Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

National minimum wage increased

By virtue of the National Minimum Wage Regulations 2019 SI 2019/603, the following increases apply from 1 April 2019:

The national living wage under reg 4 of the NMW Regulations 2015 rises from £7.83 to £8.21.

The four rates of the minimum wage under reg 4A rise as follows:

(a) £7.38 to £8.21;

(b) £5.90 to £6.15;

(c) £4.20 to £4.35;

(d) £3.70 to £3.90.

The accommodation rate in reg 16 rises from £7.00 to £7.55.

Social security benefit increases

By virtue of the Social Security Benefits (Uprating) Order 2019 SI 2019/480, the rates of benefit relevant to this work rise as follows:

(a) statutory sick pay – from £92.05 to £94.25, as from 6 April 2019;

(b) statutory maternity pay, statutory paternity pay, statutory adoption pay and statutory shared parental pay – from £145.18 to £148.68, as from 7 April 2019.

These changes, along with the new NMW rates, will be incorporated into Divs Q and R in Issue 274.

DIVISION AII CONTRACTS OF EMPLOYMENT

Disciplinary and grievance procedures; whether suspension a breach of contract

AII [313.05]

London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322

Two questions arose before the Court of Appeal in this common law action for damages for breach of contract by a teacher who had been suspended after three incidents of alleged overuse of force on difficult pupils and who had resigned immediately as a result: (1) had the employer been in breach of the term of trust and confidence in suspending her; and (2) in law is a suspension a 'neutral act'?

The first of these was the more important. The County Court judge held that there was no such breach because in the circumstances the employer had had reasonable and proper cause to suspend, given the concerns raised by two colleagues. On appeal, the High Court judge allowed the teacher's appeal, largely on the basis that it had not been 'necessary' to suspend here (see **AII [313.05]**). However, the Court of Appeal allowed the employer's appeal and reinstated the original decision. It was held that the correct test in a case such as this (of, in effect, common law constructive dismissal) is 'reasonable and proper cause', *not* 'necessity'. The claimant teacher had relied on *Gogay v Herts CC* [2000] IRLR 703, CA (see **AII [313]**), a well-known case where a suspension was held to be in breach of contract and damages were awarded, but the court here said that this correct test is highly fact-sensitive and *Gogay* was simply distinguishable on the facts – in *Gogay* (although the case also involved dealing with difficult pupils) there had only been one complaint from a pupil whose story was inconsistent, whereas here there were two complaints by colleagues about three separate incidents. The original judge's decision of no breach was one that had been open to him.

The second point had arisen in argument, with the parties disagreeing over the more theoretical point of whether in general a suspension is or is not to be treated as a 'neutral act'. This had been considered particularly by Sedley LJ in *Mezey v South West London and St George's Mental Health NHS Trust* [2007] EWCA Civ 106, [2007] IRLR 244 (see **AII [313.01]**) (albeit only on an application for leave) where he had taken the view that, certainly in the case of professional employment, it will normally not be neutral and will carry stigma. Here, however, the court thought that the question was simply irrelevant to the issue of breach of contract. At [93] Singh J ran the two points together as follows:

> 'That said, it seems to me that the question whether suspension is to be viewed as a neutral act is ultimately not a relevant question nor a particularly helpful one. The crucial question in a case of this type is whether there has been a breach of the implied term of trust and confidence. In the context of suspension that in turn requires consideration to be given to the question whether there was reasonable and proper cause for that suspension. This is a highly fact-specific question.

It is not a question of law. Whether or not suspension is described as a "neutral act" is unlikely to assist in resolving what is the crucial question.'

