Harvey on Industrial Relations and Employment Law

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

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DIVISION AI CATEGORIES OF WORKER

Officeholders; company directors; test of employee status in EU law

AI [117]; H [1112.01]

Bosworth v Arcadia Petroleum Ltd: C-603/17, [2019] IRLR 668, ECJ

This reference from the Supreme Court to the ECJ concerned territorial jurisdiction under the Lugano Convention. The company claimant sought to sue two ex-directors (one the chief executive and the other the chief finance officer) for fraud in the English courts, but the defendants relied on a provision in the Convention which states that in a case concerning 'matters relating to individual contracts of employment' an employer may only sue an employee in the state in which the employee is domiciled. Here, the defendants had British nationality but were domiciled in Switzerland. This raised the classic question – is a company director an 'employee', but in the context of EU law.

The ECJ held that the general approach was that the essence of employment is a hierarchical relationship between the worker and their employer, so that in these circumstances there must be a relationship of subordination between the company and the director. The actual ruling was that:

> '… the provisions of Section 5 of Title II (arts 18–21) of the Lugano II Convention must be interpreted as meaning that a contract between a company and a natural person performing the duties of director of that company does not create a relationship of subordination between them and cannot, therefore, be treated as an "individual contract of employment", within the meaning of those provisions, where, even if the shareholder(s) of that company have the power to procure the termination of that contract, that person is able to determine or does determine

the terms of that contract and has control and autonomy over the day-to-day operation of that company's business and the performance of his own duties.'

Applying that to the acts here, the defendants had drafted their own contracts, had exercised control over their terms of employment and had had significant control over the running of the company itself. This meant that they were not in a position of subordination (in spite of the fact that, at least in principle, they could have been removed by the shareholders) and were not 'employees', so that the action could proceed in the English courts.

Is this likely to affect purely domestic cases here involving company directors? The approach of our courts has tended to be more 'multi-factorial', based on the existence of service contracts and a consideration of all the surrounding factors, most notably summed up by Elias P in *Clark v Clark Construction Initiatives Ltd* [2008] IRLR 364, [2008] ICR 635, EAT, considered at **AI [125]**. While the ECJ also talks of such factors, it tends to stress the more intangible concepts of hierarchy and subordination. So far, these have not featured in the domestic case law and it is not clear that they are likely to in the future, except perhaps as general arguments as to what our multi-factorial approach is ultimately trying to reflect.

DIVISION BI PAY

Time limits and back pay; statutory holiday pay; what is meant by a series of deductions?

BI [376.03]; CI [238.02], CI [238.04]

Chief Constable of the Police Force of Northern Ireland v Agnew [2019] NICA 32

The NICA have upheld a claim that the Police Force should have been calculating holiday pay by including voluntary overtime (see *Flowers* below) and, most significantly, that the officers in question can claim back pay in respect of this omission back to 1998, the inception of the Working Time Regulations. The reason for this lies primarily in the fact that Northern Irish law has not adopted the two-year limitation period for deductions from wages that was introduced into the rest of the UK in 2014 (see **BI [377]**, **CI [238.06]**). To that extent, the decision prima facie is specific to Northern Ireland. However, the editor of Division CI has suggested that there are three aspects of the *reasoning* in the judgment that may have wider significance:

(i) Applying the EU principle of equivalence, the NI equivalent of reg 30 of the Working Time Regulations 1998 SI 1998/1833 **R [1087]** has to be read to allow claims for a *series* of deductions, not just for underpayment of holiday pay during the three months prior to the claim.

(ii) In order to do so, it was necessary to hold that the restrictive rules laid down by Langstaff P in *Bear Scotland v Fulton* [2015] IRLR 15, EAT, that a break of three months or more in underpayments breaks the 'series of deductions', is wrong. In doing so, the court cited and approved the criticisms of that narrow approach in **BI [376.13]**.

(iii) It was further held that *Bear Scotland* was also wrong in holding that the first four weeks of holiday taken in each year is deemed to be the Working Time Directive entitlement, before any further period of entitlement is considered.

Taking these together, the editor commented that: 'interesting questions arise as to how far these points can be relied on here to stop employers resisting significant parts of back claims for holiday pay which failed to reflect voluntary overtime; even with the two-year backstop this can be a significant issue for employers who rely heavily on overtime.'

