Employee Share Option Schemes

1. A share option is an option given by an employer to an employee to purchase shares in the employing company at a fixed price, or at a discount, set by the employer.

2. There is a period during which the employee is unable to exercise the options known as the vesting period. The vesting period usually lasts for a number of years. The employee can only exercise his right to purchase after the option has vested. He need not do so right away.

3. If the value of the company has increased since the employee was granted the option, then the price at which he or she can buy them for will be lower than their market value. The employee makes a profit.

4. The exercise of the option is usually subject to conditions.

5. The scheme may be complex in nature and often leave the employer considerable scope for the exercise of discretion as to when and what an employee may exercise as an option. The discretion may be exercised through the mechanism of a remuneration committee.

6. The intention of giving employees share options is to engender loyalty and motivate performance over a long period of time, although the amount of the reward under a share option scheme is highly variable.

7. A contract of employment is a contract to provide personal service which, unless expressly agreed to be for a fixed term, is permanent subject to the right of either party to terminate it on notice.

8. The ending of the contract of employment gives rise to the issue of what happens to those share options.

9. Where an employee has been granted the right to a share option, many contracts provide what should happen in the event the contract is terminated. In so doing, they may make a distinction between dismissal 'for cause', which may be defined, and any other dismissal. Most schemes rely on the concepts of 'good' and 'bad leavers' to distinguish who should continue to have the right to exercise their options after the end

of contract of employment and who should not. Under many schemes, the employer reserves to itself a discretion as to whether an option will vest at all and if so in what amount. These concepts are purely contractual ones and how they are defined and what they mean must be evinced in each individual case. However, in most schemes, good leavers are generally those who leave for reasons such as disability, ill-health, retirement and redundancy. Bad leavers are those who resign after a short period of time or are dismissed for capability or misconduct. Sometimes an employee who is made redundant is defined as a bad leaver. As is explained below, even an absolute discretion is not unfettered.

10. As well as the classification as a good or bad leaver having an impact on the employee's ability to retain his or her share options, some policies and contracts also make a distinction between vested and unvested share options.

11. It is often the case that where an employee leaves 'under a cloud' the employer wishes to punish the employee by cancelling unvested share options. It is also not uncommon for an aggrieved employee who has been dismissed to challenge the dismissal. This is most commonly done by the employee bringing a claim for unfair dismissal in the Employment Tribunal. However, he may also allege that the dismissal is discriminatory in some way by infringing one or more of the provisions of the Equality Act 2010 or allege the reason for dismissal is for a proscribed reason as defined in the Employment Rights Act 1996 and hence automatically unfair: the most common example of this being dismissal for having made a protected disclosure ('whistleblowing'). An employee who resigns may say he or she has been constructively dismissed and that he or she was effectively dismissed.

12. However, there is another cause of action which appears in many of the reported cases about the failure to honour share option agreements. That is the common law action for wrongful dismissal. This is different to unfair dismissal which is a statutory claim which permits the award of ongoing losses by way of compensation. The action for wrongful dismissal is an action for breach of the terms in the contract relating to termination. Almost invariably the only term relating to termination will be notice. An employer is permitted to dismiss without notice if the employee has committed gross misconduct or if there is a payment in lieu of notice cause. It tends to have prominence

in cases involving the grant of share options because the whole dispute is taking place in the realm of contract.

13. It also is common for contracts of employment to contain restrictive covenants which seek to limit what activities the employee can do for a period after leaving. Sometimes the rules relating to the share option stipulate that the employee forfeits his rights in the event he does not abide by his post-termination covenants. However, the employee, if sued for breach of post termination covenants will normally seek to argue that the covenants are unenforceable as being in restraint of trade and/or that the employer's repudiatory conduct releases him or her from them.

14. The main issues which arise are:

(a) can the employer's declaration as to whether the employee is a good or bad leaver or was dismissed for cause be challenged in an action for breach of contract? Can the employer's exercise of discretion be challenged?

(b) can the decision be challenged by way of a claim brough in the employment tribunal? This entails a consideration of:

(i) what claims in the Employment Tribunal can displace the employer's reason for termination?

