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8 November 2016

The Associate
His Honour Justice Iain Ross
President
The Fair Work Commission

Dear Associate

4 yearly review of modern awards – common issue- timing of wages – AM2016/8

1. On 21 October 2016, the President indicated that participants could file additional material in relation to matters that arose during the hearing. This response is late and we apologise for this.

2. United Voice did indicate that it would provide some additional material in response to a request for some '*authority*' in support of our submission that there is an established common law position that monies owed to an employee by an employer must be paid when the employment relationship ends.

3. This correspondence is our response.

4. We have had some difficulty finding any useful Australian authorities but have found some useful statements of principle from English text books and judgments.

5. The payment of wages is a contractual obligation of the employer generally in exchange for the performance of work by the employee. The parties can come to their own arrangements as to timing of the payment of wages and termination entitlements and even if wages are paid at all.[1] If the parties agree, at the end of the contract, whatever is owed can be paid in accordance with the agreement made.

6. English law had longstanding legislation dealing with the payment of wages starting with the Truck Acts in 1831.[2] The Truck Acts required payment in '*current coin of the realm*' and these Acts were principally designed to prevent employees being paid by way of tokens that had to be spent in the employer's shop and one of the ways that this problem was dealt with was by requiring immediate payment after the performance of the work. The Truck Acts dealt with manual labourers and some retail workers

7. The United Kingdom's *Wages Act* 1986 which repealed the last of the Truck Acts at section 4 dealt with '*final instalment of wages*' which would encompass what are called termination entitlements in Australia. The Wages Act required that the final instalment of wages '*is paid before or after the termination of the worker's contract.*'

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[1] *Smith & Wood's Employment Law*, Oxford, 12th edition, 2015, p. 201.
[2] As above, p. 226.

8. The *Employment Rights Act* 1996 which replaced the Wages Act also dealt with *'final instalments of wages'* (section 22) and also used the phrase *'in each case whether the amount in question is paid before or after the termination of the workers contract'.*

9. Both the United Kingdom's Wages Act and the Employment Rights Act did not rigidly demand that a final instalment of wages must be paid at any particular time but *'before or after the termination'* of the contract of employment. Both Acts provided for enforcement mechanisms for the non-payment of termination entitlements. The Acts characterised these as unlawful *'deductions'* and the time limit to recovering these *'deductions'* was generally 3 months from the *'occasion'* which when the final instalments of wages was payable which was the termination of the workers contract. The cause of action accrued at termination.

10. During argument before the House of Lords in *Delaney v Staples* [1992] ICR 483 at 485 it was observed:

> *The occasion for payment is the moment of breach or the moment when the employee accepts the employer's repudiation as terminating the employment. This analysis is consistent with the common law position that damages are payable immediately on breach and the innocent party need not wait until the date due for performance:* Hochster v de law Tour *(1853) 2 E. & B 678. The 'total amount .... properly payable' on that occasion is the amount of damages which would then have been payable , having regard to the variables such as mitigation.*

11. *Delany v Staples* concerned principally whether a payment in *lieu* was *'wages'* under the then Wages Act for the purpose of enlivening the jurisdiction of an industrial tribunal. There are extensive judgments by the English Court of Appeal and the House of Lords.

12. In the Court of Appeal, Lord Nichols provided some justification as to why payments in *lieu* are payable before the end of employment:

> *The classic example is where an employee is contractually entitled to a particular period of notice which he* (sic) *says he was entitled to be given. But the employer without justification terminates the employment summarily, that is forthwith and without any notice .... The proper analysis of the employee's claim is that the claim is for damages for breach of contract of employment. It is not a claim for payment in accordance with the terms of the contract.*[3]

13. We attach copies of the judgments of the Court of Appeal and House of Lords noted above.

14. We reiterate our position put at the hearing on 21 October 2016. It would be problematic to give employers specific timeframes within which to delay the payment of termination entitlements after termination. The apparent accepted practise is that termination entitlements are paid at the time of termination or (reasonably) after.

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[3] *Delaney v Staples* CA [1991] ICR 331, at 342.

There will be occasions when the money is paid a few days late and in this respect the English formulation of the time being '*before or after the termination*' provides a sensible and practical statement of an employer's obligation to pay promptly. Employees are very reasonable people and there is no evidence that the courts are being inundated by civil penalty proceedings alleging an employer has for some reason paid termination entitlements outside the strict letter of an award provision.

15. An unsubstantiated inconvenience alleged by the employer parties occasioned by having to make out of cycle payments is not a reason to alter the *status quo*.

16. Further, the requirement of paragraph 117(2)(b) of the *Fair Work Act* 2009 provides for a further difficulty for any award term that departs from what could be characterised as demanding the prompt payment of all termination entitlements.

Yours faithfully,

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I.C.R.

A [COURT OF APPEAL]

DELANEY v. STAPLES (trading as DE MONTFORT RECRUITMENT)

1990 Dec. 11; 20

Lord Donaldson of Lymington M.R., Ralph Gibson and Nicholls L.JJ.

B

Employment—Wages—Deductions—Payment in lieu of notice not paid to employee—Employee owed commission and holiday pay—Whether pay in lieu of notice "wages"—Whether non-payment of commission and holiday pay "deduction"—Whether industrial tribunal having jurisdiction to hear complaint—Wages Act 1986 (c. 48), ss. 1(1), 7, 8(3)

C *Law Reform—Whether necessary—Industrial tribunal—No power to entertain claim for damages for wrongful dismissal—Need for minister to make appropriate order—Employment Protection (Consolidation) Act 1978 (c. 44), s. 131*

The employee was dismissed and given a cheque, expressed to be payment in lieu of notice, which was subsequently stopped by the employers on the ground that they were entitled to dismiss her

D summarily. It was, however, conceded that at the date of her dismissal she was owed commission and holiday pay. On her complaint to an industrial tribunal under section 5 of the Wages Act 1986 that the employers had made unauthorised deductions from her wages contrary to section 1(1) the tribunal held that since payment in lieu of notice was not "wages" as defined by section 7[1] they had no jurisdiction to make an award under the

E Act. They held further that the sums owed by way of holiday pay and commission were unlawful deductions within the meaning of section 8(3) so as to contravene section 1(1) of the Act and made an award in respect of such sums in the employee's favour. The employee appealed and the employers cross-appealed. The appeal tribunal concluded that none of the sums fell within the ambit of the Act and held that neither claim came within the jurisdiction of the industrial tribunal. They accordingly dismissed the employee's

F appeal and allowed the employers' cross-appeal.

On the employee's appeal:—

Held, allowing the appeal in part, (1) that on its true construction section 8(3) widened the ambit of the Act to include in the expression "deduction" non-payment by the employer of amounts properly payable to the employee; and that, accordingly, the employee's claim for commission and

G holiday pay came within the jurisdiction of the industrial tribunal so that their order in respect of the sums representing those items would be restored (post, pp. 339F–H, 341H–342A, 347D–F).

Dicta in *Greg May (Carpet Fitters & Contractors) Ltd. v. Dring* [1990] I.C.R. 188, 193–194, E.A.T. and *Kournavous v. J. R. Masterton & Sons (Demolition) Ltd.* [1990] I.C.R. 387, 394 E.A.T. applied.

Dicta in *Barlow v. Whittle (trading as Micro Management)*

H [1990] I.C.R. 270, 277–278, E.A.T. and *Alsop v. Star Vehicle Contracts Ltd.* [1990] I.C.R. 378, 380–381, E.A.T. not applied.

[1] Wages Act 1986, s. 7: see post, p. 343C–D.
S. 8(3): see post, p. 339D–E.

(2) That since the employee's contract of employment was terminated summarily, thereby depriving her of the notice period to which she was entitled, her claim for payment in lieu of notice was properly to be characterised as being in respect of damages for wrongful dismissal; that since such a claim related solely to a period after the contract was terminated and since "wages" as defined by section 7 expressly excluded items relating to a post-employment period, damages for wrongful dismissal were not "in connection with the employment" so as to come within the statutory definition; and that, accordingly, the industrial tribunal had no jurisdiction to entertain that part of the employee's claim and her remedy lay by way of action in the county court (post, pp. 343A–B, E–G, 346B–C, G, 347E–F).

Dicta in *Foster Wheeler (London) Ltd. v. Jackson* [1990] I.C.R. 757, 767, E.A.T. applied.

Dicta in *Kournavous v. J. R. Masterton & Sons (Demolition) Ltd.* [1990] I.C.R. 387, 391–392, E.A.T. and in *Janstorp International (U.K.) Ltd. v. Allen* [1990] I.C.R. 779, 785, E.A.T. not applied.

Per curiam. It is unsatisfactory, even absurd, that the Act enables the industrial tribunal to entertain only part of the employee's claim. It is to be hoped that an order will be speedily made under section 131 of the Employment Protection (Consolidation) Act 1978, thereby saving inconvenience and cost to the complainant and also the waste of resources involved in such duplication of proceedings (post, pp. 346D–F, 348F–349F).

Decision of the Employment Appeal Tribunal [1990] I.C.R. 364 affirmed in part.

The following cases are referred to in the judgments:

Alsop v. Star Vehicle Contracts Ltd. [1990] I.C.R. 378, E.A.T.

Barlow v. Whittle (trading as Micro Management) [1990] I.C.R. 270, E.A.T.

Evenden v. Guildford City Association Football Club Ltd. [1974] I.C.R. 554, N.I.R.C.

Foster Wheeler (London) Ltd. v. Jackson [1990] I.C.R. 757, E.A.T.

Gothard v. Mirror Group Newspapers Ltd. [1988] I.C.R. 729, C.A.

Greg May (Carpet Fitters & Contractors) Ltd. v. Dring [1990] I.C.R. 188, E.A.T.

Janstorp International (U.K.) Ltd. v. Allen [1990] I.C.R. 779, E.A.T.

Kournavous v. J. R. Masterton & Sons (Demolition) Ltd. [1990] I.C.R. 387, E.A.T.

O'Laoire v. Jackel International Ltd. [1990] I.C.R. 197, C.A.

