Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to **1 December**.

Bulletin Editor
Ian Smith MA, LLB (Cantab); Barrister
Emeritus Professor of Employment Law at the Norwich Law School, University of East Anglia.

DIVISION AI CATEGORIES OF WORKER

Workers; private hire vehicle drivers; status and working time

AI [81.06]

***Addison Lee Ltd v Lange UKEAT/0037/18* (*14 November 2018, unreported*)**

This decision of the EAT under Judge Richardson is the second against this particular company, once again finding 'worker' status contrary to the express wording of its contracts with the claimants. The previous case (*Addison Lee Ltd v Gascoigne* UKEAT/0289/17 (11 May 2018, unreported), see **AI [81.06]**) concerned cycle couriers, but this one concerned private hire drivers. In some ways it echoes the earlier decision, but in one particular way it develops it.

The drivers were recruited and trained by the company and all but one of the four thousand rented a vehicle from a company allied to the firm (the payment for which meant in practice that they had to do a certain number of hours per week in order to pay for the hire). The firm supplied a computer by which it communicated with them and arranged assignments. The standard contract went out of its way to deny employee or worker status, and it was the case that they could choose when to work. However, the evidence showed a generally high level of activity in practice, which was essential for the service to operate; moreover, the arrangement was that once they had logged on they had to have a good reason for refusing an offered assignment, in the absence of which they would be subject to *sanctions*, a point which weighed heavily in the result.

Using the power to look beyond the wording of the documentation if it did not reflect reality (*Autoclenz Ltd v Belcher* [2012] UKSC 41, [2011] IRLR

820), the ET held that the reality was that they were not simply self-employed but came within the definition of 'worker' for working time and NMW purposes. The advance on the earlier *Gascoigne* case was that it did so on *two* grounds – it held that they came within worker status whenever the computer was turned on (in practice, sufficient for working time and NMW rights), but it also held that on these facts there was in any event an overarching *umbrella* contract between them and the firm.

On appeal, the firm argued strongly that the ET had misapplied the law, but the EAT rejected the appeal and held that the ET had been entitled to come to their conclusion on *both* grounds. In doing so, the judgment addresses directly the potential problem for the claimants that in the case of traditional taxis simply taking possible fares from a central booking firm, it was held in *Mingeley v Pennock & Ivory* [2004] IRLR 373, [2004] ICR 727, EAT, that they were *not* 'employees' under the extended (effectively, 'worker') definition in discrimination law. At [69] it was explained that:

> 'That case concerned a taxi driver who owned his own vehicle and paid the Respondent, the operators of a taxi service, a weekly sum for a radio and (latterly) access to a computer system. The issue was whether the driver was an employee for the purpose of the extended definition within section 78(1) of the Race Relations Act 1976. It was held that in the absence of any obligation to work he was not. There are a number of relevant factual distinctions between this case and *Mingeley*, including the fact that the driver supplied his own car free from any collateral arrangement with the taxi service. But the critical distinction in our judgment is that in *Mingeley* the ET found that there was no requirement at all for the driver to accept any of the fares offered by the operators. This was decisive.… In this case the ET found that there was an obligation for the driver to accept bookings and an underlying obligation to do some work for the Respondent.'

Having so found on status, the EAT went on to uphold also the ET's finding that, for working time purposes, the claimants were 'working' for the whole time that the computer was switched on, not just during actual assignments.

Part-time workers; excluded classes; judicial officeholders; retrospectivity of pension

AI [135.02]

O'Brien v Ministry of Justice C-432/17

When this longstanding *O'Brien* litigation under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 resulted in a win on all counts before the Supreme Court in 2013 (see **AI [135.01]**), the end result was that the exclusion of holders of judicial office by reg 17 could no longer be relied on and the claimant ex-Recorder could claim pension rights. However, as pointed out at **AI [135.02]**, this left one question of (important) detail – for how long a back period could he claim his pension entitlement? The point was that he had held the office from 1978 to 2005, but the Directive/Regulations were only effective from 2000. Could he claim back

to 1978? The ET held that he could, but the EAT and then the Court of Appeal held not, applying the principle of no retrospectivity to a change in substantive law. The Supreme Court referred the matter to the ECJ who have now rules in the claimant's favour. The basis for this was that a pension case such as this comes, not under the retrospectivity principle, but under the exception to it in relation to the 'future effects' of a situation arising under the old law. At [38] this is summed up as follows:

