Harvey on Industrial Relations and Employment Law

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DIVISION AII CONTRACTS OF EMPLOYMENT

Breach of confidentiality/ restraint clause; springboard injunctions

AII [171], AII [265]

Forse v Secarma Ltd [2019] EWCA Civ 215, [2019] IRLR 587

In this case, the Court of Appeal dismissed an appeal by an ex-employee against the granting by the first instance judge of a 'springboard' injunction. This all arose when several employees left the claimant company to join an ex-client of the company setting up its own in-house department to do the work previously contracted out to the claimant. The claimant argued that this constituted breach of restraint clauses by the ex-employees and a conspiracy with their new employer. It sought to restrain this conduct pending trial by an interim injunction. The result was that the Court of Appeal agreed with the judge that the high bar for such an injunction was in fact satisfied here.

The judgment by Etherton MR is of particular interest for guidance given generally on adjudicating on springboard injunctions generally. At [34] he points out that the result of such an injunction is in effect to give the claimant what it wants pending trial, without the facts being examined, which may cause severe problems for the defendant (whose fault has not yet been determined), including in relation to its dealings with third parties. In the light of that, he continued:

> '… save only where the time gap between the application for interim relief and the trial is insignificant, the court should adopt the approach in *Lansing Linde* [see **AII [265]**] on applications for an interim springboard injunction. The judge should assess and take into account the strength of each side's case both as regards liability and also the length

of time during which any unfair advantage from the springboard will continue. In carrying out that exercise, the judge cannot conduct a detailed mini trial on disputed evidence. He or she must, however, undertake a fair and reasonable evaluation of the evidence bearing in mind that there will have been no disclosure, and the witness evidence will be incomplete and untested by cross-examination.'

Later, at [59], the judgment addresses the difficult question of the length of the injunction to be granted, saying:

'Since a springboard injunction should never last longer than is reasonable to remove the unfair advantage secured by the defendant, a judge granting an interim injunction must always do their best to estimate what is the length of the reasonable period. If it is shorter than the period before the trial will commence (the date of which should always be ascertained), they should specify the period and relief will be limited accordingly. If it is at least as long as the period prior to commencement of the trial, it will not normally be necessary to say more than that. In any case, the judge must always state the grounds for their conclusion. They should avoid being too prescriptive because the evidence will be incomplete and untested at the interim stage and, as the present case shows, it may prove to be incorrect and even knowingly false.'

DIVISION CI WORKING TIME

Working hours; daily rest; weekly rest; keeping records

CI [91], CI [112], CI [118]

Federación de Servicios Comisiones Obreras v Deutsche Bank SAE C-55/18

Accepting an earlier opinion of the Advocate General in this Spanish case, the ECJ have held that it is a requirement of EU law that employers maintain objective, reliable and accessible records allowing the hours worked daily by each worker to be measured. The reasoning was that this is necessary to permit the proper enforcement of the Working Time Directive 2003/88 arts 3 (daily rest), 5 (weekly rest) and 6(b) (maximum weekly working hours) to be effective. It was stated specifically that lesser methods using secondary or indirect methods of calculation would not comply. Although the judgment concentrates on these three articles of the Directive, its injunction to member states to have provisions mandating record-keeping appears to be *general*.

What might be the effect of this in the UK (still, at the date of the judgment, a 'member state')? The Working Time Regulations 1998 SI 1998/1833 reg 9 **R [1080]** is entitled 'Records' and requires an employer to keep (for two years) records which are 'adequate' to show that certain provisions in the Regulations are being complied with. These cover regs 4 (maximum working week), 5A (maximum working time for young workers), 6(1) and (7), 6A and 7 (night working). It can immediately be seen that reg 9 gives only partial coverage and in particular does not cover daily rest (reg 10) or weekly rest

(reg 11). At the least, therefore, it may be necessary to amend reg 9 to cover these. However, the effects may go further. Regs 10 and 11 are enforceable by individual workers, but reg 4 is only enforceable administratively by the HSE (or other nominated bodies). While this in itself may not fall foul of EU law, the text at **CI [91]** makes the point that hitherto the HSE has taken a relatively 'light touch' approach to record-keeping, and that in practice 'what is required for strict compliance may well be more than many employers in fact practise'. Is that now to change?

