Neutral Citation Number: [2024] EAT 46

Case No: EA-2022-000009-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19th March 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

(1) MR M RAJPUT
(2) MR T AKMEEMANA

Appellants

- and -

SKY RETAIL STORES LIMITED

Respondent

- -
- -

RAD KOHANZAD (instructed by Lawson West Solicitors Ltd) for the **Appellants**
CAROL DAVIS KC (instructed by Sky Retail Stores Ltd) for the **Respondent**

Hearing date: 19th March 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimants were Store Managers. In addition to basic pay and commission they received a Store Manager Allowance (SMA).

As the result of a reorganisation, and following a consultation process, the respondent abolished the Store Manager role, and with it SMA, and notified the claimants that from a specified date, they would be employed as Sales Advisers. SMA ceased from that date but basic pay was increased by an amount higher than SMA. The claimants worked on under the new terms. It was their case that they had done so under protest.

The claims included a wages claim in respect of SMA and a claim of failure of collective consultation. The claimants were represented by counsel at the tribunal hearing. It was common ground before the tribunal that the two claims were mutually exclusive and that either the imposition of new terms meant that the claimants had been effectively dismissed, which it was agreed would preclude ongoing wages claims, or there had been no such dismissal, precluding protective award claims.

The tribunal found that the imposition of the new terms amounted to **Hogg v Dover College** [1990] ICR 39 dismissals, and dismissed the wages claims. While the claimants had been dismissed for the purposes of the collective consultation claims, those claims failed because they did not have standing to bring them.

In the EAT the claimants sought to appeal the dismissal of the wages claims on the footing that, in respect of a contract-based claim, **Hogg** must be interpreted or applied in light of **Geys v Sociéte Générale, London Branch** [2012] UKSC 63; [2013] ICR 117 in which it was held that the elective theory of termination applies to contracts of employment. At a rule 3(10) hearing the judge permitted this to be run as a new point

in the EAT. In their Answer, and at the full appeal hearing, the respondent challenged that decision.

Held: The point was a substantive new point in the EAT which had not been run below. The claimants therefore required permission to run it as a new point. The respondent was entitled to a review of the rule 3(10) judge's decision, as it had not had the opportunity to be heard when it was taken. Upon review, the guidance in the authorities drawn together in **Secretary of State for Health v Rance** [2007] IRLR 665 was applied. This was a novel doctrinal point that was at least arguable, and had not hitherto been the subject of judicial adjudication after contested argument. However, if the point was entertained by the EAT and succeeded, a remission to the employment tribunal would then be required. Further, the claimants had been represented by specialist counsel in the employment tribunal, where the point was not run, and where the claims were fought and decided on the agreed basis that a finding that there were **Hogg v Dover College** dismissals would bring the wages claims to an end. Permission to run the point was refused, and the appeal was dismissed.

HIS HONOUR JUDGE AUERBACH:

1. I will refer to the parties as they were in the employment tribunal as claimants and respondent. The tribunal identified in its decision that the claimants were lead claimants within the meaning of rule 36 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, with some 25 others involved in the case. I take the factual context for this appeal from findings of fact made by the tribunal which are not, as such, contested on appeal.

2. The respondent operates a number of small retail sales units located in shopping centres. At the relevant time, the majority of staff working in those units had the title of Sales Adviser (or Retail Adviser) but a number of them, including these claimants, had the title of Store Manager. Store Managers received the same basic pay as Sales Advisers and participated in the same commission scheme. But they also received further remuneration by way of a fixed store manager allowance ("SMA").

3. The tribunal reviewed conflicting evidence as to the extent to which, at the relevant time in the autumn of 2018, the role and responsibilities of Store Manager did or did not differ from that of Sales Adviser. It concluded that, right up to October 2018, Store Manager remained a distinct substantive role, for which the incumbents were being paid not insignificant additional pay by way of the SMA. It found that the role was perceived by all as a managerial role of higher status than Sales Adviser, and that the claimants were, in effect, *working as* Store Managers all the time when they were working, even when undertaking selling activity.

4. The respondent proposed a restructuring of operations which included a proposal to remove the Store Manager role and, with it, the payment of SMA. Basic pay would be increased for everyone working in the retail outlets and the commission scheme would be changed. This proposal was formally announced in August 2018. There was no recognised trade union and employee representatives were elected for the purposes of collective consultation, including

specific representatives of Store Managers. There followed a process of collective consultation and some individual consultations with those Store Managers who wanted it.

5. The tribunal then made the following findings of fact in a passage that I will set out in full:

> **"11.38 It is not necessary to discuss here the content of the collective or individual consultation in detail, but a running theme throughout was that the Store Managers wanted either for the change to their role not to take place at all, or if it was to take place they considered that it gave rise to a redundancy situation and they wanted the option of a redundancy package. They were also concerned that the increase in their basic pay would be the same as for Sales Advisers, and so with the withdrawal of SMA there would no longer be any differential between their pay and that of the Sales Advisers who they had previously managed.**
>
> **11.39 Following the conclusion of the consultation process, the Respondent confirmed that the proposed restructure would be implemented with effect from 26 October 2018. By letters sent to each Store Manager at or around the time the restructure was implemented, the respondent confirmed changes to their contractual terms. The letter to Mr Akmeemana is dated 16 November 2018 and included the following:**
>
> **'…with effect from 26 October 2018, your contractual details will change/have changed.**
>
> **Your new contractual terms are as follows**
>
> - **Your new job title will be Sales Advisor.**
> - **Your salary will be £25,500.00 per annum.**
> - **Your store manager allowance will end on 26th October 2018.**
>
> **All your other main Terms and Conditions of Employment remain the same.**
>
> **By receipt of this letter you confirm that you understand and accept the above changes.'**
>
> **11.40 Notwithstanding the last sentence of the letter quoted above, the Respondent has (sensibly) not sought to argue that mere receipt of the letter amounted to valid acceptance of any change to terms and conditions of employment.**
>
> **11.41 Following the implementation of the restructure the Claimants (with the single exception of Mr Charman) continued to work for the respondent in the role of Sales Adviser and to accept remuneration on the basis of the higher basic salary and withdrawal of SMA as implemented on 26 October 2018. They say that they did so under protest and that they made this clear to the Respondent. However, for reasons discussed below, it is not necessary for the tribunal to make further findings on that matter."**