> 'In the light of the foregoing, the answer to the question posed is that Directive 97/81 must be interpreted as meaning that, in a case such as that at issue in the main proceedings, periods of service prior to the deadline for transposing that directive must be taken into account for the purpose of calculating the retirement pension entitlement.'

This finding was strengthened by the fact, commented on in the judgment, that the UK government had not asked the court to impose a temporal restriction on the effects of their original judgment in 2012. The court did, however, impose one limitation – here, the claimant had retired in 2005, after commencement of the Directive/Regulations but it was added at [37] of the judgment that a person in a similar position who had retired *before* 2000 would not have the protection of the Directive at all.

Part-time workers; less favourable treatment

AI [145]

British Airways plc v Pinaud [2018] EWCA Civ 2427

This decision of the Court of Appeal, given by Bean LJ, shows that the existence of the first requirement for activation of the right in reg 5(1) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 **R [1292]**, ie that there be 'less favourable treatment', is a relatively straightforward question of fact, with wider arguments being primarily relevant to the subsequent question whether that treatment was objectively justified.

The claimant had worked full time for the airline as cabin crew, but later transferred to part-time. When made redundant, she raised a grievance that she had not been given her reg 5 right. The basis for this was that her part-time was on a basis of 50% pay, *but* the arrangement required her to work 130 days pa. By contrast, a full-time worker had to work 243 days; 50% of this was 121.5 days. Thus, she was having to work 53.5% of the full-time requirement for 50% of the pay. Her grievance was turned down and she brought tribunal proceedings under reg 5.

The ET held that she had been treated less favourably (and that this had been because of her part-time status, a causative factor not in contention in the case) and further that the employer's defence of justification failed. The employer appealed to the EAT which held that the decision on less favourable treatment was correct, but that the ET had not considered justification properly. The employer appealed to the Court of Appeal. What is noticeable here is that the employer was arguing primarily that there were *other* factors

at work here, due to the nature of its rostering of crew which explained the discrepancy (some of which may have been in the claimant's favour), *but* this was being put forward as meaning that there was no less favourable treatment in the first place. Dismissing the appeal in a short judgment, the court ruled against this – the discrepancy itself was enough to meet the hurdle of less favourable treatment. The other factors raised by the company were relevant to the employer defence of justification (more properly, legitimate aim and proportionate means). This matter was remitted to the ET to consider on the facts, along with (if relevant) remedy.

DIVISION AII CONTRACTS OF EMPLOYMENT

Termination of contract; implied constraints on the right to give notice; long-term health insurance

AII [476]; DI [1273.01]

***Awan v ICTS UK Ltd UKEATl0087l18* (*23 November 2018, unreported*)**

The claimant was employed under a contract which contained the benefit of a generous health insurance scheme for income maintenance during disability to work. It provided, however, that it would terminate if he was no longer employed. He became ill and went on to long-term absence. During this time, there was a TUPE transfer to the respondent company, which reviewed his case and dismissed him for medical incapacity, as a result of which his insurance payments ceased. He claimed unfair dismissal, arguing that the company was wrong contractually to end his employment because of the effect on his health insurance. The ET did not accept this, found that the respondent had acted reasonably and dismissed his claim.

Simler P in the EAT allowed his appeal. Applying the 'PHI cases' (see **AII [476]**, **DI [1273.01]**), it was held that in these circumstances there was to be implied into his contract a term that 'once the employee has become entitled to payment of disability income due under the long-term disability plan, the employer will not dismiss him on the grounds of his continuing incapacity to work.' That term was capable of clear expression, reasonable in the particular circumstances and operated to limit (rather than contradict) the express contractual right to terminate on notice by preventing the exercise of that right in circumstances where it would frustrate altogether the entitlement to long-term disability benefits expressly provided for by the contract.

