Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Agency workers; rights in relation to basic working and employment conditions; exception

AI [209]

***Twenty-four Seven Recruitment Services Ltd v Afonso UKEAT/0311/17* (*16 October 2018, unreported*)**

The general right to pay parity for an agency worker under the Agency Workers Regulations 2010 SI 2010/93 reg 5 is disapplied by reg 10 **R [2423]** in the so-called 'Swedish derogation' where the agency employs the worker and promises to pay him or her a minimum amount between engagements. This is, not surprisingly, subject to fairly stringent conditions in reg 10(1)(a). Two of these are considered for the first time at appellate level in this decision of Soole J in the EAT. They are reg 10(1)(a)(i) and (iii) which require the contract to contain written terms relating to '(i) the minimum scale or rate of remuneration or the method of calculating remuneration' and '(iii) the expected hours of work during any engagement'.

The agency had a contract of employment with the workers (the case in fact concerned 191 of them) which expressly said it came under the reg 10 exception. As for pay, the relevant term said that 'Your rates of pay will at all times be no less than the National Minimum Wage currently in force per hour worked'. As for hours, the relevant term said 'Any five days out of 7'.

The ET held that the pay term did not comply with reg 10(1)(a)(i) because it did not specify an actual rate or scale and any 'method' was not sufficient. Moreover, the hours term was again too imprecise to satisfy reg 10(1)(a)(iii). Thus, the exception did not apply and the action for pay parity succeeded under reg 5. On the employer's appeal, there was much detailed discussion of the precise wording of these terms and the potentially vulnerable position of

agency workers (especially those whose first language was not English). The result was only partial success for the agency:

(1) as for the pay term, the judgment accepts that it enacts three possible ways of complying (scale, rate, method); if the agency goes for the first two, it will need to be precise, but the third gives more latitude – here, it was sufficiently easy for a worker to ascertain the current NMW rate, even if with language difficulties, and so the reference to it in the term *was* sufficient;

(2) however, as for the hours term, the EAT agreed with the ET that this was too imprecise; as a matter of policy, it should not be for the worker to have to *interpret* the information given by the agency in order to work out what the likely hours per week would be.

The agency's argument was thus upheld on the pay term but dismissed on the hours term. However, as it needed to satisfy *all* of reg 10(1)(a) in order to rely on the exception, it failed to do so, the appeal as a whole was dismissed and the claim still succeeded.

DIVISION CI WORKING TIME

Annual leave; accrual during parental leave

CI [141]

Tribunalul Botosani v Dicu: C-12l17, ECLI:EU:C:2018:799, ECJ

This decision of the ECJ on a reference from Romania shows that the UK law on the relationship between parental leave and accrual of statutory holiday entitlement is more generous than it might have been under the Parental Leave Directive 2010/18/EU.

The claimant in the case objected that she had not been allowed all of her statutory holiday entitlement because the employer had not counted time spent on parental leave when working out her entitlement. Romanian law used a system of accruing holiday entitlement according to the amount of time worked in the relevant year and also provided that during parental leave the contract of employment was suspended. In these circumstances, the ECJ held that holiday entitlement did *not* accrue during parental leave. The judgment draws distinctions with: (a) sickness absence (an unforeseeable eventuality during which the contract subsists); and (b) maternity leave (subject to special protection which is not to be lost by whatever happens to the contract). During these, holiday entitlement continues to accrue, but that is not necessarily the case under the directive with parental leave. Indeed, the directive specifically permits a member state to determine what is to happen to that contract during the leave. Thus, the Romanian version was not in breach of it.

In contrast, UK law permits continuing accrual for two reasons: (1) the qualifying 'key' is simply worker status, not actually working; and (2) the UK legislation provides for the contract itself to continue (albeit for restricted

purposes). As pointed out at **CI [141]**, this ensures accrual throughout the statutory leave schemes, with the only question then being whether the same applies to any contractual schemes.

