would resign and then did so after the outcome of the internal appeal.

The ET found that the university had breached the implied term of mutual trust and confidence between the parties by re-marking the examination papers in the way it did and the internal inquiry had failed to cure the breach. The EAT found that the tribunal was entitled to find that there was a fundamental breach of contract, but should have found that the internal inquiry cured the breach and so there was no constructive dismissal.

The Court of Appeal held as follows:

- The correct approach in deciding whether or not an employer had acted in fundamental breach of contract was not by reference to the 'range of reasonable responses' test, but an objective test of reasonableness. The court emphasised that cases of ordinary unfair dismissal had three stages, as follows:

(a) the claimant establishes that there has been a dismissal, actual or constructive; and, if so,

(b) the respondent establishes a potentially fair reason for the dismissal; and, if so,

(c) the tribunal considers whether or not the dismissal was fair.

It was only at (c) above that the band of reasonable responses test applied.

Where breach of the implied term of mutual trust and confidence was being relied on to establish (a) above, the correct test to be used was that in *Malik v BCCI SA (in liq)*; *Mahmud v BCCI SA (in liq)* [1997] IRLR 462, HL; [1997] UKHL 23, 12 June 1997. This test was whether or not, when viewed objectively, an employer has without reasonable and proper cause conducted him/herself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. The Court of Appeal stated that this was consistent with the test established in *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, CA; [1978] ICR 221; (1977) 14 November, CA.

- An employer who has committed a fundamental breach cannot 'cure' it while the employee is considering whether or not to treat it as a dismissal. The Court of Appeal found that, as a matter of general law, an anticipatory breach of contract could be withdrawn any time up to the moment of acceptance; however, once a repudiatory breach has been committed, it was not open to the offending party (here, the employer) to retract it, but down to the offended party (here, the employee) to elect whether or not to accept the breach. Once accepted, the offending party could not cure the breach by its subsequent actions.

Tamara Lewis and Philip Tsamados are solicitors in the employment unit at Central London Law Centre® (CLLC). Readers are invited to send in innovative, unreported cases, information on significant cases in which appeals have been lodged and examples of the use of new legislation. Contributions to be included in the update in November 2010 *Legal Action* may be sent to the authors at CLLC, 14 Irving Street, London WC2H 7AF, tel: 020 7839 2998. Tamara Lewis is the author of *Employment law: an adviser's handbook*, LAG, 8th edition, 2009, £35.

Recent developments in public law – Part 2

Kate Markus and **Martin Westgate QC** continue their six-monthly series surveying recent developments in public law that may be of more general interest to *Legal Action* readers. They welcome short reports from practitioners about unreported cases, including those where permission has been granted or that have been settled. Part 1 was published in May 2010 *Legal Action* 16.

PRACTICE AND PROCEDURE

Telephone queries to the Administrative Court

With effect from 7 April 2010, the Administrative Court has introduced changes to its telephone procedures. There is now a single number to contact the court in London, which will then offer a series of options. The telephone number is: 020 7947 6655.

E-mail skeleton arguments

Skeleton arguments may now be lodged with the Administrative Court by e-mail. Details of how to do this and a template are available on HM's Courts Service website.[1]

CASE-LAW

Consultation/legitimate expectation

■ R (Albert Court Residents Association and others) v Westminster City Council and Corporation of the Hall of Arts and Sciences (interested party)

[2010] EWHC 393 (Admin), 2 March 2010

The operators of the Albert Hall (the Corporation of the Hall of Arts and Sciences) applied to vary its licence to allow activities such as wrestling and to extend the opening hours. One of the claimants represented residents of properties in close proximity to the Albert Hall (about 15 metres away at the closest point). The defendant had in the past adopted a non-statutory practice of sending notification letters to properties in the immediate vicinity. These were also sent in this case but not to the claimants because the defendant adopted a computer programme to generate the list of consultees to whom the letters would be sent. This logged buildings as dots on a map and the properties to be consulted were then chosen by drawing a circle centred on the subject property and writing to those whose dots appeared in the circle. This caused problems where there were large buildings close to one another because the dots might not show their true proximity. This is what happened here. The circle was centred on one of the north exits to the Albert Hall and did not reach to the dot representing the claimants' property. As McCombe J said at paragraph 24:

