

TOP CASE ROUND UP 2011
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11 KBW

TWO FROM STRASBOURG

1. The Judgments of the European Court of Human Rights (“the ECtHR”) in 2011 include the education cases of Ali v Lord Grey School, Judgment on 11 January, and Lautsi v Italy, Judgment on 18 March. Other education cases of interest in the year considered below include G v Governors of X School in our Supreme Court, the Shoosmith case in the Court of Appeal, and the Building Schools for the Future (“BSF”) litigation in the High Court. See further the 11 KBW Education Law Blog.

2. Ali v Lord Grey School, Application No. 40385/06, was concerned with the right to education, under Article 2 of the First Protocol (“A2P1”) of the European Convention of Human Rights (“the ECHR”) and school exclusions. The ECtHR upheld the decision of the House of Lords [2006] UKHL 14 (2006) 2 AC 363 that no violation of the A2P1 right had occurred. However, the reasoning of the ECtHR is different from that of the House of Lords.

3. The ECtHR gives guidance on:-

- (1) The circumstances in which school exclusions are compatible with A2P1 rights; and
- (2) The content of the right to education.

4. The applicant was suspected of starting a fire at the school. There was a police investigation. The school excluded him pending the conclusion of that investigation, whenever that might prove to be.

5. This meant that he was absent from school in the run up to important exams. The school did, however, make efforts to provide alternative education support during the exclusion; and he was allowed to return to school to take the exams.

6. The alternative support was not taken up. Nor did the applicant and his parents cooperate with the school in its efforts towards bringing him back to the school once the police investigation was completed. Ultimately the applicant was removed from the roll at Lord Grey School and transferred to another school. He then brought a damages claim under the Human Rights Act 1998 (“the HRA”).

7. The ECtHR accepted that disciplinary measures such as exclusion are inherent in any system of organised schooling. Indeed, such measures allow schools to achieve the very object for which they exist, namely educating their pupils. They therefore have a legitimate aim.

8. However, both the rules concerning exclusions and the manner in which they are imposed, must be:-

- (1) Foreseeable, ie reasonably clear and certain; and
- (2) Proportionate to that legitimate aim.

9. In the Ali case:-

- (1) The exclusion pursued a legitimate aim: facilitating the criminal investigation; and
- (2) The term of the exclusion was foreseeable: the applicant was told at the outset that he could not return until the investigation was complete, and it

was reasonably apparent that the investigation was unlikely to be concluded before the end of the school term.

10. The key issue therefore was the proportionality of the exclusion. The ECtHR considered a number of factors:-

- (1) The extent of applicable procedural safeguards;
- (2) The duration of the exclusion;
- (3) The extent of the applicant's co-operation with the reintegration efforts;
- (4) The steps taken to minimise the effect of the exclusion;
- (5) The adequacy of the alternative education provided; and
- (6) The extent to which the rights of third parties are engaged.

11. The last two of these factors are of particular weight.

12. Applying its analysis to the facts, the ECtHR had no difficulty in dismissing the claim. The head teacher had attempted to bring the applicant back at the earliest possible opportunity, but the applicant and his parents did not cooperate. The school offered alternate educational arrangements, but these were ignored. There had been procedural shortcomings. These, however, had to be viewed in the light of the exceptionally difficult circumstances which the police investigation created. The exclusion was proportionate.

13. In conclusion, schools should find themselves on a sound legal footing provided that they:-

- (1) Reserve exclusion for serious cases in which less draconian measures are inadequate;
- (2) Restrict the exclusion to as short a period as possible; and
- (3) Make sensible efforts to provide alternative educational support (which, in the case of a temporary exclusion, does not necessarily require that the pupil has access to the entirety of the national curriculum).

14. The Judgment of the ECtHR in Ali v Lord Grey is also of wider interest as regards the content of the A2P1 right to education. It has long been debated whether the content of the right which A2P1 protects is fixed by reference to the standard of education guaranteed by law in the domestic legal system or, rather, is restricted to some (lower) objective minimum standard. The ECtHR, without detailed reasoning or reference to authority, now appears to have departed from its previous case-law and to have accepted the former formulation. Consequently, in principle, it would seem that a pupil might be able to pursue an HRA damages claim if educational provision to which he or she is legally entitled under domestic law is not forthcoming.

15. Lautsi v Italy, Application No 30814/06, was concerned with religious symbols (crucifixes) fixed to the wall in state primary school classrooms. The ECtHR said, at (para 62):-

"... the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum. On the other hand, as its aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is

forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed."

16. The ECtHR found no violation of A2P1 (or of Article 9 or Article 14). It concluded (para 70) that the matter fell within the margin of appreciation of the State.

THREE FROM LUXEMBOURG

17. The Judgments of the European Court of Justice ("the ECJ") in 2011 include the Valencia procurement case, Judgment on 26 May, and the Ofcom information case, Judgment on 28 July. Other procurement cases of interest in the year considered below include the LAML case in the Supreme Court on the Teckal exemption and Halo Trust in the High Court on removal of the automatic stay on the award of a contract once proceedings are brought to challenge the award.

18. In the Valencia case, Commission v Spain, Case C-306/08, concerned with urban planning and development in the Valencia region, Advocate General Jääskinen warned against over-stretching the meaning of certain criteria within the public procurement Directives for the sake of fitting the present arrangements within the public procurement rules: paragraph 77. He expressed the view that "for pecuniary interest to exist it is necessary that the contracting authority bears the economic detriment either positively in the form of a payment obligation towards the economic operator, or negatively as a loss of income or resources otherwise due": paragraph 86. The rationale for this approach is that "where the contracting authority is not spending any public funds there is no danger of distorting competition" within the meaning of the procurement Directives. The ECJ itself, see (2011) PPLR, NA 185-190, held that the main object of a contract concluded between a Spanish local authority and an urban developer was not a public works contract. The ECJ said:-

"90. It is clear ... from the case-law of the Court that, where a contract contains elements relating both to a public works contract and another type of contract, it is the main object of the contract which determines which body of European Union rules on public contracts is to be applied in principle (see, to that effect, Auroux and Others, paragraph 37).

91. That determination must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very object of the contract (Case C-412/04 Commission v Italy [2008] ECR I-619, paragraph 49)."

19. On 19 May 2011 (IP/11/600) infringement proceedings (IP/10/1233) were concluded with respect to the Dutch municipality of Ede in relation to a land development project. An infringement case on land development in the Dutch municipality of Eindhoven (IP/10/679) ("the Doornakkers Centre case") is currently pending before the ECJ. The Commission's approach in the Doornakkers Centre case, in conformity with that of the approach of the ECJ in Auroux, is that works do not have to be very detailed in order to correspond to requirements specified by the contracting authority.

