IN THE INDUSTRIAL TRIBUNAL

Case No. Ind Tri 3/2012

BETWEEN:

JESUS ESPADA RUIZ

Complainant

-and-

GIBDOCK LIMITED

Respondent

DECISION

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1. This is an application by the Respondent for the Complainant's claim to be dismissed by way of strike out. The application is unopposed due to the fact that the Complainant has not participated in the proceedings for some time, as further explained below, and certainly not since the application was made. The only arguments advanced and guidance provided to me is therefore limited to that of the Respondent's solicitors Messrs Triay Stagnetto Neish.

2. Whilst I am not being asked to determine the merits of the claim, a summary of the respective parties' positions as pleaded will provide the necessary background. I do not feel that an analysis of the documents or evidence filed is relevant to this decision.

The Complainant's grounds

3. These are set out in the Complainant's IT1 Form dated 25 January 2011.

4. The Complainant was employed on 22 February 2006 becoming a permanent employee of the Respondent on 6 February 2007 in the position of painter/blaster.

5. In the course of an investigation by the Respondent into the loss of copper anodes identified on 17 October 2011, the Complainant and a number of other employees were interviewed by the Respondent on 18 October 2011. In the course of his interview, he was informed that other (unnamed) employees had named him as a suspect, which the Complainant denied.

6. On 22 October 2011, the Complainant was arrested at work by an officer of the Royal Gibraltar Police on suspicion of theft. Following a search of his locker, the Complainant was conveyed to New Mole House for further questioning. He was informed that another employee of the Respondent, Mr Francisco Javier Mesa Ruiz, had been found in possession of copper stolen from the Respondent in the boot of his car and that Mr Mesa Ruiz had alleged that the said copper had been given to him by the Complainant and that their intention was to share the proceeds of any subsequent sale. The Complainant denied this allegation and advised that he did not know Mr Mesa Ruiz other than being aware of him from work. He was bailed out to return on 17 November 2011.

7. The Complainant was interviewed by the Respondent on 24 October 2011 and on 26 October 2011 he was informed of the Respondent's decision to dismiss him summarily for gross misconduct on the ground of theft.

8. On 11 November 2011 the Complainant appealed the decision to dismiss him on a number of grounds, including previous good conduct and procedural unfairness, in particular the fact that the criminal investigation had not yet been concluded.

9. On 17 November the Complainant surrendered to his bail and was released without charge.

10. Prior to the appeal hearing the Complainant's solicitors, at the time Messrs Litigaid Law ("Litigaid"), requested disclosure of evidence in support of the allegations of theft, including statements from the employees who had named him and CCTV footage but none was provided.

11. The appeal hearing was conducted on 12 December 2011. The Complainant was not satisfied with the manner in which the hearing was conducted and maintained that he was not provided with a reasonable opportunity to defend himself as a result of the Respondent's failure to provide the requested statements, in addition to those relied upon by the Respondent (from Mr John Taylor, Mr Henry Mauro and Mr Mesa Ruiz), or to investigate the matter fully in other respects. He alleges that the investigation and disciplinary procedure were not fair or transparent, that his exemplary previous conduct was not considered and that other reasonable alternatives to dismissal were not considered.

The Respondent's grounds of resistance

12. The Respondent's position is that it carried out a prompt and thorough investigation followed by a disciplinary hearing and that having considered all the circumstances and facts known to it, the Respondent believed that dismissal was appropriate. It believed that the Complainant had conspired with Mr Mesa Ruiz to commit theft of copper anodes worth in excess of £1,000 each depending on size and model.

13. Following a report of 10 missing anodes from a vessel in dry dock, an investigation was commenced and all employees who had been at work on 15 and 16 October were interviewed. Two employees recalled seeing the Complainant handling copper anodes when he had no reason to do so but refused to give written statements.

14. On 22 October 2011, the Respondent conducted searches of all employee vehicles leaving the Dockyard after the night shift. A copper anode was found hidden in the car of Mr Mesa Ruiz and the police were called.

15. At a disciplinary meeting on 24 October 2011, Mr Mesa Ruiz stated that on 22 October 2011 the Complainant had asked him to take a copper anode out of the Dockyard in his car for the purpose of selling the same and splitting the proceeds between them. Mr Mesa Ruiz had agreed and the Complainant had given him the copper anode to put in his car.

16. Following a disciplinary meeting on 24 October 2011 with the Complainant, at which he denied any involvement with the theft, the Respondent concluded that the Complainant had conspired to commit theft of its property form the Dockyard and that this was sufficiently serious to warrant his summary dismissal without notice or payment in lieu of the same. This was communicated to the Complainant on 26 October 2011 in a letter.

