Case No: A2/2014/0395/EATRF

Neutral Citation Number: [2015] EWCA Civ 209

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HON MRS JUSTICE SLADE sitting with Two Lay Members
UKEAT0081/13

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2015

Before :

LORD JUSTICE ELIAS
LORD JUSTICE FULFORD
and
DAME JANET SMITH

- -

Between :

DAVID SMITH	**Appellant**
- and -	
CARILLION (JM) Ltd	**Respondent**
- and	
SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS	**Intervener**

- -

Mr John Hendy QC and **David Renton** (instructed by **Declan Owens for the Free Representation Unit**) for the **Appellant**
Mr John Bowers QC and **Jeremy Lewis** (instructed by **Clarkslegal LLP**) for the **Respondent**
Mr Daniel Stilitz QC and **Mr Tom Cross** (instructed by **The Treasury Solicitor**) for the **Intervener**

Hearing dates : 4, 5 February 2015

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Judgment

Lord Justice Elias :

Introduction.

1. The Appellant worked in the construction industry for some twenty years. He obtained an HND in Engineering Surveying from North East London Polytechnic in 1988 and thereafter worked on various building projects, initially as an engineer but progressing to site agent. He was active in his trade union, the Union of Construction Allied Trades and Technicians, and held a number of offices including shop steward and safety representative.

2. After 2001 he was unable to obtain employment. In 2009 he discovered what he understandably believes is the reason why: he was blacklisted because of his union and health and safety activities. An organisation called the Consulting Association compiled and maintained a database of workers in the industry who were perceived to cause problems for employers. About 40 companies accessed this information for a fee; these companies were also generally the source of the information logged in the database. The Association worked in secret but its activities came to light following a raid by the Information Commissioner. The Claimant was able to obtain his personal file in April 2009. He says that the effect of the information – much of which he contends was false – being made widely available was that he was blacklisted and forced out of the industry. Fortunately he secured a post as a lecturer in health and safety law.

3. He brought claims against three companies on the basis that by providing information about him to the Association, they had subjected him to detrimental treatment by virtue of his trade union and health and safety activities. He was permitted to bring the claims outside the normal limitation periods because he had been in ignorance of what had been going on and had taken proceedings within a reasonable period of becoming aware of these activities.

4. During the course of these proceedings he dropped the case against two of the companies and in this appeal we are only concerned with the claim against Carillion (JM) Ltd, which prior to acquisition by Carillion in 2006 was called John Mowlem & Company plc ("Mowlem"). It is that company which committed the allegedly unlawful acts. It remained a member of the Association until the takeover by Carillion.

5. During the course of the hearing before the Employment Tribunal, seven issues were identified. At the outset of the hearing the respondent conceded five of them. In substance Carillion made concessions that Mowlem had provided information about the Appellant to the Consulting Association between 1997 and 1999; that it was for the purpose of penalising him for taking part in the activities of an independent trade union and acting as a safety representative; and that the provision of this information caused him a detriment. The concession was stated to be for "pragmatic reasons", Carillion claiming that it was not in a position so long after the event to challenge the assertions made by the Appellant. It has to be said, however, that the evidence against Mowlem was very powerful.

6. It is pertinent to note that the only alleged unlawful acts relied upon were the provision of information to the Consulting Association. It is not said, for example,

that the Appellant was refused any particular job by Mowlem for which he applied or was subject to any other detriment, although it is alleged that the consequence of Mowlem's actions (along with the actions of others) was continuing damage because he could not earn his living in the industry.

7. Notwithstanding that so many issues were conceded, the Appellant still failed to establish his case. This is because he accepted that in order to succeed in his victimisation or discrimination claims, he had at the very least to establish that he was employed pursuant to a contract with Mowlem. He conceded before the Tribunal that he was never an employee; his case was that he was contractually employed and had the status of a worker within the meaning of the relevant legislation.