Secretary of State for Employment v. Globe Elastic Thread Co. Ltd. [1979] I.C.R. 706; [1980] A.C. 506; [1979] 3 W.L.R. 143; [1979] 2 All E.R. 1077, H.L.(E.)

Treganowan v. Robert Knee & Co. Ltd. [1975] I.C.R. 405

Wood v. Leeds Area Health Authority (Training) [1974] I.C.R. 535, N.I.R.C.

The following additional cases were cited in argument:

Addison v. Babcock F.A.T.A. Ltd. [1987] I.C.R. 805; [1988] Q.B. 280; [1987] 3 W.L.R. 122; [1987] 2 All E.R. 784, C.A.

Moschi v. Lep Air Services Ltd. [1973] A.C. 331; [1972] 2 W.L.R. 1175; [1972] 2 All E.R. 393, H.L.(E.)

Munir v. Jang Publications Ltd. [1989] I.C.R. 1, C.A.

Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827; [1980] 2 W.L.R. 283; [1980] 1 All E.R. 556, H.L.(E.)

A *Rickard v. P. B. Glass Supplies Ltd.* [1990] I.C.R. 150, C.A.
Ward (R.V.) Ltd. v. Bignall [1967] 1 Q.B. 534; [1967] 2 W.L.R. 1050; [1967] 2 All E.R. 449, C.A.

The following additional cases, although not cited, were referred to in the skeleton argument:

B *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591; [1975] 2 W.L.R. 513; [1975] 1 All E.R. 810, H.L.(E.)
Bristow v. City Petroleum Ltd. [1988] I.C.R. 165; [1987] 1 W.L.R. 529; [1987] 2 All E.R. 45, H.L.(E.)
Chawner v. Cummings (1846) 8 Q.B. 311
Edwards v. Clinch [1982] A.C. 845; [1981] 3 W.L.R. 707; [1981] 3 All E.R. 543, H.L.(E.)
Hewlett v. Allen & Sons [1894] A.C. 383, H.L.(E.)
C *Leary v. National Union of Vehicle Builders* [1971] Ch. 34; [1970] 3 W.L.R. 434; [1970] 2 All E.R. 713
Miles v. Wakefield Metropolitan District Council [1987] I.C.R. 368; [1987] A.C. 539; [1987] 2 W.L.R. 795; [1987] 1 All E.R. 1089, H.L.(E.)
Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)
Rigby v. Ferodo Ltd. [1988] I.C.R. 29, H.L.(E.)
D *Sagar v. H. Ridehalgh & Son Ltd.* [1931] 1 Ch. 310, C.A.

APPEAL from the Employment Appeal Tribunal.

The employee, Mary Delaney, complained by originating application to an industrial tribunal sitting at Leicester that the employer, R. J. Staples (trading as De Montford Recruitment), had made unlawful E deductions from her wages within the meaning of section 1 of the Wages Act 1986. By their decision, sent to the parties on 7 March 1989, the tribunal made an order requiring the employers to pay £55·50 by way of unpaid commission and holiday pay but held that they had no jurisdiction to make an award for non-payment of moneys in lieu of notice. On 23 March 1989 the employee appealed on the ground that the tribunal had erred in law in holding that pay in lieu of notice did not come within the F definition of wages in section 7 of the Act. The employer cross-appealed on the ground that the non-payment of holiday pay and commission were not "deductions" within the meaning of the Act so that the industrial tribunal had no jurisdiction to hear the claim. By a decision dated 5 February 1990 the appeal tribunal dismissed the employee's appeal and allowed the employer's cross-appeal.

G By a notice of appeal dated 1 March 1990 the employee appealed on the grounds, inter alia, that (1) the appeal tribunal erred in law in holding that where an employee was dismissed without notice, moneys paid or payable by the employer to the employee in lieu of notice were not wages for the purposes of Part I of the Wages Act 1986; (2) the appeal tribunal erred in failing to hold that by section 8(3) of the Act of 1986 the employee's holiday pay and commission were to be treated as, or were in H any event, deductions from the employee's wages for the purposes of Part I of the Act; (3) in the alternative, the appeal tribunal erred in failing to remit to the tribunal the question whether the holiday pay and commission were deductions from the employee's wages.

The facts are stated in the judgment of Nicholls L.J.

Robin Allen and *Martin Westgate* for the employee. The former legislation, the Truck Acts 1831–1940 and the Payment of Wages Act 1960, which were repealed and replaced by the Wages Act 1986, had regulated the payment of and deduction from wages in an unsystematic way involving fine distinctions. It was not clear what was or was not prohibited. The consultative documents issued by the Department of Employment prior to the Act of 1986 as travaux preparatoires indicate its broad legislative purpose. There was a clearly recognised problem as to what deductions were or were not permissible under the old law and a commitment to eliminate the difficult distinction between one kind of deduction and another. Parliament's purpose behind the legislation was to indicate and delimit the criteria by which the lawfulness of deductions from wages could be ascertained without the pitfalls of the earlier legislation. The new Act did so by describing what is a deduction in only the most general way. Anything taken from the "wages" (see section 7 of the Act) is a deduction.

The burden on the employer is not now so greatly increased because there are no limits on the kind of deduction that can be made, providing that the employee consents. The only protection imposed by the Act is that the making of the deduction is subject to such consent (see section 1(1)), and the special case of retail employment to which section 2 applies. The new Act, by avoiding any express definition of what is and is not a deduction, does not deal with the difficulties bedevilling the old law in distinguishing between the process of calculation of wages and deduction from wages once calculated, and should be construed on the basis that it did not intend the old problems to recur. Section 8(3) requires that any deficiency in the wages properly payable to the employee shall be treated as a deduction. Although wages are defined (see section 7) the Act is strangely silent on what is properly payable. That, however, is to be ascertained by consideration of the legislative purpose and by reference to the Act as a whole.

Where the contract of employment provides for the calculation of the wages the correct application of the contract will supply the answer. Even where the contract does not expressly so provide wages will not be payable unless the employee is ready and willing to work. By the use of "any" in section 7, "every" sum payable is within its ambit even if it might be reduced by a set-off or abatement. A right to abatement or set-off will not affect the calculation of what is payable to the employee because (a) that would remove from the Act at least some if not all of the matters that it was intended to comprehend, and (b) it would render section 1(5)(*a*),(*e*)–(*f*) otiose. Any deduction therefore for which there is a right of set-off must be made in accordance with section 1 or 2 unless it is specifically excepted from those provisions by section 1(5).

The employee is entitled to damages for loss of wages during the period of one week's notice to which she was entitled (see section 49 of the Employment Protection (Consolidation) Act 1978) and the non-payment of all or any such damages amounts to an unlawful deduction under the Act of 1986. It follows that the industrial tribunal has jurisdiction to receive and determine her complaint under section 5 of the Act and to order

A payment of the appropriate sum accordingly. The issue raised is therefore whether damages for wrongful dismissal come within the statutory definition of wages in section 7 of the Act as "sums . . . payable to the worker by his employer in connection with his employment," and if so, whether they are specifically excluded from the Act. The approach of the appeal tribunal in *Kournavous v. J.B. Masterton (Demolition) Ltd.* [1990] I.C.R. 387, and *Janstorp International (U.K.) Ltd. v. Allen* [1990] I.C.R. 779 and of the B Court of Appeal in *R.V. Ward Ltd. v. Bignall* [1967] 1 Q.B. 534, 548, *per* Diplock L.J. is adopted. Accordingly damages as here claimed are within section 7 and, in consequence the complaint is within the jurisdiction of the industrial tribunal.

The effect of the definitions of "worker," "employer" and "employment" in section 8(1) and (2) of the Act of 1986 is that "wages" will bear an C interpretation of sums payable to the erstwhile worker by his erstwhile employer in connection with the former employment. The general words of the preamble are wide and nothing in section 7 indicates that they should be given a restricted meaning. On a natural reading a payment in lieu of notice of the kind claimed here is "in connection with the employment," that is, is linked with or is associated with the employment. Further, the right to damages for summary dismissal of a contract of D employment is a right which is more than merely linked to the contract, it is an obligation under the contract: see *Chitty on Contracts*, 26th ed. (1989), vol. 1, pp. 1067–1068, para. 1701; *Moschi v. Lep Air Services Ltd.* [1973] A.C. 331, 350; and *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827, 849.

Section 4 supports that construction. Following sections 2 and 3 which, E in the case of retail workers, impose a ceiling on deductions of the amounts payable on any payday, except in the case of the final instalment of wages it provides by section 4(1)(*b*) that payment in lieu of notice is expressly included in the definition of such final instalment. Were such a payment in lieu not to be "wages" subsection (1)(*b*) would be otiose: see *Janstorp International (U.K.) Ltd. v. Allen* [1990] I.C.R. 779. Although section 4 deals with the special case of retail workers, it incorporates the F same definition of wages under section 7, and can therefore be used as an aid to construction generally. Cf. *Kournavous v. J.R. Masterton (Demolition) Ltd.* [1990] I.C.R. 387.

Where an employer is contractually entitled to make a payment in lieu, or where notice is given but the employee is not required to work (the garden leave situation) the amounts paid for the notice period are wages. G There are no policy reasons why the Act should require a distinction to be drawn between those situations and the present. Policy points to the contrary. It would be paradoxical if the employer could avoid the protection granted to a worker by the Act by breaking the contract and dismissing him without notice.

There is no justification in section 7 for the appeal tribunal's analysis that all types of wages specified in section 7(1)(*a*) can be characterised as H being "payment by an employer to a worker in consideration of services which he has provided." The types of wages specified in section 7(1)(*a*) may be payable otherwise than under contract, and in any event regard should also be had to section 1(*b*)–(*f*) where the payments are not or may

not be made in consideration of the services provided: see also section 69 of the Act of 1978. The appeal tribunal's reasoning and conclusion are wrong, as is the similar decision in *Foster Wheeler (London) Ltd. v. Jackson* [1990] I.C.R. 757.