With regard to the overlap with unfair dismissal, the judgment sets out the basic point that the fact that the employer was in breach of contract does not per se mean that the dismissal must be unfair. However, such breach can be a factor and here it was one towards the 'very relevant' end of that spectrum.

While the result of this case is largely an example of existing law, it is of particular interest for one aspect of its reasoning. On the implied term point (after commenting that this scheme may 'look unusual and particularly generous to a reader in 2018, clauses of this kind were commonplace in the 1980s and 1990s', and gave valuable rights to employees) the judgment cites

and applies the standard cases affirming such a term as set out in **AII [476]** (*Aspden v Webbs Poultry*; *Hill v General Accident*; *Briscoe v Lubrizol*). The case that potentially queried this approach, *Reda v Flag* (see **AII [476.01]**), is only mentioned in passing as part of an employer argument that was disapproved. Arguably, this backs the approach taken in the text that it is *Aspden* et al which are the rule and *Reda v Flag* the exception.

DIVISION CI WORKING TIME

Limitations on the scope of the Directive; position of foster carers

CI [13], CI [56]

Sindicatul Familia Constanţa v Direcţia Generală de Asistenţă Socială si Protecţia Copilului Constanţa C-147/17, ECJ

This reference from Romania queried the status of foster carers under the Working Time Directive 2003/88/EC, in particular art 1(3) **PII [895]** which preserved the exception previously in art 2(2) of the original Directive 89/391/EEC, ie where 'characteristics peculiar to certain specific service activities … inevitably conflict with [the Directive]'. The article mentions the armed forces, the police and the civil protection services, but these are only examples. The article is transposed into UK law in reg 18(2)(a) of the Working Time Regulations 1998 SI 1998/1833 **R [1089]**.

The first requirement for the Directive to apply was of course that the carers were 'workers'. This caused a disagreement because the Advocate General thought that they were not, but the court decided that they were. However, it then went on to hold that the particular circumstances of foster carers, responsible for the children at all times, meant that they came within the art 1(3)/art 2(2) exception (clearly showing in the process that it is indeed open-ended, because there is little by way of analogy with the examples given such as police and armed forces). In so deciding, the court dealt with the case of *Hälvä v SOS-Lapsikylä ry*: C-175/16, [2017] IRLR 942, ECJ (see **CI [209.01]**) where it was held that *relief* carers employed to look after children when their normal carers were having time off were not excluded from working time rights as 'family workers' (see reg 20(b) **R [1091]**). Given the differences in the level of commitment and care, this case was held to be distinguishable.

Taking leave and payment in lieu; carrying forward untaken leave; obligation on employer to facilitate the taking of leave due

CI [143]

Max-Plank-Gesellschaft zur Förderung der Wissenschaften e.V. v Shimizu C-684/16; Kreuziger v Land Berlin C-619/16, ECJ

The principle originally set out in reg 13(9)(a) of the Working Time Regulations 1998 SI 1998/1833 **R [1084]** that statutory annual leave may only be

taken 'in the leave year in which it is due' has been under siege for years now under EU law. The original inroads into it arose where the worker had been unable to take it in the relevant year due to sickness absence and more recently this was extended to cases where the worker had been hampered in some way by the employer from taking it (the prime example being where the employer maintained that the individual was not a 'worker' in the first place and so had refused to grant the holiday pay): see *King v Sash Window Workshop Ltd:* C-214/16, [2018] IRLR 142, ECJ. Now, however, at least one of the goalposts has been dug up again and replanted further out by the instant decision (actually two, but treated together). It extends the circumstances in which the leave can be carried over beyond employer obstruction to a lack of employer *help* to claim the leave rights in the year in question. There is still a line to be drawn because it is presumably still the case that there is no obligation on the employer to *force* the worker to take the holiday (a source of some concern when the Regulations were first introduced, with the prospect of an employer having to discipline a worker for not booking holidays, along the lines of Rousseau – man must be forced to be free).