8. The Employment Tribunal rejected this argument, holding that he had worked for Mowlem pursuant to a contract under which his services had been provided to Mowlem by an employment agency, Chanton. The Tribunal concluded that whilst both he and Mowlem had contracts with the agency, there was no contract at all in existence between him and the company as end user. On appeal the Employment Appeal Tribunal (The Hon. Mrs Justice Slade presiding) held that the Tribunal had properly directed itself in law and reached a conclusion open to it on the evidence. Accordingly it dismissed the appeal.

9. Mr Hendy QC, Counsel for the Appellant, seeks to challenge that finding. But even if he succeeds in establishing that a contract existed, he still has various other hurdles to surmount before his claim can succeed. As I will later explain, he has sought to rely upon articles 8 and 11 of the European Convention on Human Rights and the broad principle of construction conferred by section 3 of the Human Rights Act 1998.

10. The company, represented by John Bowers QC, and the intervener, represented by Daniel Stilitz QC, both submit that the Employment Tribunal was entitled to find that there was no contractual relationship at all between the Appellant and Mowlem. They also contend that the relevant acts complained of, namely the provision of information at various times, all occurred prior to the Human Rights Act coming into force on 2 October 2000. Accordingly they say that even if Convention rights were engaged – which they dispute – that fact could not assist the Appellant since the obligation to give effect to those rights under domestic law, using the broad interpretative principles conferred by section 3, has no application to events occurring prior to the Human Rights Act coming into force. Finally, they also submit that the Act would not provide the assistance which Mr Hendy claims even if it were applicable.

The relevant legislation

11. The Claimant contends that he was penalised for taking part in the activities of a trade union contrary to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 and also for exercising the functions of a safety representative contrary to section 44 of the Employment Rights Act 1996.

12. As initially enacted, and at the time when the specific alleged unlawful acts were committed, section 146 was as follows:

> (1) An employee has the right not to have action short of dismissal taken against him as an individual by his employer for the purpose of –
>
> > (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
> > (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so…

13. Section 146 was amended by the Employment Relations Act 2004 to substitute "worker" for "employee" in relation to acts, or failures to act, on or after 1 October 2004. This was in part to give effect to the decision of the European Court of Human Rights in *Wilson and Palmer v United Kingdom* [2002] IRLR 568 which had found English law to be in breach of article 11 of the Convention.

14. The definitions of employee and worker are found in sections 295 and 296 of the 1992 Act respectively. Section 295 provides:

> (1)In this Act—
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> …
>
> The relevant definitions of worker and employee under the Act are as follows:
>
> 'contract of employment' means a contract of service or apprenticeship,
>
> 'employee' means an individual who has entered into or works under…a contract of employment, and
>
> Section 296
>
> (1) In this Act 'worker' means an individual who works, or normally works or seeks to work –
>
> > (a) under a contract of employment or
> > (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his…

It follows from these definitions that whilst all employees are workers, not all workers are employees. The Appellant's submission below was that whilst he did not fall under subsection (a), he did fall within subsection (b). I will call that category of worker a "limb (b) worker".

15. A similar though differently structured provision to section 146, specifically designed to protect the status of those acting as health and safety representatives, is section 44 of the Employment Rights Act 1996: `

> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—
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> (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
>
> (b) being a representative of workers on matters of health and safety at work or member of a safety committee—
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> (i) in accordance with arrangements established under or by virtue of any enactment, or
>
> (ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee…

16. There is a significant overlap between section 146 and section 44 since many safety representatives of the workers will be trade unionists, and in performing health and safety activities they are at the same time carrying out an important aspect of trade union activities. But there is not a complete overlap because not all safety representatives belong to a union, such as where they are appointed by workers in a non-unionised workforce.

17. Unlike section 146, section 44 was not extended in 2004 to embrace the wider category of workers. It still applies only to employees.