DIVISION BI PAY

Duty to pay wages; effect of suspension

BI [8]

North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387

This case of a suspended NHS doctor raised issues of pay during suspension and the relationship between internal disciplinary/dismissal procedures and police investigations (considered below under **Div DI**). The doctor's responsibility for two deaths had come under investigation. He was subject to two forms of suspension, first by the Trust and secondly by the medical authorities' Interim Orders Tribunal (IOT); the latter was expressed to be an interim, non-terminatory measure, but its effect was to remove his registration for 18 months, meaning that he could participate in no medical work. The position of the Trust was that it continued to pay him during its own suspension, but not during the IOT's suspension. The doctor challenged this as a breach of contract. Unfortunately, his contract did not specifically cover the matter (nor was it a matter of custom and practice) and so the case revolved around first principles of work and pay, as set out at **BI [6]**–**B [9.01]**. The judgment of the Court given by Coulson LJ includes consideration of the existing, not always easy, case law set out there. The first instance judge found for the doctor and the Court of Appeal upheld her judgment on this aspect of the claim. As the text argues, the court considered that the basic old rule 'no work, no pay' (the 'co-dependency' argument) is too blunt an instrument for modern employment cases. More relevant was the slightly more subtle 'ready, willing and able to work' test. At [52] the judgment gives this helpful summary of the position reached to date:

'It is, not always easy to discern a clear set of principles from these authorities. However, the following seem to me to be uncontroversial:

a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay.

b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.

c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay.

d) By contrast, an inability to work due to an "unavoidable impediment" (Lord Brightman in *Miles v Wakefield*) or which was "involuntary" (Lord Oliver in *Miles v Wakefield*) may render the deduction of pay unlawful.

e) Where the employee is accused of criminal offences, the issue cannot be determined by reference to the employee's ultimate guilt or innocence, nor simply by reference to whether he or she was granted bail or not.'

Most of the cases have involved some form of criminal charge/imprisonment, meaning that applying that to these facts was particularly difficult. Ultimately, however, the court was concerned that to allow non-payment of wages where a third party 'interim', precautionary suspension was in place risked prejudging guilt on the part of the employee. Ruling that the non-payment here unlawful, the court summed up its view at [69]:

> 'Thus, although wary of giving a black and white answer to this last element of the question raised in Issue 1, I consider that, in a situation where the contract does not address the issue of pay deduction during suspension, the default position should be that, in the ordinary case, an interim, non-terminatory suspension should not attract the deduction of pay. There may be exceptional circumstances (such as a complete or part admission of guilt) which might justify such a deduction, but they would not ordinarily arise.'

Given the relative paucity of authority over so many years about such a fundamental employment problem, this case may be seen as giving useful further guidance generally; what was said in argument was that it was likely to be of importance in the *specific* context of precautionary medical suspension by an outside body.

DIVISION CI WORKING TIME

Rest breaks; compensatory rest

CI [221.02]

Network Rail Infrastructure Ltd v Crawford [2019] EWCA Civ 269

The facts of this case are set out at **CI [221.02]**. In the circumstances of a railway signaller working alone, the EAT held that, although the normal requirement of rest breaks in the Working Time Regulations 1999 SI 1999/3372 reg 12 did not apply because of the exception for rail transport in reg 21(f), the respondent had not provided the necessary 'compensatory rest' under reg 24(a) **R [1095]** because the rest that he could take during his shift took the form of intermittent periods between trains, not necessarily amounting to 20 minutes at any one time. Discontinuous rest was held not to satisfy reg 24.

This has now been overturned by the Court of Appeal which allowed the respondent's appeal. Stressing that by its nature compensatory rest need not be the same as normal rest under reg 12, Underhill LJ's judgment states that instead the question is whether the form it takes is of the same *value* in terms of contributing to the individual's well-being. This is heavily a question of fact for the ET, which here had been entitled to conclude that the rest(s) possible did qualify. In fact, the judgment states, it is not difficult to imagine cases where several discontinuous breaks during a shift could be more

advantageous. The claimant had relied on *Hughes v Corps of Commissionaires Management* [2011] EWCA Civ 1061, [2011] IRLR 915, but the judgment in the instant case points out that this specific point of discontinuous rest did not arise directly in that case and that nothing in it prevents such rest.

Rest breaks; enforcement; compensation

CI [241.01]

***Grange v Abellio London Ltd UKEAT/0304/17* (*8 October 2018, unreported*)**

The text at **CI [241.01]** states that on the first occasion that this case went to the EAT (on the question of whether there must be a positive 'refusal' of rest breaks), it was not necessary to consider remedy. That question has now arisen in this second appearance before the EAT.