20. The Ofcom case, Ofcom v Information Commissioner, Case C-71/10, was concerned with the situation where multiple exemptions under the Environmental Information Regulations 2004 ("the EIR") and the Directive they implement are engaged and there is some public interest in maintaining each exemption. The issue was whether those public interests should be considered cumulatively and be weighed together against the public interest in disclosure, or whether the information must be disclosed unless the public interest is in favour of maintaining at least one particular exemption considered separately from any other. The ECJ has ruled in favour of the former. No doubt the same applies in relation to FOIA. See further the 11 KBW Information Law Blog.

21. Another recent ECJ decision of interest is Scattolon, Case C-108/10, Judgment on 6 September 2011, on the maintenance of the rights of workers in the event of a transfer of an undertaking from a local authority to central government. The decision confirms that the Henke exception to the general application of the Acquired Rights Directive for activities “which fall within the exercise of public powers” did not extend to the transfer of staff undertaking ancillary services such as cleaning and caretaking for schools from municipal authorities to the central government. This is confirmation that, possibly excepting the core administrative functions of an authority, the transferring of local authority functions between public sector entities is not excluded from the ambit of the Directive (or by extension TUPE).

THREE FROM THE SUPREME COURT

22. The Judgments of our own Supreme Court in 2011 include the LAML procurement case on 9 February, the Hounslow housing case on 23 February, and the education case of G v Governors of X School on 29 June.

23. In the LAML case, Brent LBC v Risk Management Partners Ltd [2011] UKSC 7, (2011) LGR 169, the Supreme Court considered three questions of principle:-

- (1) Whether the Teckal exemption applies to the Public Contract Regulations 2006 at all: answer - it does;
- (2) Whether it applies to contracts of insurance: answer - it does; and
- (3) Whether, in order for the exemption to apply, the control which the contracting authority exercises over the contractor must be exercised by that authority individually or it is sufficient that it could be exercised collectively, together with other authorities: answer - the latter.

24. The Supreme Court unanimously allowed the appeal from the Court of Appeal, holding that the requirements of the Teckal exemption were satisfied and that the control limb of Teckal was satisfied on the facts. The Supreme Court held that the local authorities were entitled to rely on the Teckal exemption when dealing with LAML. No reference to the ECJ was required.

25. Specifically, the Supreme Court has decided the following five issues:-

- (1) The Regulations incorporate the Teckal exemption: paragraphs 22-26 and 92;
- (2) There is nothing in the intrinsic nature of insurance contracts which means that Teckal cannot apply in such cases: paragraphs 27-30;
- (3) The Teckal control condition can be satisfied in all cases by joint or collective control by a number of authorities, of which the particular contracting authority may be only one: paragraphs 67-73;
- (4) The control limb of Teckal was (contrary to the conclusion of the Court of Appeal) satisfied on the facts; and
- (5) The activities limb of Teckal was also satisfied: LAML was not market-oriented: paragraphs 59 and 85.

26. As regards the control limb of Teckal being satisfied on the facts, the Supreme Court was not impressed by the particular features of LAML which had exercised the Court of Appeal (in particular, that an authority would not participate in decision-making about its own claims under the insurance, and other similar points). Nor, more importantly for the wider use of Teckal, was it troubled by the fact that much of the day-to-day running of LAML would be left to the Board, and that the Directors owed their duties to the company itself, rather than to the authorities which appointed them. Rather, the very facts that the participating contracting authorities together held all the shares and had all the votes at general meetings, certainly when coupled with their power by a 75% majority to direct the Board by special resolution, appear to have been regarded as enough.

27. It was key that there was power for the authorities to give directions on strategic matters and important issues of policy. On that basis the precise decision-making procedure was not material. The thrust of the Judgment is that, if authorities are genuinely engaged in an exercise in co-operation to obtain a service from their own resources, in a way that is not market-oriented, the Courts should be slow to impose the requirements of procurement law upon them.

28. Paragraph 52 of Lord Hope's speech is especially important:-

"The reasoning in Hamburg Waste shows how far we have travelled since the court issued its judgment in Teckal. ... There is now a much clearer focus on the purpose of the Community rules on public procurement so as not to inhibit public authorities from co-operating with other public authorities for the purpose of carrying out some of their public service tasks ... So long as no private interests are involved, they are acting solely in the public interest in the carrying out of their public service tasks and they are not contriving to circumvent the rules on public procurement ... the conditions are likely to be satisfied."

29. At paragraph 53 Lord Hope said:-

"... Individual control is not necessary. No injury will be caused to the policy objective of the Directive if public authorities are allowed to participate in the collective procurement of goods and services, so long as no private interests are involved and they are acting solely in the public interest in the carrying out of their public service tasks. ... the decisive influence that a contracting public authority must exercise over the contractor may be present even if it is exercisable only in conjunction with the other public authorities. ..."

30. Lord Rodger said:-

"73. ... In short, not only are local authorities free to use their own resources to perform the services which they exist to provide, but they may also co-operate with other local authorities to ensure that, collectively, they have the necessary resources to do so. ...

74. Where the co-operation among the local authorities takes the form of establishing a body which then provides them with the necessary products or services, the Directive will not apply if, in substance, each of the co-operating authorities is intending to obtain the products or services from the resources contributed by the co-operating authorities for the use of the body. In such a case, in substance, the authority is intending to obtain the products or services in-house, in co-operation with other public authorities.

75. Since the whole point is that the Directive does not apply in the case of such an arrangement because the public authorities are intending to obtain the products or services from their own resources which are to be administered in the public interest, it is essential that any body which the authorities establish does not involve any private investment. ...

76. ... if a body becomes market-oriented, the award of a contract to it by a public authority cannot be regarded as a transaction internal to that authority to which the rules of Community law do not apply. ..."

31. At paragraph 80 Lord Rodger said:-

"... the court recognises that a local authority can perform its services for the public either entirely out of its own resources or by co-operating with other local authorities to perform them out of their pooled resources. That co-operation may take the form of

the authorities establishing and financing a body to provide what they require. If, taken overall, the control of the body by the authorities is great enough to satisfy the first Teckal criterion, this will be an indication that the body is there to carry out the purposes of the local authorities which control it – and, hence, that it is not to be regarded as an outside body vis à vis any of them. For this reason, the mere fact that any single authority does not exert the necessary degree of control by itself is irrelevant.”

32. Lord Rodger further said:-

“84. ... I am satisfied that the first Teckal criterion is to be applied by reference to the control exercised by all the authorities which have co-operated to establish and finance the body with which the individual authority intends to contract.