18. Accordingly, in the period between 1997 and 1999 - the period during which it was conceded that relevant information was passed to the Association - the protection of both statutes was, on its face at least, limited to those who were employees. Since the Appellant expressly disavowed that status before the Employment Tribunal, he faced difficulties in making good his claim. Nothing daunted, he sought to do so by the following chain of reasoning. First, he submitted that he had a contractual relationship with Mowlem under which he had the status of a limb (b) worker. Second, he argued that although the legislation only in terms extended to employees at the material time, it should be construed compatibly with the Human Rights Convention. Third, he claimed that limiting the protection of these provisions to employees, at least in circumstances where the alleged unlawful act involved the distribution of personal information about his union and related activities, was an unlawful interference with his private life under article 8 and of his right to freedom of association under article 11. Finally, he submitted that since Convention rights were engaged, section 3 of the Human Rights Act required that the domestic legislation should be construed in a liberal way so as to give effect to those rights. In this context that required the protection of these provisions to be extended to include limb (b) workers.

19. As I have said, before the Employment Tribunal he failed at the first stage. The Tribunal held that he had no contract of any kind with Mowlem; he was neither an employee nor a limb (b) worker. The Tribunal did not consider it necessary to deal with the further steps in the reasoning. The EAT similarly went no further than confirming the conclusion reached by the Employment Tribunal.

The agency relationship

20. The finding of the Employment Tribunal in this case was that the Appellant was supplied as a worker to Mowlem by the employment agency, Chanton. This was not a case where the agency simply introduced the worker to the employer, who then entered into a contractual relationship with the worker. The agency itself was in a continuing relationship with the Appellant and paid his wages. This is not an unusual situation. The agency pays the worker and the client pays the agency. The agency will typically receive a higher sum than the wage to reflect its own profit and expenses. There is no express contract between the client or end user and the worker.

21. The question arises whether and in what circumstances a contract between the worker and the contractor to whom he is providing his services can be implied. This question has been considered by the Court of Appeal on a number of occasions. In submissions before us counsel focused on two authorities in particular, namely *James v Greenwich London Borough Council* [2008] EWCA Civ 35; [2008] ICR 545 and *Tilson v Alstom Transport* [2010] EWCA Civ 169; [2010] IRLR 169. It is not necessary to analyse these cases in any detail since the principles they espouse were not disputed. For the purposes of this case they may be summarised as follows:

(1) The onus is on a Claimant to establish that a contract should be implied: see the observations of Mance LJ, as he then was, in *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192, para 102.

(2) A contract can be implied only if it is necessary to do so. This is as true when considering whether or not to imply a contract between worker and end user in an agency context as it is in other areas of contract law. This principle was reiterated most recently in a judgment of the Court of Appeal in *James* which considered two earlier decisions on agency workers in this court, *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437and *Cable and Wireless plc v Muscat* [2006] ICR 975. It is sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJJ agreed (para. 23). Mummery LJ stated that the EAT in that case had:

> "… correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was *necessary* to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in *The Aramis* [1989] 1 Lloyd's Rep 213, 224:
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> > "necessary . . . in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

(3) The application of that test means, as Mummery LJ pointed out in *James* (para.24), that no implication is warranted simply because the conduct of the

parties “was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."

(4) It is, however, important to focus on the facts of each case. As Mummery LJ observed in *James* (para.51): “there is a wide spectrum of factual possibilities. Labels are not a substitute for a legal analysis of the evidence.” The question a Tribunal needs to ask is whether it is necessary, having regard to the way in which the parties have conducted themselves, to imply a contract between worker and end user.

(5) Accordingly, if the arrangements which actually operate between the worker and the end user no longer reflect how the agency arrangements were intended to operate, it may be appropriate to infer that they are only consistent with a separate contract between worker and contractor. This may be because the agency arrangement was always intended to be a sham and to conceal the true relationship between the worker and the contractor. But it may also be simply because the relationship alters over time and can no longer be explained by the dual agency contracts alone. However, the mere passage of time cannot be enough to justify the implication of a contract on necessity grounds: *James* para.31 per Mummery LJ.