The ET on remission decided to award £750 by way of compensation, stating that it was for 'discomfort and stress', given the claimant's evidence that the lack of breaks had exacerbated a pre-existing bowel condition. On appeal, the company relied on *Santos Gomes v Higher Level Care Ltd* [2018] EWCA Civ 418, [2018] IRLR 440, [2018] ICR 1571 (see **CI [242]**) where it was held that there cannot be compensation under the Working Time Regulations for injury to feelings. The argument here was that this ET award was either for injury to feelings or for a combination of that and personal injury. If the former, it was contrary to *Santos Gomes*. If the latter, that precedent *implicitly* also ruled out personal injury damages on the basis that it restricted compensation to pecuniary losses only (which were absent here). In the EAT, Soole J held for the claimant and upheld the £750 award. The reasoning was that there is nothing in *Santos Gomes* stopping personal injury compensation; the point had not arisen before the Court of Appeal, but its judgment had approved generally that of Slade J in the EAT, one passage of which had envisaged such a possibility. Applying that here, the EAT considered that, in spite of possible ambiguity in the ET's categorisation of the loss, ultimately this was an award for personal injury not injury to feelings and so the ET's decision stood, especially as the ET had had *Santos Gomez* cited to it and had taken it into account.

DIVISION DI UNFAIR DISMISSAL

Misconduct; making proper enquiries; pending police inquiries

DI [1498]

North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387

The suspension/pay point in this case is discussed above (**Div BI**). The suspended doctor also complained to the court that the conduct of the Trust in going ahead with disciplinary proceedings (leading to his dismissal) was a

breach of contract through breach of the implied term of trust and confidence. Again, the trial judge found in his favour, but this time the Court of Appeal allowed the Trust's appeal.

Two main issues arose here: (1) the application of the implied term; and (2) the general position in dismissal law on the relationship between internal disciplinary proceedings and parallel police investigations. Here, the police (investigating possible manslaughter charges) had said that they had no objection to the Trust proceedings, but the doctor refused to take part in those proceedings on legal advice and argued that the Trust should have postponed them. The judgment of the Court of Appeal given by Coulson LJ considered the case law on pending police inquiries set out at **DI [1498]–DI [1500]**, and at [107] isolated the following points:

'a) An employer considering dismissing an employee does not usually need to wait for the conclusion of any criminal proceedings before doing so.

b) *A fortiori*, an employer does not usually need to wait for the conclusion of criminal proceedings before commencing/continuing internal disciplinary proceedings, although such a decision is clearly open to the employer.

c) The court will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger (and not merely a notional danger) that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene.'

Putting together the two main issues, the court held that:

(1) the facts were not strong enough to surmount the relatively high bar for breach of the T & C term;

(2) it was not clear that the judge had applied the necessary two-stage approach – did the employer's conduct destroy/damage the relationship *and* did the employer have reasonable and proper cause for it?

(3) the claimant here had not shown that there was a real danger of a miscarriage of justice in any subsequent criminal proceedings;

(4) the mere fact that the doctor had acted on legal advice did not justify the court in intervening to strike down the internal proceedings.

The result was that the judge had erred in ruling against a decision to proceed which was one which was reasonably open to the Trust.

Misconduct; warnings; challenging a warning

DI [1538]

***Beattie v Condorrat War Memorial and Social Club UKEATS/0019/17* (*11 September 2018, unreported*)**

It is inherently difficult for a claimant to challenge the validity of a warning in later unfair dismissal proceedings. The case law on this is considered at **DI**

[1538], with the general guidance given by Langstaff P in *Wincanton Group Ltd v Stone* [2013] IRLR 178, EAT set out at **DI [1545]**. Essentially, a warning will be considered as the employer's business (and so assumed to be proper) unless the claimant can show that it was not issued in good faith or was 'manifestly inappropriate', a high bar.