85. I have already noted that the Directive will apply if there is private investment in the body with which the local authority intends to contract or if the body is market-oriented. The Directive has to apply in such circumstances in order to prevent the body concerned enjoying an unfair competitive advantage. The second Teckal criterion is therefore designed to ensure that the Directive always applies unless, in substance, the body concerned only trades with the local authority or authorities – unless, in short, it is not market-oriented. In other words, the body must remain within the public authority sphere and cannot go out and compete with other suppliers for other primary insurance business on the open market. It would obviously be unfair if the body could compete in this way, but, when one of the local authorities was contemplating contracting with it, other suppliers were prevented from competing for the business. The second criterion prevents this.”

33. Lords Walker, Brown and Dyson agreed with the reasons given by Lord Hope and Lord Rodger. A broad approach was taken to the Teckal exemption.

34. In Hounslow LBC v Powell (2011) UKSC 8, (2011) LGR 363, the Supreme Court sought, in the context of homelessness cases and introductory tenancies, to resolve a number of the loose ends left by its landmark decision in Manchester City Council v Pinnock [2010] UKSC 45, [2010] LGR 909. In Pinnock’s case, a panel of nine Supreme Court Justices held in relation to demoted tenancies that it was always in principle open to a defendant to local authority possession proceedings to raise a proportionality defence based on Article 8 of the ECHR.

35. In Pinnock the Supreme Court held that the Courts need to consider proportionality before granting possession orders against individuals at the request of public authorities. In Powell, the Supreme Court confirmed that the same analysis applies to introductory tenancies and to tenancies granted by local authorities under the homelessness regime.

36. More significantly, the Supreme Court has taken the opportunity in Powell to provide general guidance about how the proportionality test is to be approached in practice, including as regards the types of factual issue that may need to be investigated by the Court. As such, Powell is now the leading authority on the significance of Article 8, and the right to a “home”, in public authority possession actions, and has been applied, for example, in relation to the Dale Farm travellers.

37. G v Governors of X School, (2011) UKSC 30, (2011) IRLR 756 concerned legal representation and school disciplinary proceedings. G worked as a music assistant at a school. It was alleged that he formed an inappropriate, and possibly sexual, relationship with a 15 year old boy on work experience at the school. The school was informed by the boy’s parents, and launched disciplinary proceedings against G. The police were informed, but following an investigation, no charges were brought.

38. The school's policy on disciplinary hearings permitted G to bring a trade union representative or friend. G, who was not a union member, requested his lawyer attend. The school refused that request.

39. G declined to answer questions at the hearing. The school found that G had formed an inappropriate relationship with the boy. They summarily dismissed G for gross misconduct.

40. Because of the nature of the finding, the school reported the matter to the Secretary of State, now the Independent Safeguarding Authority ("the ISA"), for consideration of whether G should be placed on the barred list under the Safeguarding Vulnerable Groups Act 2006. The determination by the ISA remains pending.

41. Overturning the Court of Appeal, the Supreme Court held that G had no Article 6(1) ECHR right to legal representation at the school's disciplinary hearing. G argued that the refusal to permit legal representation at the hearing was in breach of Article 6(1) because that hearing was determining a civil right, namely the right to practise his profession as a teacher.

42. The Supreme Court held that the question whether proceedings are directly decisive of the right in question, where they are related to a second set of proceedings which are themselves directly decisive, should be assessed by reference to whether those proceedings have a substantial influence on the second proceedings. This was the test proposed by Laws LJ in the Court of Appeal.

43. However, in applying that test, the majority of the Supreme Court came to a different outcome to the Courts below. Everyone agreed that any decision taken by the ISA to place G on the barred list, and any appeal from the ISA to the Upper Tribunal, was directly decisive of G's right to practise his profession. However, the majority saw the decision of the school to go only to G's employment with that school and not any wider right. There was undoubtedly a link between the school hearing and any ISA decision, but the ISA is required to take its own decision and is not bound by any previous findings of fact. The refusal of the school to permit legal representation at its disciplinary hearing was therefore not a breach of Article 6(1) ECHR. It lacked a substantial influence over the decisive proceedings.

44. Lord Kerr dissented, holding that it was artificial to separate out the two stages of the proceedings. It was necessary to assess the overall picture, and the findings of the school, which will have tested the evidence, would and should be given significant weight by the ISA in its own determination. The procedure as a whole was therefore not Article 6(1) compliant.

45. Other Supreme Court decisions so far in 2011 include R (Morge) v Hampshire County Council (2011) UKSC 2, (2011) LGR 271, on whether a local planning authority, in granting permission for the development along an overgrown railway line, had adopted the correct approach as to whether this would constitute a prohibited "disturbance" to local bat populations within the meaning of the Habitats Directive; Yernshaw v Hounslow LBC (2011) UKSC 3, on the definition of "violence" in Section 177(1) of the Housing Act 1996; Knowsley MBC v Willmore (2011) UKSC 10; Welwyn Hatfield BC v SoS for CLG, (2011) UKSC 15, (2011) LGR 459, on planning permissions obtained by deceit; and R (McDonald) v Kensington and Chelsea RLBC (2011) UKSC 33, on care packages.

THREE IN THE COURT OF APPEAL

46. In R (Sharon Shoosmith) v OFSTED, Secretary of State for Education and Haringey LBC [2011] EWCA Civ 642, (2011) LGR 649, in which case the Supreme Court has refused permission to appeal, the Court of Appeal addressed the question of the extent to which Haringey could rely or continue to rely on a decision of another (a direction from the Secretary of State) which was held to be unlawful. Maurice Kay LJ said, at para 119:

"It seems to me that there is an area, admittedly ill-defined but left open by Lord Steyn in Boddington and Lord Phillips in Mossell, in which the act of a public authority which is done in good faith on the reasonably assumed legal validity of the act of another public authority, is not ipso facto vitiated by a later finding that the earlier act

of the other public authority was unlawful. I consider the present case, which involves the termination of an employment relationship, is within that ill-defined area. Although, at least by the time of the internal appeal hearing in January 2009, Haringey knew that Ms Shoemsmith did not accept the lawfulness of the Secretary of State's direction, it was not for an internal disciplinary panel to rule on that. Haringey was entitled to take the direction at face value. Whilst it would have been open to Haringey to challenge the direction by way of judicial review, it is not suggested that it was obliged to do so. Nor had Ms Shoemsmith yet commenced proceedings in the Administrative Court, so no question of adjourning the internal proceedings pending determination of an application for judicial review arose. For all these reasons, I do not consider that the application for judicial review against Haringey succeeds simply because it acted on an unlawful direction. However, that is not the end of the matter."

