Harvey on Industrial Relations and Employment Law

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

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

DIVISION AII CONTRACTS OF EMPLOYMENT

Statutory statement of terms of employment; compensation for failure to give statement; timing

AII [137]

***Govdata Ltd v Denton UKEAT/0237/18* (*28 January 2019, unreported*)**

The power in the EmA 2002 s 38(3) **Q [1259]** to make an additional award of two or four weeks' pay for failure to give a section 1 statement gives the ET a wide power (with no requirement for example that that failure had any effect on the other claim or claims in which the claimant was successful). However, there is one temporal limitation on this power in sub-s (3), namely that the employer must have been in breach of the ERA 1996 s 1 (or 4) 'when the proceedings began'. This decision of Judge Richardson in the EAT shows that this means what it says and must be applied.

The claimant began employment on 1 December 2015; he was not given a section 1 statement at that time. He was finally given one on 15 June 2016, well outside the month's grace then given. His employment terminated on 19 August 2016 in acrimonious circumstances. He brought ET proceedings for non-payment of wages, holiday and notice pay and other amounts on 22 November 2016. These claims succeeded and the ET went on to make a further order for compensation under s 38(3). The employer appealed against that further award and the EAT upheld its appeal. The simple fact was that, although the employer *had* been in breach of s 1 for some time, it had eventually complied and, crucially, had done so before the relevant proceedings had been commenced. There was thus no power to make the additional award.

Confidentiality and privacy; accessing employee's emails

AII [194.24]

Argus Media Ltd v Halim [2019] EWHC 42 (QB), [2019] IRLR 442

Most of this first instance decision on an ex-employer's application to enforce a restraint clause against a leaving employee was concerned with the interpretation of the clause (in particular, its geographical extent) and its inherent validity or otherwise. On the facts, the decision went for the employer. However, its interest legally lay in a secondary and different argument maintained by the employee. This was based on the fact that the employer, prior to his leaving, had accessed his e mails during a period of garden leave. He argued that this breached his art 8 right to privacy, thereby also breaching the implied term of trust and confidence; the result was that the employer had put itself in fundamental breach of contract which (under the doctrine in *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL, see **AII [241]**) meant that the restraint clause could not be enforced.

To back the art 8 point, the employee relied on *Barbulescu v Romanis* [2017] IRLR 1032, ECtHR. As discussed at **AII [194.24]**, in that case the Grand Chamber went against the lower chamber's approach and imposed stricter tests as to when such interference with electronic communications will be valid. However, in the instant case the court held against the employee. It distinguished *Barbulescu* on the ground that here the employer had had a clear email policy which had been sufficiently communicated to the employee; this negated the argument as to breach of privacy, particularly as he could still have communicated privately by phone or computer. Thus, there was no basis for his argument for termination by employer breach, the restraint clause stood, and he was in breach of it.

Restraint on competition; existence of a restraint clause

AII [195.01]

Tenon FM Ltd v Cawley [2018] EWHC 1972 (QB), [2019] IRLR 435

Most of the case law on restraint of trade clauses is of course concerned with the validity of such a clause and how it is to be enforced. However, this first instance decision had to consider a relatively unusual but prior question as to whether such a clause existed at all (or, at least, in the form contended for by the employer). On this point the ordinary law of contract is applicable.

The ex-employee had been a senior and relatively well-remunerated manager. Her original written contract had had a restraint clause in it in fairly general terms. She had had several promotions involving new contracts. When she left and joined a competitor, the employer sought to enforce what it said was a more stringent restraint term which, it argued, had been introduced at one of the promotions. The employee, however, argued that she had consistently *refused* to accept any such change. What primarily persuaded the court to hold for the employee and refuse the injunction sought by the employer was

that it could provide no evidence of either a later signed contract or, in the absence of that, consideration given by her to validate a change to a different restraint. Further, there was no evidence of the employer having tried to enforce such a change in the light of objection by her. The judgment expresses surprise at such a lack of evidence/records in the case of such a senior employee. Ultimately, all that the employer could show was that she had continued to work through each of the promotions. Applying *Reuse Collections Ltd v Sendall* [2014] EWHC 3852 (QB), [2015] IRLR 226 (considered at **AII [195.01]**), it was held that this by itself was insufficient to show a consensual variation. The moral of the case for employers in this situation is fairly clear.

DIVISION CIII WHISTLEBLOWING

The six statutory categories; failure to comply with a legal obligation; how specific must the complaint be?