This decision of Judge Stacey in the EAT is another example of this approach, but with a twist in its application. The claimant was dismissed from the social club following stock discrepancies, for which she had accepted some responsibility. In deciding to dismiss, the club had taken into account the existence of a final warning on another matter. The procedure on the dismissal left something to be desired and it was held unfair on that basis. However, the ET on remedy applied a 100% *Polkey* reduction because it thought that on the facts and in particular in the light of the final warning it was certain that she would have been dismissed anyway with a fair procedure.

The claimant appealed but the EAT affirmed the ET's decision. The claimant had sought to have the final warning disregarded but the EAT held, applying *Wincanton*, that she had not satisfied the 'manifestly inappropriate' test. To a large extent, this is a factual example of settled law, but what is interesting is the application of that law – normally the question of the legality of a warning will arise in the primary 'unfairness' adjudication on liability (ie that it should not have formed part of the dismissal decision), but here it arose at remedy stage; the argument for the claimant (who had already won on liability) was that if the warning was ignored there was no basis for the *Polkey* reduction because it could no longer be inferred that she would have been dismissed anyway. However, as the warning stood on the facts, that reduction stood too.

DIVISION K EQUAL PAY

Remedies; distinction between equal pay and sex discrimination; no overlap

K [654.01]; L [576.01]

BMC Software Ltd v Shaikh [2019] EWCA Civ 267

The decision of the EAT in this case is set out in the text in both Divs K and L for its emphasis on the importance of the deliberate separation of the equal pay provisions and the sex discrimination provisions of the EqA 2010 (see s 70 **Q [1512]**). There has now been an appeal to the Court of Appeal, but on very limited grounds. The employer appealed against the finding that, while it was accepted that there was equal work, the employer had failed to establish the genuine material factor defence in s 69, based on its particular pay and grading systems (with which the ET was less than impressed). The main ground here was that the ET had given insufficient reasons for this part of its decision. In a short judgment of the court, Underhill LJ held that on these facts the ET's decision was sufficiently explanatory, adding this warning to employers at [19]:

> 'Because we are only concerned with a reasons challenge it is strictly unnecessary for me to express a view about whether the Tribunal's reasoning, which I have held to be perfectly understandable, was also correct. But I think I should say that in my view it was. If an employer is going to seek to justify a pay disparity based on a factor such as the comparator's promotion or superior "merit" or "market forces" it needs to be able to explain with particularity what those factors mean and how they were assessed and how they apply in the circumstances of the case. It is evident from the Tribunal's findings that BMC was simply unable to do that, because of its chaotic and wholly non-transparent "employment systems". The equal pay risks in having non-transparent pay systems is a commonplace of equal pay law.'

However, from the point of view of the citation of the EAT decision in the text, nothing is said to doubt the EAT's views about the importance of the separation of the two causes of action within the one Act.

DIVISION L EQUAL OPPORTUNITIES

Discrimination; pregnancy and maternity; causal connection

L [264.07]

***South West Yorkshire Partnership NHS Trust v Jackson UKEAT/0090/18* (*22 November 2018, unreported*)**

The text at **L [264.07]** states that in a case of pregnancy or (as here) maternity discrimination the key point is that the reason for the unfavourable treatment has to correspond to the pregnancy or maternity; it is not sufficient for the pregnancy or maternity to be just part of the background. This decision of Judge Shanks in the EAT makes that point neatly and emphasises the correct test to be applied to that causal connection.

The claimant was on maternity leave when the possibility of redundancies arose. She came in for one meeting, but then further details (including possible alternative jobs) were sent to her at an email address to which she did not have access during her leave. This became clear to her subsequently, but she had lost several days of notification. When chosen for redundancy, she brought several claims, including maternity discrimination contrary to the EqA 2010 s 18(4) **Q [1471]** (less favourable treatment 'because she is exercising … the right to … maternity leave'). The ET found for her because there was less favourable treatment and her failure to receive the email was a 'direct consequence' of her being on leave. On the employer's appeal, the EAT overturned that decision. It was accepted that there had been unfavourable treatment *but* the ET had used the wrong test for causation. It had used a 'but-for' test (but for being on leave, she would have received the email) but the correct test for 'because' here was the usual discrimination law 'reason why' test. Citing *Onu v Akwiwa* [2016] UKSC 31, [2016] IRLR 719, this meant considering if the treatment arose from the application of a rule that was inherently discriminatory or if the protected characteristic in question

(here, being on leave) actually operated on the discriminator's mind. As was pointed out in *Indigo Design Build and Management Ltd v Martinez* UKEAT/0020/14 (10 July 2014, unreported) (cited in the judgment), it may be to the contrary that the treatment was merely because of an administrative error, which would not be contrary to s 18. Here, the ET had not made any findings of fact about the reason why, and so the matter was remitted.

