PROMISES, PROMISES: LATERAL THINKING IN ENFORCEMENT

Suzanne Staunton, Guildhall Chambers

Introduction: Types of promises

1. Promises can be made by an employer to an employee in a variety of different ways. More often than not, they usually include promises:

    1.1. Within the body of the contract of employment;
    1.2. Within a policy document, which either forms part of the contract of employment, or which "does not form part of the contract of employment";
    1.3. Through a collateral contract;
    1.4. Though an implied term of the contract;
    1.5. Simple promises, which could amount to promissory estoppel.

2. This paper will seek to examine where promises are made through express terms within contracts of employment, including those where there is seemingly no discretion once the promise is made, and those terms where employers are able to exercise discretion, and how the exercise of discretion can be fettered. Moreover, when terms can be implied into a contract will also be explored. I will then seek to go through more unconventional causes of action when presented with promises. Finally, the paper will briefly turn to what remedies are open to both employees and employers when a breach of contract occurs.

Construing promises generally

3. It is trite that to have a valid contract, there must be: the intention to create legal relations; a valid offer; acceptance of the offer; and then consideration in return.

4. More often than not, the consideration by the employee is not specified, but is the execution of their role satisfactorily.

5. Express terms of contracts are dominant, and where there is one in play, the dispute will generally revolve around the interpretation of a particular clause in the light of:
    5.1. its wording;
    5.2. its context in the contract overall;
    5.3. the facts surrounding the agreement;
    5.4. evidence of how the contract operated in practice; and
    5.5. the circumstances that constitute the alleged breach.

6. Employment law contracts follow ordinary contractual principles. Each contractual term is given its objective meaning, examining how the impartial reasonable man would understand the term, having due regard to commercial common sense, rather than what was actually in the minds of both parties when the term was decided.

7. This point is aptly summarised in **Brogden v Investec Bank Plc** [2014] IRLR 924 HC, by Leggartt J, when he states the "*actual intentions* [of the parties] *are happily irrelevant…The court identifies the meaning of contractual language not simply by adopting the point of view of a reasonable bystander but by assuming that the parties themselves were reasonable people using the language of the contract to express a common intention.*" [1]

8. In doing so, the court will examine "*all the background knowledge… reasonably… available to the parties… at the time of the contract…* [including] *absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*"[2]

[1] at paragraphs 75-77

[2] **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896, 912 HL, per Lord Hoffmann.

9. It is important to note that "*the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.*"[3] Whilst the court will consider the ordinary meaning of the language adopted, the court can override the 'ordinary meaning' by its interpretation of what the reasonable man would interpret the term. Therefore, the courts may focus on what must have been meant by the parties, also taking into account: common sense (in light of the agreement); and the construction which makes the most business sense.[4]

10. This gives both Claimants and Respondents/ Defendants huge scope for argument in the Tribunal of Civil Courts about what exactly an agreed term meant, and can be used to both parties' advantage.

Contracts of employment

Where there is no discretion on the face of it

11. Often, contractual terms will seem absolute, and the employer will – on the face of it – have no scope to exercise their discretion. In those circumstances, it is still open to the parties to argue about how a term should be construed.

12. In doing so, either party is well advised to collate documentation from the time the contract was made, which would assist a Tribunal and/or a court in assessing what the reasonable parties would have considered the term meant, objectively.

13. Further, implied terms can remedy deficiencies or holes in contractual terms in certain circumstances (see: **Stubbes v Trower, Still & Keeling** [1987] IRLR 321, CA).

14. An example of this would be if a term states:

> "*A 10% bonus will be payable at the end of the financial year if an employee has satisfactorily executed their job*".

15. On the face of it, as long as the employee has done their job, they are entitled to a bonus of 10%.

16. But, there is scope here to argue about what the 10% is. It is open to an employee or employer to argue that this is 10% of the employee's wage (and there could be an argument about whether it should be gross or net), or of the profits, or if a commission based job, of the commission earned. All of this could easily be subject to judicial scrutiny, and depending on the context of the term, and the documentation both parties had at the time, could dictate how a court perceives how a "reasonable man" would interpret the term.

17. The same applies to "*satisfactorily executed their job*". The starting point would be to argue *whose opinion* should count when it comes to the employee's "satisfactory performance". Again, the courts will look at who the reasonable man would understand had the discretion to decide what is satisfactory performance.