> *No one seems to have considered the simple exercise of common sense and discretion by looking at the map or going to take a look on site, even in respect of this Hall, which must be one of the largest entertainment venues in the land. It seemed to me that the process was simply dictated mindlessly by the database, even though its results could be seen to be bizarre on the briefest glance at the plan itself. The question remains, however, whether that bizarre result has produced an unlawful outcome, which is the second issue to be decided here.*

The residents did object, but too late. The effect was that their objections could not be received as 'relevant representations' that had to be taken into account under the Licensing Act (LA) 2003. The claimants argued that nonetheless the objections could be received as a matter of discretion or that the authority could pass them on to a statutory consultee who had objected in time (such as the environmental health officer) and so take the representations into account in that way. McCombe J held that this technique was not open to the authority. Under the LA, the authority must grant the application in the absence of relevant representations and the authority could not undermine the structure of the Act by letting in representations through the back door.

However, the decision was quashed because of failures in the consultation process. The court accepted that there had been a practice of consultation of those in the immediate vicinity on which the residents of Albert Court had relied in the past. This practice had been adopted by the defendant not 'as a mere courtesy' but 'for the proper discharge of the council's functions under the Act' (para 50). Although the consultation was not a legal requirement:

> *... once embarked upon it had to be carried out properly. This is all the more so in a case where the practice is clearly adopted in the light of statutory guidance to which the council as licensing authority has to have regard. This is not to say that the notification exercise will fail because some residents have been missed, but it will fail if it obviously will not catch whole residential buildings as substantial as the one in issue here. It would fail similarly if the council knew of a relevant resident, but simply decided not to notify him* (para 54).

In this case, the consultation had been so bad as to be irrational.

Comment: It is questionable whether the decision can be justified as an example of legitimate expectation based on prior practice. The judge relied on *R (Bhatt Murphy (a firm) and others) v the Independent Assessor*; *R (Niazi and others) v Secretary of State* [2008] EWCA Civ 755, 9 July 2008 to support this, but it is not sufficient to show that there has been a prior practice which is consistent with, or carried out in discharge of, a public function unless there has been some promise or assurance of the continuation of the policy. The case may be on stronger ground when relying on the proposition that even voluntary consultation must be carried out properly, or at least not irrationally.

Duty to give reasons

■ R (Savva) v Kensington and Chelsea RLBC

[2010] EWHC 414 (Admin), 11 March 2010

The claimant challenged a decision of the local authority not to increase her personal budget for the purpose of discharging its functions under the Chronically Sick and Disabled Persons Act 1970. One of the issues was whether there was a duty to give reasons at all. It was common ground that the relevant statutory provisions did not contain any such duty and the defendant argued that the general common law rule applied so that there was no duty to give reasons.

HHJ David Pearl, sitting as a deputy High Court judge, rejected this argument and held that there was a clear policy 'to provide service users with clear information about how personal budgets are arrived at' (para 38). This was found in a range of documents produced by central government, including circulars, consultation documents and draft guidance, together with documents produced by the Association of Directors of Social Services, all of which pointed to 'transparency, openness, and consultation, prior to the drawing up of an agreed care and support plan' (para 41). The deputy High Court judge also relied on the vulnerable position of people likely to be in need of social services, such that 'those affected can [not] be assumed to be capable of looking after their own interests' (para 43); the fact that there had been a failure to follow guidance; and the fact that the claimant was left in the dark about how the personal budget had been calculated in this case. All of these factors made it insufficient for explanation of the process to be left to a dialogue between the claimant and her social workers.

Procedure

Full disclosure

■ Linsen International Ltd and others v Humpuss Sea Transport PTE Ltd and P T Humpuss Intermoda Transportasi TBK Ltd

[2010] EWHC 303 (Comm), 19 February 2010

This is not a judicial review claim but concerns the duty of full disclosure on a without notice application. The claimants claimed unpaid hire and damages for repudiation under a charter. There was evidence that the vessels were earning money for the defendants but that they were diverting the money and not paying the owners. The claimants sought a worldwide freezing injunction on the basis that the defendants were dissipating assets. The defendants applied to set aside because the claimants had not disclosed the fact that there had been without prejudice discussions two days before the freezing order was made. The defendants said that this was an indication of good faith and so inconsistent with a claim of dissipation.