(ii) what claims in the Employment Tribunal can challenge the employer's exercise of discretion?

(iii) what is the effect of a finding of constructive (unfair or wrongful dismissal)?

(iv) how the loss arising from the failure to grant the right to exercise the share option be claimed? Are there any restrictions or limits?

(c) what effect does a provision that prevents the exercise of the share option where the employee is in breach of post termination covenants have?

Can the employer's declaration as to whether the employee is a good or bad leaver or was dismissed for cause be challenged in an action for breach of contract?

15. The short answer is yes. Precisely how that is done will depend upon the provisions of the particular contract in question and the precise grounds under which the employer is seeking to deny the right.

16. The means by which the loss may be recovered for the failure to permit an ex-employee to exercise his share options will differ depending on the circumstances. Many of the cases are actions for wrongful dismissal. The claim for wrongful dismissal is effectively a claim for notice pay since the common law says that damages for the wrongful termination of a contract of employment are limited to the notice period on the basis that the employee's loss is calculated on the basis of the least burdensome means of terminating the contract as far as the employer is concerned: Lavarack v Woods of Colchester [1967] 1 QB 278, CA. This assessment includes an assessment, on reasonable assumptions, as to what level of non-contractual benefits would actually have been awarded if the employer had complied with its good faith obligations. The court must reach a conclusion on the balance of probabilities as to what would have happened had the employer complied with its contractual obligations: per Burton J in Clark v Nomura International plc [2000] IRLR 766 at [40]. In such cases, the employee will be arguing that, had the employer given him notice, in the notice period he would have been able to exercise his option had he been terminated with notice. This is the claim that was made in Reda v Flag Ltd [2002] IRLR 747, Privy Council.

17. However, a slightly different approach is taken in other cases. In Micklefield v SAC Technology Ltd [1990] IRLR 218, High Court, CH and Levett v Biotrace International plc [1999] ICR 818, Court of Appeal, the argument the employee made is that because the employer had wrongfully dismissed him his characterisation under the share option agreement could not stand.

18. The case of Mallone v BPB Industries Ltd [2002] IRLR 452, Court of Appeal has nothing to do with wrongful dismissal. In that case the issue was whether the ex-employer's exercised of its discretion as to what proportion should be paid post termination was irrational and in breach of contract. This is dealt with under implied terms below.

19. In other cases, the issue of whether the employee's repudiatory conduct *per se* absolves the employer from permitting the employee to take advantage of the option: Plumbly v Beatthatquote.com Ltd [2009] EWHC 321, High Court, QBD; Tesco Stores Limited v Pook [2004] IRLR 618, High Court. This is slightly different, but potentially connected to, the issue of classification as a bad or good leaver.

No term

20. The first situation to consider is what happens when the reason for termination, or the situation in which the employer is seeking to deny entitlement, is not one, or are not, defined by the contractual rules.

21. The contract of employment is essentially a work-pay bargain. The employee puts himself at his employer's disposal at agreed times usually on an on-going basis. In return, the employer must pay the employee the sums he promised to pay him. An employee who establishes that he is ready and willing to work is entitled to pay: Miles v Wakefield Metropolitan District Council [1987] ICR 368 . The Court of Appeal referred to comments by the trial judge in Mallone v BPB Industries Ltd [2002] IRLR 452 setting out how a share option is granted in return for service - see para 44)

22. The grant of the share-options constitutes remuneration. It is not actual but deferred remuneration. It is a benefit which is provided in return for the employee doing the work he agreed to do on the agreed dates. The other common example of deferred remuneration is a pension. Both are earned in return for doing the work but not due to be paid until long after the work was done.

23. In the absence of any express term permitting the employer not to pay, the right to exercise the option survives the termination of the contract of employment. The

employer has no grounds to deprive him of it. In short, the employee has earned it. Only a clearly expressed agreed rule can deprive him of it.

24. The next issue to consider is where the employer has made a declaration as to whether the employee is a good or bad leaver, or that there are other grounds in the contract which justify the withdrawal of the right, can that declaration be challenged?