The appeal tribunal also wrongly concluded that pay in lieu of notice is not a fixed sum. In law it is an ascertainable sum except for the variables of the duty to mitigate, and the right to dismiss summarily for gross misconduct: see *Greg May (Carpet Fitters & Contractors) Ltd. v. Dring* [1990] I.C.R. 188 and *Addison v. Babcock F.A.T.A. Ltd.* [1987] I.C.R. 805.

The industrial tribunal rightly held, by implication that the payment in lieu of notice was within section 7, but they were wrong to conclude that the sum was excluded as being "compensation for loss of office" within section 7(2)(*c*). On any view the employee did not hold an "office."

Non-payment of the holiday pay and commission is to be treated as coming within the definition of "deductions" in section 8(3), and so as contrary to section 1(1). The industrial tribunal were right to entertain that part of the claim and to make their award. A sum due under the contract which falls within the definition of wages will be "properly payable . . . on that occasion" and where the total amount of wages paid will be less than that properly payable on that occasion, it will be a deduction under section 8(3). The industrial tribunal will have to determine what is "properly payable" and so to construe the contract, but that is not an activity which it is in any way inappropriate for them to do. The appeal tribunal relying on *Barlow v. Whittle (trading as Micro Management)* [1990] I.C.R. 270 considered that if Parliament had intended to give jurisdiction to industrial tribunals over breaches of contract it would have done so expressly, and that accordingly the Act of 1986 should not be so construed. That, in their view, avoids the need for the tribunals on the plain words of sections 7(1) and 8(3) to construe the contract to determine what is payable. But that approach and their conclusion that there is no issue relating to deductions when the employer asserts that he has already paid the sum claimed, or that it is not due under the contract, are not warranted by the Act, and would produce a most unsatisfactory test for the industrial tribunal's jurisdiction depending on how the respondent, rather than the applicant, put his case.

In reality the tribunal will have to apply the Act to their findings of fact and then decide whether there has been a non-payment which is a deduction within the meaning of the Act, or a "failure to pay" which supposedly is not. The tribunal would therefore discover their own jurisdiction only as the end of the case so that the worker's only safe course would be to consider proceedings in both courts. [Reference was made to *Munir v. Jang Publications Ltd.* [1989] I.C.R. 1.]

The reasoning of the appeal tribunal and the analysis of the Act on which it is based both here and in Barlow's case therefore leads to an unsatisfactory result and cannot be sustained. Their conclusions rest on a dichotomy which finds no basis in the Act. The jurisdiction of the industrial tribunal is not lightly to be excluded (see section 6(3)) but the proposition underlying the appeal tribunal's approach is that it is for industrial tribunals to deal with deductions and for the county court to deal with failures to

A pay. A proper analysis of the Act cannot support such an approach. [Reference was made to *Rickard v. P. B. Glass Supplies Ltd.* [1990] I.C.R. 150.]

The appeal tribunal are wrong in their reference to section 131 of the Act of 1978 suggesting that Parliament could more clearly have reached the desired result by implementing that section because (1) the Act of 1978 applies to employees who are more narrowly defined than workers to B whom the Act of 1986 applies (Cf. section 153 of the former with section 8 of the latter) and (2) in any event the use of section 131 is restricted to a more limited class of circumstances than the Act of 1986.

The employer did not appear and was not represented.

Cur. adv. vult.

C

20 December. The following judgments were handed down.

NICHOLLS L.J. This appeal raises two points on the correct interpretation of the Wages Act 1986. In 1988 Miss Mary Delaney was employed as a recruitment consultant by a recruitment agency in Leicester D known as De Montfort Recruitment. This was the trading style of Mr. Robert Staples. She was employed from 11 February 1988 until she was summarily dismissed seven months later, on 9 September. At that time she was owed £18 in respect of unpaid commission and £37·50 holiday pay. She was not paid these sums. She was handed a cheque for £82, and told that this was in lieu of notice. Subsequently Mr. Staples stopped payment of the cheque. He asserted that Miss Delaney had taken away confidential E information, and that he would have been entitled to dismiss her summarily. Miss Delaney then made an application to an industrial tribunal in respect of non-payment of these sums: £55·50 for commission and holiday pay, and £82 for pay in lieu of notice. She claimed that in withholding these sums Mr. Staples had acted in contravention of the Wages Act 1986.

These simple facts, involving small sums of money, give rise to two F points of law of general application. Both points have been the subject of conflicting decisions of the Employment Appeal Tribunal. In the present case, on 15 February 1989 the industrial tribunal at Leicester ordered Mr. Staples to pay Miss Delaney the sum of £55·50, but decided that it had no jurisdiction to entertain her complaint regarding the sum of £82. On appeal, on 5 February 1990 the appeal tribunal presided over by the President, Wood J., held that the industrial tribunal had no jurisdiction to G entertain either claim. Both of the matters of which Miss Delaney complained fell outside the ambit of the Act. Accordingly, her complaint was dismissed. Miss Delaney has now appealed from that decision.

Is mere non-payment a deduction?

The most convenient way of setting out the first question which arises is H to refer at once to section 1(1) of the Act:

> "(1) An employer shall not make any deduction from any wages of any worker employed by him unless the deduction satisfies one of the following conditions, namely—(*a*) it is required or authorised to be

made by virtue of any statutory provision or any relevant provision of the worker's contract; or (*b*) the worker has previously signified in writing his agreement or consent to the making of it."

This subsection prohibits the making of an unauthorised deduction from wages. It envisages that an employee is owed wages, and that from those wages an employer has made and retained a "deduction." By way of contrast, it can be said, is a case where an employer simply refuses or fails to pay an employee's wages. Such a case is not one in which an employer has made a *deduction* from an employee's wages: it is a case of *non-payment*. In *Alsop v. Star Vehicle Contracts Ltd.* [1990] I.C.R. 378, 380–381, the appeal tribunal considered this point:

"The Act is designed to give jurisdiction to industrial tribunals to decide whether deductions made are legal. It is not designed to give jurisdiction to a tribunal to decide cases based in contract which heretofore had been the subject of claims within the county court jurisdiction. It is an Act which is designed to deal with 'deductions,' not with 'non-payments.' How then is a tribunal to approach a case where the employee appears and claims that he has not been paid 'wages' as defined in section 7? The initial question must be to decide why the payment has not been made. Evidence of this may come orally from the parties or from the written documents. The employer's case may be: 'Under the contract I don't owe,' or 'I don't owe the amount claimed,' or 'I owe £X but I claim that he (the employee) owes me £Y,' or 'I won't pay for any or no other reason.' Clearly there can be an infinite variation of fact. If the answer is the first, second or the last of those possibilities, then it is almost certainly a case of non-payment and the industrial tribunal have no jurisdiction; nor would they have jurisdiction if it is simply a contractual issue of whether any sum is due. It is only if there is proved to be (a) an amount admitted or found due as 'wages' (section 7) of £X, and (b) an amount which the employer claims is due from the employee of £Y and (c) the employer seeks to recover that amount by deducting it from wages which would otherwise be due, that the tribunal have jurisdiction. The issue is legality of the deduction."

The present case is of the "non-payment" type. Holiday pay and commission are wages as defined in the Act: see section 7(1)(*a*). Under these two heads Miss Delaney, when dismissed, was owed £55·50. She should have been paid this sum. Her employer failed to do so. Thus, it is said, the case is outside the jurisdiction of the industrial tribunal. That was the view of the appeal tribunal.

I turn to the scheme of the Act. Part I of the Act, which came into force on 1 January 1987, replaced the old Truck Acts. Stated very broadly, the object of the Act was to see that workers receive their wages in full at the time they are due. Employers may not make deductions save in specified circumstances. Part I consists of 11 sections, and is headed "Protection of workers in relation to the payment of wages." Section 1 contains two prohibitions. The first is in subsection (1), quoted above. The second is in subsection (2). This is a prohibition against an employer receiving a payment from an employee in terms corresponding to those

A contained in subsection (1) in respect of deductions. It precludes an employer from circumventing subsection (1) by the simple device of paying the wages in full without deduction but then receiving a repayment from the employee. Subsection (5) contains a list of deductions from wages to which the statutory prohibition does not apply. Sections 2 to 4 contain special provisions regarding a particular type of deduction from the wages of a particular class of workers, namely, deductions from the wages of a B worker in retail employment on account of cash shortages or stock deficiencies. Section 5 enables workers to present complaints to an industrial tribunal in respect of contraventions of sections 1 to 3. Section 6(1) provides that the remedy of a worker "in respect of any contravention" of the relevant statutory prohibitions "shall be by way of complaint under section 5 and not otherwise." Section 6(3) precludes "contracting out" of C its provisions. Section 7 contains a definition of wages, to which I shall have to return. Section 8(1) and (2), also contain definitions. A "worker" is defined in wide terms. In short, a worker is an individual who has entered into or works (or worked) under a contract of service, a contract of apprenticeship, or any other contract whereby he undertakes to do or perform personally any work or services. Excepted are cases where the status of the party for whom the work or services are being done or D performed is that of a client or customer of any profession or business undertaking carried on by the individual. Section 8(3) reads:

> "Where the total amount of any wages that are paid on any occasion by an employer to any worker employed by him is less than the total amount of the wages that are properly payable by him to the worker on that occasion (after deductions) then, except in so far as the deficiency E is attributable to an error of computation, the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

I need not refer to the remaining sections in Part I.

As I see it, the answer to the first question raised by this appeal depends on the proper construction of section 8(3). As to that, whatever might be the F position in the absence of section 8(3), I think that the observations in the above extract from the decision in the *Alsop* case cannot, in their entirety, survive the presence of section 8(3). Section 8(3) must have been intended to widen the ambit of the Act, because it is a deeming provision, extending the scope of the expression "deduction:"

> "Where the . . . amount of any wages that are paid . . . is less than the G total amount of the wages . . . properly payable . . . the amount of the deficiency *shall be treated* for the purposes of this Part *as a deduction* . . ."

This subsection provides, in express terms, that wages which are properly payable but not paid are to be treated, to the extent of the non-payment, as within the scope of the expression "deduction." Non-payment of the amount H properly payable is to be treated as a deduction. The only exception is for a deficiency attributable to an error of computation.

