Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

Increase of limits

Employment protection limits are subject to the usual uprating by virtue of the Employment Rights (Increase of Limits) Order 2019 SI 2019/324, which comes into force on 6 April 2019.

The principal changes are that: (1) the statutory maximum on the 'week's pay' for the relevant calculations rises from £508 to £525, meaning that the maximum redundancy payment/basic award goes up to £15,750; and (2) the maximum compensatory award goes up from £83,682 to £86,444. This gives a normal maximum for unfair dismissal of £102,194, exceeding £100k for the first time.

These changes will be incorporated into Divs Q and R in Issue 274.

DIVISION AI CATEGORIES OF WORKER

Agency workers; remedies; assessing compensation; liability of parties

AI [215.03], AI [216]

London Underground Ltd v Amissah [2019] EWCA Civ 125

In this first case to consider at appellate level the provisions of the Agency Workers Regulations 2010 SI 2010/93 on remedies, the facts were rather unusual. They are set out in the text at **AI [215.03]**. The claim was for back payments against both the agency (TP) and the client (LUL), but the complications were that: (1) LLU had put TP in funds to make these payments but the latter had not done so; and (2) by the time that the claimants had rather belatedly brought their action, TP had become insolvent. The case therefore revolved around the liability of LUL.

Legally, the problems arose in respect of the relationship between the applicable individual regulations, which contained at least one anomaly. The eventual result was that the Court of Appeal disapproved the ET's decision in LUL's favour, largely upheld the EAT's decision to allow the claimants' appeal (though with some variation on a couple of points of interpretation) and remitted the case to the ET on details of quantification.

The first point established in Underhill LJ's judgment is that reg 5 **R [2418]** goes beyond just requiring the *establishment* of equal terms with a permanent worker and (particularly in the case of pay) actually provides the statutory right to be *paid* the equal amount. The result of this is that the underpaid worker's remedy lies as a claim for statutory compensation under Part 3 of the Regulations themselves, not as a claim at common law for liquidated damages (amenable to recovery under the ERA 1996 Part II). The question then arises as to how those provisions operate.

Under reg 14(1) and (2) **R [2427]**, the agency and the hirer are both liable to the extent that they are each 'responsible for that breach'. In this case, the ET had held on the facts that TP and LUL were liable on a straight 50/50 basis. However, the complication arose when one turned to reg 18 **R [2431]** which not only governs compensation but in para (9) provides for the apportionment of that compensation if there is more than one respondent. This is to be done by apportionment on the basis of what the ET considers 'just and equitable having regard to the extent of each respondent's responsibility for the infringement to which the complaint relates'. Does this just echo reg 14, or does it add another dimension? In case this sounds like sophistry, on the odd facts here it made all the difference. The ET had held that although 'liability' was 50/50 under reg 14 it was not just and equitable to make LUL pay its half because it had already paid money over to TP to cover its liability and it would not be fair to make it pay again. The EAT held that this was incorrect, given that LUL had also been remiss in other ways in trying to deal with the problem. The Court of Appeal went further and held that, although reg 18(9) gives an *element* of discretion to the ET, in a straightforward pay case the right in reg 5 will normally mean that a claimant is to be paid for the underpayment, and (in a multiple respondent case) paid the amount for which that respondent has been held liable under reg 14 *unless there was serious fault on the claimant's own part.* The mere fact that the claimants here had delayed bringing proceedings did not come within that exception. Moreover, accepting the EAT's criticisms of LUL's actions, it would be unfair to make the claimants shoulder the loss at the end of the day. This is all best summed up at [66]:

> 'On that basis the question is whether it was open to the Employment Judge, in all the circumstances found by him, to hold that justice and equity required that LUL should not pay the Claimants any compensation in respect of the arrears notwithstanding that it was 50% responsible for them not being paid at equalised rates up to mid-October 2012. I do not believe that it was. The finding that LUL was 50% responsible reflected findings by the Judge that it culpably contributed to the fact that the Claimants' pay was not equalised many months sooner than it

was. It is true that it did the right thing thereafter by funding TP to pay the arrears, and I can understand why the Judge baulked at the idea that it should have to "pay twice". But I cannot accept that that circumstance, regrettable though it is, renders it just and equitable to deprive the Claimants of the compensation otherwise due. There is no question of any misconduct on their part. They have been underpaid wages for reasons which have nothing whatever to do with them and were (partly) LUL's fault: LUL chose to deal with TP and it should in my view be it, and not the Claimants, who should bear the burden of TP's dishonesty. That basic inequity is elaborated by Mitting J in the four "counter-balancing factors" which he identifies in his judgment [see **AI [216]**], and I differ from him only in believing that they render the ET's decision not only "open to question" but positively wrong.'