CIII [55]

***Arjomand-Sissan v East Sussex Healthcare NHS Trust UKEAT/0122/17* (*17 April 2019, unreported*)**

As the text points out at **CIII [55]**, apparently different views have been expressed in the case law as to how *specific* the employee must be when making a disclosure, especially in the case of an allegation under the ERA 1996 s 43B(1)(b) – to what extent must he or she spell out just what 'legal obligation' the employer is failing to comply with? In *Fincham v HM Prison Service* UKEAT/0991/01 (3 December 2001, unreported) it was established that there is such an obligation on a whistleblower employee, but it was also said that this need not be 'in strict legal language'. More broadly, when the important case of *Bolton School v Evans* was in the EAT ([2014] IRLR 500), Elias J added that in some cases it will be perfectly 'obvious' that there is potential legal liability and so the bar for the whistleblower will be low. On the other hand, in the more recent cases of *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416, EAT, and *Eiger Securities LLP v Korshunova* [2017] IRLR 115, EAT, there was more emphasis on the whistleblower identifying the source of the obligation and referring to it, for example by citation of statute or regulation. In the instant case, the judgment of Soole J in the EAT helpfully squares this circle by holding that it depends on the *stage* of the complaint/action that is involved. The more indulgent (realistic?) approach in *Fincham* and *Bolton School* was adopted at the stage of the *original disclosure* to the employer, which must be viewed in a commonsense way, not requiring citation of legal chapter and verse, but rather just enough for the employer to understand the complaint. On the other hand, *Blackbay* and *Eiger* concerned the specificity required at the stage of any eventual *ET complaint*, where it is reasonable to expect the claimant to make clear just what the infringed legal obligation was (especially as *Eiger* affirms that it must indeed have been a *legal* obligation, not just a moral or professional one).

DIVISION G INSOLVENCY OF EMPLOYER

Guaranteed debts; 'arrears of pay'; application to a potential equal pay claim

G [28]; F [168.01]; K [653.01]

Graysons Restaurants Ltd v James [2019] EWCA Civ 725

Can amounts under an equal pay claim that has not yet been adjudicated upon come within the phrase 'arrears of pay' in the ERA 1996 s 184(1) **Q [808]**, so that they must be satisfied by the Secretary of State under s 182, at least up to the maximum of eight weeks' worth? In this case, the facts of which (including a complicating TUPE transfer) are set out at **K [653.01]**, the ET held that such unassessed liability could not qualify, but the EAT reversed that. The transferee employer in fact settled in relation to its liability beyond that statutory maximum, but the Secretary of State appealed and the Court of Appeal agreed to hear the appeal because of its public importance and the fact that the issue had not arisen before in reported case law.

In a relatively short judgment given by Bean LJ, the court dismissed the appeal, very much along the lines of the judgment of Simler P in the EAT. They stressed the contractual nature of an equality clause, and its legal nature as a provision that applies *automatically* once the requirements of the EqA 2010 s 66 **Q [1508]** are satisfied; this occurs irrespective of whether any potential or actual equal pay claim has been finally adjudicated upon. Moreover, the phrase 'any arrears of pay' in s 184(1) is to be interpreted as it stands (not by reference to other parts of the legislation, especially the rules on a 'week's pay') and it is wide enough to cover an amount due by virtue of an equality clause.

Two subsidiary points were then dealt with:

(1) It was accepted that, as put in argument, such a conclusion could cause practical problems for the Secretary of State in dealing with a s 182 claim, particularly as the limitation period for a contract claim is six years, not three months' so that a claim could be old (as this one was) and complicated by further factors such as the transfer. However, it was held that that could not affect the plain meaning of s 184 and the nature of an equality clause.

(2) The Secretary of State also raised a conceptual problem, namely that a successful equal pay claim can be enforced either by an action for debt or for damages (see **K [653]**), but the Secretary of State can only satisfy a claim in debt. However, even accepting this, it was pointed out that in this case the claimant was clearly claiming in debt, and moreover (as pointed out in the text) that will usually (if not always) be the case in a straightforward claim for equal *pay* (as opposed to equality in some other non-pay term or condition).

DIVISION L EQUAL OPPORTUNITIES

Remedies; compensation; injury to feelings; increase in the Vento scales

L [888.01]

Presidential guidance

The Presidents of Employment Tribunals have updated their guidance as to compensation for injury to feelings in discrimination cases. This increases the *Vento* scales as follows:

Lower level	£900 – £8,800
Middle level	£8,800 – £26,300
Upper level	£26,300 – £44,000

These increased levels apply to cases presented on or after 6 April 2019.