18. Alternatively, the court may examine what the definition of "*satisfactorily executed their job*".

19. Either way, in doing so, the courts will examine how the term relates to the rest of the employment contract, and the other information available at the time.

[3] Ibid
[4] **Rainy Sky SA v Kookmin Bank** [2011] 1 WLR 2900 UKSC

20. Therefore, both Claimants and Respondents/ Defendants should utilise all documentary evidence they are able to point to, which was available at the time the term was drafted and agreed to, to best argue their point, using ordinary contractual construction.

Where there *is clearly* discretion

21. The recent case of **Braganza v BP Shipping Limited** [2015] 1 WLR 1661 UKSC, highlights the minefield that is "employer's discretion".

22. In brief, Mr Braganza was subject to a contract of employment, which stated, in so far as is relevant, the following terms:

> "*For the avoidance of doubt compensation for death… shall not be payable if, **in the opinion** of the company or its insurers, the death… resulted from amongst other things, the officer's wilful act…*". (my emphasis added)

23. Mr Braganza died in service. Either, he died by: accident, by falling overboard; or, he committed suicide. The company, by way of a commissioned report, explained that whilst it was possible that Mr Braganza could have gone on deck and fallen off the boat by accident, they concluded that Mr Braganza most likely died by committing suicide. They took this view, because of extraneous issues which alluded to Mr Braganza not being of his normal mind-set.

24. Suicide constituted a wilful act. Therefore, the employer refused to pay death in service compensation to his widow. Mrs Braganza brought a claim for breach of contract, asserting that the employer should not have exercised their discretion in that fashion. How an employer should exercise their discretion was considered by the Supreme Court.

25. All Supreme Court Judges agreed that the decision of an employer could, in theory, be challenged. They all agreed on adopting the following approach:

    25.1. First, that discretion within contracts is fettered by: "*concepts of honesty, good faith and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.*"[5] In that way, the Supreme Court all concurred that contractual discretion is akin to the decision-making by public bodies, in that it should be lawful and rational.

    25.2. Secondly, even more analogous to public law decision making, the Supreme Court Judges agreed that the test in Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223 should be adopted, which essentially has two limbs. It focuses first on the reasonableness of how the decision was made. Secondly, it examines the reasonableness of the outcome:

> "*The court is entitled to investigate… whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered [favourably]… it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.*"[6]

26. However, where the law Lords' opinion diverged was when the question of trust and confidence was broached. The majority (3:2) considered that trust and confidence within an employee relationship was significant, bearing in mind the disparity of power between the two parties, and also because the two parties interests may be diametrically opposed.

[5] **Socimer International Bank v. Standard Bank London** [2008] EWCA Civ 116, as per Lord Justice Rix
[6] **Associated Provincial Picture Houses Ltd v. Wednesbury** Corp [1948] 1 KB 223, as per Lord Green MR

27. Therefore, they considered that trust and confidence should be taken into account when scrutinising employers' decisions, where:

    27.1. the decision will have a substantial impact;
    27.2. there is an inherently improbable event, for example, suicide or child abuse[7] (though, of course this is case specific).

28. Regardless of who you are representing, the opinion of **Braganza** could have ramifications on how you seek to present a case. If the decision an employer has to make or has already made is a serious one, **Braganza** should be used as a guide to assist you in pointing to the reasonableness or otherwise of how a decision was reached, and whether it was a reasonable decision in all the circumstances.

29. In practical terms, following the case, there is now a stronger emphasis on adopting an objective standard of reasonableness, in both the approach to decision making, and also, the decision itself.

30. The case of **Bouygues E&S Contracting UK Ltd v Vital Energi Utilities Ltd** [2014] CSOH 115, though not an employment case, is helpful in addressing the requirements of a decision maker. This states that a decision maker should (a) show each of the issues have been dealt with by expressing what has been considered in deliberation; (b) reach a conclusion on each issue; and (c) be comprehendible to the reasonable man.