Express Terms

25. In the case of good and bad leaver clauses, there may be a misunderstanding as to the correct label that should be imposed to the reason for leaving or, more often, the employer has put the wrong label on the termination in order to avoid the consequences of the employee being a good leaver.

26. The employee may wish to sue the employer in contract for a declaration that he is entitled to exercise it or seek damages for the money he would have made had he been permitted to exercise it.

27. The express terms of the agreement are the starting point in any dispute. It may be the case that the terms of the agreement are exhaustively defined and there is not much room for interpretation.

28. On the other hand, terms are often used in agreements without much thought as to how they should be defined or on assumption as to their meaning.

29. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. This is the classic statement of how to interpret express clauses to be found in the speech of Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896.

30. It will often be the case that where an agreement or clauses in a contract of employment defining good and bad leavers or dismissal for cause, the terms used will

be lifted from some area of employment law, whether it be statute or common law. Knowledge of these definitions must be part of that background knowledge a reasonable person would have. Where an employer has sought to argue for an interpretation which is contrary to the established meaning of those in order to avoid the departing employee from exercising his right under the share option scheme, such an interpretation is not one a court is likely to apply unless it is clearly supported by clauses within the agreement.

31. In order for a dismissal to be fair within Section 94 of the Employment Rights Act 1996, the employer must have a fair reason for dismissal[1]. A reason is potentially fair if it:

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do: 98(2)(a) of the Employment Rights Act 1996; or

(b) relates to the conduct of the employee: Section 98(2)(b) of the Employment Rights Act 1996; or

(c) is that the employee is redundant: Section 98(2)(c.) of the Employment Rights Act 1996.

Definition of Capability

32. Capability and qualification are defined by the Employment Rights Act 1996. 'Capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality: Section 98(3)(a) of Employment Rights Act 1996. 'Qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held: Section 98(3)(b) Employment Rights Act 1996.

33. Of course, there is case law further defining it. Gross negligence or gross incompetence by which is usually meant a single act of incompetence or ill-judgement that has catastrophic consequences is sometimes said to amount to gross misconduct:

[1] The employer must in addition follow a fair procedure. However, that is not relevant here.

Turner v Pleasurama Casinos Ltd [1976] IRLR 151, QBD; Taylor v Alidair Ltd 1978] ICR 445, CA.

Definition of conduct

34. This is a concept which exists in unfair dismissal law, but in so far as it constitutes gross misconduct, has always been defined by the common law. There is a distinction between gross misconduct which justifies dismissal and conduct which is a breach of contract but does not justify dismissal.

35. The word 'conduct' means actions 'of such a nature whether done in the course of employment or outside it that reflect in some way upon the employer/employee relationship': Thomson v Alloa Motor Co Ltd [1983] IRLR 403, EAT (employee accidentally damaged employer's property; held not misconduct since employee's capacity to perform duties not affected). This was applied in CJD v Royal Bank of Scotland [2014] IRLR 25, Ct Sess (IH) to hold that an unsubstantiated accusation of assault in a purely personal context outside work (of which the claimant was acquitted) was not misconduct at all for these purposes. A similar approach was taken in JP Morgan Securities plc v Ktorza UKEAT/0311/16 (11 May 2017, unreported) where it was pointed out that the statutory language refers to 'conduct', not 'misconduct', and that at this stage of isolating 'the reason' there is no legal requirement to show that the employee's was culpable (especially in the criminal law sense of having been subjectively intentional or reckless).

36. The term ‘gross misconduct’ at common law means that the employee has committed a repudiatory (or fundamental) breach of contract which is so serious that it entitles the employer to accept the breach and be released from its future obligations under the contract. This includes the obligation on the employer to give notice prior to ending the contract. It is a defence to the common law claim of wrongful dismissal which is an action for breach of contract focused on the term relating to termination. The employee’s repudiatory breach releases the employer from the requirement to terminate with notice. This is known as summary dismissal. The right to dismiss summarily is the application of the doctrine of repudiatory breach to the employment relationship.