Christopher Clarke J said that where there was a conflict between the duty of frank disclosure and the privilege attaching to without prejudice communications, 'the court will make a judgment as to whether the public policy in favour of confidence is overridden by the possibility of the court being misled' (para 36). On a without notice application, some disclosure of without prejudice communication will be necessary if it is clear that without it the court might be misled. In this case, there was no duty to disclose because the meeting had not resulted in any agreement or offer capable of acceptance. In context, the content of the meeting ought not to have been disclosed and the court would not have been helped by knowing only that the meeting had happened.

Disclosure and cross-examination

■ R (Al-Sweady and others) v Secretary of State for Defence

[2009] EWHC 2387 (Admin), 2 October 2009, [2010] HRLR 2

These cases involved claims of human rights violations by British troops in Iraq. During numerous interlocutory hearings, issues arose about cross-examination and disclosure. Before the proceedings were concluded, the secretary of state decided to hold a full investigation into the disputed incidents and the proceedings were stayed. The Divisional Court gave this judgment in order to explain how it had dealt with these procedural matters, as they would be likely to arise not only in other claims against the Secretary of State for Defence but also in other cases where there are disputed allegations that human rights have been infringed.

The Divisional Court noted that the usual procedure in judicial review cases is as follows:

- ■ first, for there to be no oral evidence; and
- ■ second, in so far as there are factual disputes between the parties, ordinarily the court is obliged to resolve them in favour of the defendant.

However, that would mean that the defendant would always succeed if sued for an infringement of human rights which was disputed and so a different approach was needed. It was necessary to allow cross-examination in relation to 'hard-edged' questions of fact. As a consequence, disclosure would be needed to enable effective and proper cross-examination to

take place. The duty of disclosure was heightened by the fact that the allegations raised concerned some of the most important and basic rights under the European Convention on Human Rights ('the convention').

The court gave guidance for such cases, including the following:

- The parties have a clear obligation in any judicial review case to consider at all times whether there is a crucial issue, in the form of a hard-edged issue, because that will be relevant in deciding whether or not the court should make orders for cross-examination and disclosure. In the absence of agreement, an application should be made to the court.
- The secretary of state has clear obligations to ensure that any PII certificate is accurate.
- The Treasury solicitor should ensure that those involved in similar cases in the future are fully aware of their duty to ensure that proper disclosure is given where there is to be cross-examination or in any case where the court makes findings of fact.
- The secretary of state should ensure that there is in force an adequate document retrieval system.

Delay

■ Uniplex (UK) Ltd v NHS Business Services Authority

C-406/08,
28 January 2010[2]

Uniplex was unsuccessful in tendering for a contract with the NHS for the supply of haemostats. On 22 November 2007, it was notified that its bid had failed. On 13 December 2007, it was given further information which, it claimed, revealed a breach of the Public Contracts Regulations 2006 (the PC Regs) SI No 5, which implement Council Directive 89/665/EEC. The PC Regs adopt the same limitation provisions as under Civil Procedure Rules (CPR) Part 54 so that proceedings must be '... brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose ...' (reg 47(7)(b)).

The High Court referred questions to the European Court of Justice (ECJ) for a preliminary ruling:

- first, about whether time ran from the date of breach or from when the claimant knew, or ought to have known, of it; and
- second, seeking guidance about how the court should apply the requirement to bring proceedings promptly and the discretion to extend time.

On the first question, the ECJ noted that the Directive guaranteed effective procedures to review infringements of its provisions. It held that this could only be achieved if the limitation period ran from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions.

On the second question, the ECJ held that the Directive did not permit a rule under which the court could dismiss proceedings as being out of time because they had not been brought promptly. This could, in principle, result in the claim being dismissed even within three months. It left the limitation period in the discretion of the court and so was not predictable. It followed that it did not effectively transpose the Directive.

The ECJ held that it was the duty of the domestic court to interpret the regulations accordingly, and if it could not do so then the court must exercise its discretion to extend time to give the claimant a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules.