DIVISION DI UNFAIR DISMISSAL

Automatically unfair dismissal; asserting statutory rights

DI [1955]

***Spaceman v ISS Mediclean Ltd UKEAT/0142/18* (*19 October 2019, unreported*)**

The claimant was a porter accused of sexual misconduct at work. He faced disciplinary action. At the hearing, he said that the fellow employee chosen to represent him had been told to 'back off' because the decision had already been taken that he was to be dismissed. He was indeed dismissed and brought proceedings for automatically unfair dismissal under the ERA 1996 s 104 **Q [728]**, ie that he had been dismissed for asserting statutory rights, in particular para (1)(b) ('alleged that the employer had infringed a right of his'). His argument was that the employer was threatening to dismiss him unfairly (by pre-judging his case). The ET, however, rejected his claim as hopeless because of the use of the past tense in the subsection; here, the employer had not at the relevant time infringed his statutory right.

In the EAT, Judge Richardson dismissed his appeal. Nothing had actually happened that could invoke s 104(1)(b). Making the point contained in the notes to that section in Div Q, it was said that this interpretation may show a gap in the protection of the employee in a case of a *threatened* infringement. However, no canon of interpretation could ignore that past tense. Support for this came from the leading case of *Mennell v Newell & Wright (Transport Contractors) Ltd* [1997] IRLR 519, CA where it was held that it is not enough that employer's conduct *could have* given rise to a relevant allegation. At [29] and [31] the judgment draws an interesting comparison with other sections in the 'stable' of provisions enacting automatic unfairness where Parliament *has* expressly included threatened employer action, but also points out the difficulties of doing this in the context of unfair dismissal:

'29. In these respects, section 104 is more narrowly drafted than other members of the same family of provisions. The drafting techniques in

> the family are not always precisely the same and I do not need to go through the provisions individually. However, in contradistinction to section 104(1)(a) other provisions are often drafted so that the employer's reason may relate to proposed proceedings as well as actual proceedings or proposed action as well as actual action; see for example section 104A to 104E. In practice these provisions will sometimes give protection where section 104 does not since they apply to cases of proposed action as well as actual action.'
>
> '31. In my judgment sections 104(1)(a) and (b) must be given their natural meaning. It is true that they could both have been drafted to afford wider protection; but it is not possible within ordinary canons of construction to interpret them as if they did. It would, for example, be impossible to know what criterion to apply in section 104(1)(b). Would it be sufficient for the employee to allege that an infringement may take place or would the allegation have to encompass a threat of infringement or a proposal to infringe or an intention to infringe?'

Of course, in the ordinary course of events a dismissal shown to have been pre-determined will most likely be unfair on general principles, but not unusually the basic problem for the employee here was that he lacked the two years' continuous employment to be able to bring a straightforward unfair dismissal action.

DIVISION F TRANSFER OF UNDERTAKINGS

Dismissal because of relevant transfer; effect of other reason

F [157.01]

Hare Wines Ltd v Kaur [2019] EWCA Civ 216

The text at **F [157.01]** sets out the decision of the EAT in this case, upholding the ET's decision that the claimant had been dismissed because of the TUPE transfer in question, thus establishing automatic unfairness. The case arose because prior to the transfer the claimant had had (mutual) personal difficulties with a colleague, which had not been resolved by the transferor company. However, when the TUPE transfer was arranged, the transferee company expressed a wish not to take the claimant on, on the basis that the colleague would have become her manager, which would only have made the difficulties worse. Was her dismissal by the transferor because of the transfer? On disputed facts, the ET found for the above interpretation and that it established the necessary connection with the transfer.