37. The classic exposition of the concept of repudiatory breach of an employment contract is that of Lord Evershed in Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 2 All ER 285 at 287, where he set the question out as being:

> **"whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service".**

38. More recently it was put another way in Neary v Dean of Westminster [1999] IRLR 288 (approved by the Court of Appeal in Briscoe v Lubrizol Ltd [2002] IRLR 607 and by the Privy Council in Jervis v Skinner [2011] UKPC 2) namely whether the conduct:

> **"so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment"**

39. The Neary definition is a mirror of what the employee usually seeks to prove when he is seeking to show the employer has repudiated the contract of employment other than by breaking an express term. This same term is the usual basis of the action for wrongful or unfair constructive dismissal. Constructive dismissal is where the employee accepts the employer's repudiatory breach of contract by resigning without notice. Constructive dismissal and summary dismissal are the mirror of each other.

Redundancy

40. This is a concept which exists in unfair dismissal where it is defined by reference to how it is defined in a statutory claim for a redundancy payment.

41. Section 139 of ERA 1996 defines redundancy:

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—**
>
> **(a) the fact that his employer has ceased or intends to cease—**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
>
> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(b) the fact that the requirements of that business—**

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish. For the purposes of unfair dismissal law:

42. There is considerable case law on this section.

Definition of Disability

43. This concept is defined by Section 6 of the Equality Act 2010:

A person (P) has a disability if—

(a)P has a physical or mental impairment, and

(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

44. The above definition is supplemented by Schedule 1 to the Equality Act 2010.

45. There is considerable case law on this section.

Dismissal or resignation

46. In some agreements, whether an employee is a good leaver, or a bad leaver depends on whether the employee resigned or was dismissed.

47. It is important to be aware that a resignation can be a dismissal. This happens where the employee accepts the employer's repudiatory breach of contract by resigning and not giving notice in response. This is known as constructive dismissal. A constructive dismissal can both unfair and wrongful.

48. The test for whether there has been a constructive unfair dismissal is set out in the judgment of the Court of Appeal in Western Excavating (ECC) Ltd v Sharp [1978] ICR 221:

(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his

leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

(3) He must leave in response to the breach and not for some other, unconnected reason.

(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

49. In most cases these days, employees do not rely on breach of a single express term but on a course of conduct which is alleged to constitute the term implied into every contract of employment that:

> **"the employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee." Malik v BCCI SA (in liquidation) [1997] ICR 606.**

Displacement by Express Definitions

50. Of course, where the definitions set out above, are defined within the contract itself, the statutory terms will not displace that definition.

51. An employer is usually advised to define both gross conduct and conduct falling below that in the contract of employment. This is often done in the Employee Handbook, Staff Disciplinary Procedure and in various workplace policies such as anti-discrimination, harassment, whistleblowing, Code of Conduct etc.

Rules of Construction

52. In construing a contractual term, there is a general rule of construction that, stemming from the general principle of law that no man could take advantage of his own wrong, that in the absence of clear language to the contrary it was not to be assumed that parties to a contract intended that one party could deprive the other of rights and benefits under the contract by relying on his own breach of contract: Alghussein Establishment v Eton College [1991] 1 All ER 267, HL.

53. This rule was applied in Levett v Biotrace International plc [1999] ICR 818.

54. The Claimant was employed by the defendant company under a service contract as its managing director. In November 1993 the contract entitled him for a period of seven years to acquire shares in the company subject to the rules of the share option scheme. Rule 5.7.1 of the scheme provided that, if an option holder became subject to the company's disciplinary procedures and his contract of employment was consequently terminated, all the options then held by him would lapse. The rules were to be read in conjunction with an accompanying letter which provided, by paragraph 3, that, in the event of the employment contract being terminated "through breach of contract, gross misconduct or voluntary resignation," all his options would lapse in accordance with the scheme rules.

55. After a disciplinary meeting in November 1996 the company immediately terminated the plaintiff's employment without payment in lieu of notice in breach of the contract. The plaintiff claimed against the company a declaration as to his rights under the share option scheme. The company asserted that the Claimant's employment had been terminated, albeit wrongfully, consequent upon disciplinary proceedings so that his share option lapsed under rule 5.7.1.