DIVISION CIII WHISTLEBLOWING

Whistleblowing detriment; liability of fellow workers; dismissal as detriment

CIII [98.01], CIII [126.03]

Timis v Osipov [2018] EWCA Civ 2321

This is the further appeal in the case known in the EAT as *International Petroleum Ltd v Osipov*, which is considered at **CIII [98.01]**. The claimant, having been dismissed for whistleblowing, sought to bring proceedings against two seniors in the company for detriment in procuring his dismissal. This was done under the provisions on fellow worker liability/vicarious liability introduced into whistleblowing law in 2013 (ERA 1996 s 47B(1A)–(1E) **Q [671.03]**); its significance was that although his action would normally have lain against the company under s 103A, the company was in fact insolvent and it appeared that the individual respondents were insured (a point potentially of importance given that the damages claimed came to £2.04m).

The principal problem here was s 47B(2) which seemed to rule out a detriment action where the detriment in question was dismissal. The respondents argued that this applied across the board in order to draw a clear line between detriment under s 47B and dismissal under s 103A and that this applied whether the respondent was the employer or (since 2013) fellow workers. As the text points out, this was rejected by the ET and EAT, and has now been rejected again by the Court of Appeal, in a judgment given by Underhill LJ. This accepts that, whatever the correct statutory interpretation of s 47B(2) (in the light of the 2013 changes), there will be anomalies (largely because whistleblowing generally has been covered under the ERA 1996 even though conceptually much of it is based on discrimination law); however, on balance the anomalies in the claimant's interpretation are fewer than under the respondents' interpretation, and the former is, as a matter of legislative policy, more in line with the protection intended by the 2013 reforms. Thus, when s 47B(2) talks of ruling out a detriment amounting to dismissal, this only applies to an action directly against the employer (which is to be brought under s 103A). Moreover, the judgment holds that in an action under the inserted s 47B(1A), the compensation for the detriment can include losses flowing from the resulting dismissal. At [91] the judgment helpfully sums this all up as follows:

> '(1) It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). All that section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.

(2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, section 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply.'

Four subsidiary points are mentioned:

(1) This does have the odd result that an action under s 47B(1A) can be used to fix the employer (if solvent) with *vicarious* liability under s 47B(1B), even if a direct action would have had to be under s 103A, but as the judgment points out, a claimant's adviser would have to weigh up the pros and cons of this tactic, given differences in causation and compensation rules between the two sections (and the possibility of the 'employer's defence' of reasonable steps in s 47B(1D)).

(2) In *Royal Mail Group Ltd v Jhuti* [2017] EWCA Civ 1632, [2018] IRLR 251, it was said obiter that the 'losses from dismissal' point above might cause some problems next to the older CA case of *Melia v Magna Kansei Ltd* [2005] EWCA Civ 1547, [2006] IRLR 117, which had stressed the separate nature of detriment and dismissal (see **CIII [126.03]**). However, the judgment in the instant case addresses that directly and holds that there is *no* inconsistency because *Melia* was concerned with the different question of whether a claimant could recover compensation in a dismissal case for detriment arising *before* the dismissal.

(3) One difference/anomaly mentioned in the argument was that there can be compensation for injury to feelings in a detriment case but not in a dismissal case. This is based on the detriment case of *Virgo Fidelis Senior School v Boyle* [2004] IRLR 268, EAT (see **CIII [113]**). There was some mention in argument as to the correctness of this decision, but ultimately this did not have to be decided and the court simply *assumed* that it was correct.

(4) In the EAT it was held on compensation inter alia that the two individuals would also be liable for a 12.5% uplift under TULR(C)A 1992 s 207A for failing to use the procedures laid down in the ACAS Code of Practice (here, totalling £93k); this was not appealed and so it must be assumed that this stands.

DIVISION DI UNFAIR DISMISSAL

Some other substantial reason; reasonableness; procedural fairness

DI [1923]

Hawkes v Ausin Group (UK) Ltd UKEAT/0070/18 (14 June 2018, unreported)

The text makes the point that, even assuming that the ACAS Code of Practice applies to SOSR dismissals (see **DI [1922.01]**), the level of procedural

fairness will vary with the circumstances, given that these are *not* misconduct cases, to which the Code is primarily addressed. This can be seen from this decision of Choudhury J in the EAT.

