OUTER HOUSE, COURT OF SESSION

[2020] CSOH 67

P180/20

OPINION OF LORD PENTLAND

In the petition of

LEVENSIDE MEDICAL PRACTICE

Petitioner

for

Suspension and suspension *ad interim*

Petitioner: McGuire; BTO Solicitors LLP
Interested Party: Cowan; Anderson Strathern LLP

3 July 2020

Introduction

[1] This petition for suspension and *interim* suspension of an order made by the Employment Tribunal has been brought by the partnership known as Levenside Medical Practice. It is a general medical practice carrying on business at Dumbarton Health Centre. The petition was presented to the court on 27 February 2020 and *interim* suspension was granted on an *ex parte* basis that day. In the petition the respondent is identified as being the Employment Tribunal (Glasgow). The respondent has not lodged answers to the petition. Answers have, however, been lodged by Dr David Neilson ("Dr Neilson"), a general medical practitioner, who had been the claimant in the proceedings before the Employment Tribunal. Dr Neilson brought those proceedings against Greater Glasgow and Clyde NHS Board ("the Health Board"). The Health Board are not parties to the present case.

[2] The case came before me for a hearing on the adjusted petition and adjusted answers. There was no dispute about the underlying facts. A significant number of factual points were agreed by joint minute. For present purposes, the relevant facts may be summarised as follows.

The facts of the present case

[3] On 23 March 2017, the medical practice in which Dr Neilson was then a partner along with one other doctor, Dr Claire McGonagle, was dissolved. The partnership had been responsible for providing GP services to around 2,000 patients under a contract with the Health Board. Both Dr Neilson and Dr McGonagle were self-employed partners in the practice. The practice carried on its business from Dumbarton Health Centre. No transitional arrangements had been made at the time of dissolution. This meant that the contract for the provision of GP services was terminated with immediate effect.

[4] Following dissolution of the practice, the Health Board resolved to assume responsibility for running the practice directly and with immediate effect under and in terms of section 2C of the National Health Service (Scotland) Act 1978. The West Dunbartonshire Health and Social Care Partnership established a process to take longer-term decisions for the care of the patients of the dissolved partnership. The staff of the dissolved practice were transferred to the Health Board. Dr Neilson and Dr McGonagle were each offered fixed term contracts of employment with the Health Board until 30 June 2017; they both accepted these contracts. Dr Neilson's contract of employment with the Health Board was later extended to 31 July 2017. Dr McGonagle refused an offer to extend her fixed term contract.

[5] The Health Board invited applications from existing local GP practices to provide primary care medical services to the patients of the dissolved practice with effect from 1 August 2017. The letter inviting applications explained that the contracts of employment of the five members of staff of the dissolved practice would transfer to the successful applicant by virtue of the TUPE regulations (the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)). Dr Neilson, as a partner of the dissolved practice, was not amongst the members of staff to be transferred.

[6] The petitioner successfully applied to provide the medical services that the dissolved practice had previously carried on. In its application the petitioner explained that it already operated from Dumbarton Health Centre; there were in fact several GP practices carrying on business there. The petitioner had a patient list of about 8,000. There were five GPs in the partnership and no salaried GPs. The petitioner intended to take over the patients of the dissolved practice and thus to enlarge its own practice. With that aim in mind, the petitioner took on another partner. The petitioner agreed with the Health Board that its assumption of responsibility for the patients of the dissolved practice would constitute a transfer of an undertaking for the purposes of the TUPE regulations and accordingly that it would become the employer of the employees of the dissolved practice. The petitioner's application stated that it did not propose to engage either Dr Neilson or Dr McGonagle as employees.

[7] On 22 November 2017 Dr Neilson presented a claim to the Employment Tribunal alleging that he had been unfairly dismissed when his contract of employment was not automatically transferred to the petitioner under the TUPE regulations on 31 July 2017. In his claim Dr Neilson sought an order for re-engagement "on terms no less beneficial than those which had governed his employment by the Health Board".