17. Having received the Complainant's appeal against dismissal, and in light of the allegations of an unfair disciplinary procedure (which it denied), the Respondent decided to conduct the appeal by way of re-hearing on 12 December 2011. The Respondent did not find that the hearing provided any grounds to alter its original decision and upheld the decision to dismiss the Complainant. This was communicated to the Complainant at the conclusion of the hearing and by letter dated 21 December 2011.

18. The Respondent contends that the fact that an employee is acquitted in criminal proceedings – in this case the Complainant was released from bail without charge – is irrelevant to whether or not his employer acted reasonably in dismissing him. The Respondent reminds the Tribunal that the question is not whether the Complainant was guilty of conspiracy to commit theft but whether it is satisfied that the Respondent had reasonable grounds in the circumstances to believe that he was guilty and acted reasonably in deciding to dismiss him on that basis. It further contends that summary dismissal is a fair sanction following a finding of gross misconduct on the grounds of theft generally and in accordance with relevant provisions of the Respondent's Employee Handbook.

Chronology of proceedings before the Tribunal

19. The Complainant filed his IT1 Form dated 25 January 2011 on 25 January 2012.

20. On 27 January 2012 the Tribunal wrote to the Respondent enclosing a copy of the IT1 Form and copies of Forms IT1 and IT2 in the usual way.

21. On 9 February 2012 the Respondent filed its IT3 Form.

22. On 16 February 2012 the Tribunal wrote to the Complainant enclosing a copy of the Respondent's IT3 Form.

23. On 5 December 2012 the Tribunal wrote to the parties notifying them that the case had been listed for a first preliminary hearing on 8 January 2013.

24. The parties appeared before Chairman Mr Anthony Lombard on 8 January 2013. Both parties were represented – the Complainant by Ms Kathryn Moran of Litigaid and the Respondent by Mr Guy Stagnetto of Triay Stagnetto Neish ("TSN"). Standard case management directions were ordered by consent, in summary namely:

    (a) Exchange of lists and documents by 5 February 2013;

    (b) Simultaneous exchange of witness lists by 5 March 2013;

(c) Simultaneous exchange of witness statements by 19 March 2013;

(d) Liberty to the parties to exchange supplemental witness lists by 2 April 2013;

(e) Simultaneous exchange of supplemental witness statements by 16 April 2013;

(f) Witness statements to stand as evidence in chief;

(g) Complainant to provide draft hearing bundle index to the Respondent 21 days before trial and Complainant to file a hearing bundle 14 days before trial;

(h) Parties to file skeleton arguments 7 days before trial;

(i) 4 day hearing to be fixed in June 2013 on application by the parties;

(j) Liberty to apply.

25. On 5 February 2013 the parties exchanged lists of documents and copy documents.

26. On 4 March 2013 the Respondent filed a supplemental list of documents and copies of the same pursuant to its continuing disclosure obligations.

27. Following two extensions of time in relation to the 5 March 2013 deadline agreed between them, on 26 March 2013, the parties exchanged witness statements – one by the Complainant and eight by the Respondent.

28. Between 26 March 2013 and 3 June 2013 neither of the parties requested that the case be listed for a hearing in accordance with the order of 8 January 2013.

29. On 3 June 2013 Litigaid wrote to the Tribunal advising that they no longer represented the Complainant due to the Complainant's inability to pay their legal fees to that date or going forward. They informed the Tribunal that the Complainant did however wish to proceed with the claim and provided his contact address and last available telephone number as follows:

Address:	Urbanization Bellavista Bloque 3, 2B La Linea de la Concepcion 11300 Cadiz
Telephone number:	0034648451862

30. They understood that the Complainant had recently changed his telephone number and were making efforts to obtain his new number for provision to the Tribunal and the Respondent's solicitors. They advised the Tribunal that the Complainant would require an interpreter at future hearings.

31. No further contact details for the Respondent have been made available to the Tribunal since that date.

32. Between 3 June 2013 and 5 December 2013 the Tribunal Secretary tried to contact the Complainant on the available telephone number with no success finding it switched off or otherwise unavailable.

33. On 5 December 2013 the Secretary wrote to the Complainant at the available address reminding him that no correspondence had been received from him for some considerable time. She also referred to the letter from Litigaid dated 3 June 2013 and advised him to seek alternative representation if he wished to pursue the claim further. This letter received no reply from the Complainant.

34. On 13 June 2014 the Secretary wrote to the Complainant at the available address once again in the same terms as in her letter of 5 December 2013, albeit, on this occasion, in Spanish. This letter received no reply from the Complainant.