The claimant was a member of the army reserve. On being taken on, he was allowed one week's unpaid leave pa for this purpose. Without consulting the employer first, he signed up for a seven-week overseas call-up; this was not compulsory, but once undertaken was binding. He asked for leave; the employer took the view that he had implied that it was in fact compulsory. When it became clearer that it was not, the employer called him to a meeting, at which it appeared that he was going to go anyway. The employer took the view that it could not be without his work for this period and dismissed him summarily. When he claimed unfair dismissal, the employer defended on the basis that the dismissal was for SOSR. The tribunal agreed and held it fair in all the circumstances, one factor being that the parties had in effect come to a deadlock and that a more extensive procedure (warning or earlier meeting to put charges) could not have altered anything.

Appealing to the EAT, the claimant argued that what the ET had done was to apply to fairness the *Polkey* question ('did it make any difference?') which should only be relevant to remedy. In spite of the prima facie attractiveness of this argument, the EAT held that on a full reading of the judgment the ET had not in fact done so; it had addressed in order the questions arising under ERA 1996 s 98 and come to a permissible decision. Part of this reasoning was based on its having been a SOSR case, where the question of the necessary procedural steps is much more at large. As it was put at [25]:

> 'This is not, for example, a misconduct case where it would usually be considered necessary to hold a meeting in order to consider the employee's explanations for the impugned conduct. This was a dismissal for some other substantial reason, that reason being that the Respondent could not sustainably permit the Claimant to take seven weeks' leave. In that context, it was open to the Tribunal to make a finding of fact that an earlier meeting would not have changed the position because of the Claimant's firm commitment to the exercise.'

Obviously, the facts here were particularly strong and the decision does not deny the need generally for a fair procedure, but it does underline the conceptual difference between misconduct and SOSR.

DIVISION H CONTINUITY OF EMPLOYMENT, ETC

Excluded employments; overseas employments; application of the Lawson rules

H [1108.01], H [1110.13], H [1110.15], H [1211.01]; PI [59.13]

British Council v Jeffery; Green v SIG Trading Ltd [2018] EWCA Civ 2253

The decisions of the EAT in these two cases on territorial jurisdiction are set out in the text. They have been joined in an appeal to the Court of Appeal

which has in effect confirmed the results in each. However, the process of reaching the eventual decision was complex.

The principal judgment was given by Underhill LJ who started by saying that the court was not engaging in a further examination of the basic principles in this notoriously difficult area, instead just giving a summary of the overall effects of the relevant House of Lords/Supreme Court judgments in question. However, three subsidiary points did arise which may add to the jurisprudence here:

(1) Is the fact that the employee's contract of employment adopts British law a relevant consideration? In *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, [2012] IRLR 315, [2012] ICR 389, Lady Hale clearly said that this can be at least a relevant factor (albeit not the test). In this appeal, this was attacked as having been *per incuriam* because she had not been directed to the ERA 1996 s 204 **Q [828]** which *seems* to say that the proper law is 'immaterial' for the purposes of the Act. This could lead to the counter-argument that this was originally put in to apply to s 196 (territorial jurisdiction) which was of course repealed in 1999 (causing the whole of this sorry mess). However, Underhill LJ held that he did not have to decide this neat point because the *per incuriam* principle does not permit a lower court to override a higher one and so, quite simply, the court was bound to apply Lady Hale's judgment on this point. The court was unanimous on this.

(2) Should a more generous approach be adopted to accepting jurisdiction if the claim is (as in *Green*) that the claimant was a whistleblower? This was argued primarily under EU law on freedom of expression, but the judgment rejected this claim and upheld the decision to that effect of Langstaff P in *Smania v Standard Chartered Bank* [2015] IRLR 271, [2015] ICR 436 where the point was directly addressed. Again, the court was unanimous on this.