On appeal by the transferee company, it was argued that this was a wrong view of the law and that these personal conflict issues had to be construed as the real reason for the dismissal. However, the EAT held that this was a finding open to the ET and the Court of Appeal in a short judgment by Bean LJ have now also upheld its decision. The points that particularly weighed in the claimant's favour were:

(1) this went beyond a simple issue of 're-labelling' (the company's use of 'redundancy' as its reason to her being false);

(2) proximity to the transfer (here, just before) is not determinative, but can be evidentially relevant (citing *P Bork International A/S v Foreningen af Arbejgsledere I Danmark* [1989] IRLR 41, ECJ (see **F [157]**));

(3) the transferor had not dealt with the personal difficulties, which had only been addressed at the time of the transfer;

(4) the company had not sought to rely on the 'ETO' defence;

(5) the correct test here is not a simple 'but-for' one, but what was the reason or principal reason (citing *Smith v Trustees of Brooklands College* UKEAT/0128/11 (5 September 2011, unreported), see **F [130.06]**, **F [164.01]**) which is very much a question of fact for the ET.

Applying this, it was held that this was a case of a dismissal because the transferee did not want the claimant on its books post-transfer, fearing the potential personal difficulties, *not* a case of dismissal because of those personal difficulties, with the TUPE transfer merely coincidental.

DIVISION L EQUAL OPPORTUNITIES

Protected characteristics; disability; long-term effect; no hindsight

L [165]

Nissa v Waverly Education Foundation Ltd UKEAT/0135/18 (19 November 2018, unreported)

Hindsight, it is said, is a wonderful thing but this decision of Judge Eady in the EAT shows that it must not be used when deciding whether a claimant in a disability discrimination case has surmounted the hurdle of showing that the relevant condition had a long-term effect, ie under the EqA 2010 Sch 1 para 2(1)(b) **Q [1594]** that 'it is likely to last for at least 12 months'.

The claimant was a teacher at the respondent's school. From December 2015 she began to suffer the symptoms of fibromyalgia but this was not formally diagnosed until 12 August 2016. In the meantime she had tendered her resignation, effective from 31 August 2016. When her specialist submitted his report in October he said that her condition might improve now that she was no longer working. She claimed disability discrimination, but the employer disputed that she was disabled at all and a preliminary hearing was conducted on this point. The ET held that she was not disabled because she did not satisfy the 12-month likelihood test. In so deciding, it relied on the fact that the diagnosis had only been made late and had included the possibility of improvement.

The EAT allowed the claimant's appeal. It was held that the ET had erred by concentrating on the diagnosis, rather than the condition itself. A diagnosis can be evidentially relevant but is not determinative. Moreover, although the ET said that it was not using hindsight, the EAT held that it had indeed done

so impermissibly by looking at the position post-August 2016 and in the light of the October report. It should rather have looked at the likely effect of the condition itself during the period *before* the termination of her employment. All of this meant that the ET had taken too narrow an approach and had not applied properly the test of whether it 'might well' have lasted for at least 12 months mandated by the decision of the Supreme Court in *SCA Packaging Ltd v Boyle* [2009] IRLR 746, [2009] ICR 1056 (see **L [165.01]**).

Religion or belief; freedom to hold or manifest a belief; must be the employee's belief, not the employer's

L [212]

Gan Menachem Hendon Ltd v de Groen UKEAT/0059/18
(*12 February 2019, unreported*)

This decision of Swift J in the EAT shows the significance of the decision of the Supreme Court in *Lee v Ashers Baking Company Ltd* [2018] UKSC 49, [2018] IRLR 1116 (doomed in perpetuity to be known as the 'gay cakes case'), not just in its extension to a religion/belief case, but in its relevance generally to interpreting the direct discrimination provisions of the EqA 2010 s 13 **Q [1466]**.

The claimant was employed by an ultra-orthodox Jewish nursery. At a social event with parents, it came to light that she was living with her partner. In the face of parental complaints about this, she was interviewed, at which it seemed to have been the employer's approach that her private life was her own and if she denied it that would be the end of the matter. On reflection, she refused to lie about her situation and she was eventually dismissed. She claimed sex discrimination and religion/belief discrimination. The ET upheld both and the employer appealed.