(6) If an Employment Tribunal has properly directed itself in accordance with these principles, then provided that there is a proper evidential foundation to justify its conclusion, neither the EAT nor this court can interfere with the Tribunal's decision: see *Tilson* per Elias LJ, para.9.

22. It is also important to bear in mind that it is not against public policy for a contractor to obtain services in this way, even where the purpose is to avoid legal obligations which would otherwise arise were the workers directly employed: *James* para. 56-61; *Tilson* paras.10-11. That will frequently but by no means always be the reason why the employer enters into a relationship with an agency. A contract cannot be implied merely because the court disapproves of the employer’s objective.

The Employment Tribunal’s analysis.

23. The evidence before the Tribunal related to relationships which had ceased over twelve years earlier. There were some admitted facts and evidence was given by the Appellant and by a senior employee of Mowlem. The admitted facts included the following relevant matters:

1. The Appellant worked for Mowlem from October 1997-May 1998 in the Docklands Light Railway (DLR) as a section engineer; and again in September 2000 when he worked at the former Cooperative store in Stratford.
2. There was a contract between the Appellant and the Chanton employment agency pursuant to which the Appellant provided his services to Mowlem. This was not a written contract.
3. He was paid net of tax by the agency.

24. The Tribunal then made a number of additional findings relating to his employment as section engineer which are summarised in paragraphs 27-41 of its decision. Some of these findings demonstrated that the Claimant was fully absorbed into the managerial structure of Mowlem's business. Because they were central to the argument advanced by Mr Hendy, I set some of them out:

> 27. He was … engaged through the above-mentioned employment agency ("Chanton"). He dealt with Chanton exclusively by telephone. Under Chanton's procedures he was required to submit timesheets and invoices. He was paid at an hourly rate, in accordance with timesheets presented. The Tribunal assumes that in the usual way, Chanton were paid a slightly larger sum, representing their profit.
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> 28. Before taking up his appointment the Claimant was interviewed by the John Mowlem project manager responsible for the DLR site.
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> 29. The Claimant received what he termed site induction safety training provided by John Mowlem,
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> 30. The Claimant was fully integrated into the John Mowlem site management team. He reported to the John Mowlem site manager. He produced programmes for discussion and approval at weekly John Mowlem management team meetings, which (apart from him) were attended only by John Mowlem managerial staff.
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> 31. The Claimant was provided with an office within the John Mowlem main site office compound.
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> 32. In the performance of his duties the Claimant liaised with sub-contractors and John Mowlem quantity surveyors in setting up new contracts. He represented John Mowlem in dealings with third parties, which included ordering materials from suppliers and communicating with building control officers of the local authority. He signed documents as "Dave Smith, Mowlem", and had authority to do so. We accept his evidence generally that to all outward appearances he seemed to be an employee of John Mowlem.
>
> 33. The Claimant managed John Mowlem staff and had power to exercise some disciplinary control over them; in particular, he issued an oral warning for lateness to one member of staff.

25. The Tribunal then noted that although as a matter of courtesy the Claimant would be expected to give notice if he intended to take leave, there was no question of the company allocating leave nor was he obliged to obtain their permission before taking

it. Moreover, whilst it had been anticipated that the engagement would be long term, running for many months at least, in fact it was terminated by Mowlem without notice when the project still had more than a year to run.

26. The Tribunal noted that when later working with Mowlem at Stratford, the Appellant worked through Chanton as before and his relationship with John Mowlem was not materially different from that which had existed during his time on the DLR contract. He claimed that this engagement at Stratford was terminated because he had raised health and safety concerns about asbestos.

27. In the light of these findings, the Tribunal started from the premise that the Appellant had been provided to Mowlem pursuant to the agency relationship and that there was no express agreement between him and Mowlem. The Tribunal summarised two general principles applicable to such relationships which thereafter informed its analysis:

> "We have reminded ourselves of the key principles. First, it is for the Claimant to establish that a contract should be implied between him and the end-user. Secondly, a contract can be implied only if it is necessary. This means that if the facts would be equally explicable without the implication of a contract, it is not permissible to imply one."

