# Harvey on Industrial Relations and Employment Law

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## LEGISLATION

### New 2018 EAT Practice Direction

The President of the EAT has issued a new Practice Direction, replacing that set out at **PI [1901]**, as from 19 December 2018. The most immediate need for it came from the deletion of the section on EAT fees, with the consequent renumbering. Much of the rest of the drafting is with a view to making typographical changes, improving the clarity of existing provisions or extending them to reflect current practice. However, there are substantive changes as follows:

(1) the time for the respondent's answer is raised from 14 to 28 days;

(2) all skeleton arguments are to be delivered 14 days before the hearing;

(3) the 42-day limit for appealing is to run from the date the written reasons are sent to the parties, including in cases where they were requested (and permitted) out of time; and

(4) there is a new section setting out the procedure to be followed in a 'leapfrog' appeal directly to the Supreme Court.

This new Practice Direction will be substituted in Div PI in Issue 274.

### Response to the Taylor Report and the first detailed regulations

The government have published their response to the consultation on the Taylor 'Good Work' Report. This has been largely favourable, with commitments to several of its detailed recommendations for change. The first of the necessary amending instruments have been published (one in final form and two in draft). The most important preliminary point to note about them is that they are all to come into force on 6 April 2020. They are as follows:

Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 SI 2018/1378. These provide that the section 1 statement of terms and conditions must be given on the first day of employment, not within two months (except in relation to pensions, applicable collective agreements and training rights); they also add more details that are to be given in the statement, including on normal/variable hours, probationary periods and 'any other benefits provided by the employer that do not fall within another paragraph in this subsection'. The ERA 1996 s 198 (statement not necessary where employment lasts less than a month) is repealed. In addition, the reference period for calculating a week's pay for statutory holiday pay purposes (but not elsewhere) is raised from 12 weeks to 52 weeks.

Draft Employment Rights (Miscellaneous Amendments) Regulations 2019. These: (a) extend the right to receive the section 1 statement from 'employees' to 'workers' (as is to be done already with the itemised pay statement, as from 6 April of this year (see SI 2018/529); (b) increase the maximum amounts of the financial penalties on employers for breaching employment rights under the ETA 1996 s 12A from £5,000 to £25,000 and from £10,000 to £40,000; and (c) decrease the percentage of the workforce necessary for there to be a valid request to the employer to negotiate an information and consultation agreement from 10% to 2%.

Draft Agency Workers (Amendment) Regulations 2019. The purpose of these is to repeal the controversial 'Swedish derogation' in the Agency Worker Regulations 2010 SI 2010/93 regs 10 and 11 under which an agency worker can be denied the right to parity of pay with a permanent worker if under a contract with the agency under which he or she is entitled to a minimum level of pay between engagements. The necessary textual amendments are made, special unfair dismissal and detriment protection is given to workers affected and there is an obligation on an agency with workers under such contracts to provide them with a statement of the effects of the repeal on their rights, by 30 April 2020.

These will be incorporated into Divs Q and R as prospective amendments in Issue 272.

## Changes to immigration checking provisions

The Immigration (Restrictions on Employment) (Code of Practice and Miscellaneous Amendments) Order 2018 SI 2018/1340 makes a series of amendments to the provisions requiring employers to undertake right to work checks, on pain of automatic penalties (see **AII [20.01]** ff). The two most relevant to this work are:

(1) the introduction of an online 'right to work' checking system operated by the Home Office; from the employer's point of view, the most important point here is that amendments to the Immigration (Restrictions on Employment) Order 2007 SI 2007/3290 provide that an employer may rely on its use of this online system in order to establish a statutory excuse;

(2) the substitution of a new Code of Practice on Preventing Illegal Working: Civil Penalty Scheme for Employers to replace the 2014 Code set out at **S [2701]**.

The Order comes into force on 28 January 2019. The new code of practice will be substituted in Div S in Issue 274 and the necessary amendments to Div AII made in the same issue.