35. On 22 January 2015 my appointment as Chairman in place of Mr Lombard was published in the Gibraltar Gazette.

36. On 6 February 2015 the parties were notified by letter (the Complainant at the available address) that the case had been listed for a public hearing to 3 March 2015 at 12.00 pm at the John Mackintosh Hall, Lecture Room. I reproduce the text of that letter herein as follows:

Dear Sir,

INDUSTRIAL TRIBUNAL RULES 1974

NOTICE OF HEARING OF COMPLAINT OF UNFAIR DISMISSAL

(PRELIMINARY HEARING)

The Industrial Tribunal will convene a public meeting on the 3rd of March 2015 commencing at 12.00 am or so soon thereafter as they may be heard, at the Lecture Room, John Mackintosh Hall, Gibraltar, to discuss preliminary issues namely, discovery of documents, exchange of witness statements and set dates for the full substantial hearing in respect of the originating application dated 25th January 2011 of Jesus Espada Ruiz v Gibdock Limited.

Should you wish to submit representations in writing for consideration by the Tribunal, please note that these should be addressed to the Industrial Tribunal Secretary, 31 Town Range, Gibraltar to reach the Secretary no later than seven days before the date set for the hearing and copied to the other party concerned.

If you fail to attend, or to be represented at the hearing, (whether or not written representations have been sent), the contents of the Originating Application, or the entry of appearance as the case may be, may be treated as representations in writing.

At the hearing you may either appear before the Tribunal and be heard in person, or you may be represented by counsel, by a representative of a Trade Union or an Employers Association, or by any other person who you may so desire. The parties at the hearing are entitled to make opening statements, to call witnesses, to cross-

examine any witness called by the other party and to address the Tribunal. They may, if they so desire, give evidence on their own behalf.

If a party fails to appear or to be represented at the time and place fixed for the hearing, the Tribunal may dispose of the Application in the absence of that person, or may adjourn the hearing.

Yours faithfully

Lorriane Fa
Administrative Officer,
Industrial Tribunal.

37. On 20 February 2015 the parties were notified by letter (the Complainant at the available address) that the case had been listed for a public hearing to 3 March 2015 at 12.00 pm at the Boardroom of the Ministry of Business and Employment. Save for the change of Venue, the content of the letter was identical to that of the 6 February letter. This letter was accompanied by a further letter of the same date from the Tribunal's Administrative Officer specifically drawing the parties' attention to the change of venue.

38. In the meantime, the Secretary continued to attempt to contact the Complainant on the available telephone number until a time when the number appeared to be out of service and no further attempts to contact him by telephone were made.

39. On 3 March 2015 the hearing was attended only by the Respondent who appeared represented by Mr Guy Stagnetto and Ms Gabrielle O'Hagan of TSN together with a director of the Respondent. The Complainant did not appear and no explanation for his failure to appear was provided to the Tribunal. Representations were made to me on behalf of the Respondent that the Tribunal should consider dismissing the claim given that the Complainant had made no contact with the Tribunal for the purpose of advancing his claim or otherwise since the last letter from Litigaid on 3 June 2013. I did not feel that it was appropriate to consider such an application without giving the Complainant a further opportunity to appear. I was then asked to make an unless order, which invitation I also declined. The hearing was adjourned to 10 April 2015 at 9.00 am.

40. On 5 March 2015 the parties were notified by letter (the Complainant at the available address) that the case had been listed for a public hearing to 10 April 2015 at 9.00 am at the Boardroom of the Ministry of Business and Employment. The content of the letter was identical to that of the 6 February letter. The letter sent to the Complainant was returned by the Spanish postal service undelivered with a note containing the word "Desconocido" (translation: "unknown"). It is not clear whether the letter was referring to the name or the address.

41. On 10 April 2015 the hearing was attended only by the Respondent who appeared represented by Mr Guy Stagnetto. The Complainant did not appear and no explanation for his failure to appear had been provided to the Tribunal. On this occasion, an application that the claim be dismissed by way of strike out was made on

behalf of the Respondent. Having been taken though the chronology of the events to that date, Mr Stagnetto advanced the following arguments in support of his client's application:

(a) That the claim had been dead since 2013 and related to events in 2011;

(b) That the Tribunal has a power to strike out a claim pursuant to Rule 16(1) of the Industrial Tribunal Rules 1974 ("the Rules") so long as it acts consistently with the other Rules;

(c) That it would be appropriate to strike out this claim because:

(i) The Respondent had already incurred significant costs since the disciplinary stage;

(ii) In such frivolous cases the odds were stacked against employers generally given the absence of any costs consequences against employees and that to continue to entertain these proceedings simply compounded the situation for the Respondent;

(iii) To deal with the matter by listing the claim for a hearing and dispose of the of it pursuant to Rule 13(3) in the absence of the Complainant would only serve to further compound the Respondent's exposure to unreasonable and unnecessary costs;

(iv) That it could not be in the interests of justice for the Tribunal system to be clogged up with cases that were not going anywhere;

(v) That the Tribunal must have an inherent power to clear its caseload of such cases fairly and following proper notice to the parties;

(vi) In this case, Litigaid were originally instructed and they would surely have advised the Complainant of the steps that he was required to take in the further pursuit of his claim and yet he had made no effort to contact the Tribunal since then;

(vii) The Tribunal was at a point where I would be entitled and justified to dismiss the claim.