DIVISION CI WORKING TIME

Statutory holidays; holiday pay; inclusion of voluntary overtime

CI [193.10]; H [871.10], H [871.15]

East of England Ambulance Service v Flowers [2019] EWCA Civ 947

As the text points out, in this case Soole J in the EAT followed the decision of Simler P in *Dudley MBC v Willetts* [2017] IRLR 870, [2018] ICR 31 to hold that voluntary overtime is to be included in the calculation of statutory holiday pay. That position seemed to be generally accepted, based on ECJ authority. However, in *Hein v Albert Holzkamm GmbH* C-385/17 (a case about the effect of short-time working on holiday pay; see **Bulletin 486**) the ECJ indulged in an exercise in 'careless talk costs lives' (or at least legal certainty) by saying:

> '46. Lastly, as for the rule that overtime worked by the worker is to be taken into account for the purpose of calculating the remuneration due in respect of paid annual leave entitlement, it should be noted that, *given its exceptional and unforeseeable nature*, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of the paid annual leave provided for in Article 7(1) of Directive 2003/88.
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> 47. However, when the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that the worker receives for his professional activity, the pay received for that overtime work should be included in the normal remuneration due under the right to paid annual leave provided for by Article 7(1) of Directive 2003/88, in order that the worker may enjoy, during that leave, economic conditions which are comparable to those that he enjoys when working. It is for the referring court to verify whether that is the case in the main proceedings.'

In the light of this (particularly the phrase in italics), the Court of Appeal gave permission to appeal; naturally, the employers relied on these dicta to argue that voluntary overtime should not be included at all and that *Willets* was wrongly decided.

Rejecting the appeal in a judgment given by Bean LJ, the court decided that, although in fact the particular overtime was *contractually* includable on the facts, it would also pronounce on the position under the Working Time Regulations. The apparent meaning of these paragraphs was so surprising that the court first enquired as to whether there had been an error in translation; there had not. It then held that such a meaning was completely contrary to previous ECJ case law, commenting that, while that court has a reputation for delphic pronouncements, it is one thing to be delphic but another to be contradictory. On that basis, voluntary overtime would only be excluded if it was *on the facts* 'exceptional and unforeseeable'; to the contrary, it was *not* to be excluded merely because it was not actually obligatory under the contract. One interesting consideration of policy in coming to that conclusion was that if voluntary overtime did not count, there would be an incentive for employers to draft contracts with low standard hours, classifying the rest of the expected hours as overtime, thus diminishing holiday pay; indeed, in the case of a purely zero-hours contract it could have been argued that no holiday pay was due at all.

Thus, *Willetts* was correctly decided, Soole J here was correct to apply it and we now have Court of Appeal authority that in principle voluntary overtime is to be included (with the caveat that it must be 'normal' in the individual's case).

DIVISION DI UNFAIR DISMISSAL

Reason for dismissal; medical incapability; overlap with SOSR; importance of employer policy

DI [847], DI [1193], DI [1264]

***Kelly v Royal Mail Group Ltd UKEAT/0262/18* (*11 June 2019, unreported*)**

The claimant, a postman, was dismissed after a review of his medical/attendance record. He had had to have two operations, but these came on top of a poor sickness record over some time. The ET (obviously taking seriously the requirement not to substitute its own view) held that although dismissal may seem to have been 'harsh', it could not fault the employer's procedure or decision. On appeal, two general issues on incapability arose:

(1) The employer had relied, not on incapability as such, but on some other substantial reason (SOSR). The text at **DI [1193]** states that there has in the past been discussion of the borderline between incapability and misconduct; here, Chaudhury P in the EAT held that there can also be an overlap with SOSR – a label is not conclusive (see **DI [847]**) and the ET had correctly taken into account that the employer's case had not just been based on his 'static' medical condition, but also on the fact that he had been less than co-operative in the procedure and that ultimately the employer had taken the view that it could no longer have confidence in his ability to work consistently. SOSR was therefore an appropriate reason.

(2) The claimant objected to the use of his earlier history in the review occasioned by the two operations (which were not his fault). However, the employer's sickness absence policy specifically permitted this. Again, the EAT found nothing wrong with this. On the premise generally that a dismissal in line with (as here) a clear and well-notified policy will not normally be unfair, it was held that the claimant could not have been surprised by this element of the review and had had a proper opportunity to challenge the employer's case at the time.