## DIVISION AI CATEGORIES OF WORKER

### Meaning of worker; Uber taxi drivers

**AI [81.05]; CI [74.07], CI [141.07]**

***Uber BV v Aslam [2018] EWCA Civ 2748***

The decision of the EAT in this case, upholding that of the ET that Uber drivers are 'workers' for working time and national minimum wage purposes, is set out at **AI [81.05]**. It will be recalled that permission for a leap frog appeal directly to the Supreme Court was refused, but it appears that the case is heading there anyway, the employer having lost again in the Court of Appeal (who granted leave to appeal). Given the general rub of the green in this area recently (see *Addison Lee Ltd v Lange* UKEAT/0037/18 (14 November 2018, unreported), reported in last month's **Bulletin 485**), it might have been thought that the employer's chances would be slight, *but* that may now no longer be the case because of an unusual but strong difference of opinion within the Court of Appeal, not just on fact but on some of the underlying law.

The majority (Etherton MR and Bean LJ) largely followed the line of the EAT, holding that the ET was entitled to hold that the contractual framework erected by Uber for its drivers did not reflect the actual relationship and so could utilise the *Autoclenz* principle of looking at the realities in a more robust and commonsense manner. On that basis, Uber did not just supply an app-based booking system but had in law created a relationship of worker and employer. Moreover, on these specific facts and arrangements, the Uber model was distinguishable from that of ordinary taxi drivers and minicab drivers which has been held in the past to constitute self employment. They further held that this relationship existed throughout the whole period that the driver switched on the app, was in the relevant area and was available to take a fare (an important point for quantifying the rights claimed here).

So far, so orthodox. However, Underhill LJ dissented fundamentally. Going back to the basic *Autoclenz* principle, he considered that it can only apply if the contractual provisions are clearly at variance with the actual working arrangements. It is not to be used merely to attack such provisions because a later court or tribunal considers them harsh and/or the product of unequal bargaining position (which, by implication, he considered the majority to have done). Here, he thought that the contract did reflect the actual agreement, which had to be applied and which defeated worker status. Moreover, even on the opposite basis that there was such status, he would have held that it only applied during the period of an actual fare.

This dissent was backed by one other point that also caused an acute difference of opinion. At the end of his judgment, Underhill LJ cited the Taylor Report and the recent controversies over gig economy working. Although he said that this was not the basis of his dissent, he did use it to raise another argument that may well feature in a further appeal, namely that by now, given the complexity of the definitions here, it really is for Parliament to develop the law, not the courts. The majority expressly dissociated themselves from this view. Overall, the strength of the dissent and the standing of the dissenting judge in employment law must make the result of a further appeal more difficult to call.

## Meaning of worker; Deliveroo riders

**AI [81.07]; NI [1003.01]**

***R* (*Independent Workers' Union of Great Britain*) *v CAC [2018] EWHC 3342* (*Admin*)**

Shortly before the Court of Appeal's judgment in the *Uber* case above, an application for judicial review by the union representing Deliveroo riders of the CAC decision rejecting an application for statutory recognition because they were *not* 'workers' was dismissed by Supperstone J in the Administrative Division.

The application had been permitted to proceed by Simler J on only one ground, namely that the CAC should have found that the worker definition in TULR(C)A 1992 s 296(1) (and its requirement of personal service) should be interpreted in the light of the collective bargaining rights in art 11 of the European Convention (as applied in *Demir v Turkey* [2009] EHRR 54), so as not to exclude these Deliveroo drivers. It was argued for the union that art 11 was not dependent on the existence of worker status under s 296. However, this was rejected, the judgment holding that art 11 is not engaged in the absence of an employment relationship. Secondly, even if art 11(1) did apply, the restriction in the 1992 Act to workers as defined would have been justified under art 11(2) as 'rationally connected' to the aim of striking a balance between the interests involved in statutory recognition, and proportionate. Further, it would not have been possible (as the union had argued) to 'read down' s 296 to achieve coverage because that would have had the impermissible effect of contradicting the section. Finally, it was held that the CAC had in fact considered and pronounced on this point sufficiently, albeit briefly.

# DIVISION AII CONTRACTS OF EMPLOYMENT

## Statutory statement of terms of employment; exceptions to the right; time it is to be given

**AII [97], AII [102]**

***Stephanko v Maritime Hotel Ltd UKEAT/0024/18* (*25 September 2018, unreported*)**

It is perhaps ironic that, just as we are seeing proposals to amend the law on section one statements of terms and conditions (above), we have a rare

decision on that law, and a first appellate decision on a specific point apparently showing a mismatch in its drafting.