DIVISION DI UNFAIR DISMISSAL

Misconduct; refusal to obey a reasonable order; religious proselytising at work

DI [1356]; L [212]

Kuteh v Dartford and Gravesham NHS Trust [2019] EWCA Civ 818

The claimant was a nurse who held strong religious views. Her post dealing with pre-op routines involved asking patients inter alia about their religion if any. However, there were complaints by patients and staff that on occasion she had gone beyond that and expressed religious views and opinions that were unwelcome. She was investigated and told not to do this, but on subsequent occasions repeated this behaviour. As a result, she was disciplined and dismissed. She brought proceedings for unfair dismissal and 'breach of art 9 of the Convention' (though oddly not for religious discrimination).

The ET dismissed her claim and the EAT upheld that decision. The Court of Appeal rejected her further appeal. It was pointed out that there is no direct action for breach of a Convention article before a tribunal, so the question arose as to how her beliefs and actions fitted into an unfair dismissal action, where it was accepted that the article might have indirect significance. The original case on this was *Copsey v WBB Devon Clays Ltd* [2005] IRLR 811, [2005] ICR 1789, CA which was an unfair dismissal case but not directly in point because it concerned a refusal to work Sundays, not religious activity at work. The latter arose instead in *Chandol v Liverpool City Council* UKEAT/0298/08, [2009] Lexis Citation 583 (applied in *Wasteney v East London NHS Foundation Trust* [2016] IRLR 388, EAT, see **L [212]**) which was primarily a religious discrimination case. However, in the instant case Singh LJ held that the basic principle there can be read over into unfair dismissal law, and refuted the basic argument for the claimant that *Chandol* and *Wasteney* should be overruled. The basic principle in question is that there is an important distinction between holding a belief and inappropriate proselytising at work; this applies not just to domestic law but also to art 9 as interpreted by the ECtHR. This case came within the latter category. At [67] the judgment states that 'It is important that cases such as this should not become over-elaborate or excessively complicated'. Essentially, here, she had overstepped the mark, she had been told to stop it but had not, there had been a fair procedure and the decision to dismiss was within the range of reasonable responses.

DIVISION F TRANSFER OF UNDERTAKINGS

Relevant transfer under reg 3(1)(a); application to the financial sector

F [32]

Dodic v Banka Koper C-194/18

This decision of the ECJ on a Slovenian reference does not add much to the existing case law on an 'ordinary' business transfer (ie in UK terms under TUPE SI 2006/246 reg 3(1)(a) **R [2292]**, as opposed to a service provision change under reg 3(1)(b)) but it is an interesting example of the application of that case law in the context of the financial sector, where the 'assets' in question are intangible and relate to the financial services being supplied to clients.

Co B stopped providing investment services for its clients and closed that department. It transferred to Co A the relevant financial instruments, other client managed services, client accounts and the records relating to these matters. B in fact continued to provide certain services to A. Clients could go to whatever new provider they wanted, but B suggested they go to A, which 91% did. However, the missing link was that B's staff previously in this department were *not* transferred to A. The claimant was one of B's stockbrokers who, having turned down alternative work, sought to bring proceedings for dismissal, based on there having been a business transfer. The national courts all held that there had been no such transfer, but remitted the question to the ECJ which held that on these facts there could be a transfer under the Acquired Rights Directive 2001/23/EC. The court's judgment sets out the usual multi-factorial approach to the existence of a transfer (including, as here, the transfer of part of an undertaking). Normally, there will be the transfer of significant tangible assets, but in a case such as this it held that the economic activity carried on by the entity did *not* require such tangible assets to operate. By contrast, since such economic activity was based primarily on intangible assets, the transfer of those assets was of undoubted importance for the purpose of classification as a 'transfer of part of an undertaking'. Here, those intangible assets contributed to the identity of the economic entity in question and consisted of the financial instruments and other assets of the instructing parties, the keeping of their accounts, the other financial and ancillary services and the maintenance of records; namely, the documentation relating to the investment services provided to clients and the investment activities carried out for them. These were prima facie sufficient for there to be a business transfer. For good measure it was added that: (1) it is necessary in this type of case for clients to go to the transferee, but the number going will not in itself be determinative; (2) the fact that clients had a choice as to their new provider did not prevent there being a business transfer; and (3) neither did the fact that B continued to provide some relevant services for A.