42. I adjourned the hearing to consider the application.

43. On 29 April 2015, TSN helpfully filed a letter containing a summary of relevant authorities and setting out and supplementing their submissions at the hearing.

The source of the Rules

44. The Industrial Tribunal is a creature of statute established by Rule 3(1) of the Rules in 1974:

3.(1) There is hereby established an Industrial Tribunal.

45. The Rules themselves were issued pursuant to Section 12 of the Employment Act 1932 ("the Employment Act"):

The Industrial Tribunal

Power to establish an Industrial Tribunal

12.(1) The Minister may by rules establish an Industrial Tribunal and may by such rules provide for –

(a) the constitution, membership and procedure of such tribunal;

(b) the appointment of a chairman of the tribunal;

(c) the powers of such tribunal; and

(d) such other matters as appear to the Minister to be necessary or expedient.

(2) The Minister may make rules for the purposes of hearing complaints by the tribunal and for the enforcement of awards and without prejudice to the generality of the foregoing such rules may prescribe –

(a) the form of complaint;

(b) the form of defence;

(c) the form of joinder of third parties;

(d) the method by which awards made by the tribunal may be enforced and for the purpose of this paragraph an award made or varied by the Supreme Court on appeal from the tribunal shall be deemed to be an award of the tribunal.

46. The Employment Act also makes express provision in relation to the Tribunal's jurisdiction and powers at Sections 70 to 74 under the heading *Complaints to and Powers of the Industrial Tribunal* but these are not relevant to the application currently before me.

47. At Section 90 the Employment Act specifically deals with the Supreme Court's inherent jurisdiction in relation to the Employment Act notwithstanding the jurisdiction of the Tribunal:

Jurisdiction of the Supreme Court.

90.(1) For the avoidance of doubt, the Supreme Court shall retain its inherent jurisdiction over matters arising under this Act notwithstanding that this Act confers jurisdiction in relation to such matters on the Industrial Tribunal.

(2) Notwithstanding subsection (1), the Supreme Court may, in its absolute discretion, decline jurisdiction where the only issue to be referred to the court is one over which the Industrial Tribunal has jurisdiction by virtue of this Act.

(3) Subsection (2) shall not apply where the relief sought by any party to the proceedings is not available in the Industrial Tribunal or where the Court does not consider it expedient or equitable for such relief to be sought from the Industrial Tribunal.

The application

48. Although I have not been asked to deal with this point, I feel it should be addressed.

49. Having considered the Rules, it would appear that the application must be brought pursuant to Rule 17(2), given that what is sought by the Respondent is a direction on a matter arising in connection with these proceedings and there does not appear to be any other relevant rule which impacts upon or any in way restricts the scope of this Rule.

50. Rule 17(2) provides as follows:

Extension of time and directions

17.(2) Subject to rule 6(2) a party may at any time apply to the Tribunal for directions on any matter arising in connection with the proceedings.

51. This application is therefore subject to the notice requirements of Rule 16(3):

(3) The tribunal may, if it thinks fit, before granting an application under rule 10 or rule 17 require the party making the application to give notice of it to the other party or parties. The notice shall give particulars of the application and indicate the address to which and the time within which any objection to the application shall be made being an address and time specified for the purposes of the application by the tribunal.

52. The application was filed by way of letter dated 2 April 2015 from TSN and representations in support of it were made before me on 10 April 2015 at a hearing which was not attended by the Complainant. In the course of writing my decision, on 18 May 2015 I checked with the Secretary who confirmed that the Tribunal had not communicated with the Complainant since those dates.

53. TSN's communications with the Complainant had been limited to copying their letters of 2 and 29 April 2015 to the Complainant by post at the available address.

54. The requirement for notice is clearly set out in the Rules and by the rules of the other Tribunals considered in the authorities below. This requirement is an eminently reasonable one which accords with the explicit overriding requirement in the rules of the other tribunals referred to herein that cases be dealt with fairly and justly, a requirement which, as I will further address below, must be implied into the Rules.