The claimant was dismissed after six weeks working for the respondent. One of her claims was that she had not been given a section one statement, with the result that, as she had succeeded in other claims, she should have two to four weeks' pay under the Employment Act 2002 s 38 **Q [1259]** because of that omission by the employer. The ET rejected this claim. While it was true that she did not come within the exception in the ERA 1996 s 198 **Q [822]** (no obligation to give the statement if the employment lasts for less than one month), it is provided in s 1(2) that the employer has *two* months in which to give it. The ET construed this as meaning that on these facts the obligation did not arise to the claimant with her six weeks' employment.

The EAT disagreed. The simple answer was that the ET had overlooked s 2(6) **Q [626]** which states that the statement is to be given to the person 'even if his employment ends before the end of the period within which the statement is required to be given'. More generally, it was said that:

> 'The effect of sections 1, 2 and 198 is to make the entitlement to a section 1 statement a time served right, applicable to employees with one month's service, but thereafter, the employer is provided with a one month's grace in which to supply the written statement. However, the obligation to provide the statement continues for employees with one month or more service, whether or not the employment relationship is ended in its second month. It does not follow from the flexibility afforded to an employer by section 1(2) as to when the statement of initial employment particulars must be provided, that there is no requirement to provide a statement if the contract ends within two months.'

The case was remitted for calculation of her week's pay and consideration of whether to award two or four weeks. When s 196 is repealed and the two months' grace removed in April 2020, the position will be even clearer.

## Employer's duty of care; application to interference with employee's privacy

**AII [146], AII [194.24]**

***Richmond v Selecta Systems Ltd [2018] EWHC 1446 (Ch), [2019] IRLR 18***

After a rather messy and involved 'managing out' of a salesman by his MD, litigation ensued in which the claimant lost on his principal claim (that he had actually reached a termination agreement with the employer, which it had then failed to honour). This was primarily a question of fact involving conflicting accounts. However, he won on a subsidiary ground, which is more interesting legally, showing the ever-present dynamic of the common law, even in contexts more usually dealt with in other ways.

As part of his investigations into the claimant, the MD had taken and hidden his (employer-provided) mobile phone, concerned that he might leave immediately and take confidential information with him. In the course of negotiations, the MD demanded the password. Instead of getting a techie to do so, the MD then searched the phone's Internet accounts for such confidential information. In trying to delete some such information, he found that he had to reset the password for certain other accounts. Unfortunately, this then locked the claimant out of not just those accounts but also other purely personal services he had had and in relation to which he was now locked out.

Normally, interference with an employee's privacy in relation to electronic equipment raises issues of data protection and/or human rights law (see **AII [194.24]**). Here, however, as an adjunct to his primary common law action for breach of contract, the claimant sued for the tort of *negligence* in the way that the MD had interfered with his online accounts. Judge Matthews (sitting as a High Court Judge) held that in the light of the modern realities that equipment such as mobile phones is often provided for employees with (implied) permission for private use as well, there was no reason why the employer should not owe a duty of care in relation to the employee's online accounts. He commented that, if the employer wishes to place restrictions on this, it must do so by provisions in the contract of employment. Applying the usual three-fold test for negligence, he then found that here the claimant's loss was reasonably foreseeable, the relationship was of sufficient proximity and it was fair, just and reasonable to impose a duty of care. On the crucial question then of *breach* of that duty, it was held that: (1) an employer in such circumstances does have a legitimate interest to access a phone to protect its business interests; but (2) the MD here was *not* an expert in IT or technology (presumably operating on the fundamental technology principle of 'I wonder what this button does') and should have involved someone who was. Moreover, the fact that the claimant had given him the password did not mean that he had given carte blanche to go beyond essential searches and interfere with non-work accounts. On that basis, the employer was held liable for damages in negligence, which were quantified at £1,000 – hardly a king's ransom, but making rather an interesting point.