6. The two claimants raised various individual and collective grievances over the period from 7 September to 26 October 2018. The tribunal made the following observation at [11.44]:

> **"The content of the various grievances varied to some extent, but as with the collective and individual consultation meetings the running theme was that the claimants did not want the restructure to go ahead, at least in so far as it affected their roles, and/or if it did go ahead they wanted to be offered a redundancy package."**

It also made the following observation at [11.47]:

> **"As already noted above, the restructure had in fact been implemented with effect from 26 October 2018. Mr Akmeemana did not request a further individual consultation meeting on or after 26 October 2018 and nor did Mr Rajput."**

7. The tribunal claims began in 2018. Prior to the hearing giving rise to the decision which is the subject of the present appeal there was a preliminary hearing, in around March 2021, at which both the claimants and the respondent were represented by counsel. This led to a reserved decision promulgated in August 2021. One strand of the original complaints was struck out as having no reasonable prospect of success. The live complaints going forward were identified as being of: (a) unlawful deduction from wages in respect of SMA; (b) failure to inform and consult contrary to section 188 **Trade Union and Labour Relations (Consolidation) Act 1992**; and (c) detriment on grounds related to trade union activities (section 146 of the **1992 Act**). The basis on which each of these complaints was advanced was considered in the course of that decision.

8. There was then a full merits hearing at Croydon by CVP in November 2021 before Employment Judge K Bryant QC (as then styled), Ms P Barratt and Ms A Boyce. Both the claimants and the respondent were represented by the same respective counsel as had appeared at the previous preliminary hearing that I have mentioned. In a reserved judgment with reasons sent on 24 November 2021 the tribunal dismissed all of the complaints.

9. In the opening part of its decision, the tribunal identified the complaints that were live before it as reflected in the outcome of that hearing. It then said this:

> **"4. It was agreed by both sides that the claims under ERA, s13 and TULRCA, s188 were alternatives, ie only one or the other could succeed on the facts of this case. Which claim fell to be considered further would depend on whether or not the unilateral changes in October 2018 had the effect of terminating the Claimants'**

> **contracts of employment or merely purporting to vary them; if they amounted to termination then the unauthorised deduction claim would fall away, and if they did not then the failure to consult claim could not succeed."**

10. I have already set out the pertinent findings of fact made by the tribunal. The tribunal went on to set out the relevant statutory provisions in relation to each of the three complaints. It then turned to the parties' submissions, drawing on both their written skeleton arguments and oral submissions and case law. This section of the tribunal's decision included the following passage:

> **"16. With regard to the claim for unauthorised deduction from wages, the Claimants' position, in short, was that SMA fell within the definition of wages in ERA, s27(1), they had a contractual entitlement to SMA payable each month, they had never agreed to vary their contracts to remove entitlement to SMA, they had not affirmed their contracts following the withdrawal of SMA, and the contractual position therefore remained that they were still entitled to SMA.**
>
> **17. The Respondent did not dispute that Store Managers, including the Claimants, were entitled to SMA up to 26 October 2018. However, it said that SMA was not properly payable thereafter because it was only payable for so long as individuals performed the duties of Store Managers, which they did not following the restructure and the abolition of the Store Manager job title. Further, the Respondent argued that if the Claimants were right in saying that the Store Manager remained a substantive role up to the date of the restructure, then its removal was a fundamental change which, in law, amounted to termination of the Claimants' contracts of employment and the imposition of new contracts; on that basis, there was said to be no ongoing entitlement to SMA since the new contractual terms did not include such entitlement. In the alternative, the Respondent said that if the Claimants contracts of employment were not terminated at the time of the restructure, then by continuing to work and accept increased basic pay they had affirmed their contracts as varied or, in the further alternative, since their new basic pay was higher than the total of their previous basic pay plus SMA, they had in fact been overpaid rather than underpaid.**
>
> **18. The claim under TULRCA, s188 rested on a finding that the proposed restructure would amount to termination of the Claimants' existing contracts of employment such that the Respondent was proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days, and the duty to consult collectively under s188 was therefore triggered. The tribunal was referred to the wide definition of redundancy for these purposes in TULRCA, s195. The number of Store Managers whose roles were being abolished was clearly more than 20, but the tribunal raised with the parties the question of whether there was an issue as to whether the restructure involved 20 or more employees 'at one establishment'; neither side suggested that this was a live issue in this case and, in any event, for reasons discussed below it was not necessary for the tribunal to resolve it even if it had been.**
>
> **19. The Claimants submitted that the withdrawal of the Store Manager role and SMA amounted to a forced demotion and was so fundamental that it would amount to termination of their existing contracts and the offer or imposition of a new contract. That, they said, meant that the proposed restructure involved a proposal**

> **to dismiss them and the other Store Managers as redundant. They relied on *Hogg v Dover College* ([1990] ICR 39, EAT) and *Alcan Extrusions v Yates* ([1996] IRLR 327, EAT) in support of this.**
>
> **20. As noted above, if the duty to consult under TULRCA, s188 was triggered then there was no dispute between the parties that employee representatives were properly elected in accordance with the statutory requirements or that collective consultation with those representatives had taken place. The remaining areas of dispute were (a) whether the content of the collective consultation complied with TULRCA, s188(2), and (b) whether the Claimants had standing to bring a claim for failure to consult because of the wording of TULRCA, s189(1). Unsurprisingly, the Claimants' position was that the answers to (a) and (b) above should be no and yes respectively, and the Respondent's position was the opposite."**

11. I do not need to consider the issues to which the section 146 complaints gave rise as they are not the subject of, nor relevant to, this appeal.