The ECJ considered two cases from Germany where (on termination) the employer had relied on national law similar to reg 13(9) to refuse payment of holiday pay outstanding from previous years. The court was considering the matter under art 7 of the Working Time Directive 2003/88/EC **PII [901]** which, it said, does allow national rules laying down conditions for claiming the holiday rights, including provision for the loss of untaken holiday entitlement at the end of a holiday year *provided* that the worker was in fact given the opportunity to exercise the right. Until now, that would probably have been taken to mean lack of any obstruction, but here the court went further. In this context, it was construed as meaning that before the right can be denied there must be prior verification that the worker was indeed given that opportunity, which in turn means not only lack of discouragement but also employer encouragement (by formal means if necessary) to do so, while informing the individual, accurately and in good time, that otherwise the right will be lost. Moreover, the court held that the burden of proof is on the employer to show 'all due diligence' in doing so. If the employer discharges this burden (in effect by showing that the worker made a deliberate and informed decision not to claim the right), it can rely on any national legislation ending the right, but if not there will be a breach of art 7 and the worker can claim the back holiday pay (including on termination), apparently without temporal limitation. The actual holding of the court was as follows:

> 'Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and of Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, in the event that the worker did not ask to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period – automatically and without

> prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information – the days of paid annual leave acquired under those provisions in respect of that period, and, accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated. It is, in that regard, for the referring court to determine, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, whether it can arrive at an interpretation of that right capable of ensuring the full effectiveness of EU law.'

This important ruling on substance was followed by a ruling on a point of enforcement. In *Shimizu* the employer was a private concern, meaning that any direct effect of the Directive could not be relied on per se (and the German legislation in its terms clearly allowed extinction of the right). To circumvent this, the court approached the matter not only under art 7 of the directive, but also under art 31(2) of the Charter of Fundamental Rights of the EU **PII [78]**. This is much shorter than the Directive, but in effect incorporates it and is to be construed in the same way. This *does* have the necessary effect and so the court went on to hold that if the German court on remission could not interpret the exclusory provision in such a way as to comply with art 7/art 31(2), it must disapply that provision. This holding is also worth setting out in full:

> 'In the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.'

One final point to note is that when the UK leaves the EU, the Charter will no longer apply here (EU (Withdrawal) Act 2018 s 5(4)) *but* this decision is primarily one on the interpretation of the *directive*, coming before that date and so arguably will remain important in interpreting the ever-diminishing reg 13(9).

DIVISION J FAMILY MATTERS

Pregnant workers; night work; meaning; risk assessments; burden of proof

J [604], J [605]

Gonzales Castro v Mutua Univale [2018] IRLR 1142, ECJ

In discussing the recent case of *Otero Ramos v Servicio Galego de Saude*: C-531/15, [2018] IRLR 159, [2018] ICR 965, ECJ, the text at **J [607.02]** states that 'This may breathe new life into the argument that it will be discriminatory treatment not proactively to carry out at least a sufficient preliminary assessment of whether such hazards might potentially affect the woman concerned'. This subsequent case in the ECJ bears this out, and moreover does so in the specific (and important) context of the obligation in EU law to ensure that women who are pregnant or breastfeeding should not be engaged on night work.

Article 7 of the Pregnant Workers Directive 92/85/EEC **PII [427]** states that pregnant workers, those who have recently given birth and those who are breastfeeding must not be obliged to perform night work. Two problems of definition arise which are not addressed in the directive – what about a worker who works a shift *part* of which is at night and, in any event, what is 'night'? In this case from Spain, the employer argued that night work must mean work done entirely at night, but the ECJ held against this fundamentalist approach. To the contrary, it is the case that the social purpose behind art 7 can only be met if it applies where *part* of the scheduled work is during the night. That led to the question as to what constitutes 'night'. The court took the view that, as Directive 92/85/EEC does not define it, it was legitimate to look at the provisions of the Working Time Directive 2003/88/EC which comes from the same stable. Article 2(3) of this directive **PII [896]** defines 'night time' as 'any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00'. That definition is to apply under the Pregnant Workers Directive too. In the UK, it is further defined in the Working Time Regulations 1998 SI 1998/1833 reg 2(1) **R [1073]** in the same way, where it is fixed by a relevant agreement or, in default of such an agreement, the period from 11pm to 6am.