Comment: The ECJ's answer to the second question creates a conflict between it and cases under the convention that have considered the judicial review time limit. In *Lam and others v UK* App No 41671/98, 5 July 2001, the European Court of Human Rights rejected an argument that the requirement to apply promptly was insufficiently certain and this was applied by the Court of Appeal in *R (Hardy and others) v Pembrokeshire County Council and others* [2006] Env LR 28 at paras 11–18. Both of these were planning cases and the requirement to apply promptly was held to be a legitimate measure to protect the interests of third parties. *Hardy* is binding authority that the CPR Part 54 time limit is valid in convention cases (at least in the planning context or where there are definable private interests at stake which may be jeopardised by the delay) but may need to be revisited in the light of *Uniplex*.

The answer to the first question also produces a different result from that in domestic law. Under CPR Part 54, time is generally taken to run from the date of the breach, although knowledge is highly relevant to the question of whether or not to extend time.

Penal notices

■ MSA v Croydon LBC

[2009] EWHC 2474 (Admin),
12 October 2009

Collins J ruled that it was not necessary to endorse orders made against public authorities in order to enforce them. While a penal notice would be needed if contempt was to be punished, in cases involving public authorities, the court's ability to make a finding of contempt (and, if necessary, a further mandatory order which might indicate what could happen if there was any further failure to comply), as well as a probable order for indemnity costs, should normally be sufficient.

Jurisdiction

■ R (A) v Director of Establishments of the Security Service

[2009] UKSC 12,
9 December 2009,
[2010] 2 WLR 1

The claimant, A, was a former member of the Security Service who wished to publish a book about his work. His statutory and contractual obligations and duties of confidentiality meant that he could not publish it without the consent of the Director of Establishments of the Security Service. The director refused to consent to publication of parts of the book. A complained that this violated his right to freedom of expression under article 10 of the convention. The question arose whether the High Court had jurisdiction to entertain the claim or whether it could only be brought before the Investigatory Powers Tribunal (IPT).

The issue depended principally on a construction of Regulation of Investigatory Powers Act (RIPA) 2000 s65(2)(a), which provided that the IPT was 'the only appropriate tribunal' for the purposes of proceedings against any of the intelligence services under Human Rights Act (HRA) 1998 s7(1)(a) that the service has acted or proposes to act in a way which is incompatible with convention rights. A submitted that he was entitled to choose whether to proceed before the IPT or by way of judicial review. HRA s7(1)(a) applied to proceedings in 'the appropriate court or tribunal' and he submitted that RIPA s65(2)(a) excluded the jurisdiction of any other tribunal but not of the courts. Alternatively, he submitted that s65(2)(a) only conferred exclusive jurisdiction on the IPT in respect of proceedings against the intelligence services arising out of the exercise of one of the investigatory powers regulated by the RIPA.

The Supreme Court rejected these submissions. The word 'tribunal', depending on the context, can apply either to tribunals in contradistinction to courts or to both tribunals and courts. A proper reading of the statutory provisions meant that it was unlikely that parliament had intended to leave it to the complainant to choose whether to bring proceedings in the High Court or before the IPT. Moreover, the RIPA and the rules of the IPT have provisions which are not available in the courts to ensure that proceedings before the IPT are able to decide the most sensitive intelligence cases. Finally, there are no other tribunals other than the IPT with jurisdiction over claims against the intelligence services.

The Supreme Court also rejected the submission that s65(2) conferred exclusive jurisdiction on the IPT only in respect of RIPA-regulated functions, applying ordinary rules of statutory construction. Nor did the court consider that there were any sufficiently strong arguments to compel it to adopt a contrary construction. Section 65(2)(a) did not oust a pre-existing right. The RIPA, the HRA and the CPR all came into force at the same time as part of a single legislative scheme. Nor did *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 assist A. The provision in this case did not purport to remove any judicial scrutiny of the intelligence services; it had simply allocated the scrutiny to the IPT.

The Supreme Court considered the claimant's and intervener's (ie, Justice) submission that there was a breach of article 6 by forcing the challenge into the IPT because:

- proceedings are not only in private but are also secret;
- there are closed hearings from which the claimant is excluded;
- the claimant is only informed of the respondent's case with the respondent's consent; and
- no reasons are given for any adverse determination.