The claimant's appeal was dismissed.

Remedies; re-engagement; non-compliance with an order

DI [2420]

McKenzie v Chancellor, Masters and Scholars of the University of Cambridge [2019] EWCA Civ 1060

In this case a member of the university's law faculty successfully brought proceedings for unfair dismissal. She asked for an order of re-engagement, which the university opposed but the ET granted. The university declined to re-engage her. Normally the statutory remedy then becomes an additional award of compensation, but the claimant instead brought judicial review proceedings against the university to quash its decision not to comply with the order, basing it on breach of human rights legislation. As the text points out, Jay J rejected the claim in very clear terms and the Court of Appeal have now equally clearly dismissed the claimant's appeal. Giving judgment, Underhill LJ states that remedies for unfair dismissal are to be found in the self-contained provisions set out by Parliament in the ERA 1996. These deliberately omit any provision for direct enforcement of an order for either reinstatement or re-engagement, leaving the claimant to pursue monetary remedies only. Nothing in domestic or European human rights law contradicts this. At [31] the judge sums this up simply:

> 'The reason why there is no statutory machinery for requiring an employer actually to re-engage an employee, as opposed to requiring it to pay an additional award, is that the statute on its true construction does not give him or her a right to be actually re-engaged. That being so, failure to re-engage does not represent a breach of any right and there is nothing for which an effective remedy is required.'

Without commenting on the rights and wrongs of the individual case, it may seem to the hard-pressed employment lawyer that this is a welcome decision – employment law is difficult enough in all conscience (as shown by the cases reported in this Bulletin) without having to deal with novel, non-statutory remedies coming in unforeseeably from stage left.

DIVISION L EQUAL OPPORTUNITIES

Disability; discrimination arising from disability; employer knowledge; reliance on occupational health

L [136.01]

***Kelly v Royal Mail Group Ltd UKEAT/0262/18* (*11 June 2019, unreported*)**

The unfair dismissal element of this case is discussed above under Division DI. The dismissed postman also claimed disability discrimination under the EqA 2010 s 15 **Q [1470]**. One of its elements by virtue of s 15(2) is that the employer must have had actual or constructive knowledge of the employee's disability. That was the key issue here, the point being that the employer's occupational health (OH) department had advised it on more than one occasion that the claimant was *not* disabled within the meaning of the 2010 Act. The employer therefore did not have actual knowledge but the claimant argued that it had had constructive knowledge. The ET rejected this and the EAT dismissed his appeal. The claimant had relied on the decision in *Gallop v Newport City Council* [2013] EWCA Civ 1358, [2014] IRLR 211 where it was held that reliance on OH advice does not put the employer in the clear. However, as the text argues at **L [136.01]**, what *Gallop* really concerned was simply *rubber stamping* an OH report. Here, the final OH report was a *reasoned* one, setting out the case for there being no disability in law, and the dismissing manager had then properly reviewed that report before acting on it. *Gallop* was distinguished and there was thus no constructive knowledge on the facts. Going back to the text, the decision is thus in line with that in *Donelien v Liberata UK Ltd* [2018] EWCA Civ 129, [2018] IRLR 535 where again *Gallop* was distinguished because the employer had not just engaged in a rubber-stamping exercise.

Disability; progressive conditions; application of perceived disability

L [136.04], L [162], L [131.01]

Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061

The claimant had a hearing problem which was short of a disability. When she applied to move from one police force to another (the respondent) this was refused due to a concern that her condition would develop, making her not fully deployable. She challenged this as disability discrimination, even though she was not actually disabled, on the basis that she still qualified by a combination of the statutory concept of a progressive condition and the case law concept of *perceived* disability. The latter arises where the claimant is disadvantaged because the employer *believes* that he or she has a protected characteristic, even though this is wrong (the leading case being *English v Thomas Sanderson Blinds* [2009] IRLR 206, [2009] ICR 543, CA in the context of sexual orientation, see the discussion in relation to age at **L [131.01]**). The instant (disability) case, however, concerned a further development of this concept – hitherto it had applied where the employer believed

that the employee *had* the disability, but here the issue was that the employer believed that she *might develop* the disability, hence the need also to pray in aid the further element of progressive conditions (see the EqA 2010 Sch 1 para 8 **Q [1594]**).