12. The tribunal began its discussion and conclusions with the following passage:

> **"23. Were the Claimants' contracts terminated?**
>
> **The first matter to consider is whether the restructure which was implemented on 26 October 2018 amounted, in law, to the termination of the Claimants' contracts of employment and the offer or imposition of new contracts. The Claimants accept that if it did then their claim for unauthorised deduction from wages would fall away, and if it did not then their claim for failure to consult must fail.**
>
> **24. There was some discussion with the parties during their closing submissions as to what the correct legal test is for what one might call a *Hogg v Dover College* type termination. At one point the Respondent said that a fundamental breach of contract by the Respondent would be enough to terminate the Claimants' contracts of employment. The Claimants did not accept this, saying that what is required is more than a fundamental breach.**
>
> **25. The tribunal notes the way in which the applicable test has been formulated in previous appellate cases. In *Hogg v Dover College* itself, Garland J (at 42F) referred to Mr Hogg in effect being told that his former contract was from that moment gone, and that he was to be employed on wholly different terms.**
>
> **26. In *Alcan Extrusions v Yates*, HHJ Smith QC (at ¶25) formulated the question for the tribunal to answer in such cases as whether the old contract was being withdrawn or removed from the employee and noted (at ¶27) that the tribunal in that case had been entitled to conclude that the new terms imposed on Mr Yates were '*so radically different from the old as to pass beyond mere repudiatory variation of the old contract*'; this latter point, the tribunal finds, resolves the question of whether a repudiatory breach without more would be enough to amount to termination.**
>
> **27. In light of the guidance from the EAT in these and other cases, it seems to the tribunal that the question it has to answer is whether, on an objective consideration, the restructure in so far as it affected those with the job title of Store Manager was**

> **so substantial that it amounted to the withdrawal of their existing contracts of employment and the offer or imposition of new contracts of employment.**
>
> **28. It was the Claimants' case (albeit in the alternative to their unauthorised deduction claim) that the restructure involved the removal of their substantive Store Manager role and the higher status and additional remuneration associated with it, and that this amounted to a forced demotion. They also relied on the fact that before the restructure the payment of SMA meant there was a substantial differential between their pay and that of the Sales Advisers, whereas after the restructure there was none. They said in closing submissions that these were very substantial changes.**
>
> **29. The tribunal has already found that the Store Managers, including the Claimants, held a distinct and identifiable role which was seen by all concerned as of higher status than the role of Sales Adviser, that it was a managerial role which involved substantive additional duties, and that this remained the case up until 26 October 2018 when the restructure was implemented. It is also clear from the evidence that the differential pay as between Store Managers and Sales Advisers disappeared after the restructure.**
>
> **30. The tribunal finds that the unilateral removal of this role and the additional remuneration, in the form of SMA, that went with it was a very substantial change to what were clearly contractual terms of the Claimants' employment.**
>
> **31. The question is then whether the changes imposed on the Claimants were so substantial as to amount, on an objective assessment, to the withdrawal of their existing contracts as Store Managers and the imposition of new ones as Sales or Retail Advisers. The tribunal has considered the fact that many of the reported cases, including *Hogg*, appear to have involved not only a substantive change in role but also a substantial reduction in pay. In this case, although SMA was removed, the increase in basic pay was greater than the level of SMA payments. However, the absence of a pay reduction cannot, in the tribunal's judgment, be decisive; the question remains whether, objectively, the restructure amounted to the withdrawal of the Claimants' existing contracts of employment.**
>
> **32. The tribunal has concluded, taking into account all of the evidence presented to it, that in this case the changes imposed by the Respondent were, as the Claimants said at the time, sufficiently significant when assessed objectively to amount to termination of their contracts of employment with effect from 26 October 2018. Thereafter, they continued to work under new contracts of employment."**
>
> **33. Unauthorised deduction from wages**
>
> **In light of the above conclusion, the claim for unauthorised deduction from wages cannot succeed since the Claimants' contractual entitlement to SMA ended on 26 October 2018 when their existing contracts of employment were terminated. This claim is therefore dismissed."**

13. The tribunal went on to consider the complaint under section 188. That complaint failed because the tribunal concluded that neither of the claimants had standing to bring it. The tribunal finally considered the section 146 complaint, which also failed for reasons I do not need to set out.

14. On 5 January 2022 new solicitors appointed to act for the claimants and two of their colleagues made an out-of-time application for reconsideration of the tribunal's decision dismissing the section 188 complaints on the question of standing. That was refused by the judge for reasons set out in a letter of 13 January 2022. Also on 5 January 2022, the new solicitors instituted an appeal to the EAT. The grounds of appeal were settled by Mr Kohanzad of counsel, who had not previously appeared for the claimants in the employment tribunal.