DIVISION H CONTINUITY OF EMPLOYMENT, ETC

Excluded employments; territorial jurisdiction; the Lawson v Serco principles

H [1110.17]

Foreign and Commonwealth Office v Bamieh [2019] EWCA Civ 803

The facts of this case are set out at **H [1110.17]**. In relation to claims for whistleblowing detriment during secondment employment from the FCO to EULEX in Kosovo, the FCO accepted that a UK ET had jurisdiction, but claims against EULEX, the Italian Head of Mission and two fellow British employees there failed on jurisdiction grounds before the ET. As the text points out, on appeal the EAT agreed that the first two claims could not be brought, but allowed the claims against the two fellow employees to proceed. The basis for this claim was the ERA 1996 s 47B(1A) **Q [671.03]** which was added in 2013 in order to impose liability on such fellow employees for personal acts of detriment. The question here was how the normal *Lawson v Serco* jurisdiction rules were to apply to this novel form of liability (for which, the claim was, the FCO would then be vicariously liable).

Before the Court of Appeal, this crystallised as the question of where the focus lay under s 47B – was it on (a) the co-workers' relationship with the claimant (as the FCO and fellow employees argued) or (b) the relationships between the fellow employees and the FCO on the one hand and the relationship between the claimant and the FCO as common employer on the other hand (as the claimant argued). The court held for version (a) and allowed the FCO/fellow employees' appeal. Applying this, it was held that common employment is not in itself sufficient. Here, that commonality in Kosovo was entirely fortuitous (they had all been seconded to EULEX separately and had only worked together in Kosovo). Their only point of employment contact was the rules of EULEX at theatre level. Applying *Lawson*, this EULEX relationship was not within the 'legislative grasp' of s 47B and EULEX itself could not be an 'enclave' for jurisdictional purposes. Indeed, there were strong policy factors here for not accepting jurisdiction because EULEX is an independent international body over which the FCOP has no control and moreover accepting UK jurisdiction would cut across EULEX's own rules and procedures. Apparently, leave to appeal further to the Supreme Court is being sought.

DIVISION J FAMILY MATTERS

Statutory shared parental pay; effects of enhanced maternity pay

J [883]

Ali v Capita Customer Management Ltd; Hextall v Chief Constable of Lincolnshire Police [2019] EWCA Civ 900

These two cases concerned different aspects of a long-debated issue, namely whether, if an employer agrees to pay enhanced maternity pay to a female

employee on maternity leave, it must also pay that enhancement to a male employee entitled to take shared parental leave. Can failure to do so be challenged as unlawful sex discrimination?

This issue is considered in detail at **J [881]** ff, where the facts and separate decisions of the EAT in the two cases are set out. They have now been consolidated into one further appeal to the Court of Appeal, where the overall result of the court's judgment given by Etherton MR is that the employer does *not* have to enhance statutory shared parental pay in like manner to statutory maternity pay.