55. In the circumstances of this case, where the Tribunal must be satisfied that all reasonable steps to notify the Complainant of the progress of the claim have been taken, it must ensure that the Complainant has been notified in accordance with the requirements of Rule 16(3) of any application by the Respondent, not least one seeking dismissal of the claim in its entirety. TSN's letter of 2 April 2015 provided particulars of the application and their letter of 29 April 2015 served to significantly enhance those particulars with legal authority and argument. It is certainly arguable that their letters implied an address to which any objection to the application should be made. However, I was not satisfied that this was clear. Further, since the application was made, the Tribunal had not specified the address or time within which any objection to the application should be made.

56. This is not in any way a criticism of the conduct of this matter by TSN or the Respondent who have pursued this application diligently and offered significant assistance to the Tribunal by way of oral and written submissions.

57. In the circumstances, on 18 May 2015 I directed the Respondent to write to the Complainant at the available address and for the avoidance of doubt at the address provided in the IT1 form, namely Calle Pedreras 122, La Linea de la Concepcion, Cadiz, Spain, notifying him that any objections to its application must be filed with the Secretary at her address by 9 June 2015. The Secretary's telephone and fax numbers and email address were also to be provided. I further directed the Secretary to post copies of TSN's letters to the Complainant at both addresses in the usual way.

58. These directions were complied with: the letters by TSN dated 18 May 2015 having gone out on that same day and the letters by the Tribunal enclosing copies of TSN's letters having gone out on 19 May 2015.

59. No response whatsoever to any of those letters has been received by the Secretary from the Complainant.

The source of the Tribunal's power to strike out a claim

60. Having considered the submissions made in support of the application by the Respondent, I agree that the only potential source of the Tribunal's power to strike out the Complainant's claim in the circumstances of this case and as requested by the Respondent is Rule 16(1) of the Rules, namely:

    Miscellaneous powers of tribunal

    16.(1) Subject to the provisions of these rules, the tribunal may regulate its own procedure.

61. The Respondent has been unable to identify any authorities which deal with this point precisely, and I have not been any more fortunate in that regard. The authorities considered therefore deal with cases in which a tribunal's power to regulate its own procedure generally or in other respects, including the power to strike out under an equivalent rule albeit subject to express strike out provisions.

The Tribunal does not have an inherent jurisdiction

62. That the Tribunal does not have an inherent jurisdiction of its own appears to be an obvious point, albeit one which the Courts in the authorities considered have felt it necessary to place beyond any doubt in the process of attempting to define the extent of a tribunal's implied powers. I will address this issue for the sake of completeness.

63. In *Charman v Palmers Scaffolding Ltd EAT [1979] ICR 335* ("*Charman*") the Employment Appeal Tribunal considered an appeal from the Industrial Tribunal on the issue of whether the Industrial Tribunal had the power to order that the employee's claim could be re-heard by a differently constituted tribunal. In his judgment Talbot J found as follows at page 338 D:

"We were invited also to find that there was an inherent power in relation to their own procedure. Our view as to that is that as an industrial tribunal and an appeal tribunal are created by statute, it would be difficult to invoke an inherent power lying in either tribunal unless such power had been specifically reserved by the statutory procedures."

64. In *Kelly v Ingersoll-Rand Co Ltd EAT [1982] ICR 476* ("*Kelly*") the Employment Appeal Tribunal considered an appeal from the Industrial Tribunal on the issue of whether the Industrial Tribunal had jurisdiction, in accordance with rule 12(2)(f) of the Industrial Tribunal (Rules of Procedure) Regulations 1980, to dismiss the employee's claim for want of prosecution. In his judgment Brown Wilkinson J found as follows at page 480 A:

"It is to be remembered that industrial tribunals are statutory bodies whose powers are exclusively conferred and regulated by statute. They have no inherent jurisdiction: any jurisdiction they have has to be found in their regulating statutory provisions."

65. In *R (V) v Asylum and Immigration Tribunal [2009] EWHC 1902 (Admin)*("*R v AIT*") the High Court considered an application for judicial review of a decision of the Asylum and Immigration Tribunal ("the AIT") in which one of the questions to be determined was whether the AIT had jurisdiction to deal with an alleged abuse of process. In his judgment Hickinbottom J found as follows at paragraphs 24 and 28:

"24 As I have said (paragraph 8 above), the AIT is purely a creature of statute: and, in my judgement, it does not – and cannot – have any inherent powers on the same basis as the High Court. The High Court is, of course, also a creature of statute – it was created by section 16 of the Judicature Act 1873 – but, at its inception, it was endowed with the powers vested in or capable of being exercised by the courts whose jurisdictions were transferred into it, including common law powers that had been exercisable by the superior courts since the earliest days of the common law (see Metropolitan Bank v Pooley (1885) 10 App Cas 210 at pp 220-1, per Lord Blackburn). Those historical powers are only exercisable by the High Court because it is a superior court of record with a unique constitutional position: and in any event, as I have indicated, they have been expressly maintained in the High Court by the relevant legislation (see, most recently, section 19(2) of the Supreme Court Act 1981). Neither the AIT nor any other so-called "inferior" court or tribunal can have inherent powers in that sense. An inferior tribunal derives its powers exclusively from

the statue creating it: and it therefore only has – and can only have – the powers given to it by the statutes and rules that govern its jurisdiction and procedure."