47. Stanley Burnton LJ, however, disagreed with this. He said, at paras 136-138: "... This case raises in an acute form the question whether a public authority that acts on what is subsequently found to have been an unlawful and legally void executive act itself acts unlawfully, and if so whether its own act is itself void. In my judgment, the answer must depend on the circumstances. In the present case, Ms Shoemsmith's contention that the Secretary of State's direction was unlawful and void because he had acted unfairly and in breach of the rules of natural justice was expressly and clearly raised on her behalf before the Dismissal Appeal Panel: The facts on which her contention was based were not controversial. The Panel had the benefit of legal advice. Faced with this contention, in circumstances in which there was no genuine urgency in the Panel reaching a conclusion, in my judgment the least that Haringey should have done was to have put Ms Shoemsmith to her election: to begin judicial review proceedings against the Secretary of State to challenge his direction, or for the hearing to continue on the basis that it was valid. As it was, the Panel proceeded on the basis that the direction was lawful and took the risk of its subsequently being held to be void. In my judgment, therefore, Haringey's decision to dismiss Ms Shoemsmith was itself unlawful and void."

48. The Master of the Rolls agreed with Stanley Burnton LJ. He said:

"141. I am prepared to accept, without deciding, that there is a principle that, in "ill-defined" circumstances, the act of a public body ("the public body"), acting in good faith and in reliance on the reasonable assumption that an earlier act of another public body ("the other public body") was lawful, will not be vitiated as a result of a subsequent finding that the earlier act was in fact unlawful. The existence of such a principle is supported by what was said by Lord Browne-Wilkinson in Boddington v British Transport Police [1999] 2 AC 143, 194 and, arguably, by Lord Phillips in Mossell (Jamaica) Ltd v Office Utilities Regulation [2010] UKPC 1, para 44.

142. However, like Stanley Burnton LJ, I do not consider that it is open to Haringey to rely on such a principle on the facts of this case. I rest that conclusion on a combination of a number of factors; it is unnecessary, and I think it could be unhelpful, to seek to identify whether the absence of one or more of these factors would justify a different conclusion.

143. First, it is Haringey, not Ms Shoemsmith, who are seeking to invoke the principle. It seems to me that, at least in general, it should be easier for the principle to be invoked against the public body by a third party who has done something in reliance on the validity of the act, than against a third party by the public body.

144. Secondly, by the time that Haringey dismissed Ms Shoemsmith, she had put them on notice in terms that the direction of the Secretary of State, on which they were relying, was unlawful. Indeed, she had advanced that contention on the very ground which we have found to be made out, namely that he had acted unfairly and in breach of the rules of natural justice. Accordingly, this is

not a case where, at the time that it carried out the act in question, the public body was unaware of the contention that the earlier act of the other public body was unlawful. Further, at the time that this notice was given, Haringey, through the appeal panel which considered Ms Shoemsmith's appeal (following the disciplinary hearing) in January 2010, had the benefit of legal advice, and the facts on which her contention was based were not in issue.

145. Thirdly, there was no requirement for particularly urgent action on the part of Haringey. They obviously wanted to get things sorted out, but Ms Shoemsmith was not a front-line social worker, there was no particular need for her to leave forthwith, she was already suspended, and Mr Lewis had been appointed DCS from 1 January 2009.
146. Fourthly, as mentioned by Stanley Burnton LJ, there was no reason why Haringey could not have suggested to Ms Shoemsmith that she should choose between (i) promptly beginning judicial review proceedings against the Secretary of State to challenge his direction, or (ii) letting the disciplinary hearing and any appeal hearing proceed on the basis that the direction was valid.
147. Finally, this is not a case where the consequences of holding the act of the public body to be invalid should have caused any particular prejudice to the public body. ...”

49. The Court of Appeal further held that Haringey's termination of Ms Shoemsmith's employment as Director of Children's Services (DCS) was amenable to judicial review, that the alternative remedy available in the Employment Tribunal was not adequate, and that the dismissal was unlawful. On amenability to judicial review, Maurice Kay LJ said, at para 87: "It is now obvious that in the great majority of cases proceedings in the Employment Tribunal will be the better, if not the only, remedy. But there will still remain cases which are amenable to judicial review and in relation to which the alternative remedy in the Employment Tribunal will be inappropriate or less appropriate."

50. At para 91 he said: "Stepping aside from the details of the present case and the multiplicity of parties, if a local authority were to dismiss a DCS in total disregard for the rules of natural justice, I am in no doubt that, whatever alternative remedy might be available in the Employment Tribunal, the dismissal would be amenable to judicial review."

51. The decision of the Court of Appeal in Orr v Milton Keynes Council [2011] ICR 704 is an important case on unfair dismissal. Mr Orr, who is black, was dismissed for gross misconduct after a disciplinary hearing conducted by a Director of the Council. The gross misconduct included insubordination of his line manager. Unknown to the Director, the line manager had provoked Mr Orr by 'duplicitously' trying to change his working hours, and by subjecting him to racist language (found by the ET to be an act of direct race discrimination). One of the reasons the line manager's conduct did not come to the Director's attention was that Mr Orr did not attend the hearing. He did attend an appeal but that was unsuccessful.

52. The question for the Court of Appeal on these facts was whether, in deciding the fairness of the dismissal, the ET could treat the knowledge of his own conduct by the line manager as part of the "knowledge" of the Council, or whether what was relevant was the actual knowledge of the dismissing officer. By a 2-1 majority the Court held the latter to be the correct test. A dismissal may be fair even if it is unjust to the employee, since the focus is on the reason for the dismissal (a set of facts known to, or beliefs held by, the employer), the objective reasonableness of the investigation, the employer's belief in the employee's guilt, and the sanction imposed. In any large organisation the power to dismiss is necessarily delegated, and the employer in these circumstances is the manager taking the decision.

53. This conclusion is qualified on two points. The first point is that if the additional knowledge is that of the dismissing manager (as would have been the case had the line manager himself conducted the disciplinary proceedings knowing of his conduct towards Mr

Orr), that would go to the honesty and reasonableness of the employer's belief that the employee was guilty of misconduct, and/or the proportionality of the sanction. Secondly, in many cases the fact that conduct by a manager of the kind in this case is not known to the dismissing manager may well indicate an insufficient investigation.

