant's suggestion that she had made clear oral assurances to him that

F the March 2017 service agreement would reinstate his statutory rights. To the extent that the Claimant seeks to go behind that finding, he does not begin to meet the high threshold to successfully mount a perversity challenge.

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47. The Claimant further argues, however, that the March 2017 service agreement itself made plain he was no longer bound by the section 205A agreement he had previously entered into with

H the Respondent. Even allowing for the ET's rejection of his case at all previous stages, the Claimant relies on clause 27.5 as making clear that any earlier section 205A agreement had been

A superseded by the March 2017 service agreement, which did not purport to comply with the requirements of section 205A and which could not, therefore, give rise to (or continue) employee shareholder status for those purposes.

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48. The ET also rejected this argument. First, because it did not accept the context upon which the Claimant relied as providing the "*background knowledge*" available to the parties at the time (and see per Lord Hoffman in **ICS v West Bromwich and ors** [1998] 1 ALL ER 98);

C see the points made above. Second, because the words used in the March 2017 service agreement did not support that submission. On its face, that must be right given that the March 2017 service agreement is silent on the question of employee shareholder status. Third, and more specifically,

D the ET rejected the Claimant's contention that clause 27.5 amounted to a "whole agreement" provision, which expressly superseded all previous agreements (save for the September 2015 deed), including (by implication) the section 205A agreement.

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49. On this point, the ET considered that clause 27.5 of the March 2017 service agreement did not refer to the section 205A agreement because: (1) the document the Claimant had signed on 25 September 2015 "*was a statement and not an agreement as referred to in clause 27.5*" (ET

F para 34); (2) the March 2017 service agreement did not "*deal with or refer to employer [sic] shareholder status or to the subject matter of the employee shareholder agreement*." (also, para 34); and (3) what was mutually intended by the March 2017 service agreement, in particular by

G clause 27.5, was that "*the Claimant would continue to have the benefit of the [September 2015 deed] and would not have restored to him the statutory employment rights to go to the ET. If this was not so there would have been no need to preserve the [September 2015 deed]*" (ET para 35)

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50. I do not think it is correct to characterise the section 205A agreement as merely a "statement" rather than an "agreement". The document certainly included the written statement of particulars required by sub-section 205A(1)(c) (containing the information specified by sub-section 205A(5)) but it was a written agreement that the Claimant was to be an employee shareholder, not merely a statement of particulars. That said, I consider the ET was right to find that the section 205A agreement was not included within "*the matters dealt with*" in the March 2017 service agreement. The section 205A agreement and the March 2017 service agreement played entirely different roles and the latter did not deal with the matters addressed in the former. More than that, as the ET observed, it was apparent that the March 2017 service agreement was intended to preserve the "reinstatement" of contractual rights (that is, the contractual replication of statutory rights that was the means by which the parties had agreed to "reinstate" the Claimant's former unfair dismissal and redundancy protections) as provided by the September 2015 deed. There was nothing to suggest that the parties intended those contractual rights to exist alongside the statutory rights that they replicated; that would make no sense and the ET was entitled to look to construe clause 27.5 in a way that gave business efficacy to the parties' agreement.

51. For completeness, I should also address the Claimant's contention that the parties' subsequent behaviour evinced their mutual understanding that the March 2017 service agreement displaced the section 205A agreement. I do not accept that it is appropriate to seek to construe a contractual bargain by reference to the parties' subsequent conduct. In any event, however, in the present case the ET found that the parties had simply overlooked the fact and application of the section 205A agreement and the September 2015 deed; their conduct said nothing about their understanding or intention at any earlier stage.

52. Ultimately, the determination of the issues raised by this appeal case comes down not to the construction of section 205A **ERA** but of the agreements entered into by the parties; in particular, as to the construction of the subsequent agreement – the March 2017 service agreement – on which the Claimant sought to rely as demonstrating that his employee shareholder status had terminated for section 205A purposes and he had reverted to be an employee. In this regard, I am satisfied that the ET reached permissible findings as to the background context that entirely supported its construction of the relevant provision within the latter agreement. Specifically, in construing clause 27.5, the ET correctly had regard to the differences between the March 2017 service agreement and the section 205A agreement and permissibly interpreted this provision in such a way that would make sense of the apparent intention to preserve the contractual rights provided by the September 2015 deed. The conclusion reached was correct, given the particular agreements between these parties, and the purposive construction of section 205A urged by the Claimant would not impact upon that. For all those reasons, this appeal is dismissed.