"28 The use of the term "inherent powers" as applying to inferior tribunals in these cases must mean something different from the term as used of the High Court: and it seems to me that the references are not to the historical powers of the superior courts inherent in the High Court, but to powers that can properly be implied into the statutory scheme on the usual principles of statutory interpretation. It is well-settled law that it is justifiable to imply words into legislative provisions where there is an ambiguity or an omission and the implied words are necessary to remedy such defect (see, e.g., Elloy De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999]AC 69 at page 77H)."

66. In *Chief Constable of Nottinghamshire v Nottingham Magistrates' Court [2009] EWHC 3182 (Admin)* ("*CC Nottinghamshire*") the High Court considered an application for judicial review of a decision of the Nottingham Magistrates' Court in which the extent of the powers of the magistrates were considered. In his judgment Moses LJ considered Hickinbottom J's findings in *R v AIT* favourably as follows at paragraphs 33-35:

"33 All the parties and the deputy judge laboured under the difficulty that they lacked the benefit of Hickinbottom J's learning in R (V) v Asylum and Immigration Tribunal [2009] EWHC 1902 (Admin). In that case he dismantled any superstition that a statutory tribunal, or for that matter a statutory court such as the magistrates, had any inherent jurisdiction. However, he accepted that having regard to the statutory function of the particular tribunal in question, and in that case the Asylum and Immigration Tribunal, the statute might itself impliedly confer powers which may be exercised to further the objective of the statute in question.

...34... I read Hickinbottom J as echoing ... the words of Lord Reid in Wiseman v Borneman [1971] AC 297, 308 B-G, where Lord Reid acknowledged that a tribunal was entitled to exercise powers and adopt rules, which should be flexible, so as to ensure that they can carry out their task more effectively.

35 What Lord Reid and Hickinbottom J teach is that tribunals and magistrates do have power to control and regulate their own procedure, so as to ensure the effective resolution and determination of those functions imposed upon them by the statute in play. There is nothing inherent about that power. It is a power which the statute impliedly confers in order to achieve a statutory objective, which it is the tribunal in question's responsibility to fulfil."

67. Whilst it is clear on the face of the Rules - and certainly in light of the above authorities - that the Tribunal does not have an inherent jurisdiction, the fact that Section 90 of the Employment Act specifically preserves the inherent jurisdiction of the Supreme Court in relation to the Act without stating or howsoever otherwise implying that the Tribunal is vested with such a jurisdiction is telling. The specific reference at Section 90(2) to the jurisdiction of the Tribunal arising by virtue of the Employment Act puts the issue beyond question.

Implied powers of the Tribunal

68. The courts have shown an equally robust unanimity with regard to the proposition that tribunals created by statute are vested with implied powers which allow them to discharge their function of dealing with cases justly and fairly so long as these are not in conflict or otherwise provided for by their rules.

69. In *R v AIT* the Court considered the issue of implied powers and held as follows at paragraphs 29 and 30:

"29 In some statutory schemes it is necessary to imply many or even most of a tribunal's powers. For example, in R (IB) 2/04, a tribunal of Social Security Commissioners held that it was necessary to imply all powers of a social security appeal tribunal – because the relevant statute gave a right of appeal but did not expressly give the appeal tribunal any powers at all (see, particularly, paragraph 12 of that decision).

30 What is "necessary" by way of implication will depend upon the nature of the tribunal and its work, and of course the express powers that are given to it by the legislative scheme. However, in respect of any tribunal with a judicial function, it must be assumed (at least in the absence of the clearest wording) that Parliament intended the tribunal to deal with the cases fairly and justly: and, consequently, provisions that are not incompatible with the express rules can be readily implied insofar as they are necessary for achieving fairness and justice. As Lord Bridge said in Lloyd v McMahon [1987] AC 625, at pages 702-3:

> *"My Lords, the rules of so-called natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.* ***In particular, it is well-established that when a statute has conferred on a body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness****."[emphasis added]."*

70. Tribunal rules and regulations post-dating the Rules have consistently expressly enshrined the principle of dealing with cases fairly and justly explicitly, thereby removing the need to imply this fundamental requirement. We need look no further than Rule 2, Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 where the overriding objective of The Employment Tribunals Rules of Procedure is stated as:

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.