54. Sita UK Ltd v GMWDA (2011) EWCA Civ 156, (2011) LGR 419, is the leading post Uniplex case on time limits for procurement challenges, and as to the date on which a claimant knew, or ought to have known, of an infringement of the procurement rules, as to which see now the Public Procurement (Miscellaneous Amendments) Regulations 2011, SI 2011/2053. The Court of Appeal held that:-

- (1) There is a duty to extend time where the reason for delay beyond the enacted time limit is lack of actual or constructive knowledge;
- (2) There is a distinction between grounds of infringement (knowledge necessary) and particulars of breach (knowledge not necessary): time does not wait for evidential basis of a claim to become clear;
- (3) Time starts to run "Once the prospective claimant has sufficient knowledge to put him in a position to take an informed view as to whether there has been an infringement in the way the process has been conducted"; and
- (4) There must be "knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement".

55. The most straightforward application of the SITA test of knowledge occurs in the context of challenges to evaluation criteria which have been stated in the ITT, perusal of which gave the claimant sufficient knowledge of the alleged breach. In the case, however, of a claim for non-disclosure of criteria, as opposed to the adoption of an unlawful criterion, it is much less likely (but by no means impossible) that time will start to run from the date of publication of the ITT.

56. Other 2011 Court of Appeal cases reported in the Local Government Reports are R (FZ) v Croydon LBC, (2011) EWCA Civ 59, (2011) LGR 445, on children and age assessments; R (007 Stratford Taxis Ltd) v Stratford-on-Avon DC, (2011) EWCA Civ 160, (2011) LGR 404, on whether a decision is for Cabinet or Full Council; R (Save Britain's Heritage) v SoS for CLG, (2011) EWCA Civ 334, (2011) LGR 493, on the effect of demolition works on the environment; R (Hertfordshire County Council) v Hammersmith and Fulham LBC, (2011) EWCA Civ 77, (2011) LGR 536, on which authority is responsible for mental health after-care services; Albert Court Residents' Association v Westminster City Council, (2011) EWCA Civ 430, (2011) LGR 616, on consultation; R(H) v A City Council, (2011) EWCA Civ 403, (2011) LGR 590, an important decision on information sharing (past convictions); and Jones v Neath Port Talbot CBC, (2011) EWCA Civ 92, (2011) LGR 630, on whether the Governing Body or the LEA or both is/are the proper respondent to an ET unfair dismissal claim, in which the Court of Appeal held that the LEA was potentially directly liable as employer for the unfair dismissal of a teacher following the closure of a school and the dissolution of its GB.

FIRST INSTANCE MISCELLANY

57. The BSF case, (2011) EWHC 217 (Admin), (2011) LGR 553, (2011) ELR 222 with which contrast Board of Governors of Loreto Grammar School, Omagh [2011] NIQB 30, and R (Cheshire East BC) v SoS for DEFRA (2011) EWHC 1975 (Admin), on the withdrawal of prospective Government funding for a PFI waste project, were concerned with consultation, equality duties, fettering of discretion, rationality, and substantive legitimate expectation. Holman J quashed the withdrawal of funding from BSF pipeline projects on procedural grounds. The claims against the Secretary of State ("the SoS") by six local authorities succeeded. The SoS was required to reconsider his decisions.

58. The authorities had carried out the procurement of a Local Education Partnership (LEP) which had received funding for a first wave of projects. It was the funding for a second wave that was cancelled. This was because those projects had not received outline business case (OBC) approval before 1 January 2010, the cut-off date selected by the SoS for repeat wave cases. Quashing of the SoS's decision to cancel funding for these projects was ordered on several grounds which the Judge summarised as being concerned with a failure by the SoS to consider the individual local authorities and their projects in a sufficiently case-specific way. The SoS had applied a "strict rules-based approach".

59. First, the Judge held that the SoS had unlawfully failed to consult with the authorities as to the effect on their individual projects of his possible decision options. There was a procedural legitimate expectation of such consultation, even though there had been no relevant promise or practice of consultation, because of the "pressing and focussed impact" which the DfE's past conduct had had upon the claimants. In short, because of the very large sums involved, and the way in which the authorities had continued to act and spend significant sums of money in reliance on the stage that they had reached in the approval process, along with the fact that they had been engaged in continuing dialogue with Partnerships for Schools, stopping the projects without prior consultation was so unfair as to amount to an abuse of power. The consultation might legitimately have been short (perhaps 3 weeks or so), but there was no justification for dispensing with it altogether.

60. Secondly, Holman J held that the SoS had failed to comply with his statutory public sector equality duties ("PSED") - specifically, the duties to have regard to the need to eliminate unlawful race, sex and disability discrimination, to promote equality of opportunity between men and women, different racial groups and disabled persons and others, and to take steps to account of disabled persons' disabilities and to promote positive attitudes towards them. The position was that neither the various option papers put before the SoS, nor any other disclosed documentation from the time of the decision, referred materially to disability, race or gender. Although it was said in evidence that the SoS had been aware, as a general proposition, that the earlier (and already funded) waves of BSF investment were likely to have delivered funding for schools with greater proportions of disabled or ethnic minority pupils, the Judge said that such a generalised approach "[did] not begin to discharge the equality duties 'in substance [and] with rigour'", as required by R (Brown) v Secretary of State for Work and Pensions [2009] PTSR 1506. Given that Ministers generally had recently been reminded of the importance of having processes in place to show that equality issues had been taken into account, the Judge found the absence of any documentary evidence of such consideration to be "glaring and very telling". It would appear that the Judge did consider that the SoS should have been prepared to engage in case by case consideration of the relevance of particular pipeline projects to equalities issues before deciding which ones to cancel, at any rate to the extent that any special equality considerations pertaining to particular projects had been highlighted in the consultation that should have taken place.

61. There had been no equality impact assessment (EqIA) at the time of the decision. An EqIA had subsequently been carried out, which concluded that there had indeed been an "inadvertent" disproportionate impact upon what it called the "prioritised groups", although it also claimed that the differential impact was only slight. Holman J did not find it necessary to enter upon the debate about the statistical significance of what the EIA showed. Rather, he held simply that it had come too late in the day to save the decision. Due regard should have been had to equalities issues at the time of the decision, precisely so as to avoid such inadvertent consequences.

62. Thirdly, although his ultimate conclusion is expressed in terms of lack of consultation and breach of equality duties, it would seem that Holman J would also have characterised the case as one in which the SoS had unlawfully fettered his discretion under the grant-making power, s14 of the EA 2002. The Judge rejected the SoS's submission that the non-fettering principle did not apply to a one-off decision, as opposed to the application of a previously adopted policy to future decisions. Here, whilst the SoS had been entitled to adopt rules, each project was an individual case, to which the SoS should have been prepared to give individual consideration for the residual exercise of discretion, at any rate in marginal cases or those

where consultation of authorities was required. Instead, the rules had been applied in a rigid and hard-edged manner. Open-minded consultation would have avoided any such fettering.