31. In **Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd** [2009] EWHC 408 (TCC), again, not an employment case, gives good guidance on how an important decision should be reached:

> "*an adjudicator is obliged to give reasons so as to make it clear that he has decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that the parties can understand, in the context of the adjudication procedure, what it is that the Adjudicator has decided and why.*"

32. In circumstances where the decision is very unusual or improbable, it is important that the evidence is extremely lucid and coherent. If acting for the Defendant/ Respondent, it is important to focus on why, proportionately, the evidence backing the decision is adequate.

33. Conversely, if acting for the Claimant, the adequacy of the evidence and the ferocity of its examination can be attacked. If the **Bouygues** test is not adhered to, the decision making can be criticized, taking each stage in turn.

34. For example, taking this into consideration, if acting for the employer before an important decision has to be made, you may consider advising them to conduct an investigation, akin to an unfair dismissal type of investigation. This could include:

    34.1. collating and reviewing all relevant documentary evidence;
    34.2. collating and reviewing representations from all relevant parties, including the employee/ employee's family that are affected by the employer's decision.

35. Following from this, you could advise your client to give the employee/ employee's family full written reasons for decisions, making reference to all documentary evidence that has been considered when coming to their decision.

36. Not only will it make it more difficult for a decision to be challenged, but also, it will render the decision less likely to be subject to judicial scrutiny, in that clearly, it is highly unlikely to meet **Wednesbury** unreasonableness, nor breach the terms of trust and confidence.

[7] **Braganza** See: Lady Hale at para 35

37. If acting for the Claimant, on the other hand, the decision making process, including documentary and witness evidence could be scrutinised, as well as the employer's (lack of) forensic examination of the evidence in question, in addition to the reasonableness of the decision.

38. Cases where the exercise of discretion within contracts of employment is particularly important concern are cases where ones' career is/ could be affected.

39. In **Chhabra v West London Mental Health NHS Trust [2013] UKSC 80**, there was an express term to the effect that the disciplinary procedure would be operated in an objectively reasonable fashion. In this case, a Human Resources professional amended an investigatory report, and in doing so, changed the thrust of the report. This was considered to be an unreasonable exercise, going beyond a clarification of matters. Therefore, the Defendant did not exercise their discretion appropriately.

Where a term should (or should not!) be implied into the contract

40. Bonuses, or benefits, which have not formed part of the contract of employment, any collateral contract, or even part of a policy, may still become an implied contractual right.

41. The two ways a term is usually implied into a contract of employment is either by using the 'officious bystander' test or the 'business efficacy' test.

42. The officious bystander test is one where the term is abundantly obvious to the objective reasonable man, standing in the position of both parties.

43. The business efficacy test is where a term is implied to make the term effective from a business perspective (see: **Reigate v Union Manufacturing Co (Ramsbottom) Ltd and Elton Cop Dyeing Co Ltd** [1918] 1 KB 592, CA).

44. Both these tests can overlap.

45. Whether a term should be implied into a contract is most aptly described in **BP Refinery (Westernport) Pty Ltd v Shire of Hastings** (1978) 52 ALJR 20, by Lord Simon of Glaisdale. He stated that in order for a term to be implied into a contract, the following conditions must be met:

> "*(1) it must be **reasonable** and **equitable**; (2) it must be necessary to **give business efficacy** to the contract, so that no term will be implied if the contract is effective without it; (3) it must be **so obvious that 'it goes without saying'** (4) it must be **capable of clear expression**; (5) it must **not contradict any express term of the contract***." (emphasis added)

46. Simply put, an implied term is one that "*spell*[s] *out what the contract* [or term] *means*".[8]

47. In practical terms in the employment context, this usually involves examining the ordinary custom and practice between the parties.

48. When looking at custom and practice, the guidance by Underhill LJ in **Park Cakes Ltd v Shumba** [2013] EWCA Civ 974 should be remembered. The principles are as follows:

    48.1. Using "ordinary contractual principles, what matters must be not what an offeror actually intends but what intention his words or conduct would communicate to the reasonable offeree"[9] (my emphasis added);

[8] **Attorney General of Belize v. Belize Telecom Ltd** [2009] 1 WLR 1988 PC per Lord Hoffmann
[9] paragraph 29