28. Counsel for Mr Smith did not dispute in his submissions to the Employment Tribunal that he had to meet the necessity test, conceding that this was a difficult hurdle for him. He focused on five features in particular to justify the inference that it was necessary to imply a contract between Mowlem and the Appellant: that the Appellant was invited to an interview, which indicated that it was important that he personally continued to do the work thereafter; that it was intended to be a long term arrangement; that he was fully integrated into the company's management; that the company determined when he would be dismissed; and that there were no written terms setting out his relationship with the agency.

29. The Tribunal concluded that none of these features either separately or cumulatively required the inference of a contract between the Appellant and Mowlem. The nature of the work required a significant degree of integration into the management structure. The Tribunal accepted that to outward appearances he would have been perceived as an employee, but that is often the case with agency staff and it did not justify inferring a contract. The interview merely enabled the company to be satisfied that Mr Smith was a competent and suitable person and it was not inconsistent with an agency arrangement. The length of the proposed engagement did not alter the nature of the relationship, as the *James* case confirmed. There was nothing of significance in the fact that Mowlem terminated the relationship; it must always be open to the contractor in a three party relationship to terminate the assignment and ask for someone else. Finally, it was not in issue that he was provided to Mowlem as an agency worker and the absence of any written terms did not alter that fact.

30. The EAT rejected the Appellant's appeal. Mrs Justice Slade analysed the case law with care notably the decisions in *James* and *Tilson*. Mr Hendy QC had argued that Convention rights required traditional contractual principles to be remoulded so as to take more fully into account the imbalance in bargaining power between employer

and employee. He argued that the decision of the Supreme Court in *Autoclenz v Belcher* [2011] ICR 1157 supported this proposition. That was a case where the formal terms of an employment relationship did not reflect the true agreement between the parties. Mrs Justice Slade accepted that it was necessary for a Tribunal to focus on the true nature of the relationship, but that principle was emphasised in *James*, and *Autoclenz* did not alter that approach. Before us, Mr Hendy relied upon *Autoclenz* as emphasising the importance of the need for a careful factual analysis of the relationships, and removing the need to establish a sham term, but he did not contend that it required a departure from the established jurisprudence with respect to agency workers.

31. The EAT held that on the facts found, the Employment Tribunal was plainly entitled to reach the conclusion that there was no contract between Mr Smith and Mowlem. There was no material misdirection by the Employment Tribunal and no error of law in the analysis of the evidence. There was no basis for the EAT to interfere.

The grounds of appeal.

32. Mr Hendy, in an attractive argument, submitted that the Employment Tribunal's conclusion that there was no contract in place between Mr Smith and Mowlem was not sustainable. He asserted that there had been a material misdirection. He took issue with the Tribunal's starting point. He emphasised that the cases require a careful evaluation of all the facts and submitted that this had not been carried out. In particular, there was only the most rudimentary analysis of the alleged contracts. All that was known about the contract between Chanton and the Appellant was that the agency paid him for hours actually worked. There was no evidence about the nature of the specific agency or any of its terms. Moreover, there was nothing at all known about the alleged contract between Chanton and Mowlem. Indeed, Mr Hendy observed that there was no evidence that any contract existed between them at all; it had simply been inferred. If it was to be implied, that required the necessity test to be satisfied. But it was not necessary to imply such a contract when, in view of the facts, it was more natural to explain the relationships by implying a contract between the Appellant and the end user.

33. I do not accept that submission. The admitted facts before the Employment Tribunal included the Appellant conceding that he was what was described as an "agency worker". Moreover, before the Employment Tribunal counsel then advancing the case for the Appellant conceded – in my view correctly - that there was no express contract between the Appellant and Mowlem and that in accordance with the recognised authorities, he would have to show that a contract could be implied on the principle of necessity. In these circumstances it is not surprising that the Employment Tribunal treated that as its starting point, and in my judgment it cannot possibly be criticised for so doing.