The court took into account the special problems raised by claims against the intelligence services and decided that the proceedings would not necessarily involve a breach of article 6. There was some flexibility in the IPT's rules which allowed it to provide as much information to the complainant as was possible consistently with national security interests. In the present case, A had in fact learned in some detail of the objections to publication. Strasbourg case-law does not go so far as to require the court to hold in the abstract that the IPT procedures are necessarily incompatible with article 6(1). If the IPT rules and procedures are incompatible with article 6(1), the remedy lies in their modification rather than in limiting artificially the construction of the IPT's jurisdiction.

Finally, the court rejected the submission that affording exclusive jurisdiction to the IPT where a claim is made under HRA s7 is anomalous because non-HRA claims against the intelligence services can be made in the courts. The court said that it is s7 claims that are most likely to require a penetrating examination of the justification for the intelligence services' actions. Although there was force in the suggestion that the position was anomalous where the courts have jurisdiction in respect of s7(1)(b) (ie, where a party relies on a convention right in legal proceedings), this may simply be a result of defences not having been sufficiently thought through at the time of this legislation. In any event, the scope for inquiry was relatively limited in comparison with that which may be opened up by a claim under s7(1)(a).

■ R (Cart) v Upper Tribunal; R (U and C) v Special Immigration Appeals Commission

[2009] EWHC 3052 (Admin), 1 December 2009, [2010] 2 WLR 1012

The issue in these cases was whether the Upper Tribunal (UT) or the Special Immigration Appeals Commission (SIAC) are amenable to judicial review in respect of decisions which are not appealable. The decisions in these proceedings were a refusal by the UT of permission to appeal to itself and bail decisions by the SIAC. Both the UT and the SIAC are designated by legislation as superior courts of record.

The Divisional Court held that the mere designation by parliament of a body as a superior court of record does not exclude the judicial review jurisdiction. Judicial review can only be ousted by the most clear and explicit words. The rule of law requires that the UT and the SIAC should not be the last judges of the law which they have to apply. The interpreter of the law cannot be constituted by the public body which has to administer the relevant law. The body that interprets the law must be an independent, impartial, authoritative judicial body and the need for such an authoritative source cannot be dispensed with by parliament. As the overriding foundation for the exercise of judicial review is excess of jurisdiction, it generally applies to courts whose jurisdiction is limited.

The incapacity of Special Immigration Appeals Commission Act 1997 s1(3) and Tribunals, Courts and Enforcement Act 2007 s3(5) to exclude judicial review does not deprive those subsections of content. They have attributed certain characteristics to the SIAC and the UT, such as the presumption that they have acted within their powers unless the contrary is shown, their decisions have effect as precedents for lower tribunals and they have power to punish for contempt.

Whether, or the extent to which, the SIAC or the UT are amenable to judicial review is a matter for the common law. Both have limited jurisdictions although that of the UT is cast very wide because of its statutory 'judicial review' functions. The question is whether or not either of them is the alter ego of the High Court: excess of jurisdiction possesses two meanings:

- first, transgression beyond the boundaries of the court's permitted subject matter; and
- second, making a legal error where it is not the final judge (subject to appeal) of the law it has to apply.

The SIAC is not the alter ego of the High Court. It is plainly reviewable for excess of jurisdiction in the first sense. It is in the same position as the Asylum and Immigration Tribunal and so is also reviewable in the second sense. Although judicial review could not be deployed to challenge appealable decisions of the SIAC, the statute had not provided for an appeal against bail decisions. Judicial review could not be used as a surrogate appeal process. It would not be possible to challenge a refusal of bail which involved the tribunal making fine judgments on issues of national security on *Wednesbury* grounds. A sharp-edged error of law would have to be shown. In the present cases, there was such an error of law in that the decisions were taken on closed evidence without providing the suspects with sufficient information to enable them to give effective instructions to the special advocate.

The UT was, however, the alter ego of the High Court. It is at the apex of a new and comprehensive judicial structure and, although not unlimited, its jurisdiction is very wide, including a judicial review jurisdiction. It is an authoritative, impartial and independent judicial source for the interpretation and application of statutory texts. It has the final power to interpret for itself the law that it has to apply and is not amenable to judicial review in the second sense. Judicial review would only lie where the UT embarked on a case that went beyond its statutory remit or where there had been a wholly exceptional collapse of a fair procedure.

1 See: www.hmcourts-service.gov.uk/cms/admin.htm.
2 Andrew Lockley, partner, Irwin Mitchell, Sheffield.

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