48.2. The points outlined at paragraph 16 of the judgment in Albion Automotive Ltd v. Walker [2002] EWCA Civ 946, [2002] All ER (D) 170 (Jun) are influential as to whether a custom or practice should be implied. However, these must be considered alongside the contract being read by the objective reasonable man, and also, factors (f) and (h) below should be read with caution, because they were applied in circumstances where there was a semblance of an express term. Nonetheless, the principles established are useful, and these are namely:

(a) "whether the policy was drawn to the attention of the employees;
(b) whether it was followed without exception for a substantial period;
(c) the number of occasions on which it was followed;
(d) whether payments were made automatically;
(e) whether the nature of communication of the policy supported the inference that the employers intended to be contractually bound;
(f) whether the policy was adopted by agreement;
(g) whether employees had a reasonable expectation that the enhanced payment would be made;
(h) whether terms were incorporated in a written agreement;
(i) whether the terms were consistently applied."

48.3. The number of times, and the length of time a custom or practice has occurred, and the consistency of the terms, how they are publicised within the organisation, and how they are described (for example, if they are consistently called ex gratia, this would point to it not being a contractual term).

49. This guidance is especially important in circumstances where the contractual terms appear ambiguous. In those circumstances, the courts are in a position to look at what is the ordinary custom and practise between the Respondent and the Claimant in interpreting the ambiguous term (see: **Dunlop Tyres Ltd v Blows** [2001] EWCA Civ 1032, [2001] IRLR 629). Indeed, (f) and (h) in **Albion Automotive** above will be useful in those circumstances.

50. But, it is important to remember that in general, implied terms do not override express terms (see: **Nelson v BBC** [1977] ICR 649 at 656, [1977] IRLR 148 at 151, CA, per Roskill LJ; and **Stevedoring and Haulage Services Ltd v Fuller** [2001] EWCA Civ 651, [2001] IRLR 627). Therefore, if there is a term that is capable, in theory, of being implied, a good starting point would be to examine if there is an express term that contradicts – or is capable of contradicting - the implied term, as ordinarily the express term will take precedent.

51. In an ideal world, you will be advising an employer client when they are constructing contracts of employment. If the employer client does not wish to be bound by a term which could potentially be implied by custom and practice, like bonuses, they would be best advised to include an express clause in the contract of employment, which outlined that the particular scheme is non-contractual and discretionary.

52. In circumstances when you are representing an employer, after they have already drafted the contract of employment, and their contracts of employment do not feature an express term outlining the discretionary nature of a scheme that they would like to keep discretionary, then, taking the guidance from **Park Cakes** into consideration, you could urge employers to vary the payments and/or the calculation year on year, so that there is no consistent pattern that they will be bound by. Moreover, if a bonus is given, with each bonus made, to make it clear that in accepting the bonus, the employee understands that the bonuses are discretionary, non-contractual, and that there is no right to any further or future bonus in paying this or any past bonuses. If acting for an employer who has not implemented express terms in the contract of employment, you could advise them to require the employee to sign a document outlining that the bonus they are to receive is discretionary, non-contractual, and that there is no right to any further or future bonus, before releasing the bonus payment. In those circumstances, the employer may succeed in showing that there was no intention to create legal relations.

53. However, when advising employers, it must be remembered what exactly they are trying to achieve in giving bonuses. Employers in giving a bonus usually want to thank their employees for their work, or incentivise them to work hard the next year, or even prevent employees from jumping ship to a competitor. With that in mind, employers should carefully balance wanting to protect their legal position, with keeping their employees happy. Nonetheless, the above shows that transparency and fairness should be the main consideration in drafting any contractual terms and benefits.

54. In circumstances where one is acting for the employee, it is a good idea to also use **Park Cakes**' guidance as a manual, to establish that a custom or practice should be implied as a term into the contract. In doing so, the employee would be well advised to collate data going back for as many years as they are able, showing when a bonus payment has been made, and attempt to establish a pattern in the way the payments are made. This may be in relation to the frequency; how much is given; or how the bonuses are calculated.

Collateral contracts

55. Collateral contracts are contracts made between two parties, which are subsidiary and supplement the original contract.

56. They must satisfy ordinary contractual principles, namely: the intention to create legal relations; an offer; acceptance of the offer; and consideration must be provided (see: **Heilbut, Symons & Co Ltd v Buckleton** [1913] AC 30).