## Restraint on competition; effect of wrongful dismissal on a restraint clause

**AII [242]**

***Brown v Neon Management Services Ltd [2018] EWHC 2137 (QB), [2019] IRLR 30***

The principal issue in this case was whether the employees had been wrongfully dismissed, on relatively complex facts, where there were arguments that any breaches by the employer had been affirmed by the employees. However, it is the secondary issue that is important for present purposes – it was held that the employer had indeed been in fundamental breach of contract in its treatment of the employees, which they then argued meant that they were no longer bound by post-termination restraint clauses.

On this point, the employer argued that the venerable rule in *General Bill Posting Ltd v Atkinson* [1909] AC 118, HL that a repudiation (in particular a wrongful dismissal) destroys such a clause as a matter of law should now be rejected. This was in the light of certain judicial criticisms of it as too sweeping. These are set out at **AII [242]** and centre on the view of two judges in the Court of Appeal in *Rock Refrigeration Ltd v Jones* [1996] IRLR 675 that they were only applying *General Bill Posting* because they were bound by precedent to do so. The employer here also relied on certain remarks in *Geys v Société Générale* [2012] UKSC 63, [2013] IRLR 122, though these seemed to be more ambiguous on the point. However, in giving this part of his judgment, Choudhury J (now the new President of the EAT) disapproved of this argument in very clear terms, applied *General Billposting* and held that the post-termination clauses here fell away as a result of the employer's repudiatory breaches. At [171] he said:

> 'In my judgment, none of these judicial comments, all of which were obiter, provides a firm foundation for setting aside such a long-established rule as the *General Bill Posting* Rule, particularly where, as in this case, it is the repudiator who seeks to enforce the PTRs against the innocent parties.'

## DIVISION CI WORKING TIME

### Annual holiday; holiday pay; calculation of a week's pay; effect of short-time working

**CI [191]**

***Hein v Albert Holzkamm GmbH: C-385/17, ECLI:EU:C:2018:1018, ECJ***

Most of the voluminous case law on the calculation of statutory holiday pay has concerned what *elements* of pay are to be included (eg commission and the various forms of overtime), but in this case from Germany the question was what *amount* should be the basis for calculation. As with *Tribunal Botosani v Dicu:* C-12/17, [2018] IRLR 1175 considered in **Bulletin 484**, it may be that the issue in question is more easily resolved under our domestic law because it is more generous than EU law, but that is subject to one possible application of the principle behind the decision to a slightly different possibility where domestic law is not more generous.

The claimant worked in the building trade. He was on short-time working in the year in question, in the sense that he was laid off completely for 26 of the 52 weeks. When he took his due holidays (including the four weeks required under the Working Time Directive 2003/88/EC), his pay was based on the reduced average wages due to this lay off. The employer's reason for doing this was that, although in general German law required the calculation of holiday pay to be based on normal wage rates, this had for many years been subject to the possibility of derogation by a collective agreement, and the relevant building trade agreement allowed short-time earnings to be used. It was this derogation that the claimant was challenging as contrary to the directive.

The ECJ agreed, in effect striking down the derogation (and for good measure not allowing Germany any time limitation on implementing its ruling, even though it had operated for a long time). They held that the purpose of the statutory four-week holiday with pay is a health and safety one, enabling workers to take their holidays, one aspect of which was the maintenance of 'normal remuneration' by way of holiday pay. They disapproved any 'package' approach, in that it had been argued that the collective agreement also included provisions more favourable than the directive required. They ruled as follows:

> '… Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of calculating remuneration for annual leave, allows collective agreements to provide for account to be taken of reductions in earnings resulting from the fact that during the reference period there were days when no work was actually performed owing to short-time working, with the consequence that the worker receives, for the duration of the minimum period of annual leave to which he is entitled under Article 7(1) of the directive, remuneration for annual leave that is lower than the normal remuneration which he receives during periods of work.'

Three comments are made:

(1) As the claimant here was not working for 26 out of 52 weeks, although he should have been paid his normal remuneration, the court pointed out that under EU law a worker only accrues holiday entitlement by actually working, so that his statutory entitlement for that year was only *two* weeks. They did however point out that a member state can always provide a more advantageous scheme; as pointed out in the commentary on *Dicu* in **Bulletin 484**, in UK law there is *no* such limitation to time actually worked (the only key to entitlement being 'worker' status) and so in these circumstances the worker would retain the full four-week entitlement.