The ET accepted her claim and, as the text states at **L [136.04]**, the EAT upheld that decision. The police force's further appeal has now been dismissed by the Court of Appeal, who agreed with the EAT that there is no reason why the definition of disability should not extend to a case where the employer wrongly perceives that it could well in future have an adverse effect. Note a subsidiary point in Underhill LJ's decision, namely that 'could well happen' is indeed the correct formulation when applying the word 'likely' in para 8 on progressive conditions; the judgment expressly says that this looser interpretation in *SCA Packaging v Boyle* [2009] UKHL 37, [2009] IRLR 746, [2009] ICR 1056, is the correct one to apply here (see **L [162]**, **L [169]**) and that the earlier case of *Mowatt-Brown v University of Surrey* [2002] IRLR 235, EAT (**L [162.01]**) with its narrower interpretation of 'more likely than not' was overruled in *SCA*.

Religion and belief; holding and manifesting a belief; acts separable from the belief

L [212], L [214.01]

***Page v Lord Chancellor UKEAT/0304/18* (*19 June 2019, unreported*)**

***Page v NHS Trust Development Authority UKEAT/0183/18* (*19 June 2019, unreported*)**

There was reported in last month's **Bulletin 491** the case of *Kuteh v Dartford and Gravesend NHS Trust* [2019] EWCA Civ 818 where a nurse expressing her strongly-held Christian views at work was held to have overstepped the mark into unacceptable proselytising. This was in the context of a claim for unfair dismissal, but the Court of Appeal in upholding a finding of fair dismissal relied on the religion/belief case law as to that mark. This month, in these two cases before the EAT under Chaudhury P, an employee expressing strong religious views in a professional context again lost legal protection (here under discrimination law) but this time for the different (but equally important) reason that the employer(s) could show that they took the action in question not because of the belief itself but because of the *way* that he had conducted himself in expressing it.

This crucial but controversial distinction can be seen primarily in the victimisation case of *Martin v Derbyshire Solicitors* [2011] ICR 352, EAT **L [487.01]** which built on the older trade union dismissal/detriment cases of *Lyon v St James Press Ltd* [1976] IRLR 215, [1976] ICR 413, EAT and *Bass Taverns Ltd v Burgess* [1995] IRLR 596, CA (see **NI [513]** ff). In all of these cases the courts have stressed that a finding of improper means will be exceptional and that an ET must be wary of it being too easy a get-out-of-jail

card for employers who prima facie have breached the laws against discriminatory action. However, they also say that an ET can be trusted to sort the wheat from the chaff and that the distinction remains a real one.

The claimant was a magistrate and non-executive director of an NHS Trust. In relation to his magisterial work with children he expressed his religious view that a child should be placed if necessary with a heterosexual couple, not a single parent or homosexual couple. This was investigated by the Lord Chancellor and he was removed from the bench. In the meantime, he had given a media interview about his case without telling the Trust. He was told to inform them in future but gave a second interview (on BBC Breakfast News), as a result of which he was suspended and then not re-appointed as a non-executive director. He brought religious direct discrimination claims against the Lord Chancellor and the Trust, but both were unsuccessful before the ET and his appeals to the EAT were dismissed in both. The principal reason in both was that the actions taken against him were not because of his belief as such, but because of his actions in giving the interviews (in the case of the Trust, this involving breach of instructions and the effects of his actions on the working of the Trust in the community). In both cases, the test in *Martin* of whether the claimant's actions were 'properly and genuinely separable' from the belief itself was satisfied. In the case against the Trust, there was also a claim for indirect discrimination, but this also failed because the ET had correctly held that he had not shown the necessary 'group disadvantage' as explained in *Mba v Merton LBC* [2013] EWCA Civ 1562, [2014] IRLR 145, see **L [214.01]**.

Indirect discrimination; justification; cost or cost-plus?

L [347.03]

***Heskett v Secretary of State for Justice UKEAT/0149/18* (*25 June 2019, unreported*)**

The text considers the arguments over the place of cost in determining whether a potentially discriminatory provision, criterion or practice can be justified as a proportionate way of pursuing a legitimate aim under the EqA 2010 s 19(2)(d) **Q [1472]**. One way of looking at the case law there is that cost alone cannot justify, but 'cost-plus' may (ie where there are other legitimate factors at work). One of the most fertile areas for applying this distinction has been arguments over age discrimination where changes in terms and conditions bear more heavily on one or more age groups within the organisation. The text at **L [347.03]** expresses this as a 'distinction between "cost" and "fair distribution of limited resources" '. That is neatly reflected in the judgment of Judge Barklem in the instant case.