The Act is, indeed, concerned with unauthorised deductions. But section 8(3) makes plain that, leaving aside errors of computation, any shortfall in

payment of the amount of wages properly payable is to be treated as a deduction. That being so, a dispute, on whatever ground, as to the amount of wages properly payable cannot have the effect of taking the case outside section 8(3). It is for the industrial tribunal to determine that dispute, as a necessary preliminary to discovering whether there has been an unauthorised deduction. Having determined any dispute about the amount of wages properly payable, the industrial tribunal will then move on to consider and determine whether, and to what extent, the shortfall in payment of that amount was authorised by the statute or was otherwise outside the ambit of the statutory prohibition: for example, by reason of section 1(5). To the extent that the shortfall is found to be a contravention, the industrial tribunal will make an appropriate declaration and orders, in accordance with section 5(4) to (6).

So far as the employer is concerned, the real sting lies in the further consequence which such orders have. Thereafter the employer is precluded from recovering ("by whatever means") the amount comprised in such an order for payment: see section 5(7) and (8). For instance, if an employer has a claim against an employee, and he asserts that claim by making a deduction from the employee's wages in contravention of the Act, he will find himself barred from pursuing that claim in other proceedings after the complaint before the industrial tribunal has reached the stage of the tribunal actually making a payment order. This is the peril confronting an employer if, in contravention of the Act, he makes a deduction in reliance on such a cross-claim.

I turn to the difficulties which are said to attend this construction of section 8(3). I can dispose of one point straightaway. The subsection makes repeated references to an "occasion." The subsection is concerned with a comparison between the amount paid on an occasion with the amount which ought to have been paid on that occasion. I do not think this presents any problem. If on his "pay day," when an employee is due to be paid, a worker receives less wages than he should have done, the deficiency is to be regarded as a deduction for the purposes of the Act. Likewise if he receives nothing. If, come his "pay day," a worker is in law entitled to a particular amount as wages and he receives nothing then, whatever be the reason for non-payment (excepting only errors of computation), that amount is to be treated as a deduction made from his wages on that occasion. Section 8(3) applies, because the total amount paid on the occasion when he ought to have been paid was nil. The section 5(2) time limit for making a complaint will run from the date on which the wages payment ought to have been made.

Not quite so straightforward is the consideration that, on this interpretation of section 8(3), the effect of the subsection is to bring all occasions of non-payment of wages within the Act. The industrial tribunal can entertain any claim by an employee that, in contravention of the Act, his employer failed to pay him at the appropriate time the full amount of the wages, as defined in the Act, which he ought then to have been paid. The criticism here is that one would not expect to find, as the statutory provision having such a far-reaching effect, a deeming provision tucked away innocuously in an interpretative section such as section 8. A deeming provision is a somewhat surprising method by which to enact such an important extension to what otherwise might be thought to be the intended scope of the Act.

A At first sight there is some force in this point. But I have come to the clear conclusion that, taking into account a number of matters, this point does not require or justify giving to section 8(3) a different meaning from the one I have already expressed. First, the meaning stated above accords with the natural reading of the language used. Second, I do not see what other meaning can sensibly be given to section 8(3). Third, I am not convinced that, even leaving section 8(3) altogether aside, section 1(1) does draw a clear B distinction between non-payments and deductions. Drawing this distinction involves defining the word "deduction" in some such terms as those suggested in the *Alsop* case [1990] I.C.R. 378. In that case the tribunal considered that, for there to be a deduction, there must be an amount which the employer claims is due to him from the employee. I do not think that it can be right to attempt to define "deduction" in any such limited way. The statute contains C no definition of this expression, even though it occupies a key place in the scheme of the Act. That omission cannot have been an oversight. Parliament must have intended that the word should not have a carefully circumscribed meaning. If that is so, and "any deduction" in section 1(1) is intended to have an extended rather than a confined area of application, this cuts away much of the ground on which the suggested distinction between deductions and non-payments rests.

D Fourth, I am unable to discern any underlying policy reason why Parliament should have intended to draw such a distinction. Indeed, the distinction would give rise to undesirable practical consequences, rather than the reverse. According to this distinction, an underpaid employee may have resort to an industrial tribunal if the employer is asserting a claim against the employee, but he must go to the county court in cases where the employer is E simply refusing to pay. This hardly seems sensible. Moreover, the application of the distinction to the facts of particular cases would give rise to difficulty and uncertainty and niceties which would be peculiarly undesirable in this field.

Fifth, as already noted, one item in the calculation prescribed by section 8(3) is the "total amount of wages that are properly payable" by the employer to the employee. It is implicit in this that in the event of dispute, this amount F will be determined by the industrial tribunal when a complaint has been made under the Act. This must be so in a case where the employer claims that no wages are properly payable as well as in a case where the employer admits that something is due.

Sixth, it is pertinent to keep in mind that the wider construction of the Act does not have the consequence that employees are obliged to bring all G claims for unpaid wages, as defined in the Act, by way of complaint to an industrial tribunal. Under section 6(1), an industrial tribunal has exclusive jurisdiction to entertain complaints of alleged contraventions of the statute. But an employee is not compelled to assert a contravention of the statute and advance a claim for unpaid wages on that footing. If he so wishes, he may disregard any question of contravention of the statute, and bring a simple claim in contract for unpaid wages in the county court or exceptionally, if H the sum involved is above the county court limits, in the High Court.

For these reasons, on the first question raised by this appeal, I prefer the views expressed on this point by the appeal tribunal in *Greg May (Carpet Fitters & Contractors) Ltd. v. Dring* [1990] I.C.R. 188 and *Kournavous v. J.*

R. Masterton & Sons (Demolition) Ltd. [1990] I.C.R. 387. It follows that I do not agree with the contrary views expressed in *Barlow v. Whittle* [1990] I.C.R. 270 and in the *Alsop* case [1990] I.C.R. 378. In the present case the industrial tribunal was correct in entertaining Miss Delaney's complaint regarding her holiday pay and unpaid commission. I would restore the industrial tribunal's order that Mr. Staples pay her the sum of £55·50.

Pay in lieu of notice

The second question concerns non-payment of the sum of £82. Tbis raises the much vexed issue of whether payments in lieu of notice are within the statutory definition of wages. But before turning to that definition I must mention an important preliminary matter. The phrase "pay in lieu of notice," and similar phrases, are loose expressions used indifferently to cover at least two situations which are, in law, recognisably distinct from each other. On the one hand there is the case where an employee's contract of employment has been terminated, and he is asserting a claim for wrongful dismissal. He was not given the due notice of dismissal to which he was entitled under his contract, taking into account the operation of statutory provisions such as section 49 of the Employment Protection (Consolidation) Act 1978. He is claiming "pay" for the period of notice which he says he was entitled to be given. The classic example of this is where an employee is contractually entitled to a particular period of notice but the employer without justification terminates the employment summarily, that is, forthwith and without any notice. In such cases, and whatever label the employee or his advisers may use, the proper legal analysis of the employee's claim is that the claim is for damages for breach of the contract of employment. It is not a claim for payment in accordance with the terms of that contract, although the claim arises from that contract in that the contract is the source of the employment obligation whose breach gave rise to the damages claim. If the claim is well founded, the employer is liable to pay damages to recompense the employee for the loss sustained by him by reason of the breach of contract. A payment made by an employer in respect of, or on account of, that breach is a payment in respect of, or on account of, that damages claim. This analysis accords with basic principle, and with enunciations of that principle made in cases such as *Gothard v. Mirror Group Newspapers Ltd.* [1988] I.C.R. 729, 733, *per* Lord Donaldson of Lymington M.R. To avoid confusion I shall refer to this type of claim as a claim for damages for wrongful dismissal.

The type of claim which I have described so far is one where, whether rightly or wrongly, the contract of employment has been terminated and the claim is in respect of a post-termination period of time. This is to be contrasted with the different situation where, typically, an employer gives notice of termination to an employee but dispenses with the employee's services for the period of the notice. This is sometimes described as giving "garden leave" to the employee. In such a case, the contract of employment remains in existence until the expiry of the notice given by the employer. All that has happened is that the employer has relieved the employee from the need to carry out the work which, under the contract, is normally the prerequisite to his entitlement to be paid his wages. In such a case a claim by the employee to be paid during the period of notice is truly a claim to be paid his wages under and in accordance with the terms of his contract which, in this case,

A remains in existence during the period of the notice. Thus the sums falling due for payment during the period of the notice in this second type of case are "wages" within the statutory definition.

In the present case Miss Delaney's claim for £82 is a claim for damages for wrongful dismissal. She was dismissed on 9 September 1988. Rightly or wrongly, her contract of employment was terminated on that day. Thus the question which arises is whether, on the proper interpretation of the statute,
B a claim for damages for wrongful dismissal falls within the statutory definition of "wages" applicable for the purposes of the Act. As I turn to that definition I have in mind, for in my view it would be to impose an artificial constraint not to do so, that in normal usage damages for wrongful dismissal would not be regarded as "wages," either by lawyers or, I think, by non-lawyers. Wages are, in essence, payment for work done. Thus the question is whether, given
C that normal usage as background, the extended meaning given to the word "wages" by the statutory definition includes damages for wrongful dismissal. The statutory definition is in section 7. This consists of a short definition, followed by lists of particular items which are included within or excluded from the expression "wages" for the purposes of the Act. The short definition reads: "'wages,' in relation to a worker, means any sums payable to the worker by his employer in connection with his employment . . ." Neither
D this definition, nor the accompanying lists of included and excluded items, make any express provision, either way, regarding damages payable for wrongful dismissal. The draftsman seems to have assumed, somewhat optimistically as events have shown, that the Parliamentary intention, on whether such damages were within or without the statutory definition, was sufficiently clear to need no express provision on the point.