(2) Similarly, in UK law under the Working Time Regulations 1998 SI 1998/1833 (which adopt the ERA 1996 scheme for calculating the week's pay) the particular facts of this case would be covered without recourse to EU law because, where there is a workless week during the reference period (currently 12 weeks, but to go up to 52 in 2020, see above) by virtue of the ERA 1996 s 223(2) that week is to be disregarded and a worked week prior to that period is to be substituted.

(3) However, that leaves one other possibility where UK law has always had a problem, namely where the short-time working takes the form, not of workless weeks, but of reduced hours during weeks in the reference period (not covered by s 223(2)). The emphasis on using final wage as the basis of calculation could prejudice the employee, a known problem for decades in redundancy payment law (where the employer does not collapse quickly, but over a longer period with fewer and fewer hours available to the staff); see **H [887.01]**. In the EU-backed context of

working time rights to annual leave, however, could this decision with its emphasis on 'normal remuneration' now be used to boost the argument that to calculate statutory holiday pay on the basis of the reduced hours contravenes the directive (see **H [871.18]**)?

## DIVISION E REDUNDANCY

### Collective redundancies; definition of 'establishment'; territorial jurisdiction

**E [958]; H [1109.01], H [1136.07]**

***Seahorse Marine Ltd v Nautilus International [2018] EWCA Civ 2789***

The facts of this potentially important case on discerning the 'establishment' in order to apply the '20 or more employees at the same establishment' test for triggering collective consultation are set out at **E [959]**. The ET and EAT held that, in the case of this labour-supplying business, the establishment was the whole operation, not the individual ships supplied, thus allowing aggregation to cross the 20 threshold. It has to be said that this decision to 'go big' seemed to go against the flow of both the EU law and domestic case law where the strong trend has been to 'go small' and choose the individual workplace, with corresponding limitations on the scope of collective consultation where redundancies are spread across several such. Obvious examples from each are the *USDAW* case (see **E [952]**) (the establishment was each Woolworths store, not the whole business) and the *Renfrewshire Council* case (see **E [961]**) (the establishment was each individual school, not the council's whole education department). It is explained fully at **E [963]–E [968]** that a particular problem here is that the backing directive allowed member states to choose one of two quite different thresholds – most states chose the percentage approach, under which a union will normally want the individual workplace to be the establishment, whereas the UK chose the numerical approach (20 or more) where a union will normally want the whole undertaking to count.

The decisions of the ET and EAT have now been reversed by the Court of Appeal, arguably imposing what is now orthodoxy, i e that the 'establishment' here was the individual ship, with the result almost certainly that the union's claim to consultation failed on this initial point. Underhill LJ analysed the case law set out in the text and held that it could only lead to the interpretation put forward by the employer. In particular, he disapproved three arguments relied on by the union: (1) that a distinction should be made between 'percentage' cases and 'numerical' cases (a distinction disapproved in *USDAW* itself; see **E [967]**); (2) that it made a difference that this employer merely *provided* labour, rather than operating the ships; and (3) that in general the domestic legislation should be interpreted so as to maximise, not minimise, the consultation requirement. Ultimately, it was a question of applying the EU law test as clearly set out in *Athinaiki Chaterpoiia* (see **E [957]**):

> 'an entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks'.

Given that, on the ET's findings of fact, there was sufficient evidence of 'assignment' of individuals to those particular ships, that should have been enough to allow the employer's appeal, but the court still went on to consider the second point arising, namely territorial jurisdiction. This is considered at **H [1136.07]**, where the point is made that the EAT accepted that, as TULR(C)A 1992 (like the ERA 1996 and the EqA 2010) now contains no specific provision on such jurisdiction, the case law on the latter two statutes is to be applied, in particular the *Lawson v Serco* principles and the 'sufficient connection' test. However, a further issue now had to be faced, given that there was no previous case law under the 1992 Act. Does that sufficient connection test apply to the individual employees (as it does in relation to individual rights such as unfair dismissal) or to the establishment itself? Naturally, the union argued for the former (at least for sailors living in GB), and this was accepted by the ET and EAT. However, the Court of Appeal disagreed and upheld the employer's appeal on this ground too. The vital point is that the rights and obligations in TULR(C)A on redundancy consultation are *collective* (even though the remedy, the protective award, benefits individuals) and on that basis (and accepting the employer's argument that this would make the test easier to apply in practice) the court held that, while it is indeed the *Lawson* test that must be applied, it is applicable to the establishment(s) in question. Here, that was the particular ships and, as they were all stationed outside GB, there was no sufficient connection to overturn the basic rule that Parliament must be taken to have intended that any question of redundancy consultation would fall outside the jurisdiction of domestic tribunals here.