It concerned changes to the remuneration provisions of probation officers, primarily significantly shortening the pay progression scale, with the result that those under 50 would have to serve longer to accrue the level of benefits already enjoyed by those over 50. This was challenged as indirect age discrimination. The ET accepted that it was prima facie age discriminatory, but accepted the employer's argument that changes in the pay structure had

been necessary to deal with financial constraints and that it had all been handled in, in effect, the least worst way.

On appeal, the claimants relied on the 'cost-cannot-justify' rule, citing the leading case generally of *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330, [2012] IRLR 491 (see **L [347.01]**) but the EAT dismissed the appeal, applying *HM Land Registry v Benson* [2012] IRLR 373, EAT (see **L [347.03]**) as applied in *Edie v HCL Insurance BPO Services Ltd* UKEAT/0152/14, [2015] ICR 713. It was held that the ET had been entitled to hold that coping with financial pressures had been a legitimate aim and that it had properly weighed the discriminatory effect against the employer's economic need. At [25] the judgment states:

> 'In my judgment, having examined the case law with care, there is indeed a distinction to be made between an absence of means and a Respondent seeking impermissibly to placing [sic] reliance solely on cost. Through no fault of its own, the Respondent was compelled to find a way of squaring a circle brought about by central government policy. It is clear from *Benson* and *Edie* that it is legitimate for an organisation to seek to break even year on year and to make decisions about the allocation of its resources.'

Disability; reasonable adjustments; significance of employer's policy

L [398]

Linsley v Commissioners for HM Revenue and Customs [2019] IRLR 604, EAT

In his EAT judgment in this case Chaudhury P makes an important point about the relevance of an applicable employer policy when determining whether it has made reasonable adjustments for a disabled employee; moreover, he holds that if such a policy is indeed relevant it does not matter whether it is contractual or discretionary.

The claimant had ulcerative colitis which could occasion sudden need for the toilet. This caused considerable stress in relation to driving to and arriving at work. As a result of this, the employer adopted a policy of giving her a dedicated parking place at the sites to which she travelled. This seemed to be effective until she was told to work at a new site where this was not arranged. Instead, the managers there said she could park temporarily near a toilet if necessary. She claimed disability discrimination through failure to make (or, more accurately here, to continue to make) reasonable adjustments.

The ET rejected her claim, holding that the policy was only discretionary, not contractual, and that the temporary parking arrangement was sufficient. The EAT allowed her appeal. One ground was that the ET had not engaged fully with what she was actually arguing – her principal issue was that the stress (itself an aggravator for the condition) arose not just on arriving at work but during the journey there, if she did not know she could park immediately; the temporary arrangement did not alleviate that.

However, the more important ground legally was in relation to the policy, to which the ET had not given sufficient weight, and had in any event erred in drawing the false contrast between contractual and discretionary. The point is that where an employer has a relevant policy, that should be the starting point for an ET, showing that the employer had considered that what was contained in it was a feasible way of dealing with the problem. It is true that the employer does not inevitably have to apply that policy in every case *but* if it departs from it there will be an onus on it in any subsequent litigation to show good reason *why* it had so departed. Here, the evidence showed that the only reason for departure had been ignorance of it by managers at the new location, which was certainly not good cause.

Harassment; general guidance; related to the prohibited grounds; direct discrimination; because of the disability

L [414], L [270]

***Ahmed v The Cardinal Hume Academies UKEATl0196l18* (*29 March 2019, unreported*)**

The claimant suffered from dyspraxia, which caused him difficulties in writing. He was recruited as a teacher under the Teach First programme, but after a while his head teacher suspended him and investigated the effect his difficulty was having on his work. The claimant raised a grievance, and then resigned. He brought claims for harassment (based on some of the investigation) and direct disability discrimination. The ET rejected both claims. His appeal to the EAT was rejected by Chaudhury P.