E In my view sums payable by way of damages for wrongful dismissal are not within the statutory definition. I reach this conclusion by the following route. The phrase "in connection with" is of wide import but, even so, I do not think that "any sum payable to the worker by his employer in connection with his employment" is altogether apt, and certainly it is not obviously and clearly apt, to include damages for wrongful dismissal. Damages for wrongful dismissal are payable in connection with the *termination* of a worker's
F employment, rather than in connection with his employment. They are payable because the worker's employment has ceased and is no longer continuing. They are based on the *absence* of employment for the period to which the damages relate. They relate solely to a period after the contract of employment has been terminated, and the employer–employee nexus has been severed and no longer exists. They do not relate to a claim for payment
G for work done, nor are they connected therewith.

This reading of the definition is supported by several indicia in the Act. If and in so far as the definition is ambiguous, these indicia show reasonably clearly which of the two possible interpretations must be correct. First, the answer I have stated on the first question gives section 8(3) a wide meaning and a broad effect. But even when it is given that width of meaning, section 8(3) would be ill-suited to comprehend claims for damages for wrongful
H dismissal. The subsection could perhaps be made to work after a fashion, by regarding the date on which the contract of employment was wrongfully terminated as the "occasion" on which the damages should have been paid if the employer was not to be in contravention of the Act. But that would be

an awkward and contrived construction of the subsection. Furthermore, that would place an unrealistic obligation on employers in many cases. Where the contractual period of notice is short, there will normally be little difficulty in an employer ascertaining, at the time of the dismissal, the amount of the loss the dismissed employee is likely to suffer: for instance, the loss of wages for one week or one month. But in cases where a longer period of notice is involved, it will often be impossible, at the time of the dismissal, to know the amount of the damage likely to be sustained by the employee. In particular, he may be able to get another job within that period—but when? and at what level of salary?

Second, a definition of wages which does not include damages for wrongful dismissal is consistent with the purposes of the Act. I have already mentioned that the basic object of the Act was to see that workers receive their wages in full when they are due. Damages claims seem to me to belong to a different category of employer-employee obligation.

Third, this construction of the definition gains some support from a consideration of the two lists set out in section 7(1) and (2). Subsection (1) contains a list of sums expressly included as wages, and subsection (2) a list of those excluded. I need refer only to the principal items. Section 7(1)(*a*) specifies certain emoluments of employment: fees, bonuses, commission, holiday pay or their emoluments referable to a worker's employment, whether payable under his contract or otherwise. These are matters which arise in the course of and in respect of a worker's employment. Paragraph (*b*) is concerned with sums payable in pursuance of reinstatement or re-engagement orders under section 69 of the Act of 1978. Paragraph (*c*) is concerned with sums payable pursuant to orders under section 77 of the Act of 1978 for the continuation of a contract of employment. Paragraph (*d*) is concerned with guarantee payments and other statutory payments in lieu of wages which, by section 122(4) of the Act of 1978, are treated for certain purposes as arrears of pay. The other side of the boundary line can be seen in the excluded items. In particular, section 7(2)(*c*) is concerned with payments "by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office," and paragraph (*d*) concerns payments referable to the worker's redundancy. These are matters relating to post-employment periods. Paragraph (*b*), it is true, strikes an apparently discordant note, by excluding from wages any payment in respect of expenses incurred by the worker in carrying out his employment, but there may be special reasons for this particular exclusion. Broadly speaking, however, the two lists correspond faithfully to the statutory boundary being drawn at a point which does not include damages for wrongful dismissal on the wages side of the line.

Are there any pointers in the opposite direction? In my view there are not. But I must mention, if only to reject, three suggested candidates. First is an argument based on the presence in section 7(2)(*c*) of "compensation for loss of office" as one of the matters expressly excluded. I do not think the express exclusion of this and other matters in section 7(2) indicates that the definition is to be given a meaning which would be wide enough to embrace these matters had they not been excluded expressly. The argument is that, unless the definition is construed widely, these exclusion paragraphs in section 7(2) would be otiose. That line of reasoning is unpersuasive in the

present case. With some statutory provisions, this reasoning is a useful aid to construction. That is not so here, because the list of excluded items in section 7(2) is balanced by a list of included items in section 7(1). If section 7(2) is to be read as comprehending matters which otherwise would be included in the statutory definition, and hence as supporting a wide construction of the definition, by parity of reasoning section 7(1)(*a*) to (*f*) is to be read as comprehending matters which otherwise would not be within the statutory definition, and hence as supporting a narrow construction of the definition. Thus the two lists are useless as a basis for the "otherwise would be otiose" type of reasoning: they pull in opposite directions, and are mutually cancelling. Their value is confined to such help as can be obtained by seeing if the specified instances, of items on each side of the line, themselves throw light on where the line is intended to be drawn.

Secondly, I must mention the provision in the Act which comes nearest to an express reference to payments by way of damages for wrongful dismissal. It is to be found in section 4(1), which reads:

> "In this section 'final instalment of wages,' in relation to a worker, means—(*a*) the amount of wages payable to the worker which consists of or includes an amount payable by way of contractual remuneration in respect of the last of the periods for which he is employed under his contract prior to its termination for any reason (but excluding any wages referable to any earlier such period), or (*b*) where an amount in lieu of notice is paid to the worker later than the amount referred to in paragraph (*a*), the amount so paid . . ."

The function of this definition is to identify an amount to which the relieving provisions in sections 4(2) and (3) can apply. As already noted, sections 2 and 3 contain special provision for workers in retail employment. In particular, section 2(1) imposes an overriding 10 per cent. limit on the amount an employer may deduct from the wages of a worker in retail employment on account of cash shortages or stock deficiencies. Seetion 4(2) relaxes this prohibition by making it inapplicable to a deduction from the worker's "final instalment of wages." As one might expect, this amount is identified, primarily, as the wages payable to the worker in respect of the last of the contractual periods for which he was employed: paragraph (*a*). However, that last instalment of wages is excluded from this relieving provision if an amount in lieu of notice is paid to the worker later than item (*a*). In that event, item (*a*) drops out of the definition of the "final instalment of wages." It drops out, because paragraph (*b*) is an alternative to paragraph (*a*), and when paragraph (*b*) applies paragraph (*a*) does not. Where all this leads is simply that, as a matter of drafting, the intended result, as I have sought to explain it, could not be achieved without expressly referring to item (b) in the definition of "final instalment of wages." The inclusion of item (b) in the definition was necessary for this reason. Thus its inclusion in the definition is no indication that the draftsman believed that an amount paid in lieu of notice was within the statutory prohibition on deductions from wages.

Nor do the definitions of "employer" and "worker" in section 8(1) assist. Employer means the person by whom the worker is employed or,

where the employment has ceased, was employed, and worker means an individual who has entered into or works under a contract of service or apprenticeship or other relevant contract or, where the employment has ceased, worked under such a contract. In my view the purpose of the references in these definitions to the position where employment has ceased is to adapt the language of those definitions to cases where the worker's employment has ended. This is necessary, for example, to enable a worker to present post-termination a complaint in respect of a pre-termination deduction. These definitions do not operate to give an extended meaning to the word "wages."

In the result, therefore, I am satisfied that damages for wrongful dismissal are not within the statutory definition of wages. I agree with the view expressed on this point by the appeal tribunal in the present case, which accords with similar views expressed in *Foster Wheeler (London) Ltd. v. Jackson* [1990] I.C.R. 757. I am unable to accept the contrary view of the appeal tribunal in the *Kournavous* case [1990] I.C.R. 387 and in *Janstorp International (U.K.) Ltd. v. Allen* [1990] I.C.R. 779.

I am mindful that, in one respect, this conclusion is unsatisfactory. I see no reason for thinking that the exclusion of claims for damages for wrongful dismissal from the Act is unsatisfactory. What *is* unsatisfactory, even absurd, is that the Act enables Miss Delaney to present a claim to the industrial tribunal in respect of her holiday pay and commission, but the industrial tribunal has no jurisdiction to entertain her closely-related claim of £82 for damages for wrongful dismissal. She must bring separate proceedings in the county court for this minor sum. Remedying this situation does not require primary legislation. Section 131 of the Act of 1978 enables the minister by order to make provision for industrial tribunals to determine claims relating, amongst other matters, to claims for damages for breach of a contract of employment which arise either on the termination of the employee's employment or in circumstances which also gave rise to proceedings already or simultaneously brought before an industrial tribunal. It is to be hoped that this power will be exercised speedily, thereby saving inconvenience and cost to persons such as Miss Delaney and also the waste of resources involved in such duplication of proceedings. I would allow the appeal as regards the claim for holiday pay and commission but dismiss it as regards the claim for damages in the sum of £82.

Ralph Gibson L.J. I agree that for the reasons given by Nicholls L.J. the appeal in respect of the claim to damages in the sum of £82 should be dismissed.

As to the claim for holiday pay and commission in the total amount of £55·50 I have found the construction of the relevant provisions of the Act to be regrettably obscure and difficult. My first impression was that the decision of the appeal tribunal on 5 February 1990 on this point was correct for the reasons given by Wood J. Section 8(3) is, indeed, a deeming provision but the "amount of the deficiency" is required to be treated for the purposes of Part I of the Act as a deduction made by the employer from the worker's wages on that occasion if the condition stated is satisfied, that is:

A "Where the total amount of any wages that are paid on any occasion by an employer to any worker employed by him is less than the total amount of the wages that are properly payable by him . . ."

That seemed to me to require proof of an actual occasion when wages were paid. The words did not seem to me to be apt to include reference to nothing being paid at all with the necessary "occasion" being identified B by finding a day on which, if the worker's case is right, wages ought to have been paid. Further, support for the view that the deeming provision is attached to an occasion of actual payment seemed to me to be suggested by the provisions of section 5(2) by which an industrial tribunal

"shall not entertain a complaint under this section unless it is presented within the period of three months beginning with—(*a*) in C the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made . . ."

It was not clear to me that "the date of payment of the wages from which the deduction was made" could be treated as including a date on which no payment was made.

D Nicholls L.J. has, however, in his judgment explained a construction of section 8(3) which avoids the undesirable practical consequences described by Nicholls L.J. which would result from accepting the construction applied by the appeal tribunal. After some hesitation I have reached the conclusion that the construction adopted by Nicholls L.J. is to be preferred and that, therefore, the appeal with reference to holiday pay E and commission should be allowed.