In *Ali* the challenge was on the basis of direct discrimination. The ET upheld this claim but the EAT allowed the employer's appeal. The Court of Appeal have now agreed and dismissed the claimant's appeal. The reasoning is similar to that of Simler P in the EAT, namely that there is not a true comparison between a woman on maternity leave and a man on shared parental leave (SPL). EU law is based on the premise that maternity leave and pay are there to protect the birth mother during and after birth, whereas the purpose of SPL is to facilitate childcare more generally. The claimant had argued that this original view had been overtaken by the inception of SPL, meaning that after the first two weeks of compulsory leave for the mother it was all a matter of childcare. However, the court held strongly that this was not so and that it was important to retain the special protection for the mother. In the light of that, the only true comparison was between a man on SPL and a woman *also on SPL*. As neither would receive the enhancement, there was no direct discrimination. To add belt to braces, it was also held that in any event the EqA 2010 s 13(6)(b) **Q [1466]** ruled out the claim because it excludes from the purview of direct discrimination 'special treatment afforded to a woman in connection with pregnancy or childbirth'.

As the text points out, that was arguably the easy bit (!). *Hextall* was more difficult because it challenged the lack of enhancement as *in*direct discrimination and the decision of the EAT was more equivocal. The ET rejected the claim but the EAT held that it *might* constitute indirect discrimination and remitted the case to the ET. The Court of Appeal have now upheld the employer's appeal and held that it cannot be. The decision has several layers. The first point was a potentially difficult one as to whether indirect discrimination was the proper characterisation in the first place. Was this not in law an *equal pay/terms* case under the EqA 2010 s 66, rather than indirect discrimination under s 19? The claimant was arguing that this was not the case because of the dangers that such a holding would pose for him. That is what happened. After a lengthy passage considering the complex arguments, the judgment decided that it *was* an equal pay/terms claim, which had two determinative results: (1) such a claim was defeated by the EqA 2010 Sch 7 para 2 **Q [1596]** which (in parallel with s 13(6)(b) above on direct discrimination) states that an equality clause has no effect in relation to any special treatment given to women in connection with pregnancy or childbirth; (2) the possibility of an indirect discrimination claim in the alternative was then defeated by s 70 **Q [1512]** (the exclusivity provision) which rules out a sex

discrimination action where the true cause of action is equal pay (even where, as here, that latter action could not succeed).

Thus, the indirect discrimination claim in *Hextall* failed. In relation to it, the judgment adds three further points:

(1) Although it was not necessary to go further, the court expressed its opinion that, had it been necessary to do so (because an indirect discrimination action had been viable), that action would still have failed for two reasons:

   (a) the claimant could not have included women on maternity leave in the necessary 'pool' for comparison because there has to be a true comparison (citing with approval **L [312]** on this point) and, citing again the reasoning in *Ali*, such a woman remains entitled to special protection under domestic and EU law; in the absence of such a comparison, the claimant could not show 'disadvantage' (again, because a woman on SPL would not have had the enhancement either);

   (b) in any event, if necessary the court would have held that any disadvantage was justified for similar reasons.

(2) One drafting point was addressed. The claimant pointed out that, as opposed to s 13(6)(b) and Sch 7 para 2, s 19 on indirect discrimination does not have a provision expressly excluding any special treatment for women for pregnancy or childbirth (whereas the old SDA 1975 did have such a provision). The court refused to read anything into this, by way of a parliamentary intent to change the law in 2010.

(3) Finally, the judgment ends by suggesting policy reasons for its overall decision. It states that enhancement arrangements have become quite common and to allow an action for indirect discrimination would have unfortunate results. It would mean that any such arrangement would be subject to challenge and have to be individually justified on its facts, which would compromise the policy of preserving the protection of birth mothers in connection with pregnancy and childbirth, thus contradicting the meaning of the EU case law and the policy of the EqA 2010 itself.

DIVISION L EQUAL OPPORTUNITIES

Direct discrimination, indirect discrimination and reasonable adjustments; overseas posting

L [230], L [289], L [384]

Owen v Amec Foster Wheeler Energy Ltd [2019] EWCA Civ 822

There has been a longstanding problem in industrial safety law as to when an employer may legitimately take steps to safeguard an employee's health and safety, even if the employee in fact does not *want* those steps to be taken (an extreme version being whether there is a common law obligation ultimately to

dismiss the employee to avoid the risk; see eg *Coxall v Goodyear Great Britain Ltd* [2002] EWCA Civ 1010, [2002] IRLR 742, considered at **AII [149.01]**). This case before the Court of Appeal perhaps shows a similar problem in the context of disability discrimination.