The reason for less favourable treatment; involvement of different managers

L [274.03], L [285.03]

Olalekan v Serco Ltd [2019] IRLR 314, EAT

The learned editor of the IRLR makes the point that, while the Court of Appeal in *Reynolds v CLFIS (UK) Ltd* [2015] EWCA Civ 439, [2015] IRLR 562, [2015] ICR 1010 held strongly that where discrimination (especially dismissal) is the result of the actions of multiple managers it is the motivation of the one actually carrying out the detriment/dismissal that must be considered, the instant decision of Chaudhury J might act as something of a qualification to the possibly wider implications of that case, at least in a more straightforward discrimination case.

The claimant was a prison officer accused of excessive force on a prisoner. This was considered gross misconduct and he was summarily dismissed. At his appeal he raised a question of race discrimination, arguing that in the past white officers had been treated less harshly for such an offence. The prison director hearing the appeal did not investigate alleged comparators in incidents before he arrived and concluded that other incidents in his time were not comparable; the appeal was dismissed.

The claimant brought proceedings for unfair dismissal and race discrimination, both of which were rejected by the ET. His appeal to the EAT was also rejected – the unfair dismissal claim on the well-known basis that 'disparity of treatment' cases are notoriously difficult to establish because of the need for 'true similarity' (see **DI [1040]**), and the discrimination claim because the ET had properly constructed a hypothetical comparator and preferred the evidence of the head of security that a white officer in these circumstances *would* have been dismissed.

It is, however, in relation to one other (unsuccessful) employer argument that the relevance to *Reynolds* arose. An attempt was made to use that case to establish that earlier possible comparators should be ignored because those cases had been dealt with by different managers and that constituted a material difference. The EAT held against that argument, which was capable of simply being too convenient for the employer who, in a straightforward discrimination case, must remain vicariously liable for whatever is done in its name. At [31] Chaudhury J said:

> 'The decision in *Reynolds* does not suggest that a person who is otherwise a suitable comparator is rendered unsuitable merely because a different decision-maker is involved. The scheme of the legislation is

that an employer may be liable for the acts of an employee or agent. The employer could therefore be liable for discriminatory treatment meted out to different employees in similar circumstances even though different decision-makers were involved. An employee alleging discrimination ought, in principle, to be permitted to compare his treatment with that meted out to another in similar circumstances, notwithstanding the fact that a different decision-maker in the same employment was involved. There may well be cases where the difference in decision-maker amounts to a material difference: this could arise, for example, where one decision-maker was operating under a different policy from the other, or where one decision-maker is operating at a significantly different level from the other. However, if the only difference is the identity of the decision-maker that would, in my view, be unlikely to amount to a material difference because the employer would be liable for the actions and decisions of both decision-makers (subject, of course, to any defence under s 109(4) of the Equality Act 2010). This approach is not inconsistent with that in *Reynolds*.'

Two comments are ventured:

(1) One possible rationalisation is that what *Reynolds* really concerned was what Underhill LJ calls 'an *Iago* case' where the question is not comparators, but the feeding of false information by manager A to manager B who effects the dismissal or whatever without knowing the true facts. There, it is manager B's motivation that must be considered for the reasons set out at **L [274.03]**.

(2) Going back to the unfair dismissal aspect of the case, a possible analogy can be seen in unfair dismissal law that, by and large, it will *not* be an answer to a potentially good argument of disparity of treatment for the employer to say 'Oh, that was when Mr/Ms X was in charge of HR – they did things differently' (see **DI [1042]**).