57. As with all ordinary contractual terms, an offer, and therefore the term, must be sufficiently certain.

58. A collateral contract in an employment contract may be formed in circumstances where an agent and/or employee of the employer company of high enough standing states to an individual that if they do something quantifiable, above and beyond the ordinary contract of employment, then they will get more remuneration, or a specific promotion.

59. An example of this would be if a director stated to an employee words to the effect of: "*If you complete 'project X' in your own time, and if we win the 'Y contract', and they attribute the granting of the contract in least in to 'project X', then the company will pay you a £10,000 bonus in the next pay packet, as we have that amount available for bonuses in the budget*."

60. Those sorts of conversations often occur in an informal setting, or at least are made verbally. In those circumstances, the employee in question would be well advised to draft an email confirming the conversation, and asking for clarification of any vague terms that were required (for example: how quickly 'project X' had to be completed; when the 'Y contract' will be up for tender), and accept the offer in the email.

61. Further, the employer would be well advised to confirm the conversation with the employee in writing, ironing out any ambiguties.

62. If the employee then completes this work, and the company then get the contract, in theory, the employee is entitled to the bonus that was promised to him.

Causes of action

63. The main cause of action open to employees and employers is an ordinary breach of contract claim. However, there are other causes of action, which are underused, but, can be useful ways of bringing a claim in the county or high court. These include negligent and/or fraudulent misrepresentation, negligent misstatement, and promissory estoppel.

Breach of contract

64. In circumstances where a breach of the contract of employment or collateral contract occurs, the first cause of action available to the employee will be for breach of contract. I do not propose to go into this in any great depth, save to say that both parties should utilise the ordinary principles of contractual construction to argue what the actual terms were (using the reasonable man principles and matters relating to discretion outlined above), to better their position.

Negligent misrepresentation

65. Sometimes, before the employee and employer enter into the contract of employment, or even during the employee/ employer relationship, the employer's agents/ employees will make a statement that is not factually accurate (not maliciously or intentionally so, usually because the person did not check out the information they gave) but will induce the employee to then act on that statement.

66. In the employment context, this can occur in pre-employment negotiations, where the employer represents that the employee will receive certain benefits and/or bonus payments upon joining the company, but that information turns out to be historic, or simply incorrect.

67. In those circumstances, employees can utilise the oft forgotten Misrepresentation Act 1967, to bring a claim for damages.

68. Section 2(1) of the Misrepresentation Act 1967 provides that:

> "*Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true*."

69. Section 2(2) of the Misrepresentation Act 1967 provides that:

> "*Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.*"

70. A statement will be false if not substantially correct (see: **Avon Insurance Ltd v Swire Fraser Ltd** [2000] 1 All ER (Comm)). Misrepresentation must be made by a party to the contract, though it can be made via a party's agent.

71. To be actionable, the misrepresentation must influence a party in deciding whether or not to enter into the contract. The misrepresentation need not be sole inducement, just one of the inducements. See **Edgington v Fitzmaurice** (1885) 29 Ch D 459.

72. In the employment context, the most common type of misrepresentation is negligent misrepresentation where an incorrect statement with a special relationship possesses the knowledge or skill relevant to the subject matter of the contract and can reasonably foresee that the other party will rely on the statement. The burden is then on the maker of the statement to mis-prove its negligence.

73. Misrepresentation is not actionable if the representee: (a) never knew of its existence (see: **Horsfall v Thomas** (1862) 31 LJ Ex 322); or (b) did not allow it to affect their judgement – **Smith v Chadwick** (1884).

74. Thus, liability depends on four elements:
    74.1. a misrepresentation made by one person to another;
    74.2. a subsequent contract between them (inducement and reliance);
    74.3. consequential loss; and
    74.4. an absence, at the time the contract was made, of a belief or reasonable grounds for such belief, in the truth of the facts represented.

75. If all those conditions are satisfied then the representor is liable to the representee for damages as would be payable if the misrepresentation had been made fraudulently.

76. Obviously, from an employers' perspective, it would be best if the statement was not made in the first place, or that the statement was accurate.