15. There were three grounds, of which only ground 1, which relates to the complaint of unlawful deduction from wages, is potentially live before me. The text of ground 1 is as follows:

> **"Ground 1**
>
> **5. The ET erred in applying the automatic rather than elective theory of termination in concluding that the Claimants had been dismissed. Since the House of Lords case of *Societe Generale London Branch v Geys* [2013] ICR 177, the elective theory of termination prevails in employment contracts (albeit perhaps not in unfair dismissal cases).**
>
> **6. The ET found that the Respondent's breach of contract was so serious as to amount to a termination and considered that to be the end of the matter. Given that the Claimants elected to stand and sue, it is averred that they rejected any proposed termination and that, following *Geys*, they were not as a matter of law dismissed. It is averred that the principles in *Hogg v Dover College* [1990] ICR 39 must be applied in light of *Geys*, so that where the actions of an employer are *prima facie* found to amount to a termination, if the employee stands and sues that they have rejected the employer's purported termination of contract.**
>
> **7. That position, if correct in law, has the benefit of not sweeping the carpet of the right to bring a claim for an unlawful deduction of wages from beneath the feet of employees by an employer many months or years later successfully arguing that their own breach of contract was so serious that it gave rise to a termination of contract.**
>
> **8. In the further alternative, the subjective intention of the parties is relevant, although not determinative, in determining their objective intentions. Here, the ET erred in ignoring the parties' subjective intentions."**

16. The judge who considered the grounds of appeal on the paper sift observed that ground 1 was clearly arguable but that there was no indication that the argument based on **Geys v Société Générale, London Branch** [2012] UKSC 63; [2013] ICR 117 was run before the employment tribunal. The judge noted that the claimants were represented by counsel in the tribunal, and, in

the circumstances, he could see no exceptional circumstances or compelling reason for permitting the point to be run on appeal. He also considered the other original grounds not to be arguable.

17. The claimants' solicitors requested a rule 3(10) hearing and Mr Kohanzad appeared for them at that hearing. The judge directed that ground 1 (only) be set down for a full appeal hearing. In her reasons, she observed that it was arguable that the tribunal applied the wrong test when considering whether the claimants' contracts were terminated, as **Hogg v Dover College** [1990] ICR 39 (EAT) needed to be considered in light of **Geys**. Although it was accepted that there was no reference to **Geys** below, the judge said that the "basic proposition" did appear to have been before the tribunal, the essential point having been made on behalf of the claimants, that the original contract had continued.

18. Insofar as the point was new, the rule 3(10) judge, having considered the guidance in **Secretary of State for Health v Rance** [2007] IRLR 665, considered it "appropriate to exercise my discretion to allow it to proceed"; and said that it was "a pure point of law and it is possible for the EAT to consider the point without further fact-finding". The judge added that there was some force in the submission that this was an important area affecting many employees, and that clarity on the impact of **Geys** would be helpful.

19. In its Answer, the respondent asserted that an argument based on **Geys** was not run by the claimants' counsel at either the preliminary hearing to which I have referred, or the full merits hearing; and that there were no exceptional circumstances or compelling reasons for permitting the point to be run on appeal. It went on also to submit that the argument was, in light of the tribunal's findings, in any event misconceived.

20. At the hearing of the full appeal today, Mr Kohanzad has appeared for the claimants. Ms Davis KC, who also appeared for the respondent at both of the hearings in the employment tribunal to which I have referred, appeared again for the respondent. Issues have been raised

before me as to whether I should entertain this ground of appeal at all; and, if so, as to its merits. I have heard argument from both counsel this morning on all points raised.

21. The first matter I must decide is whether I should give further consideration to the question of whether the claimants should be permitted to run this ground of appeal at all, in light of what the judge decided at the rule 3(10) hearing. Mr Kohanzad acknowledges and accepts that the respondent in its Answer correctly submits, as such, that the claimants are raising a legal argument by this ground that was *not* advanced in the tribunal below. However, he submits that the claimants *were* advancing in the tribunal the essential underlying factual premise; and that an argument advancing a new legal route to the same result does not require permission to be run as a new point in the EAT at all. Alternatively, he argues that if such permission was required, then it was plainly, and properly, granted by the rule 3(10) judge.

22. Mr Kohanzad does not ultimately go so far as to say that the rule 3(10) judge's decision is not amenable to review by me; but he contends that it is incumbent on the respondent to persuade me that there are grounds for review falling within the usual scope of a review pursuant to the **Employment Appeal Tribunal Rules 1993**, rule 33. He argues that it is therefore not enough for the respondent to assert that the rule 3(10) judge's decision was wrong, nor would it be a sufficient basis to disturb the rule 3(10) judge's decision, that I might take the view that I, for my part, would have taken that decision differently.

23. Taking these points in turn, firstly I consider that the argument that the claimants now seek to run by ground 1 is, *in substance*, and not just by label, a new argument that was not run in the tribunal. **Hogg v Dover College** holds that doctrinally there can be a dismissal by the employer where the tribunal finds that the imposition of change is so fundamental that the effect, in substance, is that the employee is being told that, as it was put in the **Hogg** case itself, his former contract was from that moment gone. In such a case, the employee is not precluded from claiming

that there has been a dismissal from employment, under what was until that point his contract, by the fact that he has remained in the employer's employment thereafter under the terms of what amounts to a new contract that has been offered and accepted.

24. It is part of the logic of this doctrine, as explained in **Hogg**, that there can be no question of continued performance of the previous contract in such a case, as it will have been wholly withdrawn and brought to an end, and replaced, going forward, by the new contract. That being so, in such a case any implied acceptance of new terms by the employee could only be by way of the employee having accepted employment under the new contract going forward, not by way of the employee having accepted a variation of the continuing old contract.

25. As the present tribunal noted, in **Alcan Extrusions v Yates** [1996] IRLR 327, which took essentially the same doctrinal approach as **Hogg**, the EAT made the following observation:

> **"In our judgment, [the tribunal] was entitled to conclude that the new terms were so radically different from the old as to pass beyond mere repudiatory variation of the old contract, so that they could properly be characterised as the removal of the old contract and the offer, by way of substitution, of a new and substantially inferior contract. In our judgment, that amounted to a finding of fact, which was correctly arrived at by the Industrial Tribunal on a correct application of the principle in *Hogg*."**

The significance of this is that the EAT identified here that, for the purposes of this doctrine, there may be (a) cases where there is a breach of contract that is not repudiatory; (b) cases where there is a breach that is a "mere repudiatory variation of the old contract"; and (c) cases where what the employer has done goes beyond a "mere repudiatory variation", so that it is treated as an effective termination of the existing contract.