With regard to harassment, the claimant had argued that the ET had applied EqA 2010 s 26(4) **Q [1479]** wrongly. This requires the ET in a harassment claim to take into account: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) 'whether it was reasonable for the conduct to have that effect'; the argument was that the ET had placed too much emphasis on this third element. However, the EAT rejected this. It followed the guidance from Underhill LJ in *Pemberton v Inwood* [2018] EWCA Civ 564, [2018] IRLR 542, [2018] ICR 1291, where it was said that if the claimant's subjective view is not established the ET need go no further, *but equally* if it was not reasonable for the conduct in question to have that effect, that too can mean going no further. The ET had followed this approach and so could not be faulted.

With regard to direct discrimination, the decision to dismiss the appeal does perhaps show a limitation in the protection under EqA 2010 s 13 **Q [1466]** that may have to be treated carefully by a putative claimant. This arises from the basic requirement under s 13 that the less favourable treatment was 'because of' the protected characteristic (here, disability). The EAT pointed out that this meant the disability itself; here, the claimant was relying on the problems with writing, but the judgment points out that this was the *adverse effect* of the dyspraxia and so could not be the disability itself. Linking this in with the requirement for a comparator (here, someone with the same writing problem but without the dyspraxia), at [63] it is stated that:

> '… in considering a claim of direct disability discrimination the question will be whether the Claimant was treated less favourably because of his disability, and not because of the effect on his abilities. Given that the abilities of the comparator in a claim of direct disability discrimination must not be materially different from those of the Claimant, a finding of less favourable treatment cannot, as a matter of logic, be based on those abilities (or inabilities).'

One interesting point here is that in coming to that rather narrow conclusion the judgment says that the writing problem was 'something arising' from the disability. *Quaere* if this means that the case should really have been brought instead under EqA 2010 s 15 **Q [1468]** ('Discrimination arising from disability'), subject of course to the employer's defence of justification in s 15(1)(b).

Victimisation; protected act; relationships that have ended; judicial proceedings immunity

L [474.01], L [498]

***Aston v The Martlet Group UKEAT/0274/18* (*21 May 2019, unreported*)**

Although the facts of this case were unusual, the judgment of Judge Auerbach in the EAT contains several points of interest on the law relating to victimisation. The claimant was dismissed after periods of illness absence and sought to bring discrimination claims. He had been offered £4,000 at the time of dismissal, but this was not paid. During a preliminary hearing the employer repeated that offer, but eventually it was again not paid (the employer said because it was contingent on dropping the case). The claimant then amended his claim to include an allegation of victimisation under the EqA 2010 s 27 **Q [1480]**, arguing that he had suffered the detriment of non-payment because of continuing with his claim. This raised several issues:

(1) Post-employment victimisation *is* covered by the 2010 Act even though not expressly included due to a drafting error, see *Rowstock Ltd v Jessamy* [2014] EWCA Civ 185, [2014] IRLR 368, [2014] ICR 550 **L [498.02]**.

(2) The reference in s 27(2)(c) to one of the protected acts being 'bringing proceedings' is to be construed as including *continuing* existing proceedings, see *Derbyshire v St Helens MBC* [2007] UKHL 16, [2007] IRLR 540, [2007] ICR 841.

These general points were in the claimant's favour, but on the facts his claim failed on three further grounds:

(3) The offer made at the hearing attracted judicial proceedings immunity.

(4) That immunity was not to be disapplied because victimisation has its origins in EU law and the Equal Treatment Directive, both as a matter of law (the limitation of that immunity in *P v MPC* [2017] UKSC 65, [2018] IRLR 66, [2018] ICR 560 **PI [63.02]** was construed as only applying to a case of purported restrictions on the right to bring ET

proceedings *at all*, not to what happens at such proceedings) and because the relevant part of the Directive (art 3(1)(c)) was not engaged here anyway because it was only concerned with 'employment and working conditions, including dismissal', which did not cover these facts.

(5) In any event, given that this all took place post-termination, the claimant would have had to rely on EqA 2010 s 108 **Q [1526]** but this requires that the discrimination must not just 'arise from' the previous relationship but also be 'closely connected' to it. Here, there was a connection but it was not close enough.