Lord Donaldson of Lymington M.R. I also have had the advantage of reading the judgment of Nicholls L.J. in draft and am in complete agreement with the order which he proposes and with the reasons which he has so lucidly explained. I add a postscript only in order to support and F emphasise the hope which he expresses in the closing paragraph of his judgment that an order will be made under section 131 of the Employment Protection (Consolidation) Act 1978.

When the Industrial Relations Act 1971 was enacted it included section 113 which enabled the Lord Chancellor by statutory instrument to confer jurisdiction upon industrial tribunals in respect of "damages for breach, by any party to it, of any contract of employment or of any term of such a G contract . . . other than damages in respect of personal injuries to any person or in respect of a person's death." The section also contemplated that any such claim would be capable of being heard concurrently with claims which were already within the jurisdiction of the industrial tribunals: see section 113(6).

In *Wood v. Leeds Area Health Authority (Training)* [1974] I.C.R. 535, 539 and *Evenden v. Guildford City Association Football Club Ltd.* [1974] H I.C.R. 554, 556, in my then capacity as President of the National Industrial Relations Court I drew attention to the hardship suffered by workers in being unable to submit all their claims to a single court or tribunal and urged that this power be exercised. My pleas were in vain.

In *Treganowan v. Robert Knee & Co. Ltd.* [1975] I.C.R. 405, 411, Phillips J. again drew attention to the problem, but noted that in repealing the Act of 1971 and replacing it with the Trade Union and Labour Relations Act 1974, Parliament had not seen fit to re-enact section 113. This was remedied by section 109 of the Employment Protection Act 1975, but again the power was not exercised. It was this section which was re-enacted as section 131 of the Act of 1978.

If there is some policy objection to extending the jurisdiction of the industrial tribunals in the interests of providing a better service to their clientele, it has never been vouchsafed. Indeed the existence of such a policy objection seems unlikely in the face of the revival of section 113 of the Act of 1971 by section 109 of the Act of 1975. Nor is it the case that the matter can have been overlooked for lack of anyone drawing attention to the continuing need for legislative change.

In *Secretary of State for Employment v. Globe Elastic Thread Co. Ltd.* [1979] I.C.R. 706, 711–712, Lord Wilberforce said:

> "It would indeed be far more convenient if the industrial tribunal could deal both with claims under the Act and claims in contract. But this procedure must—and can—be legitimated by ministerial order . . . until it is so legitimated, industrial tribunals are confined to dealing with claims under the Act."

In *Barlow v. Whittle* [1990] I.C.R. 270, 275, Wood J., the President of the Employment Appeal Tribunal, with the agreement of Mr. A. C. Blyghton, for many years the legal officer of the Transport and General Workers' Union, and Mr. G. A. Peers, said:

> "At present an applicant finds it difficult to understand why he cannot recover all that is due to him in the one court. It must tend to bring the law into disrepute."

This is unanswerable.

At the end of 1989 in *O'Laoire v. Jackel International Ltd.* [1990] I.C.R. 197, 207, with the agreement of Nourse and Russell L.JJ., I repeated my plea for action. Can nothing really be done?

Appeal allowed in part.
No order for costs.
Leave to appeal refused.

Solicitors: Central London Law Centre.

D. E. C. P.

on 16 May 1990; (ii) that there was no notice given under section 47; (iii) that the applicant cannot bring proceedings under section 56; (iv) that the employers were not in breach of any obligation to reinstate the applicant as that obligation had not been brought into being by a section 47 notice; (v) that she was entitled to bring her claim under section 55 but in considering it the industrial tribunal will no doubt bear in mind the provisions of *Western Excavating (E.C.C.) Ltd. v. Sharp* [1978] I.C.R. 221, 226, and will need to have in mind in particular (a) (iv) above; (b) paragraph 6 of Schedule 2 to the Act of 1978 and (c) the time limit; and (vi) that the applicant's claim under the Sex Discrimination Act 1975 should be heard and that the issue of time limits can be considered at that time.

Appeal allowed.
Case remitted to an industrial tribunal.

Solicitors: Duffield Harrison, Hertford.

J. W.

[HOUSE OF LORDS]

DELANEY . . . . . APPELLANT

AND

STAPLES (trading as DE MONTFORT RECRUITMENT) . . . . . RESPONDENT

1992 Jan. 22, 23, 27; March 12

Lord Templeman, Lord Bridge of Harwich, Lord Ackner, Lord Goff of Chieveley, Lord Browne-Wilkinson

Employment—Wages—Deductions—Payment in lieu of notice not paid to employee—Employee owed commission and holiday pay—Whether pay in lieu of notice "wages"—Whether industrial tribunal having jurisdiction to hear complaint—Wages Act 1986 (c. 48), s. 7(1)

Law Reform—Whether necessary—Industrial tribunal—No power to entertain claim for damages for wrongful dismissal—Need for minister to make appropriate order—Employment Protection (Consolidation) Act 1978 (c. 44), s. 131

The employee was dismissed and given a cheque, expressed to be payment in lieu of notice, which was subsequently stopped by the employer on the ground that he was entitled to dismiss her summarily. It was, however, conceded that at the date of her dismissal she was owed commission and holiday pay. On

her complaint to an industrial tribunal under section 5 of the Wages Act 1986 that the employer had made unauthorised deductions from her wages contrary to section 1(1) the tribunal held that since payment in lieu of notice was not "wages" as defined by section 7[1] they had no jurisdiction to make an award under the Act but that the sums owed by way of holiday pay and commission were unlawful deductions within the meaning of section 8(3) so as to contravene section 1(1) of the Act and they made an award in respect of such sums in the employee's favour. The employee appealed and the employer cross-appealed. The appeal tribunal concluded that none of the sums fell within the ambit of the Act and held that neither claim came within the jurisdiction of the industrial tribunal. They accordingly dismissed the employee's appeal and allowed the employer's cross-appeal. The Court of Appeal allowed the employee's appeal in part and restored the industrial tribunal's decision.

On the employee's appeal on the issue whether the industrial tribunal had jurisdiction to adjudicate on payments in lieu of notice:—

Held, dismissing the appeal, that on the true construction of section 7(1) of the Act of 1986, since wages were payments in respect of the rendering of services during employment, payments in respect of the termination of a contract of employment were excluded from the definition of "wages" save in so far as they were expressly included: that payments in lieu of notice, whether contractually payable or not, being related to the termination of the employment and not to the provision of services thereunder, were not "wages" within the meaning of the subsection; and that, accordingly, the industrial tribunal had no jurisdiction to entertain the employee's claim relating to payment in lieu of notice (post, pp. 486H–487B, 491A–D, 493G–494B).

Per curiam. Section 131 of the Employment Protection (Consolidation) Act 1978 enables the minister to confer jurisdiction on industrial tribunals to deal with claims for breach of contract. For nearly 20 years the courts have suggested the exercise of power so far without success. The present unsatisfactory position calls for fresh consideration by the minister (post, pp. 486H–487B, 494D–F).

Decision of the Court of Appeal [1991] I.C.R. 331; [1991] 2 Q.B. 47; [1991] 2 W.L.R 627; [1991] 1 All E.R. 609 affirmed.

The following case is referred to in the opinion of Lord Browne-Wilkinson:

Gothard v. Mirror Group Newspapers Ltd. [1988] I.C.R. 729, C.A.

The following additional cases were cited in argument:

Cort (Robert) & Son Ltd. v. Charman [1981] I.C.R. 816, E.A.T.
Dixon v. Stenor Ltd. [1973] I.C.R. 157, N.I.R.C.
Hochster v. de la Tour (1853) 2 E. & B. 678
Igbo v. Johnson, Matthey Chemicals Ltd. [1986] I.C.R. 505, C.A.
Janstorp International (U.K.) Ltd. v. Allen [1990] I.C.R. 779, E.A.T.
Kournavous v. J. R. Masterton & Sons (Demolition) Ltd. [1990] I.C.R. 387, E.A.T.
Miles v. Wakefield Metropolitan District Council [1987] I.C.R. 368; [1987] A.C. 539; [1987] 2 W.L.R. 795; [1987] 1 All E.R. 1089, H.L.(E.)
Rickard v. P. B. Glass Suppliers Ltd. [1990] I.C.R. 150, C.A.

[1] Wages Act 1986, s. 7(1): see post, p. 490B–D.

A APPEAL from the Court of Appeal.

This was an appeal, with leave of the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Jauncey of Tullichettle) granted on 15 May 1991, by the employee, Mary Delaney, from an order dated 20 December 1990 of the Court of Appeal (Lord Donaldson of Lymington M.R., Ralph Gibson and Nicholls L.JJ.) [1991] I.C.R. 331, whereby the court dismissed that B part of the employee's appeal which related to her claim in the industrial tribunal under the Wages Act 1986 in respect of the non-payment of money in lieu of notice.

The employee complained that her employer, R. J. Staples (trading as De Montfort Recruitment), had made unlawful deductions from her wages within section 1 of the Wages Act 1986. The tribunal made an C order requiring the employer to pay £55·50 by way of unpaid commission and holiday pay but held that they had no jurisdiction to make an award for non-payment of moneys in lieu of notice. The Employment Appeal Tribunal dismissed the employee's appeal and allowed the employer's cross-appeal [1990] I.C.R. 364.

The facts are stated in the opinion of Lord Browne-Wilkinson.

D *Robin Allen, Martin Westgate* and *Thomas Kibling* for the employee. The question is whether the definition of "wages" under section 7 of the Wages Act 1986 includes a payment in lieu of notice and, therefore, whether the industrial tribunal have jurisdiction under the Act to entertain a complaint in respect of non-payment of money in lieu of notice.

E Section 4(1) defines "final instalment of wages" as either the last contractual remuneration or an amount in lieu of notice and shows that payments in lieu fall within "wages" for the purposes of the Act. [Reference was made to section 4(2) and (5) and *Janstorp International (U.K.) Ltd. v. Allen* [1990] I.C.R. 779, 784.]