26. It is important to note that both **Hogg** and **Yates** were concerned with complaints that turned on there having been a dismissal for the purposes of statutory claims, within the definition of dismissal in what is now Part X **Employment Rights Act 1996**. It is *not* argued by ground 1 of this appeal that **Geys** can or does make any difference to the settled law in relation to that statutory

concept of dismissal; and, indeed, that it does not make any difference has been recently reaffirmed in **Meaker v Cyxtera Technology UK Ltd** [2023] EAT 17.

27. This ground of appeal relates to the dismissal of the wages claims. These were premised on the proposition that the old or existing contract had *not* been terminated, and, in particular, that the respondent was in breach of contract by stopping payment of SMA to the claimants, but that the claimants had *not* agreed to a variation of their *existing* terms relating to remuneration, and so they had an ongoing right to claim entitlement to be paid SMA by way of properly-payable wages.

28. But, as is clear from paragraph 4 of the tribunal's decision in particular, and elsewhere, it was accepted and agreed by the claimants and respondent before the tribunal that the wages and section 188 claims were mutually exclusive. For a section 188 claim to succeed and result in a protective award requires there to have been a dismissal, which for these purposes is defined by the **1992 Act** as a dismissal within the meaning of part X of the **1996 Act**. It was accepted and agreed before the tribunal on behalf of the claimants that *if* there was a statutory dismissal applying the doctrine in **Hogg** to the facts of this case, then that would *open* the door to the section 188 claims, insofar as they required there to have been a dismissal to be potentially viable at all, but that the same finding would have also *closed* the door to the wages claims.

29. Mr Kohanzad argued before me this morning that, nevertheless, the claimants were still relying before the tribunal on an elective theory of termination, because the premise of their wages claims was that, while the respondent was in breach by stopping payment of SMA, they had not accepted any variation to their existing contracts – something they could have, but did not, elect to do; and this was part of the basis of their claims that the wages continued to fall due.

30. That this was how the claimants put their case on the wages claims is true, as such. But the issue raised by ground 1 is a different one. It is whether, in light of **Geys**, the tribunal erred by holding that, if the breach was not "merely" a fundamental breach, but was, according to the

Hogg/**Yates** analysis, so serious as to go beyond that, and amount to an effective termination, then this would, without more, lead to the conclusion that the claimants no longer had a contractual right to continue to receive SMA, because there would have been an effective termination of their contracts for the purpose of *that* money claim as well. That is to say, the issue raised by this ground is whether **Geys** has a bearing on whether there is any room for the **Hogg** doctrine to apply, not merely in relation to the question of whether in the given case there has been a statutory dismissal as defined in Part X of **1996 Act**, but in relation to a legal complaint which gives rise to an issue as to whether there has been a *contractual* termination of the existing employment.

31. It seems to me that, at its highest, indeed, the logic of the challenge raised by ground 1 is to raise the possibility that **Hogg** has no application *at all*, where the underlying issue on which the complaint turns is whether there has been an effective termination, as a matter of contract law. That is on the basis of the contention that a repudiatory breach by an employer of *any* kind is only ever effective to terminate the contract, as a matter of *contract law*, if the wronged party one way or another (by words or conduct) accepts it as having done so, and that there is no super-category of **Hogg**-type more-than-mere-repudiatory breach in that context.

32. Mr Kohanzad said this morning in oral submissions that he does not seek to go that far, and only seeks to argue that in this context of a wages claim, **Hogg** must be interpreted or "applied in light of" **Geys**; and he explained in oral argument that, by that, he means that he would wish to argue that the correct legal analysis would be that there *could* still be an effective **Hogg** type *contractual* termination, but only if the employee did *not* object to that taking effect.

33. That way of putting the matter, I have to say, is not spelled out in the ground, which does not explain what the phrase "applied in the light of" means; and I am not sure, though I am not deciding, whether it offers a sustainable middle course between the proposition that **Geys** does not preclude there being a **Hogg**-type termination by an employer effective as a matter of contract law

on the one hand, and the proposition on the other that **Hogg** has no application at all in the contract-law context

34. But, in any event, however the argument is now put, this is *not* how the claimants put their case in the tribunal. They did not contend that, if there was found to be a termination of the sort that fell within **Hogg**, then it would still not be effective to terminate their contracts for the purposes of putting a halt to the wages claims. Nor did they contend that it would not be so effective in the particular circumstances of this case because they registered their objection to such a termination. Rather, as I have said, they put forward two analyses as being mutually exclusive.

35. On the first analysis advanced by them to the tribunal, the unilateral removal in particular of the SMA was a fundamental breach, but the respondent's conduct *fell short* of effecting a **Hogg** termination so as to *defeat* their wages claims, but open the door to their section 188 claims. On that analysis, the existing contracts continued with, on the claimants' case, them working to those contracts under protest and, hence, being entitled to continue to receive SMA under the existing contracts on an ongoing basis. At the same time, on that analysis, there was no statutory dismissal, the absence of which would defeat the section 188 claims.