56. The judge held that the natural and common sense meaning of rule 5.7.1 was that it applied where the disciplinary proceedings resulted in lawful termination of the contract of employment and that the unlawful termination of the Claimants' employment did not also terminate his option to purchase the shares.

57. The same rule was not applied in Micklefield v SAC Technology Ltd [1990] IRLR 218 on the basis that the clause excluding the employee's right to exercise his option validly excluded the rule.

58. The contract provided for a share option scheme entitling the employee to purchase shares. The option was exercisable on 19 February 1988. The contract said that the option could not be exercised if the employee ceased to be an employee 'for any reason.'

59. On the assumed facts of the case, the employer wrongfully dismissed the employee without notice on 11 February 1988, so he ceased to be an employee before he was

able to exercise the option. It was held that there was no implied term which prevented the employer terminating the contract wrongfully to prevent the option being exercised. The employee sought to rely on Alghussein Establishment v Eton College in support of his case and as authority for the proposition that 'no man can take advantage of his own wrong.' However, it was held against the employee that the clear terms of the relevant clause in Micklefield had the effect of excluding the principle that a person cannot be permitted to take advantage of their own wrong. It was held that the principle can be excluded by an appropriate contractual provision.

Implied Terms

60. An employment contract is modified both by the common law and statute. In any dispute about good or bad leaver status or entitlement under a share option scheme granted as deferred remuneration those obligation imposed by law have to be considered.

61. There may be a question as to whether the agreement to provide the employee with a share option is a term of the contract of employment or a collateral contract in which case the implied terms set out below may arguably not apply. This theme is only touched on in the case law (see Micklefield v SAC Technology Ltd [1990] IRLR 218 Ch D, High Court and Plumbly v Beatthatquote.com Ltd [2009] EWHC 321, QB.

62. The following terms are implied by law into all contracts of employment there is implied:

(a) an obligation on both employer and employee not to act in a manner which is likely to destroy or seriously damage the relationship of trust and confidence that should exist between the parties without reasonable or proper cause: Malik v BCCI SA (in liquidation) [1997] ICR 606. The implied term of trust and confidence conventionally only exists for the duration of the contract. It does not exist in relation to the steps taken to terminate it (which is known as the *Johnson v Unisys exclusion zone* as defined by Lord Hofman in Johnson v Unisys [2001] UKHL 13) or after it has ended. In this regard, see Reda v Flag Ltd [2002] IRLR 747 where the

Privy Council said it could not control an express power to dismiss without notice to avoid payment under a share option scheme. However, it has been said that the implied terms of trust and confidence does apply to the exercise of discretion in the case of another form of deferred remuneration, pensions (see Imperial Group Pension Trust Limited v Imperial Tobacco Ltd [1991] 1 WLR 589. This case gives scope for arguing that the implied term of trust and confidence might apply to post-termination exercise of powers under a share option scheme;

(b) a term that any discretion the employer has reserved to himself under the contract of employment be exercised rationally (or not fall outside a band of reasonable responses or not Wednesbury unreasonable): Clark v Nomura International plc [2000] IRLR 766, HC, Burton J, para 36. An apparently unfettered discretion is thus subject to limitations: that discretion will be exercised in good faith and not irrationally. This test of irrationality or perversity was adopted by the Court of Appeal in Mallone v BPB Industries Ltd [2002] IRLR 452 itself a share option case where damages were awarded for a perverse decision post-termination to exercise a discretion under a share options scheme to deprive the departing employee of options for which he had otherwise qualified. That the employer's decision-making process has to be reasonable in the Wednesbury sense: Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 was confirmed by the Supreme Court in Braganza v BP Shipping Ltd [2015] ICR 449, SC. This test has two limbs: the first is whether the correct matters have been taken into account in reaching the decision (i.e. has there been a failure to take into account relevant matters or have irrelevant matters been taken into account); the second is concerned with whether the result is so outrageous that no reasonable decision-maker could have reached it even if the decision maker has kept 'within the four corners of the matters which they ought to consider' (per Lord Greene MR in Wednesbury Corpn);

63. However, one term that has been implied into contracts of employment – a term that the employer should not be able to use one contractual provision to negate rights under

another – in the specific case of permanent health insurance benefits - has not been extended to the grant of share options.