[8] Thereafter the Health Board's solicitor enquired of Dr Neilson's solicitor on 9 February 2018 whether he intended to seek to add the petitioner as a party to the Employment Tribunal proceedings. Dr Neilson's solicitor said that his instructions were not to pursue the petitioner but that he would bring them in if he felt he needed to. He suggested that it might be that the Health Board would wish to do so if they intended to seek to argue that any liability that they might have should be passed to them under the TUPE regulations. In the event, neither Dr Neilson nor the Health Board chose to seek to add the petitioner as a party to the Employment Tribunal proceedings.

[9] A preliminary hearing before the Employment Tribunal took place on 6 April 2018 at which Dr Neilson and the Health Board were both legally represented. At the hearing, the question as to whether the petitioner should be added as a party to the proceedings was again discussed. Dr Neilson's solicitor submitted that this was not necessary because of section 115 of the Employment Rights Act 1996 ("the 1996 Act"), which provides *inter alia* that an order for re-engagement may be made against a "successor of the employer". In any event, witnesses could be called from the petitioner at a remedies hearing to give evidence on the issue of the practicability of re-engagement and the tribunal would take account of the views of the petitioner when determining this issue. It was agreed that the question as to whether the petitioner should be joined as a party on the application of the Health Board would be reconsidered at a later stage.

[10] In a conversation between them on 6 April 2018 after the preliminary hearing the Health Board's solicitor asked Dr Neilson's solicitor why it was only the Health Board who had been sued and not the petitioner. Dr Neilson's solicitor indicated that his instructions were not to pursue the petitioner because Dr Neilson did not want to sour any relationship

with its partners and his primary cause for concern was with his treatment by the Health Board.

[11] By letter dated 6 June 2018 the Health Board admitted that Dr Neilson had been unfairly dismissed. The Employment Tribunal then issued a judgment dated 3 September 2018 stating its finding that Dr Neilson had been unfairly dismissed and ordering that a remedies hearing was to take place.

[12] In a further conversation on 21 September 2018 between Dr Neilson's solicitor and the Health Board's solicitor regarding the remedies hearing, Dr Neilson's solicitor said that he had advised his client that he could come out of the Employment Tribunal with nothing if the tribunal accepted that liability had transferred to the petitioner because they were not a party to the proceedings. However, Dr Neilson still wished to proceed against the Health Board only.

[13] The Health Board, through its solicitor the Central Legal Office, informed the petitioner's solicitor on 21 November 2018 that Dr Neilson intended to seek a remedy for re-engagement by the petitioner at the forthcoming remedies hearing. The petitioner received legal advice in relation to the fact that the remedy of re-engagement was going to be sought against it. Whilst not waiving his client's legal privilege in relation to the advice it had received, Mr McGuire explained, having taken instructions at the hearing, that the petitioner did not want to become voluntarily involved in the Employment Tribunal proceedings for three reasons. First, because of what it perceived as reputational risk arising from the newsworthy nature of the underlying events in the local community; secondly, because of the risk of damage to relationships with Dr Neilson and others and how that might affect the petitioner's interests; and thirdly because of the costs involved in defending the proceedings. Counsel informed me that the petitioner's view was that if they were not

parties to the proceedings an order for re-engagement could not be made against them. Although he frankly acknowledged that this view was not based on legal advice, Mr McGuire submitted that it was a reasonable and legitimate view for the petitioner to take.

[14] In the course of its preparations for the remedies hearing the Health Board's solicitor made factual inquiries of the petitioner through its solicitor and these were responded to.

[15] The case came before Employment Judge Wiseman for a remedies hearing on 3 and 4 October 2019. Dr Fergus MacLean, one of the partners in the petitioner, was called by the Health Board as a witness of fact at the hearing. He gave evidence that it would not be practicable for the petitioner to re-engage Dr Neilson. The petitioner was not a party to the proceedings which took place at the remedies hearing and was not represented at the hearing. The Health Board did not take on any responsibility for representing the petitioner at the hearing.