Indirect discrimination; justification; proportionate means

L [352]

***City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18* (*21 December 2018, unreported*)**

The claimant was a bus driver who had difficulties with certain shifts because of his faith as a Seventh Day Adventist, requiring abstaining from work from sunset on Fridays to sunset on Saturdays. The company required drivers to work Fridays and Saturdays; to an extent, drivers of different religions could operate a 'swap' system, and also certain measures had been taken to accommodate the claimant individually. However, the company took the view that this could not be done permanently because of the possible effects on efficiency, harmonious working, the effects on other drivers and possible union objections.

The claimant alleged indirect religious discrimination. The ET found for him, finding a PCP of six days working and holding that this had not been justified by the company under the EqA 2010 s 19(2)(d) **Q [1472]** because it had not been shown to be a proportionate way of dealing with the claimant's situation. The EAT however allowed the company's appeal on the ground that what the ET had not done was to balance the discriminatory effect of the PCP on the claimant against the needs of *the business* itself. Applying *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] IRLR 601, [2012] ICR 704, and *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] IRLR 590, [2012] ICR 601, it is necessary to take a wider approach to proportionality that just to apply it to the claimant. As Lady Hale said in *Seldon*, 'where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it'. The matter was referred back to the ET to apply this approach.

Discrimination arising from disability; arising in consequence; causal link

L [374.02]

***iForce Ltd v Wood UKEAT/0167/18* (*3 January 2019, unreported*)**

The point is made in the text at **L [374.02]** that in the current s 15 of the EqA 2010 **Q [1468]** the causal link between the treatment and the disability has been weakened from the previous formulation under the DDA 1995. However, this decision of the EAT under Judge Eady shows that there still has to *be* a sufficient causal link.

The claimant was disabled with osteoarthritis, which her doctor said would be aggravated by cold and damp. When she (along with the rest of the workforce) were asked to move between benches, she thought that this would worsen her condition. The employer looked into this and found that it was not so. However, she persisted in her view, refused to move and was given a warning. She complained that this was disability discrimination under s 15. The ET upheld her claim, in spite of finding as a fact that she had been mistaken. However, the EAT allowed the employer's appeal. It was held that there was unfavourable treatment (the warning) because of 'something' (her refusal to move) *but* the ET had been wrong to hold that that something had arisen in consequence of her disability. The test is objective and, on these facts as found by the ET, that something had not arisen from her disability, but from her mistaken belief that her health would suffer, a belief that had had no factual basis.

Remedies; compensation; contributory fault

L [862]

***First Greater Western Ltd v Waiyego UKEAT/0056/18* (*6 December 2018, unreported*)**

In a wide-ranging appeal against the amount of compensation awarded by an ET for, inter alia, disability discrimination, the respondent employer in one

ground of appeal argued that the claimant had been remiss in not mentioning therapy that she had already been receiving and that, to reflect this, the ET should have made a reduction under the Law Reform (Contributory Negligence) Act 1945. Rejecting this, Kerr J in the EAT held that, while that Act is technically applicable to at least some forms of discrimination, the statement in *Way v Crouch* [2005] IRLR 603, [2005] ICR 1362, EAT (considered at **L [862]**) that compensation for discrimination 'is subject to the [1945] Act' is too wide. There is a bad fit between the Act and discrimination because it is difficult to apply the Act's concept of 'fault' in such cases and because a discriminator may act *without* fault in that sense. At [38]–[43] the judgment expands on this, giving five reasons for care in applying contributory negligence:

(1) The framers of the 1945 Act had no idea it might be applied to discrimination claims; there was no statutory discrimination law until two decades later.

(2) Discrimination may not necessarily involve 'the fault of any other person or persons' within the wording of the 1945 Act, s 1(1). Discrimination can, at least arguably, be committed without fault in any ordinary sense of that word. It can be unconscious; it can be committed deliberately but misguidedly, with good intentions, and so forth.

(3) If a discriminator acts without 'fault' within s 1(1) of the 1945 Act, the victim is better off, not being at risk of a contributory fault reduction, than if the discriminator is at fault. That may or may not be a good thing but the proposition has an arbitrary air about it.