Having held that this worker on split shifts was indeed having to perform night work, the court then turned to the separate matter of whether a sufficient risk assessment had been carried out. This is covered by reg 4 of the Pregnant Workers Directive, which requires a special level of assessment given the worker's condition; in the UK this is found in the Management of Health and Safety at Work Regulations 1992 SI 1992/2051 reg 16 (see **R [844]** n 'General'). On this question of the sufficiency of an assessment, the court made two important points:

(1) there is an initial burden on the worker to produce evidence from which a conclusion could be drawn that the assessment was not sufficiently specific to her condition, but the ultimate burden of proof lies on the employer; and

(2) if such a failure is shown on the part of the employer, this can constitute less favourable treatment of the worker, leading to a finding of direct sex discrimination contrary to the Equal Treatment Directive 2006/54/EC.

DIVISION K EQUAL PAY

Remedies; time limits; stable employment relationship

K [673]

***Barnard v Hampshire Fire and Rescue UKEAT/0179/18* (*12 October 2018, unreported*)**

It was to avoid equal pay claims being ruled out of time too easily because the claimant's contracts had changed over time that there was introduced into the legislation an exception where there had been a 'stable employment relationship' (in the EqPA 1970), changing to a 'stable working relationship' in the EqA 2010 ss 129, 130 **Q [1541], Q [1542]**. However, this phrase is not defined in the legislation and has caused considerable problems, as the text explains. This decision of Judge Barklem in the EAT illustrates this and tends to show the problem arising in a novel way, rather than giving a particular answer to it. This was partly because the actual decision was that the ET had found insufficient facts, failed the *Meek* test on reasons and come to a perverse decision; the matter was remitted to a fresh tribunal.

The problems have hitherto arisen where the form of contract has changed over time (eg from temporary to permanent), but this case concerned changing *roles* over time with the one employer. It was accepted that none of the case law gave guidance on this. The claimant had worked for the fire authority from 2011 to 2017 continuously, *but* with two job changes/promotions. When she claimed equal pay at the end, the ET held that these changes had interrupted her stable working relationship, so that claims in respect of her two previous roles were out of time and she could only proceed with the claim in relation to her final role. On her appeal, the EAT held that the ET had applied too simple a test (had there been 'fundamental' changes?) and had not found sufficient facts to justify its decision. The judgment considers the cases of *Preston (No 3)* [2004] IRLR 96 (see **K [674]**), *Slack v Cumbria County Council* [2009] EWCA Civ 293, [2009] IRLR 463 (see **K [670]**), *North Cumbria University Hospitals NHS Trust v Fox* [2010] EWCA Civ 729, [2010] IRLR 804 (previously called *Potter*, see **K [671]**) and *Dass v College of Haringey Enfield and North London* UKEAT/0108/12 (20 June 2014, unreported) (see **K [675]**) but accepting that none of these concerned this particular problem. The judgment makes the point that the change of wording in the 2010 Act changed nothing and states that the correct approach is neither purely temporal nor contractual. Moreover, the varying terminology used (fundamental, radical or significant change) is not helpful

and it would be unfortunate if a concept introduced to help equal pay claimants with time limit problems had the opposite effect. Beyond that, it remains difficult to see just how the phrase should be applied. Perhaps the nearest comes at [54] where the judgment states:

> 'So, in *Potter* [ie *Fox* in the EAT] it was held to have been perverse to conclude that the imposition of a contract which required the demonstration of an increased skill level in order to progress through a pay band amounted to a fundamental change, albeit in the context of a contractual change. I see no reason why a promotion or change in role within the same organisation could not, similarly, amount to something short of a fundamental (or "radical" or "significant") change.'