Under section 5(1) "A worker may present a complaint to an industrial tribunal" for breaches of section 1, 2 or 3. By section 5(2) a F complaint has to be presented within three months of the cause of action arising. Section 6 refers back to section 5 for remedies available to a worker. Those provisions give jurisdiction to industrial tribunals to adjudicate in the present case. [Reference was made to *Rickard v. P.B. Glass Supplies Ltd.* [1990] I.C.R. 150, 155.]

Where an employee is wrongfully dismissed, the damages payable, G even though unascertained, are capable of being "wages" under section 7. The only limit imposed by the section is that the damages must be payable "in connection with" the employment, i.e. they must be "linked to" or "associated with" the employment. [Reference was made to *Miles v. Wakefield Metropolitan District Council* [1987] I.C.R. 368.] Damages are an obligation of the contract.

Section 8(3) requires the identification of an "occasion" and of "the H total amount . . . properly payable." Each of these can be identified in the case of dismissal without notice. The "occasion" for payment is the moment of breach or the moment when the employee accepts the employer's repudiation as terminating the employment. This analysis is

consistent with the common law position that damages are payable immediately on breach and the innocent party need not wait until the date due for performance: *Hochster v. de la Tour* (1853) 2 E. & B. 678. The "total amount . . . properly payable" on that occasion is the amount of damages which would then have been payable, having regard to variables such as mitigation. Such damages are "wages" for the purpose of the Act and the industrial tribunal has jurisdiction to consider such claims: *Kournavous v. J.R. Masterton & Sons (Demolition) Ltd.* [1990] I.C.R. 387. [Reference was made to *Dixon v. Stenor Ltd.* [1973] I.C.R. 157 and *Gothard v. Mirror Group Newspapers Ltd.* [1988] I.C.R. 729.]

Damages payable on termination are "wages" for the purposes of section 7 provided that they are an ascertained sum, paid or agreed to be paid or offered to be paid in respect of the termination of and in connection with the worker's employment, and provided they are not in respect of a category of payment excluded by section 7(2). Such damages include a payment in lieu of notice. If an employee was not protected from deductions made from payments made in lieu of notice the employer would be able, by his own wrong, to evade the protection granted by the Act.

Alternatively, if it is not accepted that all damages for breach of contract are within the Act because of the wording of section 8, to give effect to section 4 it should be concluded that any sum of whatever nature identified as a payment in lieu of notice is protected. But the court should exercise caution when determining whether an employee accepted a termination of employment. The termination is not consensual merely because the employee accepts an amount as payment in lieu of notice: *Robert Cort & Son Ltd. v. Charman* [1981] I.C.R. 816. The issue is important, because in a true case of discharge by agreement there will be no dismissal and hence no right to claim unfair dismissal: *Igbo v. Johnson, Matthey Chemicals Ltd.* [1986] I.C.R. 505.

The employer was not present and was not represented.

W. Robert Griffiths amicus curiae. Where a contract of employment gives an express right to a payment in lieu of notice non-payment will give rise to a contractual debt. A breach of contract will also give rise to damages. In those circumstances an employee would not have to rely on a claim for wrongful dismissal. Section 7 of the Act of 1986 would not give the industrial tribunal jurisdiction to hear such claims.

A claim arising out of the failure to give proper notice is based on a breach of contract and the cause of action arises at the time the employment is terminated. Claims can arise where there is a breach of contract but there are no express terms in the contract relating to notice to terminate employment or payment in lieu of notice. Such contracts incorporate section 49 of the Employment (Consolidation) Act 1978.

[Lord Bridge of Harwich. Mr. Griffiths, their Lordships do not wish to trouble you any further.]

Allen replied.

Their Lordships took time for consideration.

12 March. LORD TEMPLEMAN. My Lords, for the reasons given in

A the speech of my noble and learned friend, Lord Browne-Wilkinson, I, too, would dismiss this appeal.

LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. I agree with it and, for the reasons he gives, I would dismiss the appeal.
B

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Browne-Wilkinson. I agree with it, and for the reasons which he gives I, too, would dismiss this appeal.

C LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Browne-Wilkinson. I agree with it, and for the reasons which he gives I, too, would dismiss this appeal.

LORD BROWNE-WILKINSON. My Lords, this case raises a point of some importance on the construction of the Wages Act 1986. That Act
D prohibits an employer from making unauthorised deduction from "wages." The question in this case is whether "wages" for this purpose includes a payment in lieu of notice paid by an employer when terminating employment without notice.

The facts are simple. The appellant, Miss Delaney, was employed by Mr. Staples as a recruitment consultant at a wage of £125 per week
E plus 6 per cent. commission. Her employment started on 11 February 1988. She was entitled to receive one week's notice under section 49 of the Employment Protection (Consolidation) Act 1978, but was dismissed without notice on 9 September 1988. On that date she was given a cheque for £82 "in lieu of notice." However, before the cheque was presented it was stopped by Mr. Staples who claimed he had discovered
F that she was in breach of her duty of confidentiality. Miss Delaney's weekly pay was apparently up to date but she claimed that there was due to her commission of £18 and accrued holiday pay of £37·50 that Mr. Staples had not paid.

Miss Delaney applied to the industrial tribunal in Leicester claiming all three of these sums under the Act of 1986. The industrial tribunal has no jurisdiction to adjudicate upon these claims unless the failure of
G Mr. Staples to pay the sums claimed constituted "deductions" from "wages" within the meaning of the Act. The industrial tribunal held that the failure to pay commission and holiday pay constituted "deductions" and ordered Mr. Staples to pay £55·50 to Miss Delaney in respect of those two claims. As to her claim for £82 in lieu of notice, the industrial tribunal held that it had no jurisdiction to adjudicate on
H the claim since payments in lieu were not "wages" within the meaning of the Act.

On appeal the Employment Appeal Tribunal held that there had been no "deduction" of the payments due for commission and holiday pay nor was the payment in lieu "wages" within the Act [1990] I.C.R.

364. On further appeal to the Court of Appeal, the decision of the industrial tribunal was restored: the claims for holiday pay and commission were held to be within the Act as constituting "deductions" but the claim for £82 payment in lieu was not [1991] I.C.R. 331. There is no appeal against the Court of Appeal decision as to holiday pay and commission but Miss Delaney appeals to this House against the decision disallowing her claim to the payment in lieu.

Although the sums at stake are small, the questions raised are of considerable practical importance. If Miss Delaney is not entitled to proceed in the industrial tribunal under the Act of 1986, she can sue Mr. Staples for breach of her contract of employment in dismissing her without the one week's notice to which she was entitled. But, since the industrial tribunal has no jurisdiction to entertain claims for damages for breach of contract, such proceeding would have to be brought in the county court. In a large number of cases, claims arising from the termination of employment relate only to the employer's failure to pay accrued wages or sums in lieu of notice. It would therefore obviously be convenient if such disputes could be resolved comparatively simply in the industrial tribunal rather than pursued through the courts.

Before turning to the Act of 1986, I must say a word about the nature of wages and payments in lieu of notice. The proper answer to this case turns on the special definition of "wages" in section 7 of the Act. But it is important to approach such definition bearing in mind the normal meaning of that word. I agree with the Court of Appeal that the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word "wages." It follows that if an employer terminates the employment (whether lawfully or not) any payment in respect of the period after the date of such termination is not a payment of wages (in the ordinary meaning of that word) since the employee is not under obligation to render services during that period.

The phrase "payment in lieu of notice" is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principle categories.

(1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called "garden leave") there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages.

(2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is

not a payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment.

(3) At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment.

(4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment.

The nature of a payment in lieu falling within the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages for breach of contract. In *Gothard v. Mirror Group Newspapers Ltd.* [1988] I.C.R. 729, 733, Lord Donaldson of Lymington M.R. stated the position to be as follows:

> "If a man is dismissed without notice, but with money in lieu, what he receives is, as a matter of law, payment which falls to be set against, and will usually be designed by the employer to extinguish, any claim for damages for breach of contract, i.e. wrongful dismissal. During the period to which the money in lieu relates he is not employed by his employer."

In my view that statement is the only possible legal analysis of a payment in lieu of the fourth category. But it is not, and was not meant to be, an analysis of a payment in lieu of the first three categories, in none of which is the dismissal a breach of contract by the employer. In the first three categories, the employee is entitled to the payment in lieu not as damages for breach of contract but under a contractual obligation on the employer to make the payment.

Against that background, I turn to the relevant provisions of the Act. Section 1(1) prohibits an employer from making "any deduction from any wages of any worker employed by him" unless such deduction is of kind authorised by section 1 of the Act. Therefore, to fall within the prohibition contained in section 1 two things have to be demonstrated: first, that there has been a "deduction;" second, that the deduction was made from "wages."

As to "deductions," section 8(3) provides:

> "Where the total amount of any wages that are paid on any occasion by an employer to any worker employed by him is less than the total amount of the wages that are properly payable by him to the worker on that occasion (after deductions) then, except

in so far as the deficiency is attributable to an error of computation, the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

The Court of Appeal in this case held that a total failure to make any payment of a sum due could be a "deduction" within this definition. There is no appeal against that decision nor has there been any submission that it was wrong. I must therefore proceed on the basis that it is correct, without expressing any view of my own one way or the other.

As to "wages," section 7 of the Act provides:

"(1) In this Part 'wages,' in relation to a worker, means any sums payable to the worker by his employer in connection with his employment, including—(*a*) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise; (*b*) any sum payable in pursuance of an order for reinstatement or re-engagement under section 69 of the Act of 1978; (*c*) any sum payable by way of pay in pursuance of an order under section 77 of that Act for the continuation of a contract of employment; (*d*) any of the payments referred to in paragraphs (*a*) to (*d*) of section 122(4) of that Act (guarantee payments and other statutory payments in lieu of wages); (*e*) statutory sick pay under Part I of the Social Security and Housing Benefits Act 1982; and (*f*) in the case of a female worker, maternity pay under Part III of the Act of 1978, but excluding any payments falling within subsection (2). (2) Those payments are—(*a*) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 1(1) to any deduction made from the worker's wages in respect of any such advance); (*b*) any payment in respect of expenses incurred by the worker in carrying out his employment; (*c*) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office; (*d*) any payment referable to the worker's redundancy; (*e*) any payment to the worker otherwise than in his capacity as a worker."