71. I confidently assume that our legislators intended that such an overriding objective or principle be implied in the Rules.

72. It is useful to note that Section 88 of the Employment Act appears to mirror the position referred to in paragraph 29 of *R v AIT* in relation to the social security appeals tribunal referred to therein.

Rules of court.

88. The Chief Justice may make rules of court providing for the hearing of appeals from the Industrial Tribunal, and without prejudice to the generality of the foregoing, such rules may prescribe the form in which appeals to the Supreme Court are to be made.

73. Such implied powers are however subject to the express rules provided for the tribunal.

74. This is touched upon in *R v AIT* at paragraph 30, which I repeat in part:

"30 What is "necessary" by way of implication will depend upon the nature of the tribunal and its work, and of course the express powers that are given to it by the legislative scheme. However, in respect of any tribunal with a judicial function, it must be assumed (at least in the absence of the clearest wording) that Parliament intended the tribunal to deal with the cases fairly and justly: and, consequently, provisions that are not incompatible with the express rules can be readily implied insofar as they are necessary for achieving fairness and justice."

75. This issue was dealt with expressly in *Kelly* where the applicable employment tribunal rules at the time were the Industrial Tribunals (Rules of Procedure) Regulations 1980 and Rule 12 provided as follows:

"12(1) Subject to the provisions of these Rules, a tribunal may regulate its own procedure.

(2) A tribunal may, if it thinks fit ... (f) on the application of the respondent, or of its own motion, order to be struck out any originating application for want of prosecution; provided that ... the tribunal shall send prior notice to the Complainant."

76. The Court went on to consider that tribunal's strike out powers in light of those rules and determined as follows:

"Were it not for the words ... "Subject to the provisions of these rules," we think it may well be that the tribunal might have had power to strike out for want of prosecution. But in our view, when one sees that striking out for want of prosecution is expressly dealt with subject to specific safeguards, in rule 12(2)(f), it seems to us impossible to hold that there is a right to strike out an application for want of prosecution otherwise than in accordance with the requirements of rule 12(2)(f)."

77. Rule 16(1) of the Rules is expressed in exactly the same terms as Rule 12(1) of the Industrial Tribunals (Rules of Procedure) Regulations 1980 considered in *Kelly* (and indeed Rule 11(1) of the Industrial Tribunals (Labour Relations) Regulations 1974 considered in *Charman*). However, the Rules do not make any express provision for a power to strike out. In the circumstances, I would agree with Brown-Wilkinson J in *Kelly* that in the absence of any express rules governing a power to strike out which define and thereby limit the extent of those powers within the Rules, and in light of the implied overriding objective that the Tribunal deal with cases justly and fairly, as discussed above, I find that the Tribunal must have an implied power to strike out a claim, or part of it, if it would be just and fair to do so.

The power to "regulate its procedure" may include a standalone power to strike out even where express strike out powers are provided for

78. In *Brian Foulser, Doreen Foulser v The Commissioner for Her Majesty's Revenue and Customs [2013] UKUT 038 (TCC) 2013 WL 12843* ("*Foulser*") the Court considered a tax tribunal's powers to strike out a claim. The rules in question were the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

79. Rule 5 provided as follows:

"5(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure."

80. Rule 5 provided examples of case management procedural steps, none of which dealt with the power to strike out, which was expressly provided for by Rule 8:-

"8 Striking out a party's case

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

...(4) The Tribunal may not strike out the whole or part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

81. In his decision Morgan J considered *Kelly* and approved the rationale that a tribunal's power to regulate its own procedure was subject to the provisions of its rules:

"In Kelly, ... such a power [to strike out] was not conferred by a rule which provided that the tribunal "may regulate its own procedure" because that rule was "subject to the provisions of these Rules" and it was therefore held that the power to regulate its own procedure did not allow the tribunal to strike out in a case which did not comply with the restrictions in the express power to strike out. This approach was applied by the Employment Appeal Tribunal in O'Keefe with the same result."

82. Morgan J went on to provide further guidance on the breadth of the tribunal's power to "regulate its own procedure". In the course of his discussion, the case of *Care First*

Partnership Limited v Ms M Roffey and Others [2001] ICR 87 ("*Care First*") was considered and distinguished:

"62 Care First Partnership Ltd was a decision of the Court of Appeal which considered the rules then applicable to employment tribunals. The employer submitted that the tribunal had a power to dismiss a claim summarily on the basis that the claim had no reasonable prospect of success. The rules provided in one place for a case which was judged to have no reasonable prospect of success but did not allow the tribunal to strike out the case on that ground. Other rules allowed the tribunal to strike out a case on other grounds but not on the ground that the case had no reasonable prospect of success. It was held that a rule which allowed the tribunal to conduct the hearing in such a manner as it considered appropriate did not allow the tribunal to dismiss the case without hearing the evidence. It was also held that rules dealing with the conduct of the hearing and to regulate the procedure of the tribunal "are concerned with procedure and do not provide a jurisdiction to strike out ...".