36. On the second, alternative, analysis advanced by the claimants in the tribunal, the respondent's conduct was so serious as to, as it were, cross the **Hogg v Dover College** line, and so it *did* amount to a legally effective termination of the existing contracts, both *shutting the door* to the wages claims, and simultaneously opening the door to the section 188 claims. As the tribunal's decision makes clear, it was not argued that, on that scenario, the wages claims would not fail. The claimants' case in the tribunal did *not* involve any challenge, as such, to the proposition that the **Hogg v Dover College** line of authority was capable of applying to, and potentially determinative of, the wages complaints.

37. All that the tribunal had to decide on this point – which was a fact-finding and evaluative matter for it and a decision which is not, as such, I would add, challenged by this appeal – was whether this was a termination that was a repudiatory breach that, as I have put it, crossed the **Hogg v Dover College** line, and so amounted to a termination for the purposes of both complaints. To repeat, the case advanced on the wages complaint rested on the proposition that the respondent's conduct did *not* cross that line, not on the proposition that **Hogg** had no application at all to the wages claim or only applied potentially in some modified form to the wages claim. Insofar as it may be said that they relied on the elective theory, they did so on the footing that this was the position *if* the tribunal found that this was *not* a **Hogg** termination at all.

38. By contrast, the argument advanced by this ground of appeal raises the possibility that these two scenarios are not, or at any rate not necessarily, mutually exclusive. It raises the possibility that there could be a **Hogg v Dover College** dismissal for statutory purposes, but yet, at least in some circumstances, also a contract-based claim for wages that may continue to bite on the basis that, for contract law purposes, the original contract has not been terminated at all.

39. The case advanced by ground 1 is, I conclude, a real and substantially different case from that which was advanced in the employment tribunal. The EAT therefore needed, or needs now, to consider whether this argument should be permitted to be run on the basis that it is, indeed, a new argument of substance that was not run in the tribunal.

40. I turn then to whether I can revisit the rule 3(10) judge's decision; and, if I can, on what basis I should approach that task? As to that, at the rule 3(10) hearing, in the usual way, only the claimants, who are now the appellants, were represented. The respondent was not entitled to appear, be represented, or to put in submissions, or at any rate, had there been someone present for the respondent, not without seeking and getting the permission of the judge. The purpose of the hearing, in accordance with rule 3, was to consider afresh whether the notice of appeal disclosed

any reasonable grounds for bringing the appeal and, hence, whether any such ground should be permitted and directed to proceed to a full and contested appeal hearing.

41. A decision at a rule 3(10) hearing, adverse to an appellant, that there are no reasonable grounds for bringing an appeal, or a particular ground of appeal, will result in the appeal, or that ground, being dismissed. Otherwise, the appeal or the ground continue to a full appeal hearing.

42. It is open to an appellant to seek to *amend* their grounds of appeal and it is very common for appellants to seek to do so at a rule 3(10) hearing. At such a hearing the judge may, particularly where an appellant has a legal representative for the first time in the EAT, permit amended grounds to proceed, but in such a case the order customarily made will then permit the respondent to apply for such a decision to be reviewed, on the basis that it required the *positive* permission of the EAT for the *amended* ground to be advanced, and that the respondent will hitherto not have had the opportunity to be heard on the question of whether the amendment should or should not have been, permitted. In my judgment, the same approach must apply in principle if, albeit that the ground is contained in the original notice of appeal, it requires the *positive* permission of the EAT for it to be advanced, because it raises a point that was not advanced before the tribunal.

43. It seems to me that it would have been open to the judge at the rule 3(10) hearing, if of that view, to dismiss the ground on the basis that it was not arguable on its merits, or that it was not arguable that it should be permitted to be introduced as a new ground of challenge, or both. It would also have been open to the judge to allow the ground to proceed to a full hearing on the basis that both points were arguable, but both points were still live for consideration at the full appeal hearing. The respondent could then be heard at the full hearing on the question of whether the ground should be allowed to stand, as well, as, if so, on its merits. Alternatively, if, as in fact happened in this case, it was their decision that permission should be granted to run the point as a

new ground of appeal, then fairness requires that that decision be subject to the right of the respondent, who was not heard on this point at all, to seek a review of that decision. I consider that the respondent therefore is entitled to such a review in the interests of justice.

44. Should the review itself nevertheless, as Mr Kohanzad argues, be considered on the basis that good reason must be established within the four walls of the approach that would apply to an ordinary review under rule 33, or should the matter effectively be decided by me entirely afresh? Given that the respondent has not been, and has not had the opportunity hitherto to be, heard on this question at all, I do not accept his submission that I should conduct this review on a restricted or limited basis in the same way as would apply if this was an application for a review of a decision that had been taken after both sides had had the opportunity to be heard. It would not be fair for the respondent to be restricted in their ability to advance arguments contesting whether permission should be granted for this new point to be run. I add that the EAT's *Practice Direction* 2023, at paragraph 8.13.4, indicates that a respondent wishing to raise such an issue should do so in its Answer. This respondent has done just that, which was the first opportunity that it had to raise the matter, and register that it wanted the decision revisited.

45. I accordingly consider that I both may and should decide afresh whether this new point is one which the claimants should or should not be permitted to introduce at the appeal stage; and, of course, I have had the benefit now of hearing extensive argument this morning on this point, as well as reading the skeleton arguments of counsel now appearing for both sides.

46. I am guided by the line of authorities which goes back at least to **Kumchyk v Derby City Council** [1978] ICR 1116 and leads up the decision of HH Judge McMullen QC in **Secretary of State for Health v Rance** [2007] IRLR 665. In between, the matter was considered by the Court of Appeal in **Jones v Governing Body of Burdett Coutts School** [1998] EWCA Civ 602; [1999]

ICR 38, **Glennie v Independent Magazines (UK) Ltd** [1999] EWCA Civ 1611; [1999] IRLR 719 and **Unison v Leicestershire County Council** [2006] EWCA Civ 825; [2006] IRLR 810.