DIVISION L EQUAL OPPORTUNITIES

Disability; excluded conditions; tendency to steal

L [138]

***Wood v Durham County Council UKEAT/0099/18* (*3 September 2018, unreported*)**

This decision of Judge Stacey in the EAT is a good example of the relatively straightforward (causative) approach to the exclusion of certain conditions from the definition of 'disability' in the Equality Act (Disability) Regulations 2010 SI 2010/2128 reg 4 **R [2635]**, in particular sub-para (b) 'a tendency to steal'.

The claimant in this sad case was an ex-police officer who had worked for several years for the council. On one occasion he was accused of theft from a chemists by not paying for goods; this was dealt with criminally by a fixed penalty notice, in the light of which he was dismissed. He brought ET proceedings including for disability discrimination, based on PTSD and dissociative amnesia; he argued that this was a disability and that the dismissal was discrimination arising from disability. The council accepted that he had a mental impairment, but relied on the reg 4(1)(b) exclusion. The ET agreed and dismissed the claim. On appeal, the EAT upheld the ET's judgment. Following the straightforward approach in *Edmund Nuttall Ltd v Butterfield* [2005] IRLR 751, [2006] ICR 77, EAT (which had departed from the more nuanced approach in *Murray v Newham CAB* [2003] IRLR 340, EAT (see **L [138]**)) and the non-employment case of *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal* [2009] EWHC 1842 (Admin), [2009] IRLR 1007 (see **L [138.02]**), it was held that (in spite of some more complex arguments for the claimant on the interpretation of the sub-para and the nature of the offence) it was sufficient for the application of the exclusion that the tendency to steal was the reason for the dismissal (the alleged act of discrimination); the fact that there may have been an underlying medical condition did not alter that. At [16] the judgment gives this helpful summary:

> 'The ET correctly understood that it is necessary not only to consider if a Claimant has an excluded condition pursuant to Regulation 4(1)(b),

but also how it relates to the act of discrimination complained of. As explained in the statutory guidance on matters to be taken into account in determining questions relating to the definition of disability paragraph A13 and explored in the cases of *Edmund Nuttall Ltd v Butterfield …* and *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal* (*No 1*) … , it is important to determine the basis for the alleged discrimination. If the alleged discrimination was a result of an excluded condition, the exclusion will apply. However, if the alleged discrimination is specifically related to the actual disability which gives rise to an excluded condition, or is more tangentially related, the exclusion may not apply. The excluded condition is not considered in a vacuum but by reference to, and in the context of, the alleged discrimination complained of.'

On these facts, the claimant had not established this divergence between the condition and the discrimination.

Disability discrimination; reasonable adjustments; arising from disability; causation tests

L [374.01], L [389]

Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT

The basic question at issue in this decision of Simler P in the EAT was the level of causation required in both reasonable adjustment cases and cases of discrimination arising from disability. The claimant was a professor in a science department who had had several disagreements with the department and colleagues, leading to her having significant time off through stress-related mental problems. When she refused to return except to another department, and also potential problems arose as to her immigration status, she was dismissed. She brought tribunal proceedings for disability discrimination. With regard to her reasonable adjustment claim (EqA 2010 s 20 **Q [1473]**), the ET rejected it on the basis that no 'substantial disadvantage' had been shown, particularly with the lack of medical evidence. With regard to her claim of discrimination arising from disability (EqA 2010 s 15 **Q [1468]**), the ET held that there was no evidence that she was dismissed 'because of' her absence; she could have returned and it was her insistence on a move to a different department that was the problem.