## DIVISION H CONTINUITY OF EMPLOYMENT, ETC

### Change of employer; presumption of continuity not available but inferences may be drawn

**H [48]**

***SD* (*Aberdeen*) *Ltd v McCloud UKEATS/0003/18* (*14 September 2018, unreported*)**

The text at **H [48]** discusses the case of *Schwarzenbach v Jones* UKEAT/0100/15 (4 September 2015, unreported) where it was held that in a case of uncertainty as to the proper employer to sue and whether (for continuity purposes) two or more possible entities were associated employers, the claimant cannot establish the latter status by reliance on the statutory presumption of continuity in the ERA 1996 s 218 **Q [242]**, *but* it is still open to a tribunal to take a broad and pragmatic approach and draw *inferences* from such evidence as is before it, especially if the lack of clearer evidence is down to the employer(s).

The present decision of Lady Wise in the EAT is a good example of this approach, with one added twist. The primary question was whether the claimant was an employee or self-employed, but on the latter possibility another question arose as to whether he had sufficient continuity of employment. He was unclear exactly which one of a web of companies run by similar people had been his employer, and had provided what little evidence he had. Much depended on whether two of these companies were associated in law. Not only did the potential employers not lead clear evidence, but this was compounded by the fact that at the ET hearing they were represented by one of the directors in question who *still* did not make the position clear. The ET drew inferences from this and found on balance that the companies were associated and that this provided the necessary continuity. The EAT rejected the employers' appeal, upholding the ET's right to take this approach. At [19] the judgment states:

> 'The single issue in the present appeal is whether there was sufficient in the evidence or by implied admission for the tribunal to draw the inference that Mr Duncan Kerr had legal control of both companies, Chiahealth and SD. The case of *Schwarzenbach* is a good example of a tribunal being able to draw such an inference where respondents had chosen not to shed light on the issue of ultimate legal control. Accordingly, while voting control rather than mere *de facto* control is required for the purpose of section 231, it seems to me to be clear that evidence of *de facto* control can properly be used to draw an inference of voting control if the respondent has an opportunity to clarify the legal position and fails to do so.'

## DIVISION L EQUAL OPPORTUNITIES

### Disability discrimination; discrimination arising from disability; unfavourable treatment

**L [72], L [264.01], L [374.01]**

***Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65***

The claimant here was employed by the university from 2000 to 2013. Due to a condition accepted as a disability, in 2010 he went part-time and then in 2013 (after a period of absence) he took early medical retirement aged 39. As a result, he became due for a lump sum and annuity as if he had worked to 67, without actuarial decrease for early receipt. What he objected to, however, was that his annual pension was based on his final salary which was only for part-time working. He claimed that he should have been paid on the basis of his previous full-time working and that failure to do so constituted discrimination arising from disability under the EqA 2010 s 15 **Q [1468]**. The ET found for him, but this was reversed by both the EAT and Court of Appeal (see **L [374.01]**).

On further appeal, the Supreme Court also found against him. Although justification would have been a live issue later, the key point here was whether

he had been subjected to 'unfavourable treatment'. The short judgment of the Supreme Court given by Lord Carnworth largely agrees with that of the Court of Appeal, stressing that in interpreting s 15 it is important: (1) not to look back at what may have been the law pre-2010 ('… our task is not to try to reconstruct the pre-*Malcolm* law …'); and (2) not to drawn analogies or differences with other statutory formulations such as 'detriment' . In other words, s 15 is to be construed as it stands. Here, if the claimant had not been disabled he would not have received the pension at the full-time rate at this stage, he would not have received a pension *at all.* In these circumstances, therefore, applying the plain wording of s 15, the answer was relatively straightforward – why was there not 'unfavourable treatment'? Because he had not been treated unfavourably. QED.