(4) The discrimination statutes do not include a bespoke statutory provision dealing with contributory fault and it is likely that one would have been enacted if the legislature had intended there to be a power to reduce compensation by reason of the victim's conduct.

(5) The notion of contributory negligence in the context of discrimination is perilous and difficult to apply. It presupposes that the victim has by blameworthy conduct contributed to or encouraged the unlawful act of discrimination against her. One has only to consider the example of a sexual harassment case to see how dangerous is such a notion. There is a real danger that the essence of the right not to be discriminated against could be impaired if allegations of contributory negligence are readily made and entertained.

In the light of all of this, the judgment concludes that an ET should be very wary of invitations to apply the Act; it is possible to think of some applications (eg refusing to undergo treatment offered as a reasonable adjustment) but generally such cases will rarely if ever arise. Perhaps the key to this is the suggestion by the EAT that if one does arise it should be dealt with instead as a case of a failure to mitigate.

DIVISION NIII EMPLOYEE INVOLVEMENT

Transnational consultation; special negotiating body; failure to agree

NIII [778]

***Lean v Manpower Group UKEATl0096l18* (*15 October 2018, unreported*)**

The decision of the CAC in this case is set out at **NIII [778]**. It involved an important point of statutory interpretation of the Transnational Information and Consultation of Employees Regulations 1999 SI 1999/3323. In June 2013 there was a request for a Special Negotiating Body (SNB); the claimant employee stood in the election for it but was not elected. A European Works Council agreement was signed in March 2017. The problem was that reg 18(c) **R [1241]** provides that the fallback provisions of the schedule are to apply if, after the expiry of three years, the parties 'have failed to conclude an agreement'. Here, the three years had expired and the claimant (wanting the fallback to apply) complained to the CAC, arguing that reg 18(c) applied automatically and that the SNB had ceased to exist (in spite of the later agreement). As the text points out, the CAC rejected the complaint on the ground that the paragraph does not apply simply on the three years expiring; it is also necessary to construe the wording 'have failed …'. Agreeing with this, Soole J in the EAT rejected the claimant's appeal and at [43] explained the proper approach to the paragraph:

> '… on its proper construction Regulation 18(1)(c) is not to be read as if its conditions for application of the Schedule are merely the expiry of 3 years without agreement being reached. In my judgment the natural meaning of the words "the parties have failed to conclude" is something more than "the parties have not concluded". That something more is made clear by the language of Article 7 [of the backing Directive 94/45], which identifies the circumstance that the parties "are unable to conclude an agreement". I recognise that recital 32 of the Directive requires further provision to be made "in the absence of agreement", but the relevant provision in Article 7 adopts the distinct language of inability to conclude an agreement. In my judgment this interpretation of "failed to conclude" as meaning "are unable to conclude" is a permissible interpretation of Regulation 18(1)(c) which does not go against the grain of the Regulations. On the contrary it accords with the principle of the autonomy of the parties and the aim of consensus. If the parties consider that continued negotiation may result in agreement, there is no reason why the mere passage of time should prevent them continuing on that course.'

DIVISION PI PRACTICE AND PROCEDURE

Employment tribunals; contractual jurisdiction; conditions for an employer counterclaim

PI [52.01]

***Read v Ryder Ltd UKEAT/0144/18* (*16 November 2018, unreported*)**

This decision of Judge Shanks in the EAT is a relatively rare one on the contractual jurisdiction of an ET under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623, containing an important point of interpretation of art 4 **R [781]** which governs an employer counterclaim.

The claimant's contract provided for him to undergo training at the employer's cost, with the proviso that if he left within a certain period he would have to repay some or all of that cost. When he did indeed leave after completion of the course, the employer withheld his last wage payment to go towards the cost. There was, however, a conflict as to how that clause applied to him, but the upshot was that the employee brought an ET claim for payment of that last wage and the employer counterclaimed for a further amount representing the remaining balance of the training cost. The ET found for the employer's construction of the clause and the facts, dismissed the claim and upheld the counterclaim.