(3) Was the application of the basic *Lawson v Serco* rules on territorial jurisdiction (especially the question whether the claimant had a strong enough connection with British employment law) a question of fact or law? In theory at least, this could make a difference in the level of intervention that an appeal body can properly indulge in when reviewing the ET's original decision (thus being important to both employers here who had each won before the ET). If law, the appeal body can intervene if the decision was thought legally 'wrong'; if fact, the ET's decision should stand unless an appellant can show that it was 'perverse'. It was here that the court split, reflecting an earlier difference in the case law – in *Lawson* Lord Hoffmann said that applying the test was a matter of law, but in *Ravat* Lord Hope said that, while the applicability of s 94 (the right not to be unfairly dismissed) is a question of fact, its application required evaluation which made it a question of fact. Underhill LJ considered that it was Lord Hope's view that should be applied. Giving short supplementary judgments, Longmore and Jackson LJJ on the other hand considered that the question, although

requiring evaluation, was ultimately one of law. It is, however, possible that this apparently basic distinction may not be too important in practice because of the caveats that they each added. Underhill LJ said that although a question of fact is less easy to challenge, he would not want to raise the bar for perversity here too high, particularly because appeal from an ET goes to the *specialist* EAT; he pointed out that the other two agreed with the overall result and intimated that this is likely to be the result 'generally'. For their part, Jackson LJ agreed with Longmore LJ that although it is easier to challenge a ruling on law, in practice an appeal body will still be reluctant to interfere unless there are clear errors of law. The suggested consequence on both sides therefore is that there may be a distinction, but not much of a difference. At the very end of the judgments, Jackson LJ said:

> 'The correctness or otherwise of this conclusion has no effect on the outcome of these appeals nor, I believe, on the law generally. Whether an appeal tribunal is undertaking a relatively generous rationality review (favoured by Underhill LJ) or a relatively restrained substantive review (preferred by Longmore LJ and myself), the practical outcome is the same, namely that an appeal tribunal should be slow to interfere with an evaluative judgment of a first instance tribunal in a matter of this kind and should not do so unless it is satisfied that the judgment is wrong.'

DIVISION L EQUAL OPPORTUNITIES

Direct discrimination; sexual orientation; reason for refusal of service

L [284.03]

Lee v Ashers Baking Co Ltd [2018] UKSC 49, [2018] 3 WLR 1294

This is, of course, the Supreme Court decision in what the press insist on referring to as the 'Gay Cakes' case, the decision of the NICA in which is considered at **L [284.03]**. While it is a case on provision of services, it may have importance in discrimination law generally, not least because at first sight it looks similar to *Hall v Bull* [2013] UKSC 73, [2014] 1 All ER 919 **L [251.02]** (refusal of double room in hotel to gay couple). However, in reversing the NICA, the Supreme Court came to the conclusion that here the refusal to produce the cake with the message that offended the Christian faith of the bakers was not because of the claimant's sexual orientation; the objection was to the message, not the messenger, and so the necessary causative link with sexual orientation had not been shown. The key to this distinction is in [35] of Lady Hale's judgment:

> 'In reaching the conclusion that there was no discrimination on grounds of sexual orientation in this case, I do not seek to minimise or disparage the very real problem of discrimination against gay people. Nor do I ignore the very full and careful consideration which was given to the development of the law in this area, to which Mr Allen QC drew

> our attention at considerable length. Everyone, as article 1 of the Universal Declaration of Human Rights put it 70 years ago is "born free and equal in dignity and rights". Experience has shown that the providers of employment, education, accommodation, goods, facilities and services do not always treat people with equal dignity and respect, especially if they have certain personal characteristics which are now protected by the law. It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope.'

Questions also arose in relation to the bakers' Convention rights. The following passage at [55] accepts that these rights are of necessity not absolute, but again the above distinction came into play:

> 'Articles 9 and 10 are, of course, qualified rights which may be limited or restricted in accordance with the law and insofar as this is necessary in a democratic society in pursuit of a legitimate aim. It is, of course, the case that businesses offering services to the public are not entitled to discriminate on certain grounds. The bakery could not refuse to provide a cake – or any other of their products – to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different – obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake – support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant to the [Fair Employment and Treatment Order (NI)] claim'.