## Age discrimination; justification; application of the test

**L [358], L [365.02], L [695]**

***Lord Chancellor v McCloud; Secretary of State for the Home Office v Sargeant [2018] EWCA Civ 2844***

The facts of these joined appeals concerning tapering provisions protecting older judges and firefighters from the full effects of the Hutton Report changes to public sector pension schemes are set out at **L [365.02]**. The EAT had found that these elements of the schemes were direct age discrimination which could not be justified. The Court of Appeal have now in effect upheld that view, though with some differences in detailed reasoning. One potentially important ruling on law is that, contrary to much of the previous discussion in this and earlier case law, there is *no* significant divergence between EU and domestic law on the width of the margin of discretion to be given to a government when addressing issues of social or political importance. There is indeed such a margin, but after it has been applied an ET must still go on to apply the legitimate interest/proportionate means tests, which will require *evidence*, even where the policy in question was heavily policy-based. As it was put, 'visceral instinct' or an assertion that the result 'felt right' are not enough. Here, it was held that the government had not provided the necessary evidential base for its assertions of justification. The judgment is a long and full one, but its essence can be seen at [161] as follows:

> 'We therefore agree with and accept [counsel's] submission that the Governments' aims were ones whose claimed justification had to be supported by evidence. It was for the Governments to show that, despite the apparently discriminatory effect of their transitional protective measures as between the three groups of FPS members, their measures were a legitimate aim of social policy. In the event, they sought to do so by nothing more than assertions and generalisations. Even though governments are entitled to be afforded a broad measure of discretion, "Generalised assumptions, not based on any factual foundation, are not good enough" (*Seymour Smith,* per Lord Nicholls of Birkenhead). We noted, at para 71 above, that Lord Nicholls was there addressing himself primarily to means. But the ECJ made the

same point about aims in the *Age Concern England* Case C-388/07 [2009] ICR 1080, at paras 51 and 65:-

> "51. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle …
>
> 65. … However, it is important to note that the latter provision [Article 6(1) of Directive 2000/78] is addressed to the member states and imposes on them, notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued."

The ECJ reminded itself of those observations in *Fuchs v. Land Hessen* Case C-160/10 [2012] ICR 93, at paras 77 and 78. They show that the burden of proof of the legitimacy of a claimed aim is a high one. So it should be. If the promoter of a policy that is directly discriminatory on age grounds wishes it to be recognised as legitimate, it must prove why it is.'

Interestingly, the judgment goes on to contrast the result of this case with that in *Lockwood v DWP* [2013] EWCA Civ 1195, [2013] IRLR 941, [2014] ICR 1257, where the government department *did* lead 'full and careful evidence' as to why it had introduced a redundancy procedure even though it had elements of age discrimination.

Two final points are ventured:

(1) This may only be a 'holding' judgment, as there may well be a further appeal by the government to the Supreme Court.

(2) The reference to a 'felt right' solution and its disapproval in this context may bring tears to the eyes of those of us employment lawyers who are long in the tooth (if not actually toothless). Years ago, when practical rather than legal solutions were primarily sought (in bargaining, conciliation or arbitration), the concept of the 'felt-fair' solution was a powerful one in the prevailing ethos, especially if neither side was getting all that it wanted. Indeed, the sort of tapering/transitional scheme at issue here was not uncommon and could well be what employees and/or their union actually *wanted*, rather than challenging in court. What a different, legalised world we live in (with apologies to younger employment lawyers – just put it down to nostalgic musings by the ancient flatulence tendency).

## REFERENCE UPDATE

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| 479 | *Addison Lee Ltd v Gascoigne* | [2018] ICR 1826, EAT |
| 480 | *ACAS v PCSU* | [2018] ICR 1793, EAT |

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| 480 | *Reading BC v James* | [2018] ICR 1839, EAT |
| 480 | *Kilraine v Wandsworth LBC* | [2018] ICR 1850, CA |
| 482 | *Morrison v Aberdein Considine & Co* | [2019] IRLR 10, EAT |
| 484 | *Twenty-Four Seven Recruitment Services Ltd v Afonso* | [2019] IRLR 4, EAT |
| 484 | *Timis v Osipov* | [2019] IRLR 52, CA |

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