On appeal, the claimant argued that the ET had had no jurisdiction to entertain the counterclaim at all. This was because, although the first three conditions in art 4 were satisfied, condition (d) was not; this reads that 'proceedings in respect of a claim of that employee have been brought before an employment tribunal *by virtue of this order*'. Here, the ET1 had simply claimed the amount due, with no mention of the Order. This meant that it could have been brought before the ET under the Order (ie on termination) or under the ERA 1996 Pt II (as an unlawful deduction from wages). The EAT rejected the argument that it was not enough that it *could* have arisen under the Order; instead, at [9] the judgment states:

> '… unless a claim brought by a Claimant must necessarily have been brought under the Order or is unequivocally brought under the Order, it should not be considered to have been brought "by virtue of" the Order for the purposes of Article 4(d).'

Thus, in spite of what was called the 'unattractive' position of the claimant, the result here had to be that the counterclaim should not have been brought and the order for payment of the residue of the training cost was set aside.

Early conciliation; scope of the issues raised in EC compared with the scope of the later claim

PI [290.05]

***Akhigbe v St Edward Homes Ltd UKEAT/0110/18* (*8 March 2019, unreported*)**

This decision of Kerr J in the EAT follows a growing number of cases on the meaning and application of the ACAS Early Conciliation (EC) system showing a relatively liberal and non-technical interpretation while also accepting that there have to be some rules, especially as to the use of the vital EC certificate. There is one pointed remark in the judgment as to the amount of 'satellite litigation' that the system has produced, but on the other hand it is still in the process of bedding in with cases producing novel situations, such as this.

The claimant brought a first claim for whistleblowing, for which he obtained an EC certificate. This was struck out on its merits. While he was appealing that, he brought a second claim on the same ground plus an allegation of discrimination. For this, he cited the existing EC certificate. This was rejected under r 12(1)(c) of the ET Rules of Procedure **R [2769]** on the ground of 'claimant using old ACAS number'. He appealed to the EAT. The essential question was whether this certificate covered the same 'matter' as the second claim.

The claimant argued that this term is to be given a wide meaning and that, by way of analogy, a new certificate is not necessary where an existing claim is subject to serious amendment. The respondent employer contested this, and (more fundamentally) argued that the rule here should be simply 'one claim, one certificate'.

The EAT found on this point for the claimant and held that the EJ had been wrong to uphold the initial rejection of the second claim under r 18(1)(c). Applying the approach of Simler J in *Compass Group UK Ltd v Morgan* [2016] IRLR 924, [2017] ICR 73, EAT, that 'matter' is an ordinary English word to be applied as a question of fact by an ET, the judgment here states that whether it is the *same* matter is to be left to the good sense of the ET. There have to be limits and so, on the one hand, if there is considerable similarity then one certificate is sufficient (the example being given of a discrimination claim followed by a linked claim for victimisation); on the other hand, however, if the second claim has little similarity and just happens to be between the same parties, then a second certificate will be necessary. Given this approach, the judgment goes on to disapprove 'one claim, one certificate' as being too rigid. Here, this important question of similarity or dissimilarity had not been addressed by the EJ and the appeal was allowed on this ground.

That, however, was not the end of the matter. In an ironic denoument, the very similarity of the two claims meant that the second claim was an unacceptable attempt to relitigate the whistleblowing allegation (improperly adding the discrimination allegation which should have been raised in the

first claim) and so was to be rejected as an abuse of process under r 12(1)(b). Thus, the second claim remained rejected.

REFERENCE UPDATE

482	*Saad v Southampton University Hospitals NHS Trust*	[2019] ICR 311, EAT
485	*Gonzales Castro v Mutua Univals*	[2019] ICR 339, ECJ
486	*Stephanko v Maritime Hotel Ltd*	[2019] IRLR 322, EAT
487	*Brierley v ASDA Stores Ltd*	[2019] IRLR 327, CA
487	*ASDA Stores Ltd v Brierley*	[2019] IRLR 335, CA
487	*Royal Mail Group v Effobi*	[2019] IRLR 352, CA

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