DIVISION NI LABOUR RELATIONS

The right to associate; detriment on union grounds; sole or principal purpose

NI [675]

***North West Ambulance Services v Rice UKEATl0152l18* (*30 January 2019, unreported*)**

The claimant, an active trade unionist, was refused discretionary post-retirement re-engagement in the same job. He accepted under protest the lesser job offered. A formal grievance raised by him was rejected. The employers said the refusal was due to a contemporaneous re-arrangement of the work in question. The claimant argued that it was due to his trade union activities and brought ET proceedings under TULR(C)A 1996 s 146 **Q [380]** for detriment on union grounds (the detriment in question being the turning down of his grievance). The ET found for him but Chaudhury P in the EAT allowed the employers' appeal. This was partly on the basis that the decision was not supported by the facts, but also that in law the ET had made two mistakes in applying s 146 (both of which have a resonance with modern law in other contexts such as discrimination):

(1) the ET had not applied the proper test in s 146(1) of whether the union activities, etc, had been 'the sole or principal purpose' of the alleged detriment; the ET judgment contained phrases such as 'connected with', 'tainted with' and 'because of', but these are not sufficiently strong to represent the correct test;

(2) in addition, the ET had not concentrated on the purpose/motivation of the actual *decision-takers* (ie those who had dismissed his grievance); instead, it had taken into account the acts/omissions/alleged hostility of other managers.

Having cited the leading case of *Serco Ltd v Dahou* [2016] EWCA Civ 832, [2017] IRLR 81, at [21] the judgment sums up both of these important points as follows:

> 'It is clear from these passages that the well-established approach in other areas – such as discrimination and whistle-blowing – of considering the factors operating on the mind of the decision-maker, also applies to the application of the provisions relating to detriment on grounds related to trade union activities. It should be noted that whilst the title of section 146 uses the terminology of "grounds related to", the actual requirement is for the "sole or main purpose" of the impugned act or failure to act to be the penalisation of the Claimant for taking part in the activities of an independent trade union at an appropriate time. That is a far stricter requirement than the requirement that matters be on "grounds related to" trade union activities.'

DIVISION NII INDUSTRIAL ACTION

Impermissible action; action to enforce union membership; impermissible reason

NII [2523]

Birmingham City Council v UNITE the Union [2019] EWHC 478 (QB), [2019] IRLR 423

This is the first case to consider the application of TULR(C)A 1992 s 222 ('Action to enforce trade union membership') **Q [456]** to an industrial dispute, in spite of the fact that its forerunner was introduced by the Employment Act 1988. As such, it was part of the third and final attack on the closed shop by the then Government; the first noticeable point about this case is that it arose in a context far removed from that original function. The question was whether it nevertheless applied to render industrial action (otherwise immune under the general 'trade dispute' provisions of TULR(C)A 1992 s 219) illegal. What it in fact concerned was essentially an *inter*-union dispute playing out in action against the employer.

The council's waste collectors were members of UNITE, UNISON or the GMB. A dispute arose in 2017 between the council and UNITE and UNISON when the council proposed multiple redundancies; the result was a collective agreement rescinding them. The GMB was not a party to the dispute or the agreement because it had accepted some of the proposals. A year later GMB members were given a payment of between £3,500 and £4,000; the council said this was to settle a claim by the GMB that it had not been consulted on the proposed redundancies, but UNITE and UNISON took the view strongly that this was in reality a reward for not taking part in the dispute. The two unions took industrial action demanding the same payment for all waste collectors. The council sought an injunction to restrain it by an interim injunction. It was clear that prima facie the action was immune under s 219, but the council argued that that immunity was removed by s 222(1)(b) because the 'reason, or one of the reasons' was that the

employer had 'failed …to discriminate against' a person who was 'not a member of a trade union' (meaning here not a member of either UNITE or UNISON). It was accepted that this was quite distinct from a 1988-style closed shop case, but argued that the wording still covered the facts.

The court however disagreed and refused the interim injunction. It was held that the union was likely to establish at a full hearing that the real reason for the action was its belief that the payment was indeed a reward for GMB members and that the aim of the action was to achieve *parity* for all collectors; according to the judge, this was the very opposite of any question of not discriminating *against* certain union members. This decision may perhaps be greeted with some relief overall, because the closed shop provisions (with their incremental tightening during the period 1980 to 1988) are complex enough as it is, without allowing them to 'escape' into other, unrelated areas.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time; not reasonably practicable to present in time; effect of previous fees regime

PI [187]

***Wray v Jewish Care UKEAT/0193/18* (*17 April 2019, unreported*)**

In the context of a fairly typical case of a late application to an ET followed by a request for the time limit to be extended, a novel argument was raised as to the possible effects here of the previous fees regime which was declared illegal by the Supreme Court on 26 July 2017.

The claimant was dismissed on 6 March 2017. He sought to bring claims for unfair dismissal and breach of contract, but did so late. He was described as being of limited means and not good literacy skills. He did, however, consult the CAB and on 24 April entered ACAS early conciliation. At that time, he would have had to pay £250.00 to lodge his claims, which he said was a material factor in not claiming immediately. He learned of the overturning of the fees regime in early August, *but* still did not present his claims until 9 September. The ET refused to extend time, partly because he had had access to advice and in any event had further delayed once he knew he would not have to pay the fee.