The EAT allowed her appeal on both grounds. On reasonable adjustments it was held that: (1) a proper comparator was a non-disabled employee who could have continued working; (2) a requirement (PCP) to return to work in an environment perceived to be hostile would impact more on an employee with a mental impairment; (3) it was not for the claimant to prove facts from which a connection could be made because the test in s 20(3) is not a causative one, but a factual one as to whether the PCP had led to the disadvantage; and (4) medical evidence is not always necessary in cases such as this, where other evidence could be evaluated. With regard to s 15 discrimination, the necessary causal link should not be viewed too strictly and could involve several links. What must be shown is that: (i) 'something'

had caused the unfavourable treatment; and (ii) that something arose from the disability. Here, the ET had said that it had to consider whether the treatment was 'because of' the disability, which was too stringent a test. At [66] the judgment said (in terms that arguably could apply to both forms of discrimination):

> 'Further, it seems to me … that the incorrect language of causation used by the tribunal … ("because of her disability") fed into the tribunal's error, so that too strict a causation test was imposed by the tribunal in error. The tribunal described the critical question … to be answered as whether the claimant's refusal to return to her previous role was "because of her disability or because of some other reason, such as she considered she had been badly treated in that department", but this was not a binary question. Both reasons might be in play: her disability caused her to experience anxiety, stress and (on her case) an inability to return to the place where she perceived the mistreatment and hostility to be located, leading to her refusal. The critical question was whether on the objective facts, her refusal to return arose in "consequence of" (rather than being caused by) her disability. This is a looser connection that might involve more than one link in the chain of consequences.'

DIVISION PI PRACTICE AND PROCEDURE

EAT; appeal; raising new points of law; general principles

PI [1602]

Aziz v The Fremantle Trust [2018] EWCA Civ 2605

The text at **PI [1602]** sets out the basic principle that, save in exceptional circumstances, a losing party before an ET will not be allowed to appeal on a point of law which was not raised before that ET. At **PI [1604]–PI [1604.02]** examples of this rule in operation are given. This relatively short decision of the Court of Appeal given by Sales LJ is another good example. The claimant had had difficulties with other members of staff and the management. As part of an attempt to resolve this, the employer activated a wide mobility clause in her contract to order to work at another venue. She refused and was eventually dismissed because of that.

She claimed unfair dismissal, on the bases that: (a) her dismissal was linked to racial victimisation because of previous complaints; and (b) the mobility clause had been unlawfully applied to her in its own terms because it went beyond a policy statement on such matters. The ET found against her on both grounds. Before the EAT, she appealed ground (b) (but not ground (a)) *but* also argued for the first time that the exercise of the mobility clause was contrary to the principles in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] IRLR 487, [2015] ICR 449, that a contractual discretion must be exercised rationally. The EAT turned down her appeal on ground (b), but also listened to the *Braganza* point before ruling against her on that too. When she appealed further on the latter, the Court of Appeal took a more

straightforward approach and held that the point could not be considered *at all* because it had not been raised before the ET. At [9] the judgment states:

> 'As regards the complaints about the ET's decision which are sought to be made on behalf of the Claimant on this appeal by reference to the *Braganza* case, there is no merit in them. It was incumbent on the Claimant to set out her case why she maintained that the relocation instruction given to her was unlawful. She did so by making submissions (a) and (b) above, but not by any complaint based upon the *Braganza* case or principles. There was no duty on the ET to consider arguments founded on *Braganza* of its own motion, where they had not been raised by the Claimant. Accordingly, there was no error of law by the ET in omitting to do so.'

REFERENCE UPDATE

480	*ACAS v Public and Commercial Services Union*	[2018] IRLR 1110, EAT
482	*Talon Engineering Ltd v Smith*	[2018] IRLR 1104, EAT
483	*IR v JQ* C-68/17	[2018] IRLR 1160, ECJ
484	*Lee v Ashers Baking Company Ltd*	[2018] IRLR 1116, SC
484	*Tribunalul Botosani v Dicu* C-12/17	[2018] IRLR 1175, ECJ

Subscription and filing enquiries should be directed to LexisNexis Customer Services Department (tel: +44 (0)84 5370 1234; fax: +44 (0)20 8662 2012; email: customer.services@lexisnexis.co.uk).

Correspondence about the **content** of this Bulletin should be sent to Nigel Voak, Analytical Content, LexisNexis, FREEPOST 6983, Lexis House, 30 Farringdon Street, London, EC4A 4HH (tel: +44 (0)20 7400 2500).

Published by LexisNexis