Indirect discrimination, provision, criterion or practice

L [297]

Brangwyn v South Warwickshire NHS Foundation Trust [2018] EWCA Civ 2235

In an indirect discrimination case (and in certain cases of reasonable adjustment in disability law), the existence of a 'provision, criterion or practice' (PCP) imposed by the employer is a first matter to be identified. This decision of the Court of Appeal shows how important it is to get this right at the beginning so that the ET can direct its inquiry to that identified PCP.

The claimant, a hospital technician, developed a serious phobia to anything to do with needles or injections. It was accepted that he satisfied the definition of 'disabled', but also that this did not come to the attention of the employer until relatively late. He sought assurances that he would not have to work in or attend meetings in parts of wards where treatment was carried out. The ET found that the employer in fact had agreed to this, but

unfortunately when he was given a series of new job descriptions they were in standard form, not including this restriction. He took the view that he might still have to go into such places. He eventually went on to long-term sickness absence and after two years was dismissed for medical incapacity. He claimed that he had been indirectly discriminated against.

Before the ET he claimed that the PCP in question was a threefold requirement of handling patients in a ward, having meetings there and collecting patients from wards. The ET looked beyond the wording of the defective job descriptions and decided against him on the basis that on the facts he was not going to be required to do these. Thus, no PCP had been shown. On appeal to the EAT, he sought to change this, arguing that it was that wording that was the real PCP, but the EAT refused this on the basis that it had not been argued before the ET. On further appeal to the Court of Appeal, the argued PCP was altered again to the job descriptions having given him the *perception* that he might have to undertake these duties. However, the court applied the same line in rejecting the appeal, namely that this had not been put to the ET which had therefore not had a chance to consider it. It was pointed out that the correct way to have dealt with this would have been to ask the ET to amend the basis of the claim at that early stage.

Although that disposed of the appeal, the court added that it thought that even this latest version of the PCP would have failed on the facts – it was accepted that a contract or other provision can in itself be a PCP and indeed that that could be the case even if it had not actually been insisted upon (but was only a future possibility, as in *Secretary of State for Work and Pensions v Higgins* [2014] ICR 341, EAT, a reasonable adjustments case, see **L [396.04]**), but here it was different because of the ET's finding of fact that this PCP would *not* have been insisted upon.

Disability discrimination; reasonable adjustments; assessment may qualify

L [392], L [398], L [407]

Watkins v HSBC Bank plc [2018] IRLR 1015, EAT

Judge Richardson's judgment in this case makes an important point about reasonable adjustments, on facts that demonstrate it well. The claimant, a long-serving employee of the bank, suffered from epilepsy which was getting worse, necessitating time off. With a view to return to work, an occupational psychologist examined him and recommended that his work activity and work flow should be monitored so that he would not be taking on too much. On his return, this did not happen and he brought a disability discrimination claim based on failure to make reasonable adjustments. This was struck out by the ET on the basis that the well-known case of *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 644, EAT, established that consultation with the employee could not in itself be a required adjustment because it would not actually affect the underlying problem, and this should also apply to a risk assessment. Upholding the claimant's appeal, the EAT agreed that there was an analogy between consultation and assessment *but* held that the ET

had taken too strict a view of *Tarbuck* which should be viewed as only applying to consultation *as such*. Where it or, as here, an assessment goes beyond this to recommend a course of action, that may well cross the line into reasonable adjustment territory. In general, a broad approach is to be taken, and at [30] and [31] the judgment addresses the specific point here in these terms:

> 'To this general principle there is a qualification about consultation. Consultation may be a precursor to the taking of a step for the purposes of s 20(1) but it is not a step in itself; for it does not of itself remove any disadvantage: see *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 at paras 65 to 74. In principle the same will be true of making an assessment; it will not of itself remove any disadvantage. On the other hand, the provision of managerial support to a disabled person may amount to the taking of a step: thus in *Tarbuck* a failure to provide support to a disabled employee in a job search was found to be a breach of the duty to make reasonable adjustments (see paras 24 and 52 to 53). Providing a mentor or enhanced supervision are examples in the *Code of Practice on Employment* (2011) of steps which it might be reasonable for an employer to have to take (see para 6.33).
>
> [The psychologist's] report itself may be described as an assessment; but her proposals appear to me to be more than proposals for further assessment. They were a package of "workplace recommendations to support a sustained attendance and performance at work". She was saying that the Claimant's disability required active steps to be taken by a manager in the workplace to ensure that he was not taking on too much. As I have explained, the provision of enhanced support, supervision or monitoring may be a step which it is reasonable for the Respondent to undertake; [her] report appears to suggest that this was appropriate in the Claimant's case.'

DIVISION PI PRACTICE AND PROCEDURE

Appeal to EAT; respondent's answer and cross-appeal; extension of time

PI [1466]

***Governing Body of Tywyn Primary School v Aplin UKEAT/0298/17* (*10 October 2018, unreported*)**

The key point in this judgment of Slade J in the EAT is that, contrary to previous EAT authority, the strict rules on granting an extension of time for an appeal do *not* apply to a respondent's cross-appeal.

The claimant won before the ET. The respondent appealed. The claimant asked for a two-week extension of time to serve his 'appeal documents' to cover the Christmas period. This was allowed by the Registrar in relation to the answer only; there had been no mention of a cross-appeal by him.

The claimant then served his answer and a cross-appeal; the timing was such that this was within the extended period for the answer but outside the

primary time limit for the cross-appeal. The claimant sought an extension for the latter but this was refused, on the basis of dicta in *Slingsby v Griffith Smith, Solicitors* [2009] All ER (D) 150 (Feb) that, while the strict *Abdelghafar* approach against extensions of time for appealing does not apply to the lodging of a respondent's answer, it does apply to the service of a cross-appeal, because of its juridical similarity to an appeal.

The EAT allowed the claimant's appeal. It held that the more recent approach to cross-appeals generally in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, [2016] ICR 305 per Langstaff P was that they are *distinct* from appeals because of their reactive nature; policy considerations then suggested that it is not necessary to apply the strict approach to time extensions. Thus, this aspect of the judgment in *Slingsby* is no longer to be followed. As the judgment puts it at [52]:

> '… the analysis of the nature of a cross-appeal and the practical and policy reasons why such a step is reactive explained by Langstaff P illustrates why in my judgment the strict approach to time limits for initiating an appeal do not apply to cross-appeals. Although their "juridical basis" may be similar to appeals, in practical and policy terms they differ. There is only a cross-appeal if an appeal has been initiated. It would be wrong to reason that because a Respondent has had an ET Decision for some time they should be bound by the strict approach to timing which applies to appeals. Knowing that an adverse decision has been made is different from deciding to challenge it.'

REFERENCE UPDATE

477	*Coletta v Bath Hill Court (Bournemouth) Property Management Ltd*	[2018] ICR 1373, EAT
477	*Abertawe Bro Morgannwg University Local Health Board v Morgan*	[2018] IRLR 1050, CA
478	*Luton Borough Council v Haque*	[2018] ICR 1388, EAT
478	*Abrahall v Nottingham City Council*	[2018] ICR 1425, CA
479	*Bakkali v Greater Manchester Buses (South) Ltd*	[2018] ICR 1481, EAT
479	*York City Council v Grosset*	[2018] ICR 1492, CA
480	*Pimlico Plumbers Ltd v Smith*	[2018] ICR 1511, SC
482	*Nicholls v London Borough of Croydon*	[2018] IRLR 988, EAT

482	*Siguenza v Ayuntamiento de Valladolid*	[2018] IRLR 1056, ECJ
482	*Bichat v Aviation Passenger Services Berlin GmbH*	[2018] IRLR 1074, ECJ
482	*Saad v Southampton University*	[2018] IRLR 1007, EAT
482	*Tarn v Hughes*	[2018] IRLR 1021, EAT

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