77. If the employer wishes to defend such a claim, the employer should attack the constituent parts of the claim. First, the employer should seek to show that the statement *is* substantially correct. Failing this, the employer then could attack the employee's decision for entering into the contract in the first place. If an employee can show that it was irrelevant to the employee's decision making, making reference to documentary evidence, then that will defeat such a claim. Alternatively, employers can argue that the employee learned of the representation after the contract was formed. In those circumstances, when the contract is a collateral contract, it is worth then having an argument about when exactly the collateral contract was entered into. For example, if a conversation occurred between the employer and the employee, and then an email followed, with the additional untrue representation given as an attachment, not only has the employer got good grounds to say that: the contract was made orally, at a time when the representation was not made; that the employee did not know of the representation; but, also that the representation did not induce the employee to enter into the contract in the first place. The employer would be well advised to ask for all relevant disclosure, including specific disclosure of private text messages and emails, where the employee may have revealed to a loved one they will take a job/ do the work, before the representation was made.

78. Conversely, if acting for the employee, the employee should collate any documentary evidence that shows the representation being made, and evidence which demonstrates the falsity of the statement made. Further, the employee should endeavor to show how the statement induced them into entering into the contract. If the employee has documentary evidence which shows clarification of the term, or indeed, replies to an email where they indicate the term is important, that will greatly assist the employee in successfully bringing a claim for negligent misrepresentation. If the employee does not have that sort of evidence, even text messages/ emails to friends or loved ones, where the employee expresses glee at a certain term, can be used as evidence to show that the term did in fact induce the employee to enter into the contract. Again, the employee may have to have an argument about when the actual contract or collateral contract was formed, in order to successfully bring a misrepresentation claim.

Negligent misstatement

79. In the alternative, it is open to the employee to bring a claim for negligent misstatement.

80. The action for negligent misstatement requires not only that there has been a misrepresentation made carelessly or without reasonable grounds for believing it to be true, but also the existence of a special relationship, which possesses the following characteristics: that the maker of the statement had made it in the ordinary course of his business or profession and that the subject-matter of the statement called for the exercise of some qualification, skill or competence not possessed by the ordinary reasonable man, to which the

maker of the statement was known by the recipient to lay claim by reason of his engaging in that business or profession.

81. The principles in paragraph 74 above apply, save that here, there must be a special relationship.

82. It is open to an employer to argue that the person making the statement simply did not have the special relationship- so, for example, where an Human Resources executive discussed with a prospective employee a complicated bonus scheme, where there was an intricate and complex formula used, the employer could argue that the executive in question did not have the qualification, skill or competence above the reasonable man, to discuss this, and instead, the conversation should have been reserved for the finance director with the employee.

83. Inversely, the employee will need to show that the relationship does exist, and, so, will need to request specific disclosure about how that person was briefed on the matter in question, their qualifications, and position in the company, to establish that the person did in fact have the qualification, skill or competence above a reasonable man. Using the example in the above paragraph, the employee would be well advised to argue that, as an HR executive, the agent/ employee of the employer *did* have the requisite skill, not least because it is part of HR's function to inform employees about their respective benefits, and describe and clarify these, when there are issues.

Promissory Estoppel

84. Promissory estoppel is a reliance-based estoppel. It occurs where the ordinary contractual principles are not fulfilled (offer, acceptance and consideration), but equity prevails, and enforces the promise all the same. This tends to be only a temporary measure; so, it mainly takes effect when a party states the other party does not have to do something, rather that the party doing a positive act. It is to be used as a shield, and not a sword. By that, it must be used as a defence, and not a cause of action.

85. Promissory estoppel requires: (1) an unequivocal promise by words or conduct; (2) a change in position of the promisee as a result of the promise; (3) inequity if the promisor were to go back on the promise. In reality, promissory estoppel will occur in extremely limited circumstances in the employment context.

86. An example would be if a company emailed all employees in August, words to the effect of: "*in the week before Christmas, do not need to attend work after lunch*". Here, no consideration is given by the employee, and so, normal contractual principles are not satisfied.

87. In those circumstances, the employees may then make arrangements around that week period. So, for example, make doctor's appointments, or plan to take their children to see Father Christmas (or more likely, a series of long Christmas lunches!).

88. If the company then reneged on their promise ahead of the week, in circumstances where the employees have made arrangements which would be difficult to change, the employees have a good argument to say that promissory estoppel should apply. In those circumstances, it could be argued that it was unconscionable for the employee to rescind from their promise.