34. Mr Hendy also argued that even if the necessity test was the appropriate one to apply, nonetheless a proper and full consideration of the facts designed to discover the true nature of the underlying relationships did not justify the Tribunal's conclusion. Mr Hendy said that there were a number of factors which suggested that the Tribunal had not had regard to the underlying reality and as a consequence had erred in reaching the conclusion it did. He identified a whole series of matters which, he contended, pointed strongly in favour of an employment contract. In essence these repeated the

factors relied upon below: the degree of integration into the business; the fact that he was interviewed and therefore his identity was critical to the business; and that he appeared in every way to be an employee.

35. I cannot accept that submission. It is not unusual for an agency worker to be integrated into the business of the end user; and where the work is of a managerial nature, the worker will have to fit into the management team. As the court pointed out in *Tilson* para. 44, it will often be impossible for the worker to give satisfactory service without being integrated into the business. Similarly, whilst the fact that the employer is indifferent to the personal identity of the worker provided by the agency will reinforce the conclusion that there is no contract in place with that worker, the converse does not follow. Relatively senior staff may be provided by agencies particularly where staff are needed for particular time limited projects, and the contractor will necessarily be concerned to ensure that the individual is able and suitable for the job. Hence the need for an interview. That does not undermine the Tribunal's conclusion.

36. Mr Hendy also emphasised that the placement was intended to be for a reasonable lengthy time, at least for the duration of the project. But the period of the relationship is certainly not decisive as the court said in *James*. Moreover, there was no evidence that the Appellant had contracted to stay for the whole project even if that was the parties' expectation, and in fact the relationship was terminated by Mowlem without any notice. Indeed, it seems that as a matter of law, so far as the Appellant's relationship with Mowlem was concerned, he could leave at will.

37. I agree with the EAT that there was no misdirection here. The Employment Tribunal carefully and cogently analysed the evidence and reached a sustainable conclusion consistent with the evidence. Accordingly I would reject this ground of appeal. It follows that the remaining steps in Mr Hendy's carefully framed argument do not arise for determination.

The Human Rights submission.

38. But even if I am wrong in that conclusion, and Mr Smith was a limb (b) worker employed by Mowlem, there are still in my view insurmountable difficulties facing the Appellant. In particular, how can the legislation which at the material time applied to employees only be extended to cover someone who is on his own case merely a limb (b) worker?

39. Mr Hendy realistically accepts that it is impossible as a matter of ordinary construction to read these provisions to embrace such workers. In the 1996 Act Parliament has drawn a distinction between workers and employees; whilst all employees are workers, the converse is not the case. Some rights are given to workers and some only to employees. Limiting the scope of certain rights to employees, and not extending them to limb (b) workers, was therefore a deliberate decision. It would not be legitimate for the courts to rewrite these provisions and ignore the carefully delineated scope which Parliament has chosen.

40. As I have said, section 146 was amended to apply to all workers by the Employment Relations Act 2004. Curiously section 44 was not so amended. Mr Hendy submits that this must have been an oversight given that there is no logical basis for

distinguishing between the two provisions. He relies upon the case of *Rowstock Ltd v Jessemy* [2014] EWCA Civ 185; [2014] ICR 550 to support the proposition that section 44 should be read as if it applied to workers at least from that date. In *Rowstock* the issue was whether section 108 of the Equality Act 2010 had the effect of proscribing victimisation discrimination occurring after the termination of employment. Read literally it did not, although the predecessor legislation had done so. The Court of Appeal was in no doubt that this was simply a drafting error. The Court followed the guidance given by Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 who had held that in such circumstances it was legitimate for a court to correct the error where the court was sure of the intended purpose and could confidently state what was the substance of the provision which Parliament had intended to enact.