DIVISION NI LABOUR RELATIONS

The right to associate; inducements relation to collective bargaining; meaning of 'prohibited result'

NI [794.01], NI [797.03], NI [798.01]

Korstal UK Ltd v Dunkley [2019] EWCA Civ 1009

This is the first case at appellate level to consider the interpretation of TULR(C)A 1992 s 145B which was added by the Employment Relations Act 2004 in order to outlaw employer action to evade collective bargaining by making direct offers to the workforce. This is referred to as the 'prohibited result', defined in sub-s (2) as 'that the worker's terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union'. This was meant to deal with the problem demonstrated by the holding of the ECtHR in *Wilson v UK* [2002] IRLR 568 that lack of such a law put the UK in breach of art 11, but that was primarily related to deliberate action to destroy collective machinery in the future. The question was whether s 145B could also apply to a case such as the instant one where the employer was merely making the offer to resolve a dispute it had tried unsuccessfully to resolve with the union, on a one-off occasion where there was no intent to dispense with that machinery *generally* and into the future. The ET and the majority of the EAT held that it could (and did here). The employer had argued strongly that such an interpretation in effect gave the union a *veto* on any changes that were not agreed and that could be stopped legally simply by a failure to agree, but the majority of the EAT disagreed, though pointing out that an employer could still avoid liability under the section 'if acting reasonably and responsibly for proper purposes'. It has to be said that it was not clear where that line (not found specifically in the section) was to be drawn, and the potential difficulties here for unionised employers were clear.

The Court of Appeal has, however, now allowed the employer's appeal and disapproved the majority view in the EAT. The judgment, given by Bean LJ, accepts that the union's interpretation is linguistically possible, but cannot have been Parliament's intent because it *would* give the union a veto over even minor contractual changes; moreover, the wording concentrates on *future* effects, pointing to the intent being to evade collective bargaining altogether,

not just in a one-off dispute. It was this tactic that was under attack in *Wilson* where the mischief was seen as offering inducements to workers to *surrender* their collective representation and move to individual contracting. This view was further backed by the fact that s 145B is a *penal* section with serious consequences for an employer in breach. At [49]–[53] the judgment sums this up very clearly as follows:

> 'I would construe the "prohibited result" provisions of s 145B(1)–(2) as follows.
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> The first type of case is where an independent trade union is seeking to be recognised and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment *will not* be determined by a collective agreement.
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> The second type of case is where an independent trade union is already recognised, the workers' terms of employment are determined by collective agreement negotiated by or on behalf of the union, and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment (as a whole), or one or more of those terms, *will no longer* be determined by collective agreement. "No longer" clearly indicates a change taking the term or terms concerned outside the scope of collective bargaining on a permanent basis; and corresponds, in my view, to the ECtHR's use of the word "surrender" in paragraph 48 of *Wilson.*
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> The difficult question is whether there is a third type of case – the one relied on in the present litigation – where an independent trade union is recognised, the workers' terms of employment are determined by a collective agreement negotiated by or on behalf of the union, and the employer makes an offer whose sole or main purpose is to achieve the result that one or more of the workers' terms of employment will not, on this one occasion, be determined by the collective agreement.
>
> I do not accept that there is. My reasons are essentially these: (1) because of the penal nature of s. 145B, that construction gives a recognised trade union an effective veto over any direct offer to any employee concerning any term of the contract, major or minor, on any occasion; (2) such a veto would go far beyond curing the mischief identified by the ECtHR in *Wilson*; (3) in such a case the members of the union are not being asked to relinquish, even temporarily, their right to be represented by their union in the collective bargaining process. All that has happened is that the employer has gone directly to the workforce and asked them whether they will agree a particular term on this occasion.'

Another way of putting this would be that, although s 145B was introduced by a Blair government, there is no Third Way.

DIVISION PI PRACTICE AND PROCEDURE

Time limits; extension of time; not reasonably practicable; mistake of fact

PI [207]

***Lowri Beck Services Ltd v Brophy UKEAT/0277/18* (*25 March 2019, unreported*)**

While the bottom line in cases on whether to extend the three-month time limit for unfair dismissal is that ultimately the decision is one for the ET, with restricted chance of its being overturned on appeal, as indeed was the case here, it can still be interesting to see decisions suggesting *how* that wide discretion is likely to be exercised.