47. In **Rance**, at [50], after referring to passages in the decisions of the Court of Appeal, the EAT drew the threads together as follows:

> **"I regard those two passages as key statements of the law, together with the interpretation by Brooke LJ of previous judgments of the EAT dealing with concessions. From the authorities reviewed in those cases, I draw the following principles of law:**
>
> **(1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities; Jones paragraph 20.**
>
> **(2) The discretion covers new points and the re-opening of conceded points; ibid.**
>
> **(3) The discretion is exercised only in exceptional circumstances; ibid.**
>
> **(4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated; ibid.**
>
> **(5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken; Barber v Thames Television plc [1991] IRLR 236 EAT Knox J and members at paragraph 38; approved in Jones. It remains discretionary.**
>
> **(6) The discretion may be exercised in any of the following circumstances which are given as examples:**
>
> **(a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant that the point was not taken below: Kumchyk v Derby City Council [1978] ICR 1116, EAT Arnold J and members at 1123.**
>
> **(b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. Wilson v Liverpool Corporation [1971] 1 WLR 302, 307, per Widgery LJ.**
>
> **(c) The new point enables the EAT plainly to say from existing material that the Employment Tribunal judgment was a nullity, for that is a consideration of overwhelming strength; House v Emerson Electric Industrial Controls [1980] ICR 795 at 800, EAT Talbot J and members, followed and applied in Barber at paragraph 38. In such a case it is the EAT's duty to put right the law on the facts available to the EAT; Glennie paragraph 12 citing House.**
>
> **(d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the Employment Tribunal; Glennie paragraph 15.**
>
> **(e) The EAT can see an obvious knock-out point; Glennie, paragraph 16.**
>
> **(f) The issue is a discrete one of pure law requiring no further factual enquiry; Glennie para 17 per Laws LJ.**

> **(g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist Tribunal is required; Laws LJ in Leicestershire para 21.**
>
> **(7) The discretion is not to be exercised where by way of example;**
>
> **(a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence; Barber para 20 as interpreted in Glennie para 15.**
>
> **(b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason; Jones para 20.**
>
> **(c) The point was not taken below as a result of a tactical decision by a representative or a party; Kumchyk at page 1123, approved in Glennie at para 15.**
>
> **(d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of the law to it by the specialist first instance Tribunal; Leicestershire para 21.**
>
> **(e) A represented party has fought and lost a jurisdictional issue and now seeks a new hearing; Glennie para 15. That applies whether the jurisdictional issue is the same as that originally canvassed (normal retiring age as in Barber) or is a different way of establishing jurisdiction from that originally canvassed (associated employers and transfer of undertakings as in Russell v Elmdom Freight Terminal Ltd [1989] ICR 629 EAT Knox J and members). See the analysis in Glennie at paras 13 and 14 of these two cases.**
>
> **(f) What is relied upon is the high value of the case; Leicestershire para 21."**

48. Mr Kohanzad advances essentially three reasons why he says that this is an exceptional case where the claimants should be permitted to run the point for the first time in the EAT. First, he relies again in this context on his argument that the underlying point was advanced in the tribunal below. Secondly, he says that the ground raises a pure point of law which would require no further fact-finding or decision-making by the employment tribunal. Mr Kohanzad submitted that the "pure point of law" and "no further decision needed by the tribunal" arguments were different points; but it seems to me they are really two sides of the same coin. Thirdly, he says that this ground raises a point of law of some significance and wider public importance.

49. As to Mr Kohanzad's first point, I do not think this really adds anything to the second and third points, given my conclusion already reached, that permission to appeal *is* required because a real new argument of substance is being raised.

50. I turn then to the proposition that this is a pure point of law which the EAT is in a position to determine, and that no further fact-finding or evaluative decision by the employment tribunal would be required. As to that, the argument about what, if any, the implications of **Geys** may be for the application or not of the **Hogg v Dover College** line of authorities in relation to contract-based claims is plainly, as such, an issue of law. However, I do not agree that determination of that issue by me on this appeal would lead to me being in a position to determine liability in respect of the wages claims, still less to substitute a decision upholding them without any need for any further matter to be remitted for consideration by the tribunal.

51. Depending on what I might or might not conclude was the correct legal analysis, I might or might not be in a position to substitute for the decision of the tribunal, my own decision as to whether the respondent's conduct terminated the existing contracts for the purposes of bringing an end to the wages claims; but I might have to remit even that question itself to the tribunal.

52. Further, and in any event, even if I felt able to conclude that on a correct legal analysis applied to the facts found, there was in contract law no termination of the existing contracts but merely the imposition of a change to them in breach, I would, in that case, at least still have to remit to the tribunal the question of whether the claimants had, by working on, or otherwise, accepted the variation to their pay regime that had been introduced, or conversely had not done so, because they had in some legally-effective way conveyed that they were working under protest.

53. That is a question that the tribunal stated, in terms, that it was *not* deciding, precisely because, having concluded that this was a **Hogg v Dover College** termination which brought an end to the wages claims, it did not need to do so. That is not a question that I would be able to decide, as the tribunal would need to consider whether it required, or should permit, further evidence to be adduced. Even if it decided that it did not need, or would not permit, further evidence to be given, to answer that question would certainly require further factual or evaluative

findings to be made by the tribunal, which I am not, and could not be, in a position to do. On any scenario there would therefore have to be some remission to the tribunal to do further work.

54. Mr Kohanzad says that this issue could be resolved by reference to the tribunal's findings about what the claimants said in their grievances, but I do not agree. The scenario is a different one, and one on which, as I have said, in terms, and entirely properly, given how the matter was argued before it, the tribunal made no findings. Nor do I agree with Mr Kohanzad that the answer is that this would be a minor or limited matter which might not require any further evidence. For the purposes of considering whether I should exercise the discretion to permit this point to be run for the first time in the EAT, the point of substance is that there is a difference between a case where, once the EAT has determined the point, that will determine the outcome of the underlying complaint, and a case in which further remission to the tribunal is liable to be required.