63. The above are the arguments which succeeded. Also of interest, however, are those grounds of claim which were unsuccessful. Attempts to challenge the decisions on rationality grounds, concerning the absence of a proper basis for the 1 January 2010 cut-off date, or the failure to treat financial close on the LEP as the key event for repeat wave as well as first wave cases, were robustly rejected by Holman J. Given the heavy macro-economic and political content of the decision, the Judge's view was that to scrutinise the SoS's reasoning, beyond being satisfied that it was not inherently irrational, would have been "a grave and exorbitant usurpation by the court of the minister's political role".

64. The Judge also rejected the suggestion that the claimants had had a substantive legitimate expectation that funding would continue to be made available (if they had done, it would have been necessary for the SoS to show both that the expectation had been properly taken into account in the decision-making process, and that there had been a sufficient public interest justification for defeating that expectation). The basis for the alleged substantive expectation was put slightly differently by different authorities according to their own particular facts, but the essential point in each case was that the authority had reached a certain stage in the approval process, or had been encouraged by correspondence to think that approval would be forthcoming, without having reached the stage at which a final business case (FBC) had been approved and a promissory note issued on behalf of the Government. Holman J acknowledged that high hopes had been raised, but held that neither the OBC approval relied upon by most of the authorities, nor anything else, had created a legitimate expectation that any given project would definitely proceed. Although the evidence indicated that in the past OBC approval had in practice invariably been followed by eventual FBC approval, the documentary material and the nature of a project such as BSF meant that delivery was always conditional upon the availability of the requisite finance, and the policy decisions of the Government of the time (especially where such delivery would come after a General Election at which there was an inherent possibility that the Government would change). Accordingly, the decision was quashed on grounds which went to the manner in which it had been reached, rather than to its substantive content.

65. Holman J said that he was not laying down any new principles of law. However, the Judgment will be read with interest by those concerned with taking, or challenging, grant-funding and other similar decisions in the current climate of austerity - whether at central government level, as in the BSF case, or by local authorities themselves, or by other public bodies charged with the distribution of funds. On the one hand, the BSF judgment suggests that rationality challenges are only likely to succeed in such cases where some logical flaw in the approach taken more or less leaps off the page - even where the challenge is to the manner in which available funds have been distributed, as opposed to the more obviously politico-economic decision about how much money should be spent.

66. On the other hand, the case illustrates that authorities which do not think carefully about the procedure to adopt before reaching such decisions may find themselves vulnerable to attack. The funding constraints to which authorities are subject (and the relatively short period which may elapse between knowing what resources they have available and the point at which budgets have to be set) may create real pressure for urgency in decision-making, but more haste may make for less speed if it leads to judicial review. The Judgment is also a reminder of the importance which the Courts attach to the equality duties in decision-making, and to the degree of stringency with which at least some Judges will require equalities implications to be analysed. In the BSF case, the SoS was particularly exposed because of the absence of any paper trail showing that these matters had been properly taken into account at the time.

67. The manner in which Holman J approached the question of substantive legitimate expectation is also of general interest. The Judge's emphasis upon the possibility of a change of government as a reason why such an expectation did not arise is not something which has featured in previous caselaw. The Judgment is also notable for the Court's unwillingness to find a substantive legitimate expectation where the assurance of a future

benefit was not unqualified and unconditional, even where the eventual withholding of the benefit did not result from the non-fulfilment of the normal conditions.

68. On the PSED, in R (W) v Birmingham City Council [2011] EWHC 1147 (Admin) Walker J held that the Council had failed to comply with Section 49A of the Disability Discrimination Act 1995 in making decisions to cut funding for adult social care. At para 151 he summarised the legal principles as to the application of s49A as follows:-

To what decisions does the duty apply?

- i. The duty applies to all decisions taken by public bodies, including policy decisions and decisions on individual cases;
- ii. The duty 'complements' specific statutory schemes which may exist to benefit disabled people;
- iii. The disability equality duty is at its most important when decisions are taken which directly affect disabled people;
- iv. The duty requires public authorities to take action to tackle the consequences of past decisions which failed to give due regard to disability equality;
- v. The duty requires the circumstances of the full range of disabled people to be taken into account and may require certain groups of disabled people to be prioritised, for example on the basis that they experience the greatest degree of exclusion;

What does the duty entail?

- vi. The equality duties impose 'significant and onerous' obligations on public bodies in the context of cuts to public services;
- vii. 'Due regard' means specific regard by way of conscious approach to the specified needs;
- viii. Due regard requires analysis of the relevant material with the specific statutory considerations in mind;
- ix. General awareness of the duty does not amount to the necessary due regard, being a 'substantial rigorous and open-minded approach';
- x. In a case where the decision may affect large numbers of vulnerable people, many of whom fall within one or more of the protected groups, the due regard necessary is very high;
- xi. The duty (and in particular DDA 1995 s 49A(1)(d)) may require positive steps to be taken if the circumstances require it to address disadvantage to disabled people;
- xii. Thus, if changing a function or proposed policy would lead to significant benefits to disabled people, the need for such a change will carry added weight when balanced against other considerations;
- xiii. Similarly, if a risk of adverse impact is identified, consideration must be given to measures to avoid that impact before fixing on a particular solution;
- xiv. Impact assessments must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact;

When must 'due regard' be given to the duty?

- xv. Due regard must be given before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question;
- xvi. As such due regard to the duty must be an essential preliminary to any important policy decision, not a rearguard action following a concluded decision;
- xvii. Put another way, consideration of the duty must be an integral part of the formation of a proposed policy, not justification for its adoption
- xviii. The duty is continuing and is engaged at all stages of a decision-making process, meaning that further consideration to the duty may be required where new information comes to light;

Who needs to pay 'due regard'?

- xix. The duty is non-delegable and is owed by primary decision-makers;

- xx. Decision-makers must be properly informed of the nature and extent of the duty at the time relevant decisions are taken;
- xxi. In particular, decision-makers need rigorous and accurate advice and analysis from officers, not 'Panglossian' statements of what officers think members want to hear.

69. On EqlAs, see further R (Hajrula) v London Councils (2011) EWHC 448 (Admin), (2011) EWHC 151 (QB), on grants to voluntary organisations; and JG v Lancashire County Council (2011) EWHC 2295 (Admin), on budget cuts and adult social care, which appears to be going to the Court of Appeal; and challenges to public library closure decisions by Brent, Gloucestershire and Somerset, in which Judgments at first instance are awaited.

70. On consultation, see further Buckinghamshire County Council v Kingston-upon-Thames RLBC (2011) EWCA Civ 457 at paras 34-36 and 50-58; and Vale of Glamorgan Council v Lord Chancellor (2011) EWHC 1532 (Admin).