The claimant employee suffered from a raft of health problems, including diabetes, kidney problems, heart disease, hypertension and morbid obesity. When a client requested the employer to send out some of its staff, including the claimant, to work for it in Dubai, the employer had significant doubts as to the suitability of the posting for him. After medical examinations and managerial consideration of the overall position, especially the possible problems of falling ill abroad, the employer took the view that he should not go, on health and safety grounds. The claimant brought proceedings for direct and indirect disability discrimination and failure to make reasonable adjustments.

The ET dismissed his claims. As to direct discrimination, the ET used as a hypothetical comparator an employee who had his characteristics and health problems but falling short of a disability. On the facts, such an employee would also not have been sent. As to indirect discrimination, there was the necessary PCP (the medical procedures) but this was pursuing a legitimate aim and (by a majority) was proportionate. As to reasonable adjustments, the medical procedures had been carried out reasonably and there was no further obligation on the employer.

The EAT held that the ET had approached each of these properly and dismissed the claimant's appeal. His further appeal to the Court of Appeal was also dismissed, along similar lines. One interesting side point in the court's judgment given by Singh LJ concerned the direct discrimination point. It accepted that in a case such as this of extensive disabling conditions, it will be intrinsically difficult to establish the necessary comparator point because a hypothetical person with anything like these conditions would in practice also be disabled. The judge said that in the light of this, such a case might fit more easily into s 15 (discrimination arising from disability) which for some reason had not been relied on. However, even if it had been, the strength of the employer's case here on justification (eg on indirect discrimination) could still have defeated that claim because by virtue of s 15(1)(b) it is a defence to show that the relevant treatment was a proportionate means of achieving a legitimate aim. It is that strength that is perhaps the key point in the decision, suggesting that, as at common law, an employer may have a wide margin in deciding to adopt an essentially paternalistic approach to an employee's health and safety without incurring legal liability.

Disability discrimination; discrimination arising from disability; employer knowledge

L [368]

***Baldeh v Churches Housing Association of Dudley and District UKEAT/0290/18* (*11 March 2019, unreported*)**

On being dismissed at the end of her six-month probation period, the claimant brought proceedings for discrimination arising from disability, contrary to the EqA 2010 s 15 **Q [1468]**. It was accepted that she was disabled due to depression, but the ET dismissed her claim on four grounds:

(1) It was not made out that the employer had the necessary knowledge (actual or constructive) of her disability at the time of dismissal.

(2) There was no evidence that her behaviour towards her colleagues (one of the reasons for dismissal) arose in consequence of her disability.

(3) There were other reasons for her dismissal which were sufficient to justify it.

(4) The dismissal was justified under s 15(1)(b).

Judge Shanks in the EAT upheld the claimant's appeal on all these grounds. On ground (2) this was simply as a matter of fact (ie there *was* evidence to that effect) and on ground (4) it was because the ET had not considered sufficiently whether dismissal was a proportionate response. However, on the other two grounds the EAT's decision was on law:

— with regard to ground (1), even if the employer lacked knowledge at the time of the *initial* decision to dismiss, it was still possible that it had obtained actual or constructive knowledge by the time of the subsequent *appeal*; that appeal formed part of the unfavourable treatment of which she was complaining and so should have been considered. This can be seen to be much in line with classic unfair dismissal law where the appeal process is viewed as an integral part of the dismissal procedure (see **DI [868]**);

— with regard to ground (3), the question is whether the 'something' in question had a 'material influence' on the unfavourable treatment; this can be so even if there were other reasons for it (see **L [374.05]**).