[16] Judge Wiseman decided that an order for re-engagement should be made against the petitioner. In a detailed judgment she gave close consideration to the evidence and the submissions made to her on the practicability of an order for re-engagement being made against the petitioner. She found that the petitioner was a "successor employer" to the Health Board in terms of section 115(1) of the 1996 Act. She concluded that it would be practicable for the petitioner to re-engage Dr Neilson. Judge Wiseman ordered that the petitioner should re-engage Dr Neilson as a salaried GP working 0.8 full time equivalent; his principal place of work was to be at Dumbarton Health Centre. She also awarded Dr Neilson the sum of £32,408 in respect of arrears of pay for the period between the date of termination of his employment and the date of re-engagement; this sum was to be paid by

the Health Board. The order for re-engagement was to be complied with by 28 February 2020.

[17] By notice of appeal dated 3 March 2020 the Health Board appealed to the Employment Appeal Tribunal against the judgment of the Employment Tribunal. The notice of appeal sets out a number of alleged errors of law on the part of the Employment Tribunal, asks that the orders on remedies be set aside, and that the case should be remitted to a freshly constituted tribunal for a rehearing on all aspects of remedy. In brief summary, the grounds of appeal challenge the Employment Tribunal's approach to the question whether the petitioner was a "successor employer"; assert that Dr Neilson was not assigned to the "organised grouping" as at the date of transfer in terms of regulation 4(3) of the TUPE regulations; and contend that the Employment Tribunal erred in law by focussing on the practicability of re-engagement by the petitioner instead of by the Health Board. I was informed that a sifting decision on the Health Board's appeal had not yet been made.

Competency of the present petition

[18] The petitioner seeks suspension of the order of the Employment Tribunal that it must re-engage Dr Neilson. It submits that the Employment Tribunal did not have jurisdiction to make an order for re-engagement because the petitioner was not a party to the proceedings. The order for re-engagement is said to have been *ultra vires* and unlawful. The petitioner also claims that the making of the order against it breached the common law rules of natural justice and infringed the petitioner's right to a fair trial under article 6 of the European Convention on Human Rights.

[19] Dr Neilson maintains that the petition is not competent because the petitioner, although not a party to the proceedings before the Employment Tribunal, has a right of appeal to the Employment Appeal Tribunal against the order for re-engagement.

[20] The first question to be addressed is, therefore, whether the petitioner does indeed have a right of appeal against the order made by the Employment Tribunal.

[21] Section 21(1) of the Employment Tribunals Act 1996 provides *inter alia* as follows:

> "An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an [employment tribunal] …. "

[22] The petitioner's challenge to the judgment of the Employment Tribunal, as set out in the present petition, clearly raises questions of law to the extent that it is based upon the propositions that in making the order for re-engagement the Employment Tribunal acted beyond its jurisdiction, breached the rules of natural justice and infringed the petitioner's article 6 rights. The petitioner's first plea-in-law is to the effect that the Employment Tribunal's order for re-engagement was unlawful. It is thus clear that the legal issues which the petitioner wishes the Court of Session to decide in its favour would be within the scope of an appeal under section 21. But does the petitioner, which was not a party to the proceedings before the Employment Tribunal, have the right to appeal?

[23] This question was addressed in *Martineau and another* v *Ministry of Justice* [2015] ICR 1122 where the Employment Appeal Tribunal held that section 21(1) did not limit the right of appeal to the parties before the Employment Tribunal. In his judgment Lewis J said the following:

> "21 In my judgment, the appeal tribunal does, in principle, have jurisdiction under section 21 of the 1996 Act to entertain an appeal on any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal under one of the specified statutes or statutory instruments even where the appeal is brought by a person who was not a party to the proceedings in the employment tribunal. Any limit or restriction on the ability of persons who were not parties to the proceedings to bring an appeal must be sought in other provisions and is not

contained in section 21 of the Act itself. I reach that conclusion for the following reasons.

22 First, and principally, the wording of section 21 itself operates by conferring jurisdiction in respect of one type of issue ('any question of law') which arises in certain specified circumstances, that is where the question arises 'from any decision' or 'in any proceedings' before an employment tribunal under one of the specified statutes or statutory instruments. The section itself does not expressly limit appeals to persons who were parties to the proceedings in the employment tribunal. Provided that the appeal is an appeal falling with the description specified in section 21 of the Act, it falls within the jurisdiction of the appeal tribunal.