89. If acting for the employee, and would like to ensure that the promise is made good, then, it would be advisable that they responded in some way, to show how they intend to act on the promise. In this instance, a message to their manager, explaining that it would enable them to do whatever it is they plan to do, may be enough. Keeping documentary evidence of whatever it is that they plan, would also be advisable.

90. If acting for the employer, and if there is a possibility that the employer could go back on their promise, they should be clear about this, and make the proposition non-committal (though of course, this, in of itself, may counteract the good intention behind the 'nice' promise, and

lower morale). Alternatively, employers can simply make such announcements closer to the time, when it is clear that you are able to deliver on the promise.

91. Assuming the employer wants to take the former route, with the example used above, the could frame it in these terms, without it being likely to attract promissory estoppel: "*we are currently exploring the possibility of allowing all employees to work half days in the week leading up to Christmas. We will review whether this will be possible nearer to the time, once it is clear to us what everyone's workload is like."*

92. A claim under this head would be made stronger if promisee acted on the promise to their detriment (not as consideration), and the promisor was aware that the promisee will act in this way, in order for the promise to be enforceable.

93. As it is an equitable construct, it is discretionary, and so, the courts may refuse to recognise the promise, if they consider that it is inequitable to do so.

Remedy

94. In circumstances where there has been a breach of contract, however the term comes into being, there are a number of options that employees and employers alike can utilise, when trying to salvage a broken promise.

Damages

95. Damages are the usual way in which Claimants seek to recover in circumstances where there has been a breach of contract.

96. The specific way in which damages will be assessed varies from case to case, but ordinarily, all reasonably foreseeable financial losses will be recoverable, so that the Claimant is placed in the position that they would have been in, if the contract had been performed. In the employment context, this is ordinarily limited to loss of earnings (including past and future). Indeed, the Ogden tables can be utilised to calculate a life time career loss, and depending on the formula used, can increase or curtail the amount of damages recoverable. Further, any loss of any benefits (again, past and future) that can be recovered.

Declaratory relief

97. Declaratory relief is a rarely utilised, but excellent remedy, in circumstances where there is no clear, quantifiable financial loss involved.

98. The usefulness of declaratory relief was recognised by Lord Atkin in **Spettabile Consorzio Veneziano di Armarto v Northern Ireland Shipbuilding Co Ltd** (1919) 121 L.T., when he stated at 635: *"it is one of the most valuable contributions that the Courts have made to the commercial life of this country."* Though, this was seemingly forgotten by most practitioners.

99. In the contractual context, this remedy is best brought in circumstances where the status of a term is of central importance, and judicial intervention is of great assistance.

100. This can be brought in the civil courts, pursuant to CPR 40.20, which very simply states: "The court may make binding declarations whether or not any other remedy is claimed."

101. It is a discretionary remedy, and the courts, in exercising their discretion, will do so in accordance with the principles outlined in the leading authority of Rolls-Royce plc v. Unite [2009] EWCA Civ 387, that there should be: an dispute before the court; the issues are important; the parties involved are directly affected. It is more likely to be granted in circumstances where there is a public interest in granting the declaration.

102. Declaratory relief as a remedy has been very recently been granted in the first instance decision of Sparks v. Department for Transport [2015] EWHC 181 (QB). Whilst this is not binding, this is useful to show how declaratory relief can be best used in the employment context. In Sparks, a variety of unions successfully sought a declaration that it was unlawful for the Department for Transport to have unilaterally narrowed their sickness rules, because the unilateral term was detrimental to the Claimant parties.

103. This remedy should be seriously considered if there is a group affected by a change in contractual terms, or likewise, there are a group of individuals who would like clarity on a matter, or even a declaration that a custom and practice should be an implied term of the contract.

104. This tool can also be exploited by employers. It may be that an employer will benefit from seeking clarification on whether a term is in fact a term, or how it should be construed. Whilst this is an expensive option, it will provide the employer with certainty, and may also work out to be exceptionally cost effective, especially if a court declared that a bonus was discretionary after all, or in interpreting a term, limited its scope or effect.

Injunctive relief and/ or specific performance

105. In some circumstances, it is more attractive to seek an injunction rather than to sue for breach of contract. This is particularly the case in circumstances where a breach of contract in respect of disciplinary proceedings, or where there has been a settlement agreement which has ramifications for someone's job, would have adverse consequences for someone's career (for example, a career in medicine, law, or in the arts).