The EAT under Slade J upheld the ET's decision. Although it rejected a more purist argument for the claimant that the fact that the fees regime was illegal should mean an automatic extension in any case affected by it, it accepted that in some pre-July 2017 cases there *might* be an argument that affordability of the fee constituted a relevant consideration. However, there is no general principle here and each case must still be decided on its own facts on the extensive law on 'not reasonably practicable'. Here, the ET had been entitled to come to its decision on the facts, particularly in the light of the *further* delay from early August to 9 September. To that latter extent, the case reflects

longstanding authority that even if there is reasonable excuse for an initial failure to understand the time limit, once the claimant knows the true position he or she must act promptly.

Striking out; no reasonable prospect of success; litigant in person

PI [633]

***Mbiusa v Cygnet Healthcare Ltd UKEAT/0119/18* (*7 March 2019, unreported*)**

The judgment of Judge Eady in the EAT in this case cites with approval the first half of **PI [633]**, in particular for the proposition that striking out should not be ordered where there remain issues of contested fact. The problem in this case was a slightly different one, namely that it was not completely clear what the litigant in person was trying to argue in his lengthy but imprecise written case. Lacking two years' continuous employment for an ordinary (constructive) unfair dismissal action, he sought to bring his case within the automatic unfairness regime of the ERA 1996 s 100 on health and safety. Rejecting this and ordering a strike out, the ET considered that he had not shown that the factors leading to his walking out (assault and being made to undertake heavy lifting) had any connection with anything he may have done under s 100. On appeal, however, the EAT took the view that what he was trying to say more generally was that because of his health and safety complaints the employer had allowed a situation to arise in which these things could happen. The ET had not engaged with this version and so the 'draconian' strike out was rescinded. In a case such as this, the proper course of action would be to establish more precisely what the claimant was arguing, if necessary make amendments and then, if still in doubt about chances of success, make a deposit order.

Para [21] of the judgment contains this useful guidance about the problem of imprecise pleading, particularly by litigants in person:

> 'Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see *Hassan v Tesco Stores Ltd* UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where – as Langstaff J observed in *Hassan* – the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form.'

Privacy and restrictions on disclosure; restricted reporting orders

PI [936]

A & B v X, Y and the Times Newspapers Ltd UKEAT/0113/18 (16 July 2018, unreported)

Restricted reporting orders (RRO) often cause controversy, requiring as they do a fine and difficult balancing of conflicting interests in open justice and protection of privacy. In this case there were allegations of sexual harassment against the employer first respondent, involving allegations of sexual offences by the (individual) second respondent. In relation to the latter, the claimant had the protection of anonymity under the Sexual Offences (Amendment) Act 1992. The second respondent sought an RRO which was granted by the ET. The EAT, however, acceded to the claimant's argument that in doing so the ET had failed to give sufficient weight to the element of open justice; the matter was remitted for a rehearing.

Normally, RRO cases are heavily factual, but this decision of Soole J in the EAT has wider significance for two reasons:

(1) at [60] the judgment gives a summary of the case law to date in a series of propositions (too long to set out here, but worth a read) which may be useful as pegs on which to hang arguments in future cases;

(2) the judgment emphasises a point that may not at first be obvious, namely that it is possible for an RRO to be sought not just by a claimant (the usual position), but also by a *respondent* if (as here) an individual. His or her art 8 rights may need to be weighed in the balance, especially as that article has been held to apply to 'honour and reputation'. The judgment adds three interesting qualifications in such a case:

   (i) it is not enough just to say that, in the absence of an RRO, any reputational (possibly career-threatening) harm will be rectified simply by the claimant's claim eventually failing – mud sticks (to put it politely);

   (ii) on the other hand, high public/social standing is *not* a factor to be weighed because to do so would infringe equality before the law;

   (iii) where, as here, the claimant has the special protection of the 1992 Act, that is again not a factor to be weighed, ie an RRO is not to be ordered just to 'redress the balance'.

REFERENCE UPDATE

481	*Royal Mencap Society v Tomlinson-Blake*	[2019] ICR 230, CA
481	*Folkestone Nursing Home Ltd v Patel*	[2019] ICR 273, CA

483	*Saad v Southampton University Hospitals NHS Trust*	[2019] ICR 311, EAT
485	*Gonzales Castro v Mutua Univale*	[2019] ICR 339, ECJ
486	*Trustees of Swansea University Pension and Assurance Scheme v Williams*	[2019] ICR 230, SC
486	*Lord Chancellor v McCloud; Secretary of State for the Home Department v Sargeant*	[2019] IRLR 477, SC
488	*Gan Menachem Hendon Ltd v de Groen*	[2019] IRLR 410, EAT

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

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

Published by LexisNexis