23 Secondly, there are mechanisms for controlling appeals brought by persons who were not parties in the employment tribunal proceedings themselves where it is considered inappropriate to permit such appeals. The power conferred by section 30(1) of the Act to make rules 'with respect to proceedings' before the appeal tribunal is broad enough to include rules providing who may or may not bring proceedings. Concerns over the bringing of appeals in inappropriate circumstances or by inappropriate persons are intended to be controlled by the making of rules under section 30 of the Act rather than reading implied limitations into the provisions of section 21.

24 Indeed, at present, rule 3(7) of the Employment Appeal Tribunal Rules 1993 enables a judge or registrar to direct that no further action be taken on a notice of appeal if, amongst other things, the notice of appeal 'is an abuse of the [Employment] Appeal Tribunal's process' or 'is otherwise likely to obstruct the just disposal of proceedings'. In most circumstances, the parties concerned by a decision of the employment tribunal will be the parties to the proceedings before that tribunal. If they do not seek to appeal in respect of any question of law arising out of the decision or the proceedings, it would often, probably usually, be an abuse of process for some other person to seek to appeal any question of law or it would be likely to obstruct the just disposal of proceedings between the parties to the proceedings. There may, however, be other, relatively rare, occasions when a person is sufficiently affected by a decision reached in one set of proceedings that it would not be an abuse of process to allow an appeal by that person in respect of those proceedings to proceed. One such example might arise in relation to appeals in a case specified as a lead case under rule 36 of the Employment Tribunals Rules of Procedure 2013. A decision in such a lead case will be binding on other persons in related cases, that is those cases which raise common issues of law or fact and which have been stayed pending the outcome of the lead case. The original claimant in the proceedings may, for whatever reason, decide not to appeal. There may, therefore, be some cases in which the bringing of an appeal by persons not parties to the proceedings in the employment tribunal would be appropriate.

25 Thirdly, section 21 of the 1996 Act is to be construed in a context where it can be assumed that Parliament would not have intended to preclude an appeal by a person who was not a party to proceedings in the employment tribunal if that could, conceivably, cause injustice. The Court of Appeal has considered this issue in a different context in *George Wimpey UK Ltd* v *Tewksbury Borough Council* [2008] 1 WLR 1649. There, a statutory application was brought in the High Court by George Wimpey UK Ltd under section 287 of the Town and Country Planning Act 1990 to quash the decision of the local authority to adopt a local plan. The High

> Court granted the application to the extent of quashing the part of the local plan relating to land owned by MA Holdings and allocating it for residential development. MA Holdings sought to appeal to the Court of Appeal pursuant to Part 52 of the Civil Procedure Rules. The precise wording of those rules differs from the wording of section 21 of the 1996 Act in the present case. The decision in the *George Wimpey* case, therefore, is not binding as to the interpretation to be given to section 21. What is relevant, however, is the preliminary observation made by Dyson LJ at para 9. He observed:
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> > 'It would be surprising if the effect of the CPR were that a person affected by a decision could not in any circumstances seek permission to appeal unless he were a party to the proceedings below. Such a rule could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success.'"

[24] For these reasons, Lewis J concluded that the Employment Appeal Tribunal does have jurisdiction under section 21 of the Employment Tribunals Act 1996 to hear an appeal brought by a person who was not a party to the proceedings in the Employment Tribunal. Lewis J noted for completeness that his conclusion was consistent with the views expressed by the Appeal Tribunal in *USDAW* v *Ethel Austin Ltd* (2) (unreported 10 September 2013).

[25] On behalf of the petitioner, Mr McGuire pointed out that the facts in *Martineau* involved claimants (fee paid immigration judges) whose claims had been stayed pending determination of a lead case brought by another immigration judge. The claimants seeking to appeal against the decision in the lead case had accordingly been parties to proceedings in the Employment Tribunal, although not strictly to the proceedings in which they wished to exercise a right of appeal. This was not the position in the present case where the petitioner had not been a party to any proceedings before the Employment Tribunal. That is no doubt correct, but it seems to me to make no difference to the construction of section 21.