64. In Aspden v Webbs Poultry and Meat Group (Holdings) Ltd [1996] IRLR 521, an otherwise unrestricted power to terminate the contract of employment was held to be qualified by an implied term to the effect that the employer would not terminate the contract (except for summary dismissal for cause) whilst the employee was incapacitated where to do so would have the effect of preventing an incapacitated employee qualifying for a permanent health insurance benefit.

65. The Privy Council decided in Reda v Flag Ltd [2002] UKPC 38, [2002] IRLR 747, that such a term could not be extended to the grant of a share option. Adopting a more traditional contractual approach, the Court of Appeal upheld an express power to dismiss, even though its exercise resulted in the employee being unable to qualify for an impending share option scheme.

66. In Pook v Tesco [2004] IRLR 618, Peter Smith J found that it was an implied term of the scheme that the option would not be exercisable so long as the employee was in such breach of contract as would entitle the employer to terminate the contract of employment (i.e. repudiatory breach). He held was inconceivable that the parties would have contemplated that somebody who had committed a serious breach of contract should nevertheless be entitled to exercise his proprietary rights.

Least Burdensome Rule

67. Compensation for wrongful dismissal is calculated as what the employer would have had to pay the employee had he terminated the contract lawfully in the manner most beneficial to the employer: Lavarack v Woods of Colchester [1967] 1 QB 278, CA. The so called 'least burdensome rule'.

68. In AA v Mackenzie [2021] All ER (D) 84 (Jun), the Claimant was the Chief Executive of the AA was dismissed without notice after an unprovoked assault on a junior colleague at a work away-day event; he claimed wrongful dismissal in the High Court.

69. The contract specified three methods of termination: 12 months' notice (with benefits including scope for a bonus and share options); a pay in lieu of notice clause ('PILON') with basic salary only; or dismissal without notice for gross misconduct. The AA chose to dismiss with a PILON. Mr Mackenzie sued for 12 month's notice including bonus and share options.

70. The claim was struck out by the High Court as having no real prospect of success on the basis the employer was entitled to choose the 'least burdensome' method of terminating the contract from its alternatives (here a PILON for basic salary only), rather than also paying the additional benefits. The Court of Appeal upheld the judgment.

Restriction of Employer's Liability

71. The Court of Appeal in Keen v Commerzbank AG [2007] ICR 623, CA held that UCTA does not apply to contracts of employment.

72. In Micklefield v SAC Technology Ltd [1990] IRLR 218, the parties proceeded on the basis it did. The relevant clause of the share option scheme was held to be an exemption clause which exempted the employer from liability for their wrong. This exemption clause was also held not to be void under s 3 of the Unfair Contract Terms Act 1977. It was also held in Micklefield that the creation or transfer of securities is anyway exempt from the scope of the Act by para 1(e) of Sch 1.

73. In Raw v Guy Carpenter & Co Ltd [2022] EWHC 1277 (QB). Deputy Master Yoxall heard a summary judgment application made by the employer, the judge observed that the claim did not fall to be dismissed because of the operation of para 1(e) of Sch 1 to UCTA 1977 as the claim was for pay and was not a contract relating to the creation or transfer of securities. Keen v Commerzbank AG [2006] EWCA Civ 1536, [2007] IRLR 132 was cited as authority for the proposition that the claim was for pay and not securities.

74. Any exclusion clause contained in share schemes or contract of employment will not operate so as to limit any claim contained in a contract of employment will be void: Section 203 of the Employment Rights Act 1996 and equivalent provisions.

Can the decision be challenged by way of a claim brough in the employment tribunal?

What claims in the Employment Tribunal can displace the employer's reason for termination?

75. A claim for unfair dismissal is a statutory claim brought under Section 94 of the Employment Rights Act 1996.

76. An employee must have more than 2 years' service when in order to claim unfair dismissal.

77. In an action for unfair dismissal, the Employment Tribunal will make a finding as to the reason for the dismissal. It is obliged to do so. Such a finding may be contrary to the reason for dismissal on which the employer has relied to deprive entitlement under a share option scheme.