55. The other main plank of Mr Kohanzad's case is that the point is of some wider public interest and importance.

56. An issue arises here, and was canvassed to some extent this morning, as to whether, if I engaged with the substantive point, it would be open to me to come to a fresh view about it, having regard to the fact that there are at least two authorities of which I am aware in which it was at least assumed that **Hogg v Dover College** could apply in respect of what was on analysis a contract-based claim. One of these was **Jackson v The University Hospitals of North Midlands NHS Trust** [2023] EAT 102, where the actual dispute was about the entitlement or not to a contractual payment depending on whether and, if so, when, there had been a legally effective dismissal. The other is a case referred to in **Jackson**, **Smith v Trafford Housing Trust** [2012] EWHC 3221, where the issue for the High Court was whether the imposition of a demotion by way of disciplinary sanction amounted to a breach of contract, and, if so, with what consequences.

57. But, assuming for present purposes that it might be said that those authorities would not constrain me from coming to my own view on this legal point as a matter of substance, on the basis that it does not appear to have been raised as a contested point in either of those cases, I can certainly accept, as did the judge who first considered this notice of appeal on paper, that it is at least *arguable* that **Geys** does have some implications for the applicability of the **Hogg v Dover College** doctrine to contract-based claims. This can also certainly be said to be a potentially important doctrinal point of law which would merit specific adjudication at appellate level. But that it is an arguable point of law is not necessarily the same as saying that it in practice has wide significance. As to that, I merely observe that, so far as I am aware, it does not appear to have been raised before the EAT, at any rate not at a full appeal hearing, in the more than ten years since **Geys** was decided by the Supreme Court, until now.

58. I have to weigh up these different considerations. In **Jones v Governing Body of Burdett Coutts School** at [20] Robert Walker LJ, Morritt and Stuart-Smith LJJ concurring, said:

> **"These authorities show that although the Employment Appeal Tribunal has a discretion to allow a new point of law to be raised (or a conceded point to be reopened) the discretion should be exercised only in exceptional circumstances, especially if the result would be to open up fresh issues of fact which (because the point was not in issue) were not sufficiently investigated before the industrial tribunal. In *Kumchyk*, the Employment Appeal Tribunal (presided over by Arnold J) expressed the clear view that lack of skill or experience on the part of the appellant or his advocate would not be a sufficient reason. In *Newcastle*, the Employment Appeal Tribunal (presided over by Talbot J) said that it was wrong in principle to allow new points to be raised, or conceded points to be reopened, if further factual matters would have to be investigated. In *Hellyer*, this court (in a judgment of the court delivered by Slade LJ which fully reviews the authorities) was inclined to the view that the test in the Employment Appeal Tribunal should not be more stringent than it is when a comparable point arises on an ordinary appeal to the Court of Appeal. In particular, it was inclined to the view of Widgery LJ in *Wilson v Liverpool Corporation* [1971] 1 WLR 302, 307, that is to follow:**
>
> **'The well-known rule of practice that if a point is not taken in the court of trial, it cannot be taken in the appeal court unless that court is in possession of all the material necessary to enable it to dispose of the matter fairly, without injustice to the other party, and without recourse to a further hearing below.'"**

59. Mr Kohanzad submits that this passage does not absolutely preclude a point of real significance being run, even in a case where, if it succeeded, there would need to be a remission to the tribunal. That is true. However, I note also what was said by Robert Walker LJ at [29];

> **"However, the search for justice requires some difficult reconciliations of conflicting principles, and there is a strong public interest in finality in litigation. The rule or practice embodied in the authorities mentioned earlier in this judgment is not regarded as a matter of technicality, but of justice to a respondent who may be plunged into yet more litigation: see for instance Sir John Donaldson in *GKN* (*Cwmbran*) at p.219 and Arnold J in *Kumchyk* at p.1123. Sometimes the rule does result in a case being decided on a basis of law that is not merely arguably, but demonstrably, wrong by the time it reaches the appellate court: *Wilson v Liverpool Corporation* is itself a striking example."**

60. I note also that in **Leicestershire CC v Unison** at [21], Laws LJ (Scott-Baker and Brooke LJJ concurring), observed that "the council's claim that there is an overriding public interest that the point be decided is, I think, greatly undermined if Unison are right to submit that a decision in the council's favour on the construction issue would require the case to be remitted for further consideration by the ET."

61. There is a further consideration on the respondent's side of the scales as well, as referred to in the guidance in **Rance** at paragraph 50(7). That is that the present case is one in which the claimants had professional representation in the tribunal below, including by specialist counsel both at the hearing in question and, indeed, at the preliminary hearing which preceded it, at which the way in which the complaints were framed was considered. Mr Kohanzad says that he makes no criticism of his predecessor for not running a novel and, he says, arguable, indeed he says correct, point that occurred to him when he became involved in the matter. But whilst **Rance** refers specifically to cases in which a point has not been run as a result of lack of skill on the part of a representative, or a tactical decision, the underlying general point is that this is not a case where the claimants did not have access to, or the benefit of, legal representation in the tribunal. They were represented by specialist counsel.

62. Having regard to that fact, and the fact that, on any view, if this ground succeeded, the matter would need to be remitted to the employment tribunal, and the interest in the finality of litigation, all of these points, in my judgment, outweigh the potential wider benefits of this legal point of some interest and potential significance being determined on this particular occasion.

63. I therefore refuse permission for ground 1 to be run and so I dismiss the appeal.