On that appeal, the sex discrimination decision was upheld, but the religion/belief decision was reversed. This had primarily been on the basis of direct discrimination. Here, it was held that the ET's decision had been superseded by the later decision in *Lee* and could no longer stand in the light of Lady Hale's view that for there to be direct discrimination there must be less favourable treatment because of a protected characteristic *of the claimant*, not the employer. Here (as with the refusal of the service in *Lee*) the driving factor was the *nursery's* religious belief. At [21] the judgment sums up Lady Hale's approach as follows:

> 'The purpose of discrimination law, she said, was the protection of a person who had a protected characteristic from less favourable treatment because of that characteristic, not the protection of persons without that protected characteristic from less favourable treatment because of a protected characteristic of the discriminator. Any conclusion to the contrary would run against the principle that a discriminator's motive for the less favourable is immaterial. More importantly any direct discrimination claim that rested on the discriminator's protected characteristic would be doomed to fail because any comparison

between the person receiving the less favourable treatment and "other persons" would always produce the result that there had been no difference in treatment since it could safely be assumed that a discriminator acting on the grounds of his own political (or religious) belief would act in the same way regardless of who was affected.'

A subsidiary part of the decision here was that, although there were differences in the wording between the original Religion/Belief Regulations and s 13 of the 2010 Act, there had been no intent by the legislators to effect any substantive changes to coverage. Moreover, it was also held that associative discrimination could not be stretched to cover facts such as these.

There had also been a finding by the ET of indirect religion/belief discrimination and this too was overturned. It was held that in a case of one-off treatment such as this it had been wrong to find any 'provision, criterion or practice' applied by the employer (applying the cautionary judgment on this by Langstaff P in *Nottingham City Transport Ltd v Harvey* UKEAT/032/12, [2013] EqLR 12); in any case, there was no comparative disadvantage here (even had there been a PCP). Commenting on this aspect at [66], the judgment states that lawyers should not seek to multiply legal causes of action artificially, by what was characterised as 'over-analysis', particularly in order to add indirect to direct discrimination; here, it was the latter or nothing.

DIVISION PI PRACTICE AND PROCEDURE

Early conciliation; EC certificate; meaning of 'email address'

PI [288.01]

***Galloway v Wood Group UK Ltd UKEATS/0017/18* (*18 January 2019, unreported*)**

Question: when is an email address not an email address? Answer: when it is inaccurate. This question of electronic metaphysics arose before Lord Summers in the EAT in relation to the detailed rules relating to an ACAS early conciliation (EC) certificate in the Employment Tribunals (Early Conciliation: Exceptions and Rules of Procedure) Regulations 2014 SI 2014/254.

The clock of an employment right time limit is stopped while ACAS attempts early conciliation. It starts to tick again on 'Day B' when ACAS issues the EC certificate and sends it to the parties (ERA 1996 s 207B(2)(b) **Q [831.02]**). How is this to be effected? Sch 1 para 9(2) of the 2014 Regulations **R [2912]** states that if a party has provided an email address to ACAS, then ACAS must send the EC certificate by email. The problem in this case was that the claimant had made a minor mistake in the relevant email address (missing a dot between the first name and surname of the union official dealing with his claim), but of course that rendered it ineffective. ACAS sent the certificate to that invalid address and it was not received. By the time this was discovered, the primary time limit had expired. Had Day B been triggered?

The ET held that it had – it was enough that ACAS had sent the certificate to the address given; thus, time had recommenced and the claim was time barred. However, the EAT allowed the claimant's appeal. It was held that 'an email address' in para 9(2) means an *actual*, correct email address. That was not the case here and so, applying the paragraph's mandatory terms, there was no Day B and time had not started to run again, meaning that the claim was not out of time. One peculiarity of this decision is that normally if someone provides inaccurate information on a formal/procedural occasion it rebounds to their disadvantage, but here the claimant could rely on his own mistake.

REFERENCE UPDATE

482	*Hughes v Office Equipment Systems Ltd*	[2019] ICR 201, CA
485	*Sindicatul Familia Costata v Directia Generala de Asistenta Sociala Si Protectia Copilului Constanta* C-147/17	[2019] ICR 211, ECJ
485	*Awan v ICTS UK Ltd*	[2019] IRLR 212, EAT
486	*Uber BV v Aslam*	[2019] IRLR 257, CA
486	*R (IWUGB) v Central Arbitration Committee*	[2019] IRLR 249, HC
486	*Seahorse Maritime Ltd v Nautilus International*	[2019] IRLR 286, CA
486	*Williams v Trustees of Swansea University Pension and Assurance Scheme*	[2019] IRLR 306, [2019] ICR 230, SC

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