78. For the purposes of unfair dismissal law:

(a) the reason for the dismissal is the 'set of facts known to the employer, … or of beliefs held by him, which [caused] him to dismiss the employee': per Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323, CA;

(b) the employer may be mistaken in his view of the facts or his belief, but in conduct and capability cases the employer's subjective belief is sufficient to establish a prima facie fair reason for dismissal: Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251;

(c) however, in redundancy cases the employer must show that the grounds in fact exist; subjective belief is not sufficient: redundancy (Elliott v University Computing Co (Great Britain) Ltd [1977] ICR 147, EAT);

(d) if there is more than one reason, the employer must show the principal reason; in cases of mixed motives (e.g. misconduct and malice) the employer must still show it ASLEF v Brady [2006] IRLR 576;

(e) the reason must be that of 'the employer'; in the case of a corporate employer that will usually mean the reason motivating the dismissing manager but if that manager (acting in good faith) is in fact manipulated by another manager who acts for another reason (which may well be unfair) that second manager's reason can be attributed to 'the employer', at least if that manager is higher in the organisation's hierarchy than the claimant: Royal Mail Group Ltd v Jhuti [2019] UKSC 55, [2020] IRLR 129, [2020] ICR 731 (a whistleblowing dismissal case, but the principle is applicable across unfair dismissal law). In Uddin v London Borough of Ealing [2020] IRLR 332, EAT, Jhuti was extended to allow an ET to take into account that second manager's knowledge of facts, not just his or her motivation.

79. However, the right not to be unfairly dismissed is essentially a procedural right and in fact only a minority of decisions will un-lodge the reason the employer gave at the time. However, there are decisions in which an employment tribunal finds that the reason given for dismissal by the employer is not the real one. Where an employee succeeds in obtaining such a finding, it may give him grounds for arguing that his ex-employer's characterisation of his departure under the good/bad leaver clause is unsustainable and in breach of contract.

80. The dismissal giving rise to the withdrawal of the share option is a decision which can be challenged under the Equality Act 2010 under multiple grounds. If the dismissal were found to be discriminatory the loss of the share option would form part of the loss. It would also provide grounds to argue that the employer's categorisation of the reason for dismissal under the contract was wrong.

81. The dismissal could be found to be for an automatically proscribed reason; for example, for whistleblowing. If the dismissal were found to be for a proscribed reason the loss of the share option would form part of the loss. It would also provide grounds

to argue that the employer's categorisation of the reason for dismissal under the contract was wrong.

What claims in the Employment Tribunal can challenge the employer's exercise of discretion?

82. An employee can actually bring a claim for breach of contract in the employment tribunal if the employment has ended and the claim is limited to the cap of £25,000.

83. The decision whether to grant or not or the exercise of the discretion under the scheme are things which can separately be challenged as acts of discrimination: see Hosso v European Credit Management Limited [2012] ICR 547, in which the complaint was that the employer's exercise of discretion was more generous to a male comparator than it was to the female claimant.

84. Failure to make adjustments in the way an employer communicated about a share option scheme to employees was the basis for liability in Chawla v Hewlett Packard Limited [2015] IRLR 356, EAT.

What is the effect of a finding of constructive (unfair or wrongful dismissal)

85. A finding of constructive dismissal turns a resignation into a dismissal. Although it does not quite fit the statutory provisions well, in theory the Employment Tribunal should determine whether there was a fair reason for the dismissal. Almost invariably there will not be. The effect of a finding of constructive dismissal will normally therefore preclude dismissal on the grounds of conduct, capability of redundancy. It would also provide grounds to argue that the employer's categorisation of the reason for dismissal under the contract was wrong. Where the exercise of the option is dependent on there being a dismissal as opposed to a resignation, it would also provide grounds to argue that the employer's categorisation of the reason for dismissal under the contract was wrong.

how the loss arising from the failure to grant the right to exercise the share option be claimed? Are there any restrictions or limits?