[26] Mr McGuire also submitted that there was every chance that if the petitioner had sought leave to appeal to the Employment Appeal Tribunal this would have been considered to be an abuse of process and/or would have been considered to be likely to

obstruct the just disposal of the proceedings between the original parties. I do not see why this would be so. If there is any merit in the propositions that there has been a fundamental breach of the rules of natural justice and an infringement of the right to a fair trial and that the Employment Tribunal exceeded its jurisdiction, it can hardly be an abuse of process for the party whose rights are said to have been infringed to seek to challenge the judgment issued by the judicial body responsible for the alleged errors.

[27] Mr McGuire then contended that the case of *Martineau* had been wrongly decided and that I should not follow it. He submitted that it was implicit in the language used in section 21(1) that an appeal could only be brought by parties to the proceedings before the Employment Tribunal. In terms of practice and procedure in the Scottish civil courts an appeal could only be brought by a party to proceedings. There was said to be no good reason why a different practice should apply to the Employment Appeal Tribunal in Scotland. In my opinion, these lines of argument are misconceived. Like Lewis J, I consider that the language of section 21(1) does not exclude an appeal by a non-party. The practice and procedure of the Scottish civil courts are not matters of relevance in the context of construing the statutory provision. The Employment Appeal Tribunal, which has a UK-wide jurisdiction, has its own practice and procedure.

[28] Finally on this branch of the case, Mr McGuire submitted that the construction placed on section 21(1) in *Martineau* offended against the general principle of statutory interpretation that a statutory provision will not alter the common law, especially well-established principles of the common law, unless clear words are used. I reject this argument on two grounds. First, the wording of section 21(1) is, in my opinion, entirely clear; the right to appeal against a decision of an Employment Tribunal is not limited to those who were parties to the proceedings before the tribunal at first instance. Secondly, the

right to appeal to the Employment Appeal Tribunal is a right created by statute; section 21(1) did not have the effect of altering the common law.

[29] For the reasons I have given I conclude that the petitioner had a statutory right to institute an appeal against the judgment of the Employment Tribunal. It must be taken to have elected not to exercise that right. The petitioner has not explained why it decided not to do so. It has a real interest in the outcome of the proceedings before the Employment Tribunal in circumstances where it was not a party to those proceedings and the Health Board's appeal is on different grounds. It seems to me that this is the sort of situation which Dyson LJ (as he then was) envisaged in *George Wimpey supra* as being suitable and appropriate for an appeal by a non-party.

[30] Under rule 3(3) of the Employment Appeal Tribunal Rules (SI 1993/2854), the period within which an appeal had to be instituted was 42 days from the date of intimation of the written reasons to the parties. The date of intimation was 23 January 2020. As I have mentioned, the present petition was presented to the court on 27 February 2020. It is thus clear that the petition was initiated at a time when the petitioner could have instituted a timeous appeal to the Employment Appeal Tribunal against the order for re-engagement. Mr Cowan informed me (and Mr McGuire did not dispute this) that the effect of instituting an appeal would have been to suspend the order of the Employment Tribunal.

[31] Moreover, the petitioner could still institute an appeal by seeking to invoke the dispensing power conferred on the Employment Appeal Tribunal. Rule 37 of the Employment Appeal Tribunal Rules 1993 provides *inter alia* that the time prescribed by the rules for doing any act may be extended (whether it has expired or not) by order of the Appeal Tribunal. Under this provision the petitioner could apply to the Employment Appeal Tribunal to extend the time for it to institute an appeal. At one point in his oral

submissions Mr McGuire suggested that this dispensing power offered little comfort to the petitioner and that to seek to invoke it would be too great a burden in view of the fact that no steps had been taken by other parties to convene the petitioner as a party to the Employment Tribunal proceedings. In my opinion, there is no merit in this line of argument. The petitioner had a statutory right of appeal but elected instead to bring the present petition. In any event, there is nothing burdensome involved in seeking an extension of time to appeal.