41. I do not think that the principle can be applied here. In *Rowstock* the critical feature was that the protection had already been applied to ex-employees prior to the Equality Act coming into force, and the court was able to conclude that it was inconceivable that Parliament would have intended, in legislation designed to clarify and simplify the law, to take that right away. Here we would be re-writing the legislation not because this was obviously giving effect to Parliament's intention and correcting the draftsman's error but essentially because it seems unjust and irrational for the scope of the two sections to be different. That is a shift from interpretation to legislation: the *Rowstock* principle does not extend that far. So in my view at no relevant time has section 44 extended to protect limb (b) workers.

42. Mr Hendy submits that even if the provisions cannot be construed so as to apply to limb (b) workers when adopting traditional principles of statutory construction, a far more generous interpretative principle is permitted where the legislation has to be construed to give effect to human rights. Section 3 of the Human Rights Act requires courts to interpret legislation so as to give effect to the rights conferred by the Act "so far as it is possible to do so". In this case the submission is that the acts of the employer amounted to breaches of both Articles 8 and 11 of the European Convention on Human Rights protecting private life and freedom of association respectively; and in accordance with section 3, the courts should construe these domestic statutory provisions so as to give effect to those Convention rights.

43. The first and fundamental difficulty with this argument, raised by both the employer and the Secretary of State, is that all of the acts which are the subject of complaint occurred before the Human Rights Act came into force. It has been determined by a unanimous House of Lords in *Wilson v First County Trust Limited* (No.2) [2003] UKHL 40; [2004] 1 AC 816 that section 3 cannot be used to construe legislation retrospectively so as to give it a meaning which is Convention compliant with respect to matters arising before the Act came into force.

44. Mr Hendy recognised that he could not sensibly challenge that principle. But he sought to rescue the position in two ways. First, he contended that whilst it is true that most of the alleged acts involving passing information to the Association occurred prior to the Act coming into force, there was one act of disseminating information which occurred later. He took us to a document which, he submits, suggests that in all probability information potentially detrimental to the Appellant was sent by Mowlem to the Association in early October 2000, a matter of days after the Act had come into force. The Tribunal made no finding either way about this because in the event they

did not need to do so. He submits that nonetheless the position is sufficiently clear to enable us to make this finding in his favour.

45. I do not accept that it would be right for us to make such a finding. This particular document did not fall within the terms of the concession, and I do not think that we can say with sufficient confidence when the matter was disclosed. I would accept that the terms of the entry on the database strongly suggest that it was entered in the database after the Act came into force, but it does not follow that it would have been entered into the database as soon as the information was received. If there were even a relatively short lapse of time between receipt and entry, that would undermine the argument. I would not, therefore, be willing to draw the inference which Mr Hendy seeks without hearing evidence bearing on the matter.

46. The alternative way in which Mr Hendy puts this part of the case is to say that the provision of information was in reality a continuing act. It was the fact that the information was in the database which caused continuing detriment to the Appellant, well after the Human Rights Act came into force. For example, he unsuccessfully applied for jobs after that date and it is a reasonable inference that at least on occasion the rejection resulted from the negative impression about him which the database had created. Moreover, (although I am not sure the case was put like this) the alleged unlawful acts would have continued beyond the period when section 146 at least had been extended to limb (b) workers. If that is right, there would be no need to rely upon the Convention argument with respect to that provision, although it would still be critical so far as section 44 health and safety provision is concerned.

47. I would accept that for limitation purposes the disclosures could be treated as a series of discriminatory acts and in those circumstances time only begins running from the last of those acts. But that would not assist the Appellant with respect to the section 3 argument if this last act was prior to the Human Rights Act coming into force. I would also accept that the detriment almost certainly did continue after the disclosures to the Association came to an end; that was after all the very purpose of the blacklisting. But in my judgment, it does not follow that the particular acts of disclosing information can properly be described as continuing acts. The same argument may be advanced about an unlawful dismissal, for example, where the consequences may be felt for a long time after the dismissal. But it would be curious indeed to say that dismissal from employment was a continuing act.