86. An unfairly dismissed employee is entitled to recover future and consequential financial losses if he is found to be unfairly dismissed.

87. This includes any anticipated increases or bonuses or benefits from share option schemes even if the employee was not contractually entitled to them: York Trailer Co Ltd v Sparkes [1973] IRLR 348, [1973] ICR 518).

88. An award may be made for the loss of the chance of being granted a stock option where there is evidence that this would have occurred but for the dismissal: O'Laoire v Jackel International Ltd [1991] IRLR 170, EAT. The tribunal should seek to evaluate the loss to the employee taking into account likely fluctuations in value. The EAT held that the tribunal was 'not limited to giving compensation for loss of the plaintiff's contractual rights to the stock options which is the question that falls to be considered when assessing damages at common law.' In O'Laoire, the employee lost the chance of the stock options vesting in him which would have accrued upon his attaining the role of managing director but for which he had no contractual entitlement.

89. The compensatory award in unfair dismissal is subject to a cap. The lower of 52 weeks' pay and £93,878.

What effect does a provision that prevents the exercise of the share option where the employee is in breach of post termination covenants have?

90. A clause that deprives a former employee of a benefit to which he would otherwise have been entitled (such as pension, commission) if he carries on a trade or profession in competition is restrictive covenant: Marshall v NM Financial Management Limited [1997] ICR 1065 at 1071E, per Millet LJ; Wyatt v Kreglinger and Fernau [1933] 1 KB 793: Sadler v Imperial Life Assurance Co of Canada limited [1988] IRLR 388.

91. As a covenant in restraint of trade it will only be enforceable to the extent it protects a legitimate business interest and that it goes no wider than is necessary to protect that interest. The law of the enforceability of such covenants is a whole area in itself; however, it is difficult to see how the conventional categories of legitimate interest – customer connection, trade secrets or confidentiality – could conceivably be protected through the deprivation of deferred remuneration. There is however no English authority on the point. The case of Plumbly v Beatthatquote.com Ltd [2009] EWHC 321, QB does not concern directly an express post termination covenant. The issue in

that case was whether the employee was entitled to exercise his share option due to his repudiatory breach of contract: see paragraph 5. All the breaches alleged are pre-termination breaches,

92. It is well established that where an employer has committed a repudiatory breach, the employee is released from any post termination covenant: General Bill Posting Co v Atkinson [1909] AC 118, HL.

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APPENDIX

Cases

Micklefield v SAC Technology Ltd [1990] IRLR 218, High Court, CH

This is claim for breach of the agreement to grant share options. The argument of the employee was that the employers' wrongful dismissal of him rendered the employer's characterisation of his departure for the purpose of the Share option agreement incorrect. The finding was that the rule that a party cannot rely upon his own wrongdoing to avoid its obligations did not render the non-grant of a share option unlawful where express provision in the contract overrode this rule.

Levett v Biotrace International plc [1999] ICR 818, Court of Appeal

The claim and the issue were the same as in Micklefield. The result was the opposite. A clause preventing the employee from exercising his right to the option in the event of a wrongful dismissal by the employer had to be read so as to imply the word lawful termination on the basis that a party cannot rely upon his own wrongdoing to avoid its obligations.

Mallone v BPB Industries Ltd [2002] IRLR 452, Court of Appeal

The claim was for breach of the agreement to grant share options. The employer exercised its discretion as to what proportion should be paid post termination in a manner that was irrational which constituted a breach of contract.

Reda v Flag Ltd [2002] IRLR 747, Privy Council

An employer was permitted to terminate a contract of employment without notice to avoid an employee accruing rights to a share option scheme where the contract provided he could terminate without cause and without notice.

Tesco Stores Limited v Pook [2004] IRLR 618, High Court

It was an implied term of the scheme that the share option would not be exercisable so long as the employee was in such breach of contract as would entitle the employer to terminate the contract of employment.

Plumbly v Beatthatquote.com Ltd [2009] EWHC 321, High Court, QBD

The employer sought to avoid the exercise of a share option on the basis of the employee's pre-termination alleged repudiatory conduct. The judge found there to be no repudiatory breach of contract.