The critical question is whether a payment in lieu falls within this wide definition as being a sum payable to an employee "in connection with his employment."

Sections 5 and 6 of the Act confer on the industrial tribunal exclusive jurisdiction to determine whether there has been an unauthorised deduction under the Act. If the industrial tribunal finds that such a deduction has been made, it makes a declaration to that effect and orders the employer to pay to the worker the amount of the deduction: section 5(4). Under section 5(7), where the industrial tribunal has ordered such repayment, "the amount which the employer shall be entitled to recover (by whatever means) in respect of the matter in respect of which the deduction . . . was originally made . . . shall be treated as reduced by" the amount of the sum ordered to be repaid.

A This is a penal provision. If, for example, an employer made an unauthorised deduction from wages in respect of a valid cross-claim against the worker the industrial tribunal would be bound to order repayment of the deduction and the employer's cross-claim would for all purposes and in all courts be reduced by the amount improperly deducted.

B I return then to consider whether a payment in lieu, although not wages in the normal sense of that word, falls within the definition of "wages" in section 7(1) as being a sum payable "in connection with" the employment. The first inquiry must be whether the language of the Act throws any light on the problem. The words "in connection with his employment" are very wide, in my judgment quite wide enough to include a payment in lieu. I do not agree with the Court of Appeal that C prima facie the words are not wide enough to include a payment in lieu because such payments are payments of damages for breach of contract. First, not all payments in lieu (other than garden leave) are payments of damages. Even in the fourth category of case where payments in lieu are properly analysed as being payment of damages, that does not in my judgment mean that they are not payments "in connection with" the employment. Apart from a context indicating the contrary view, D payments connected with the termination of employment (whether or not characterised as damages) are quite capable as being described as being made "in connection with" that employment.

Nor do I get any help from the items expressly included and excluded by section 7(1) and (2). Given the presence of express inclusions as well as express exclusions, there is no room for an argument that by expressly E excluding certain items the draftsman was indicating that such items would otherwise be payments "in connection with" the employment. Nor can I detect a rough division between the express inclusions as being payments arising from services rendered under the contract and the express exclusions as payments arising from events on or after the termination of the employment. For example, the advances of wages F and expenses incurred in carrying out the employment (both of which are excluded items under subsection (2)(*a*) and (*b*)) both relate to acts occurring during the subsistence of the contract of employment.

Mr. Allen, for Miss Delaney, submitted that section 4 of the Act demonstrated that payments in lieu do fall within the definition of "wages." Sections 2 and 3 of the Act contain certain provisions providing additional protection for workers who are in retail employment. G Those sections restrict deductions from wages being made on any occasion in respect of cash shortages or stock deficiencies to one tenth of the wages payable on that occasion. Section 4(1) and (2) deal with the position at the end of the retail worker's employment as follows:

> "(1) In this section 'final instalment of wages,' in relation to a worker, means—(*a*) the amount of wages payable to the worker H which consists of or includes an amount payable by way of contractual remuneration in respect of the last of the periods for which he is employed under his contract prior to its termination for any reason (but excluding any wages referable to any earlier such

period), or (*b*) where an amount in lieu of notice is paid to the worker later than the amount referred to in paragraph (*a*), the amount so paid, in each case whether the amonnt in question is paid before or after the termination of the worker's contract. (2) Section 2(1) shall not operate to restrict the amount of any deductions that may (in accordance with section 1(1)) be made by the employer of a worker in retail employment from the worker's final instalment of wages."

Section 4(1)(*b*) contains the only express reference in the Act to a payment in lieu. Mr. Allen submits that the definition of "final instalment of wages" as including payments in lieu shows that such payments are "wages" for the purposes of the Act. In particular the words in section 4(2) "in accordance with section 1(1)" show that where the "final instalment of wages" is a payment in lieu, although the special 10 per cent. limit applicable to retail workers does not apply, the prohibition on deductions not authorised by section 1 applies to the payment in lieu. Therefore, it is said, a payment in lieu must constitute "wages" for the purposes of section 1.

I do not accept that submission. The purpose of section 4 is to permit sums not deducted during the employment by reason of the restriction in section 2 to be deducted on the termination of the employment. Such final deduction is to be made from whichever is the later, the last payment of wages (in the ordinary sense) or a payment in lieu. The fact that the employer is only allowed to make the final deduction from a later payment in lieu (if any) does not by itself mean that such payment, for the other purposes of the Act, constitutes "wages." Nor do the words in section 4(2) "in accordance with section 1(1)" take the matter any further. The words are apposite to the case where the final deduction falls to be made from the last wages (in the ordinary sense) since there is nothing in section 4 to authorise deductions prohibited by section 1(1) from such payment. The words "in accordance with section 1(1)" apply to such payments and the presence of those words can be explained on that ground. Where the final deduction falls to be made from the payment in lieu, such deduction will be in accordance with section 1(1) since there is nothing in section 1(I) to prohibit such deduction even if the payment in lieu is not "wages" within section 7(1).

Therefore on the language of the Act, I find neither anything which cuts down the wide meaning of the words "in connection with his employment" nor anything which demonstrates that Parliament intended payments in lieu to fall within the definition of "wages." I turn therefore to the way in which the Act would operate if payments in lieu were included in the word "wages." Like the Court of Appeal, I find that the provisions of the Act cannot be made to work if payments in lieu are included in the meaning of wages. I will demonstrate the difficulties by reference to the fourth and most common category of payment in lieu, i.e. where the worker is summarily dismissed in breach of contract and the employer makes no payment in lieu or a payment in

A lieu of a sum less than the full amount of the wages for the notice period.

First, in order to demonstrate that the failure to make any payment in lieu is a "deduction," the worker will have to satisfy the requirements of section 8(3). He will have to show that there was an occasion on which "wages" were payable to him and the amount of the wages which should properly have been paid to him on that occasion. These B requirements cannot be satisfied in relation to a payment in lieu. There is no "occasion" on which the payment in lieu was "properly" payable. The worker has no contractual or other right to the lump sum of liquidated damages at any time prior to judgment. Even assuming that the occasion for such payment in lieu was the date of summary dismissal, what was the sum "properly" then payable? If the worker obtains C alternative employment during the notice period, the damages for wrongful dismissal on account of loss of wages which would be payable by the employer falls to be reduced by the wages received by the worker from the alternative employment during the notice period. It is therefore impossible at the time of dismissal to quantify the correct amount of the payment in lieu. Accordingly there is no way in which the amount of the "deduction" can be calculated under section 8(3).

D Next, under section 5(2)(*a*) a complaint to an industrial tribunal in relation to an improper deduction has to be made within three months of "the date of payment of the wages from which the deduction was made." As I have said, it is impossible to identify the date on which the payment in lieu should have been made. Therefore the time limit in section 5(2) cannot be calculated.

E Next, under the general law an employer in paying damages for wrongful dismissal or a payment in lieu by way of liquidated damages is entitled to set off any cross-claim he may have against his employee. For example, in the present case the employer, Mr. Staples, was asserting a cross-claim against Miss Delaney for an alleged breach of her duty of confidentiality. If a payment in lieu constitutes "wages" for the purposes of the Act, no such deduction of cross-claims is permissible F since it would not be authorised by section 1. Moreover, if the employer were to exercise his right of set-off under the general law by deducting the amount of his cross-claim from a payment in lieu, if the payment in lieu is "wages" the worker could apply to the industrial tribunal for an order that the employer repay the unauthorised deduction even if it was a legitimate cross-claim. The industrial tribunal would be G bound to order such repayment (section 5(4)) and in consequence the employer would lose his right to enforce his cross-claim in any proceedings to the extent of the sum wrongly deducted: section 5(7). I find it impossible to believe that Parliament in passing this legislation intended, by a side wind, to alter the common law rights of employers and workers on the termination of employment.

H For these reasons, I am forced to the conclusion that payments in lieu of the fourth category do not fall within the statutory definition of "wages." Where then is the dividing line to be drawn? In my judgment one is thrown back to the basic concept of wages as being payments in respect of the rendering of services during the employment, so as to

exclude all payments in respect of the termination of the contract save to the extent that such latter payments are expressly included in the definition in section 7(1). It follows that payments in respect of "garden leave" (my category 1) are "wages" within the meaning of the Act since they are advance payments of wages falling due under a subsisting contract of employment. But all other payments in lieu whether or not contractually payable (my categories 2, 3 and 4) are not wages within the meaning of the Act since they are payments relating to the termination of the employment not to the provision of services under the employment. To draw a distinction between those cases where the payment in lieu is contractually based and the normal payment in lieu which consists of liquidated damages would be to invite numerous disputes as to the jurisdiction of the industrial tribunal which cannot have been Parliament's intention. For these reasons, I agree with the decision of the Court of Appeal.

This conclusion produces an untidy and unsatisfactory result. On any dismissal, the summary procedure of the industrial tribunal under the Act will be exercisable in relation to unpaid wages (in the ordinary sense), holiday pay, commission, maternity leave etc. but claims relating to the failure to give proper notice will continue to have to be brought in the county court. The employee is therefore forced either to bring two sets of proceedings or to proceed wholly in the county court on a claim for damages. To be forced to bring two sets of proceedings for small sums of money in relation to one dismissal is wasteful of time and money. It brings the law into disrepute and is not calculated to ensure that employees recover their full legal entitlement when wrongfully dismissed. The position is capable of remedy by an order under section 131 of the Employment Protection (Consolidation) Act 1978 which enables the minister to confer jurisdiction on industrial tribunals to deal with claims for breach of contract. As the judgment of Lord Donaldson of Lymington M.R. in the present case shows, the courts have been suggesting that this power be exercised for nearly 20 years, so far without success [1991] I.C.R. 331, 347–348. I believe that all your Lordships are of the view that the present unsatisfactory position calls for fresh consideration by the minister.

My Lords, for these reasons I would dismiss the appeal.

Appeal dismissed.
No order as to costs.

Solicitors: Central London Community Law Centre; Treasury Solicitor.

A. R.