48. A similar argument to that advanced by Mr Hendy was rejected by the Court of Appeal in *Okoro v Taylor Woodrow Construction Ltd* [2012] EWCA Civ 1590; [2013] ICR 580 in facts which bear some comparison to those in this case. Agency workers had been banned from a construction site on what they alleged were racial grounds. It was submitted that the act of banning was a continuing act extending over a period, an argument which it was necessary to advance in that case in order to prevent the claims for discrimination being lodged outside the limitation period. The Court of Appeal confirmed the decision of the EAT that the ban could not be treated as a continuing act, any more than a dismissal would have been. Pill LJ, with whose judgment Hughes and Rimer LJJ agreed, held that absent any reconsideration of the ban, as opposed to reiterations of the ban already imposed, there was no basis for saying that this was more than a one-off act. In my judgment that analysis is plainly correct, and in any event I see no sensible basis on which these acts could be treated any differently.

49. It follows that in my view the Human Rights Act has no application to the particular complaints advanced in this case. Section 3 has no traction and there is therefore no basis for construing the legislation in the manner suggested by Mr Hendy. Nor can the Appellant rely after 2004 upon the extended protection of section 146 by the Employment Act 2004.

50. As to that I would only add that there would be an additional problem. Section 146 applies to employees (and after 2004) to workers, but not in terms to former employees or workers. That would have been the status of Mr Smith after the termination of his relationship.

51. If this had been the only problem, however, I would have been prepared to find in the Appellant's favour. The courts have in a number of contexts been prepared to find even as a matter of domestic law that protection ostensibly afforded to employees in fact includes protection for ex-employees. In *Rhys Harper v Relaxation Group plc* [2003] ICR 867 the House of Lords held that discrimination and victimisation complaints could be brought by ex-employees against their former employer on the grounds that Parliament could not conceivably have intended that discriminatory action taken by the employer should be unlawful or not depending upon whether it took place before or after dismissal. Prior to that decision, in *Fadipe v Reed Nursing Personnel* [2001] EWCA Civ 1885; [2005] ICR 1760, the Court of Appeal had held that section 44 of the 1996 Act did not extend to ex-employees and that Tribunals therefore had no jurisdiction to hear such claims. But in *Woodward v Abbey National* [2006] EWCA Civ 822; [2006] ICR 1436 the Court of Appeal held that *Fadipe* could not stand in the light of the later ruling in *Rhys Harper*. In my judgment *Woodward* is binding on this court so far as section 44 is concerned, and in any event I respectfully agree with the reasoning. Although there has been no direct consideration of section 146, I see no reason to apply any different principle. So if the disclosures could have been treated as continuing acts extending after 2004, the fact that the Appellant was not a worker at that time would not in my view have been a bar to making good his claim.

52. In the circumstances it is not necessary to consider further arguments advanced by the employer and the Secretary of State which, if correct, would have defeated the claim even if section 3 were in principle applicable. These included a submission that the limitation of the protection in sections 146 (union activities) and 44 (health and safety) to employees did not infringe articles 8 and 11 as alleged; and that in any event there were remedies available in domestic law which adequately protected such Convention rights as were in issue on the facts of this case, such as a remedy under the Data Protection Act, so that there was no need to rewrite the legislation relied upon; that section 3 would not have warranted an extension of the scope of these provisions to include limb (b) workers; and finally, that if and to the extent that it could be said that either section 146 or section 44 infringed Convention rights, it was not now appropriate to grant relief given the legislative changes since the alleged wrongs were committed. These raised interesting and complex issues which may have to be resolved on another occasion.

53. For these various reasons, I would dismiss the appeal.

Lord Justice Fulford:

54. I agree.

Dame Janet Smith:

55. I also agree.