[32] Mr Cowan drew my attention to rule 18 of the Employment Appeal Tribunal Rules 1993, which provides as follows:

> "The Appeal Tribunal may, on the application of any person or of its own motion, direct that any person not already a party to the proceedings be added as a party, or that any party to proceedings shall cease to be a party, and in either case may give such consequential directions as it considers necessary."

[33] Mr Cowan submitted that if the Health Board's appeal passed the sift, the petitioner can then apply under rule 18 to be added as a party to the Health Board's appeal. It seems to me, however, that rule 18 is of no relevance in the circumstances of the present case. The Health Board's appeal does not raise the issues on which the petitioner wishes to challenge the re-engagement order made by the Employment Tribunal, that is the grounds based on lack of jurisdiction, breach of natural justice, and infringement of the petitioner's article 6 rights.

[34] Drawing matters together, the following appears to me to be the case: (a) although not a party to the proceedings before the Employment Tribunal, the petitioner had and still has a right to institute an appeal to the Employment Appeal Tribunal against the order which it asks this court to suspend; (b) the petitioner has chosen not to exercise its right of appeal; (c) although the statutory time limit for an appeal has now expired, it had not expired before the petitioner brought the present petition; (d) the petitioner has the right to

apply to the Employment Appeal Tribunal to extend the time limit for bringing an appeal, notwithstanding that the time limit has expired; and (e) the petitioner has made no such application to the Employment Appeal Tribunal for an extension of time.

[35] Mr Cowan, on behalf of Dr Neilson, submitted that suspension was not a competent remedy in circumstances where other means of review remained available and had not been exhausted. The petitioner even now had a right to seek an extension of the time limit for instituting an appeal. In these circumstances, the petition was, Mr Cowan submitted, incompetent.

[36] There was no dispute that the principles applying to the competency of an application to the Court of Session for an order of suspension were the same as those for the remedy of reduction (*Ali* v *Ali (No 2)* 2001 SC 618 para [11]).

[37] In *Adair* v *Colville & Sons* 1926 SC (HL) 51 Viscount Dunedin expressed the general principles applying to the remedy of reduction in the following terms at page 56:

> "That the remedy of reduction may be competent to set aside a judgment, when other means of review are not, is true. Instances can be found where it has been so utilised, but it is a remedy which does not exist of right, and must be most carefully applied. I shall not attempt, for I think such attempt would end in failure, to define categorically the cases in which reduction is competent. One obvious instance would be where a judgment had been obtained by reason of some fraud practised on the Court; but, generally speaking, it is certainly not competent when other means of review are prescribed, and these means have either been utilised or the parties have failed to take advantage of them. It is not for a judicial body to interfere with the wisdom of the Legislature in making the arrangements it has made, and one of these arrangements it has made in this present Act is by section 31 (of the Sheriff Courts (Scotland) Act 1907), that the verdict as applied shall be the final judgment in the cause, so that it follows that, if the parties fail to have the evidence transcribed by a shorthand writer, they accept the Sheriff's judgment as final in applying the verdict. It follows, and so all the learned Judges have held, that it is not possible to set right by the form of reduction what could have been set right by appeal."

[38] In his dissenting speech (at page 63), Lord Shaw of Dunfermline agreed that if an appeal had been open, that appeal "was the prescribed road to a remedy".

[39] In *Ali* v *Ali (No 2) supra* an Extra Division (at paragraph 11) referred to the remedy of suspension being "the setting aside for all time of a decree pronounced by the inferior court and against which an appeal is not or is no longer available."

[40] In Mackay's *Practice of the Court of Session* (1879, volume 2 pages 482 to 483) suspension is stated to be incompetent where appeal is competent.