63 ... the difficulty of deciding the present point is increased because it seems very likely that most, if not all, cases which justified the making of a debarring order could be brought within the express terms of Rules 7 and 8. I also acknowledge that the decisions ... do cause me to be hesitant before rejecting [the strike out] submission. I am less troubled by the decision in Kelly and O'Keefe than the decision in Care First Partnership Ltd. The reasoning in the first two of those cases is readily distinguishable. Both of those cases attached importance to the fact that the rule which allowed the tribunal to regulate its procedure was expressed to be "subject to the provisions of these rules" and this was held to cut down the effect of the general power to regulate procedure. Indeed in Kelly, the Employment Appeal Tribunal stated that, but for those words, the power to regulate procedure might well have conferred a power to strike out for want of prosecution. The decision in Care First Partnership Ltd is readily understandable and distinguishable from the present case but I have noted the comment that the power to regulate "procedure" did not extend to an order striking out a claim.

64 The point which has been argued would only arise in a case where the FTT considered that a debarring order was justified and no lesser order would meet the justice of the case but yet, for whatever reason, the facts of the case did not come within Rules 7 and 8. In my judgment, in that somewhat exceptional case, I am not persuaded that I should hold that the FTT could not produce the desired just result by using its power under Rule 5 to "regulate its procedure", particularly to deal with the case fairly and justly (as required by Rule 2(1) and (3)). Accordingly, I am not prepared to accept the submission of Ms Dewar for HMRC that the FTT could not make a debarring order against HMRC if, on the facts, the FTT considered that the only way to deal with the case fairly and justly was to make such an order".

83. Whilst I do not rely on this authority for the purpose of my decision, the guidance provided by Morgan J in relation to the scope of the tribunal's powers to "regulate its own procedure" is certainly worthy of note, particularly in relation to exceptional circumstances, absent in the present case, in which express rules which prima facie curtail a tribunal's general powers in relation to a specific procedure would prevent a tribunal from dealing with a case fairly and justly.

Barwil Agencies Limited v Salmon, Supreme Court 16 January 1997

84. I have been helpfully referred to *Barwil Agencies Limited v Salmon, Supreme Court 16 January 1997* which appears to be the only relevant Gibraltar authority. This case involved an appeal of an order by the Tribunal that a Notice of Appearance be struck out following a breach of an unless order relating to discovery. The case focused on Rule 10(1)(b) of the Rules:

10 (1) Subject to rule 6(2) a tribunal may on the application of a party to the proceedings made either by notice in writing or at the hearing of the originating application –

... (b) grant to the person making the application such discovery or inspection of documents as might be granted by the Supreme Court;

85. The Court considered the Tribunal's powers of sanction for non-compliance with discovery orders under its power to regulate its own procedure pursuant to Rule 16(1).

86. Chief Justice Schofield held, inter alia:

"By r.16(1), the Tribunal may regulate its own procedure. That must include sanctions similar to those of the Supreme Court to hold a party out of its process if that party proves himself unworthy of access to it. Again, the Tribunal should look to O.24, r.16 and the notes to it in The Supreme Court Practice for reference to its powers to strike out. It should be remembered that it is only where there is a real risk that justice cannot be done that a party should be excluded from proceedings. Having determined that Tribunal had the powers it exercised ... ".

87. Whilst, to my mind, the above discussion settles any question as to the Tribunal's power to strike out in the circumstances of this case, I am comforted by the absence of any significant inconsistency with Schofield CJ's conclusions on this issue.

Conclusion

88. I am satisfied that all reasonable steps to notify the Complainant of the continuing proceedings and of the Respondent's present application have been taken as required by and in accordance with the Rules, by the Tribunal and the Respondent respectively.

89. Having brought the application under Rule 17(2), the Complainant has been properly notified by the Respondent of the same in accordance with the requirements of Rule 16(3).

90. I am persuaded by the Respondent's submissions that the Tribunal has the power to strike out a claim in the circumstances of this case pursuant to Rule 16(1), there being no express power to strike out which would otherwise enable or restrict its ability to do so.

91. I find that in all of the circumstances of this case, it would by just and fair to grant the Respondent's application and I therefore dismiss the proceedings.

Dated 10 June 2015

Kenneth Navas
Chairman