71. R (Salford Estates) v Salford City Council [2011] EWHC 2135 (Admin) was concerned with an exclusivity agreement and thereafter a conditional contract between the Council and Tesco for the sale by the Council to Tesco of a plot of land in Salford. The claimant owned a neighbouring site. The main issue was whether the Council had complied with its duty pursuant to Section 123 of the Local Government Act 1972 to obtain the best consideration reasonably obtainable on a disposal of land. The Judge held that the Council had fulfilled this duty.

72. The Judge said:-

- “95. ... Firstly I accept the submissions made by the Council and Tesco that essentially section 123 imposes a duty to achieve a particular outcome, namely the best price reasonably obtainable; it is not a duty to conduct a particular process, for example to have regard to particular factors. Secondly ... as the duty rests upon the local authority, its purported discharge of that duty can only be impugned by this court on the usual public law grounds ... where the decision challenged was the decision of the local authority in discharge of its public duties, a court is not entitled to substitute its own opinion on the facts and merits of that for that of the authority. The approach would be to interfere only if there was no material upon which the decision could have been reached or if, in reaching that decision, the authority disregarded matters which it ought to have taken into consideration, or had paid attention to matters or allowed itself to be influenced by considerations which were not material to and should not have influenced the decision.”
- “96. Secondly, ... in a case like this a Judge has the benefit of hindsight and full legal arguments, a benefit not enjoyed by the local authority taking a decision, and although there is a duty to probe and explore any offer that may be made there is also maybe a danger of too much probing or that indecisiveness may lead to the loss of a bargain.”
- “97. A court is only likely to find a breach or an intended breach of provisions of section 123(2) ... if the Council has a) failed to take proper advice, or b) failed to follow proper advice for reasons which cannot be justified, or c) although following proper advice, following advice which was so plainly erroneous that in accepting it the Council must have known or at least ought to have known that it was acting unreasonably.”
- “98. Thirdly, although there is no particular prescribed route to achieve the best price reasonably obtainable there may be circumstances in which an actual sale to the market is the only way to achieve it as opposed to one particular sale at a price according to an independent valuation. ...”

“103. ... the Council would need to be aware of the section 123 duty, for otherwise it might not necessarily act so as to bring about the required best price reasonably obtainable; but of course if it was clear that the Council had that duty in mind it was not necessary to be explicitly stated; the question is substance, not form. ... To see whether that duty had been performed it was necessary to turn to the substance of the decision and its reasoning. A failure to mention the duty expressly does not itself show that the duty has not been performed. ...”

“105 ...I see no basis for overlaying the Council's normal public law duty concerning section 123 as set out above with some higher standard of scrutiny or care. ...”

73. Cranston J began his Judgment in Charles Terence Estates Ltd v Cornwall County Council [2011] EWHC 2542 (QB) as follows:-

“This case raises some novel issues concerning contracts with governmental and public authorities. In particular it raises the issue of the extent to which such authorities themselves can invoke public law flaws in entering a contract when faced with a private law claim by the other party to the contract.”

74. Having referred to Gibb v Maidstone and Tunbridge Wells NHS Trust [2010] EWCA Civ 678 and Credit Suisse v Allerdale BC [1996] QB 306, at paragraph 64 Cranston J said:-

“The upshot is that a public authority can invoke its lack of capacity as a defence to an action under a contract. Success in raising other public law flaws in the exercise of its discretion to enter a contract attracts no bright line rule: Gibb v Tunbridge Wells NHS Trust, supra. It would seem to turn on factors such as the character of the flaw, whether it was easily remediable by the public authority, its visibility to the party with which the public authority has contracted and the nature of the subject matter. Thus bad faith or improper motive on the part of a public authority has long been regarded as vitiating a decision and that would extend to its contract making. If the flaw in contracting is a failure to act for, or take account of, a non-statutory purpose or consideration, however, that would militate against a remedy. In general a public authority making a contract in breach of internal rules and procedures should not be able to invoke these when they are not readily visible to the counterparty and the counterparty has acted in good faith. That accords with the well known common law rule for public companies established in Royal British Bank v Turquand (1855) 5 E & B 248. That had commercial convenience as one of its purposes, a consideration of importance in this context as well. As to subject matter, fundamental to a public body's accountability is the care it exercises in handling public moneys. In the context of local authorities this takes legal shape in the principle of their fiduciary duty to local taxpayers. As will be seen, a contract made in breach of that principle can be a contract made without statutory power.”

75. The Judge held that, applying Bromley LBC v GLC [1983] 1 AC 768, the Council's predecessor authorities had been in breach of fiduciary duty in taking leases from the Claimant. At paragraph 79, Cranston J said:-

“In my view, the crucial point is that the councils never had regard to what was the market rent for the various properties leased from CTE... But this £120 was not a market rent and no attempt was made to discover what a market rent for the properties would be. Rather, the rent was formulaic, fixed even before the properties were identified and purchased. The £120 figure was simply multiplied by the number of bed spaces to produce the weekly, and ultimately the yearly, rent for each property. ...”

76. At paragraph 80, Cranston J continued:-

“... the parties never addressed what were the market rents for any of these properties. Given that market rents would vary from property to property, and over time from unit to unit within each property, a formulaic approach was incapable of producing market rents. The statutory power of the councils to acquire property had to be construed in the light of the principle that they owed a fiduciary duty to their council taxpayers. Compliance with their fiduciary duties demanded that the councils have regard to market rents on agreeing the rents payable to CTE for these properties. In failing to do so they acted outside their powers. The upshot is that the leases are void and of no effect.”

77. As to consequences, Cranston J said:-

“95. Given my finding that Restormel and Penwith lacked the power to enter the leases because they had no regard to their fiduciary duty to council taxpayers in doing so, they have no effect and are a legal nullity. That means that they are incapable of being ratified: Co-operative Retail Services Ltd v Taff-Ely BC (1979) 39 P&CR 223, 239, (1981) 42 P&CR 1. There is no question of any estoppel arising to give effect to the leases (Rhyl UDC v Rhyl Amusements Ltd [1959] 1 WLR 465; R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2002] UKHL 8, [2003] 1 WLR 348, [35]) nor any legitimate expectation of their being enforced as a private law right: Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363 [68]-[69], per Laws LJ.

96. Since the leases are of no effect, the issue arises as to basis on which the councils have been in occupation of the properties. Ordinarily, when tenants enter under an agreement for a term which is void at law, they are liable as a tenant from year to year on all the terms of the agreement applicable to a yearly tenancy: Rhyl UDC v Rhyl Amusements Ltd [1959] 1 WLR 465, 477; Inntrepeneur Estates Ltd v Mason [1993] 2 EGLR 189, 196. However, no periodic tenancy can have arisen in this case because no lawful rents for the properties have ever been agreed. Cornwall Council therefore occupies each property under a tenancy at will, terminable at any time.