The claimant was a vulnerable person who was being helped in bringing a claim for unfair dismissal by his brother. His claim was late, not because of any mistake or ignorance of the law here, but because the brother had misunderstood the letter of dismissal and construed it as pointing to a later date (from which the claim would have been in time). The ET agreed to extend time because: (1) it was reasonable for the claimant to rely on his brother; (2) the brother had genuinely believed in his interpretation of the letter; (3) it was reasonable for him to do so because of ambiguities in that letter; and (4) once the mistake had surfaced the brother had acted with due speed and so there was no further unreasonable delay. On appeal, Judge Eady in the EAT held that the ET had applied the law correctly and had not come to a perverse decision; the key point here was that this was a mistake of *fact*, not law, and the ET had considered the reasonableness points properly. Note that the case law at **PI [207]**, with qualifications on the subjective belief of the claimant, is addressed (as it always has been) to issues of ignorance of the time limit or the procedure for bringing a claim, ie issues of law.

Procedure at the hearing; use of specialised knowledge by tribunal members; unfairness

PI [889], PI [900]

***Commerzbank AG v Rajput UKEAT/0164/18* (*28 June 2019, unreported*)**

The claimant brought complaints against the bank including for sex discrimination, harassment and maternity leave discrimination. The ET upheld the claims at least partly on the basis that the decision-makers had acted on the basis of certain stereotypical assumptions about women and about women taking maternity leave. The problem in law (and the basis of the bank's appeal) was that it had been no part of the claimant's case that the decisions were based on stereotypical assumptions; nor had the tribunal suggested to the respondent or its witnesses that it had such matters in mind in its consideration of the inferences to be drawn about the reasons for the bank's conduct. Indeed, the reference to stereotypical assumptions had appeared for the first time in the Judgment which meant that the bank and its witnesses

had had no opportunity to challenge the existence of the alleged stereotypical assumptions or their application to the conduct of the decision-makers; the argument ultimately was that this constituted unfairness.

Allowing this part of the bank's appeal, Soole J in the EAT accepted the best explanation of the law here is the analysis in **PI [889]** that there is a distinction between on the one hand ET members using their knowledge to evaluate or interpret the evidence given by witnesses (which may involve similar factors to the general law on judicial notice) and on the other hand members using that knowledge to in effect add new evidence to that given at the hearing. In the case of the latter, the ET must give the relevant party a chance to be heard on the subject before it is used in coming to a decision. This distinction is based on the cases of *Hammington v Berker Sports-craft Ltd* [1980] ICR 248, EAT and *Dugdale v Kraft Foods Ltd* [1977] ICR 48, EAT. Here, the claimant argued that the facts came within the former, but the EAT held that they came within the latter and so it was an appealable error that the bank had not been given a chance to respond to the stereotyping point. At [81] the judgment states:

> '… this is at best specialist knowledge (or at least belief) which, if it is to be relied on for the purpose of drawing inferences about the conscious or unconscious reasoning of the decision-maker, must be disclosed to the parties and their advisers; and to any witness whose decision-making is in question. Without such notice, the Respondent and its representatives will not be in a position to challenge or test the alleged stereotypical assumption, either as to its general existence or as to its application in the case of the decision-maker. Likewise, a witness must be given the opportunity to answer the suggestion that he or she was influenced by such an assumption.'

One comment is offered. Normally, cases of use of own knowledge will concern specialist knowledge of the relevant background to the case itself, such as an understanding of the way a particular industry or trade works, or knowledge of the state of the local labour market. Were the ET's assumptions here really specialist *knowledge* in this sense; the judgment itself may implicitly doubt this by pointing out in Harvey where the relevant passage occurs. Might it not have been simpler just to treat it as a failure by the ET to *act fairly generally*, there being here a straightforward failure to give an opportunity to be heard, which is discussed at **PI [900]** ff?

REFERENCE UPDATE

479	*Kaur v Leeds Teaching Hospitals NHS Foundation Trust*	[2019] ICR 601, CA
481	*Birmingham City Council v Adams*	[2019] ICR 531, CA
481	*Royal Mencap Society v Tomlinson-Blake*	[2019] ICR 622, CA

482	*Nicholls v London Borough of Croydon*	[2019] ICR 542, EAT
485	*Barnard v Hampshire Fire and Rescue*	[2019] ICR 602, EAT
485	*Addison-Lee Ltd v Lange*	[2019] ICR 637, EAT
487	*Ameyaw v PricewaterhouseCoopers Services Ltd*	[2019] IRLR 611, EAT
489	*BMC Software Ltd v Shaikh*	[2019] IRLR 653, CA
490	*A v X*	[2019] IRLR 620, EAT
490	*Graysons Restaurants Ltd v James*	[2019] IRLR 649, CA

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