Remedies; compensation; injury to feelings; avoidance of double counting

L [887]

***Base Childrenswear Ltd v Otshudi UKEAT/0267/18* (*28 February 2019, unreported*)**

This complaint of race discrimination arose from a sudden and unlooked-for summary dismissal from a professional career, with a total failure to respond to a grievance or request for an appeal. Liability was established and at remedy stage compensation was granted for injury to feelings (at £16,000 in

the middle *Vento* band), loss of earnings, interest, aggravated damages and personal injury; in addition, there was a 25% uplift for failure to comply with the ACAS code of practice. The employer appealed against the awards. Judge Eady in the EAT rejected most of its grounds and indeed held that the totality of the final award was not out of proportion to the gravity of the conduct. However, two specific points are of interest as matters of principle:

(1) The judgment rejects an argument put by the employer that an award for injury to feelings arising from (as here) a one-off event should always be in the lowest *Vento* band. That is not the law and each case must consider the particular effect on the individual claimant.

(2) A question arose as to the ever-present need in a case involving multiple heads of compensation for the ET to avoid double-counting. The judge commented that the ET here had been aware of this and had avoided it in all but one (unusual) context, ie the ACAS uplift – the award for aggravated damages had reflected the employer's high-handed treatment of the employee *including* the failure to progress the grievance/appeal, but this had also been the basis for the ACAS uplift. This is likely to be a relatively rare circumstance, but it still constituted double counting. The EAT allowed the appeal to this limited extent; on the parties' invitation to deal with the matter itself (rather than remit) the EAT deducted £1,000 from the total award.

DIVISION PI PRACTICE AND PROCEDURE

Tribunal hearing; reasonable adjustments for disability

PI [752]

Anderson v Turning Point Eespro [2019] EWCA Civ 815

At the heart of this case lay originally the question of the procedure to be adopted by an ET when faced with a party with a disability, particularly a mental disability raising doubts as to their ability to conduct their case. That was the reason for intervention by the Equality and Human Rights Commission in the appeal. However, just before its resolution, the Court of Appeal decided *J v K* [2019] EWCA 5, considered in **Bulletin 487**, which largely dealt with the matter and so the judgment in the instant case is relatively short, dismissing the claimant's case that the ET had not made reasonable accommodations for the hearing. Although *J v K* was taken as read, two specific points were made that add to the general principles there:

(1) there is *no* general rule that an ET faced with a disabled or vulnerable party/witness must *always* conduct a ground rules hearing to decide how to proceed; as Langstaff P said in the previous leading case of *Rackham v NHS Professionals Ltd* UKEAT/0110/15 (16 December 2015, unreported) (see **PI [752]**), the matter remains one of fact in each case;

(2) where there is legal representation, the onus is on the representative to suggest adjustments that should be made, not for the ET to inquire into them; at [27] the judgment of Underhill LJ states:

'In the generality of cases it is entirely appropriate for a tribunal to leave it to the professional representatives of a party who is under a disability, or indeed otherwise vulnerable, to take the lead in suggesting measures to prevent them suffering any disadvantage. The representatives can be expected to have a better understanding than the tribunal of what the party's needs are, and access to appropriate medical advice; and there is also a risk that if the tribunal itself takes the lead in seeking to protect a party (or witness) it may give the impression of taking their side. This involves no abdication of responsibility by the tribunal. Of course it retains ultimate responsibility for seeing that a disabled party receives a fair hearing, and I do not rule out the possibility that there may be cases where a tribunal should take steps for which the party's representative has not asked; but those will be the exception, and the default position is that the tribunal can expect a party's interests to be looked after by his or her representatives.'

REFERENCE UPDATE

488	*Spaceman v ISS Mediclean Ltd*	[2019] IRLR 512, EAT
488	*London Underground Ltd v Amissah*	[2019] IRLR 545, CA
488	*Hare Wines Ltd v Kaur*	[2019] IRLR 555, CA
489	*Network Rail Infrastructure Ltd v Crawford*	[2019] IRLR 538, CA
489	*London Borough of Lambeth v Agoreyo*	[2019] IRLR 560, CA
489	*North West Anglia NHS Foundation Trust v Gregg*	[2019] IRLR 570, CA

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