97. The leases being of no effect, Cornwall Council has a restitutionary claim against CTE for repayment of the rents it has paid: Auckland Harbour Board v R [1924] AC 318. CTE accepts this but relies on the defence of change of position: Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548, 578F - 581B...”

“99. The defence of change of position is based on a principle of justice designed to protect a party from a restitutionary claim in circumstances where it would be inequitable to pursue the claim, at least in full: ... In my view, the equitable outcome is that since the councils have had the benefit they were supposed to under the terms of the leases it is proper that the level of rent payable in respect of Cornwall's occupation should be the amount that was agreed.”

78. Cranston J concluded:-

“102. To address housing need in the first part of the last decade central government encouraged local authorities to consider as one solution leasing accommodation from private landlords so that the councils could then to sub-let or licence it to residents. Central government's guidance conditioned this advice on securing "cost-effective" arrangements with landlords. In any event local authorities were obliged by their fiduciary duty to local taxpayers to approach such arrangements with prudence. By failing to take into account market rents when they entered the leases with CTE Restormel and Penwith

breached that duty. Cornwall Council, as successor to Restormel and Penwith, is entitled to invoke this vitiating feature of the leases. However, for the reasons given in the judgment, it cannot succeed in raising the other public law flaws which it contends infected the councils' decision-making when entering the leases with CTE. Under the case-law the consequence of breaching the fiduciary duty to local taxpayers is that the leases are of no effect. For different reasons so, too, are Penwith's arrangements with CTE to provide £350,000 of funding. However, as is explained in the judgment the restitutionary remedy which Cornwall Council has for repayment of the rent moneys and the £350,000 is defeated by CTE's change of position consequent on the leases and the Penwith funding arrangements being agreed."

79. In the Halo Trust v Secretary of State for International Development (2011) EWHC 87 (TCC) Akenhead J gave Judgment in favour of the Secretary of State and brought to an end the automatic stay under the Public Contracts Regulations on a contract being awarded once proceedings are brought to challenge the award. The Judge found that there was no serious issue to be tried in relation to Halo's challenges to a mini-competition under a framework agreement, resulting in the award to another party under the framework; and also that, applying the same principles as upon an application for an interim injunction, the balance of convenience favoured the contract being awarded.

80. Akenhead J adopted the following approach:-

- (1) The Court has first to determine whether there is a serious question to be tried, and, secondly, if so, whether the balance of convenience lies in favour of interlocutory relief: paragraph 33;
- (2) The governing principle in this latter exercise involves consideration of whether damages are an adequate remedy for the party in whose favour interim relief might be granted or continued: *ibid*;
- (3) It is legitimate for the Court to take into account on the balance of convenience exercise (i) the public interest and (ii) the impact on others: paragraphs 36 and 41; and
- (4) The Regulations create an adequate regime and framework, so that there is no need to imply any contract: paragraph 42.

BEYOND THE COURTS

81. Top cases come not only before the Courts but also Tribunals, not least in the areas of employment, freedom of information/data protection and local government standards. See Bloomsbury Professional Limited's "Local Government Law Bulletin" Nos 42 and 43.

82. On local government standards, in Bournemouth BC Standards Committee v Councillor John Beesley, LGS/2010/0533, the First-tier Tribunal, General Regulatory Chamber (Local Government Standards in England), decision on 15 March 2011, held that Councillor Beesley, who had declared personal interests, was not guilty of having failed to disclose those interests as also being prejudicial interests. The Tribunal said (para 4.3.13):

"The test to be applied under the Code of Conduct is in essence the same as the test for apparent bias. The member of the public viewing these circumstances would demonstrate two key characteristics - adopting a balanced approach and while not being complacent would not be unduly sensitive or suspicious (Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781). The matter must be considered from the point of view of an observer who is both informed and fair minded. The question to be addressed by the member of the public with these characteristics is

whether there is a likelihood in other words a real possibility (Porter v Magill [2002] 2 AC 3571) of bias.”

83. On the numerous cases under the FoIA, much attention has been paid to the Camden Squatters case, Voyias v ICo and Camden LBC, Case No EA/2011/0007, on whether the exemption under s31(1)(a) of FoIA was engaged and whether the public interest in avoiding prejudice to the prevention of crime outweighed the public interest in disclosure of the addresses of empty properties. The FTT ruled (para 47), applying Hogan v Oxford City Council, that s31(1)(a) was engaged: the information would be of use to organized squatters and this type of squatting is associated with types of criminal activity, and would also be of use for the criminal purposes of organized criminals, and the level of prejudice was “real, actual and of substance”. The exemption, however, is a qualified one, and applying (or misapplying) the public interest test in accordance with Bexley v ICo, the FTT ruled (para 68) that the balance lay in favour of disclosure, especially having regard to the public interest in bringing empty properties into reuse.

84. Home Office v ICo and DEFRA [2011] UKUT 17 (AAC), (2011) 1 Info LR 1533 holds that reliance can be placed on exemptions even when they are raised late, but is apparently on its way to the Court of Appeal.

ONES TO WATCH

85. Gibson v Sheffield City Council, (2010) ICR 708 (CA), on equal pay, was due to have been heard in the Supreme Court in mid-October. However, it has settled. This would have been the first time for several years that the highest court in the UK considered the law relating to equal pay. The main issue in Gibson was whether in cases of alleged indirect discrimination “it is open to an employer to avoid the need for objective justification if he can show that, notwithstanding that statistics have been produced which show that the pay practice in question has an adverse impact on women, that pay practice is not sex-tainted”. None of the cases scheduled for hearing in the Supreme Court in Michaelmas term has an English or Welsh local authority as a party.

86. In the pipeline, however, Bury MBC v Hamilton and City of Sunderland v Brennan (2011) ICR 655 (EAT), is due to be heard in the Court of Appeal in March 2012, on justification and pay protection on the implementation of Single Status, and how a local authority proves unaffordability; USA v Nolan (2011) IRLR 40 (CA) is due to be heard by the ECJ in the Summer of 2012, on whether there has to be redundancy consultation before a decision is taken to close a particular establishment; and also in 2012 the ECJ is due to hear Alemo-Herron v Parkwood Leisure (2011) ICR 920 (SC) on whether employees (TUPE) transferred out of local government employment have the right to any pay increases negotiated through collective bargaining machinery the outcomes of which were incorporated into the employees’ contracts of employment prior to the transfer.

James Goudie QC
10 October 2011