106. Injunctive relief can pre-empt disciplinary action from an employer, in circumstances where they are unlawfully exercising their discretion and/or breaching contract. This can be particularly useful in Chhabra type cases, as outlined above. In that case, an injunction was granted to prevent the disciplinary procedure being used in a way that breached the contract of employment.

107. Those acting for employers can also take advantage of injunctive relief, where an employee wishes to use commercially sensitive information, or to poach clients. This is a particularly effective remedy in circumstances where an employee leaves an organisation, taking confidential information with them, contrary to their contract of employment or the implied term of trust and confidence. A pre-emptive injunction would be useful to prevent employees from using the information, and can eliminate or at least reduce the damaging effect to the employer's business.

108. In the alternative, specific performance is also a useful tool, and occurs when a court decrees that a person must do what they promised to do. It is an exceptional remedy. The court gives specific performance "only when it can by that means do more perfect and complete justice" (Wilson v. Northampton and Banbury Junction Rly Co (1874) 9 Ch App 279).

109. Specific performance will be denied if damages are an adequate remedy. Courts are only prepared to order it when it is "impossible" to assess the damages in a given case (Hart v. Herwig (1873) 8 Ch App 860).

110. Again, this is probably best utilised in circumstances where a "career" is involved, or one could become deskilled, and money simply cannot compensate for the potential loss of career, which could arise from a breach in adhering to an agreement. An example of this could be where a settlement agreement was entered into, specifying an employer would work in a specific place, to accommodate their mental health issues. If, after the settlement agreement is entered into and the employee is not placed in that vicinity, and so, goes off sick with mental health issues, that could lead to the loss of a career, or where deskilling could occur, specific performance is the best remedy, which would mean the terms of the settlement agreement is enforced.

111. Both injunctive relief and specific performance can be provided on an interim basis. This can be highly effective, especially whereby granting the interim injunction or specific performance can essentially lead to the matter or issue coming to an end. Interim relief is granted where the damage could be unquantifiable or irreversible, if no action is taken. If the action is taken, this could lead to the end of the matter. Again, this is a discretionary remedy and the ordinary American Cyanamid Co. v. Ethicom Ltd [1975] AC 396 guidelines should be applied in assessing whether either party should seek to bring interim relief, namely: (1) is there a serious issue to be tried?; (2) who does the balance of convenience favour?; (3) would damages be an adequate remedy?; (4) are there any special factors?

112. The balance of convenience test is probably the most important in the employment context, where, as aptly described in Lansing Linde Ltd v. Kerr [1991] WLR 251, CA, the court will be looking at the: "lesser evil: will it do less harm to grant an injunction which subsequently turns out to be unjustified, or to refuse one if it subsequently turns out that an injunction should have been granted".

113. Taking that into consideration, parties should try focus on issues such as: the potential irreparable damage to the business; the deprivation of employment and/or rights; and the potential irremediable damage caused to a career/ knowledge.

Conclusion

114. Construing a written contract can be difficult enough when the terms are seemingly express and non-discretionary, but they can be even more challenging to interpret when discretion is central to the term in question, or construing whether a term is implied.

115. Practitioners are reminded to go back to basics when looking at contractual interpretation, and as a starting point to examine what the objective reasonable man would understand a contractual term to mean.

116. In circumstances where discretion can be exercised, it is important to scrutinise the significance of the decision to the employee involved, in approaching how lawful the decision making process and the actual decision is, and whether public law doctrines should be adopted.

117. When analysing implied terms of contract, by custom and practice, it is imperative to check the pre-existing express terms, to ascertain whether there is an express term to the contrary. Moreover, parties are reminded to collate documentation and evidence that demonstrates or counteracts the principles outlined in Albion Automotive above.

118. Consider other causes of action, other than breach of contract, like negligent misrepresentation, negligent misstatement and promissory estoppel.

119. When a breach of contract has occurred, or it is pre-empted that one may occur, it must be remembered that remedies aside from simple damages can be sought, which include obtaining declaratory relief, getting an injunction or specific performance.

Suzanne Staunton
Guildhall Chambers
September 2015