[41] In resisting the attack on the competency of the petition, Mr McGuire relied on a short passage in the opinion of Lord Moncrieff in *Lamb* v *Thompson* (1901) 4F 88 at 92 where his Lordship stated that the only limitation on any mode of review of inferior court decrees was if the party had already appealed and failed in the Supreme Court, on the merits or by default. That passage, in my opinion, must be read in the context of the particular facts of that case in which there was no question of the complainer having any other remedy available to him apart from suspension; in particular, he had no statutory right of appeal. He sought suspension of a charge on the ground that he was unable to implement the underlying decree because the goods referred to in the charge had been sold before the complainer's estates were sequestrated. His trustee in sequestration had declined to sist himself as a defender to the action brought against the complainer, against whom decree had passed by default. The note of suspension was unsuccessfully opposed on the basis that it was incompetent to bring a suspension of a final Sheriff Court decree on grounds that could have been stated before the decree was pronounced. It is notable that the Lord Justice-Clerk (Macdonald) approached the case on the basis that the complainer, who was facing potential imprisonment, should not be left "without remedy". Lord Moncrieff's observation about the "only limitation" must be read in that context.

[42] In my judgment, *Lamb* v *Thompson* is not authority for the proposition for which Mr McGuire contended, namely that a party, who has a statutory right of appeal available to

it, is entitled to decline to exercise that right and instead apply to the Court of Session for suspension of the decree or order of the inferior court or tribunal. In my opinion, that proposition is not supported by the authorities. If it were sound, it would mean that a party could effectively bypass a prescribed statutory avenue of appeal and come directly to the Court of Session (without leave) by way of a petition for suspension or reduction. Such a course would, in my judgment, entail offending against what Viscount Dunedin said in *Adair supra* should not be done, namely to "interfere with the wisdom of the legislature".

[43] Mr McGuire placed some reliance also on *Robertson's Executor* v *Robertson* 1995 SC 23, which concerned reduction of a decree in absence. At page 30G of its opinion the Extra Division stated that reduction of a decree in absence was not excluded by the circumstance that at some earlier point of time another method of reponing the pursuer had existed but had not been used. There was no question, however, of a right of appeal still being open to the pursuer in *Robertson's Executor*. I note also that where the Extra Division refers to the approach being to look at the whole circumstances of the case (page 30A to D) it is clearly addressing itself to the merits of the action for reduction and not to any issue of competency. For these reasons, I do not consider that the case of *Robertson's Executor* is of any assistance to the petitioner in the present context.

[44] I conclude that at the time when it was presented to the court the petition was incompetent because the petitioner had an extant statutory right of appeal against the order which it sought to have suspended. The time limit for instituting an appeal has now expired, but it remains open to the petitioner to seek an extension of it. The availability of these statutory mechanisms for challenging the order of the Employment Tribunal renders the petition incompetent in my opinion.

[45] Having reached that conclusion, there is no need (and I think it would be undesirable for me) to express any view on the merits of the petition. I would make only one observation on the practical implications of granting decree of suspension. Mr McGuire suggested that if suspension were to be granted the only prejudice to Dr Neilson would be that he would not be re-engaged by the petitioner. It is important to recall, however, that the compensation awarded to Dr Neilson by the Employment Tribunal was calculated to the date of re-engagement; that was on the assumption that Dr Neilson's loss of earnings would come to an end upon his being re-engaged. If the order for re-engagement was to be suspended, Dr Neilson would not be compensated for any continuing loss of earnings arising from his (admittedly) unfair dismissal. Section 117(3)(b) of the Employment Rights Act 1996 provides *inter alia* that where an order for re-engagement is not complied with, the tribunal shall make an additional award of compensation. I do not see how such an additional award could be made in circumstances where this court had suspended the order for re-engagement. The order for re-engagement would have been declared to have been unlawful; so there could be no duty to comply with it. This consideration seems to me to be a powerful one militating against granting decree of suspension; it points towards it being desirable that all aspects of the case should, if possible, be dealt with by the statutory system of employment (and employment appeal) tribunals.

[46] To give formal effect to my decision, I shall sustain Dr Neilson's first plea-in-law, repel the petitioner's pleas, and refuse the petition. I shall reserve all questions as to expenses.