Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Agency workers; equality of terms; meaning of 'duration of working time'

AI [210.02]

Kocur v Angard Staffing Solutions Ltd [2019] EWCA Civ 1185

The principal ground of judgment when this case was before the EAT, as set out at **AI [210]** was that when applying the rule of equality in the Agency Worker Regulations 2010 SI 2010/93 in the case of non-pay terms, this is to be done on a term-by-term basis, not by a 'package' approach. However, the EAT also went on to consider a further argument, that reg 6(1)(b) **R [2419]** which includes in the relevant terms 'the duration of work' can be construed as including a right to equivalent *weekly hours* of work; the claimant argued on this basis that, as the Post Office workers worked 39 hours pw, he (as an agency-supplied worker) had a right also to be offered those hours. The text at **AI [210.02]** points out that the EAT rejected this very clearly, largely because it would negate one economic aim of the Regulations and backing Directive, namely to permit the employer to use agency work to achieve a level of flexibility.

This further appeal to the Court of Appeal was on this latter point only. The court in a short judgment by Underhill LJ rejected the appeal (without hearing from counsel for the agency). It accepted that there could be a linguistic argument for the claimant's view, but this was negated partly because of the way that reg 6(1) mirrors the Working Time Regulations 1998 SI 1998/1833; this backs the court's preferred interpretation, that 'duration of work' only applies to any relevant period of continuous work such as a shift. Thus, if a shift is eight hours, an agency worker cannot be required to work

nine, but that has nothing to do with total weekly hours. In addition, however, the judgment backs the EAT's emphasis on the overall intent of the regulation. At [35] it states:

> 'That conclusion is reinforced by a consideration of the purpose of the Regulations, and the underlying Directive, and of the practical consequences of the Claimant's construction. The purpose of the Directive is plainly to ensure the equal treatment of agency workers and permanent employees while at work, and in respect of rights arising from their work; but there is nothing in either the preamble or its actual provisions to suggest that it is intended to regulate the *amount* of work which agency workers are entitled to be given. And of course a provision with the effect contended for by the Claimant would be contrary to the whole purpose of making use of agency workers, which is to afford the hirer flexibility in the size of workforce available to it from time to time – a purpose which the Directive expressly recognises and endorses (see in particular recital (11)). Both the ET and the EAT – in each case incorporating lay members – recognised this, and full weight must be given to their specialist expertise.'

DIVISION AII CONTRACTS OF EMPLOYMENT

Restraint on competition; construing the covenant; severance

AII [221], AII [236]

Tillman v Egon Zehnder Ltd [2019] UKSC 32

This decision of the Supreme Court makes some useful points on restraint clauses generally, but its real importance is that it provides such a fundamental reconsideration and reformulation of the law on severance of unreasonable elements in clauses that it is submitted that it should be considered 'year zero' on that always difficult issue, with the previous case law largely now being of historical interest in showing how we got to this point.

The defendant employee had been a consultant then a partner of the claimant firm. Her contract contained several restraint clauses, all but one of which she did not challenge. However, when she left, the firm sought to enforce against her a non-compete clause that prohibited her from being 'directly or indirectly engaged or concerned or interested in' any competing business for a period of time. She argued that the 'or interested in' element was too wide because it potentially prevented her from even a simple shareholding in such a business. On that basis, the whole clause should be invalid and she could not be prevented from joining a competitor. The firm argued in the alternative that: (1) the restraint doctrine did not apply to questions of ownership such as shareholding; (2) the phrase 'interested in' did not as a matter of construction affect shareholding; or (3) if the law did apply and the phrase did apply to shareholding (and was too wide), that part of the clause should be severed and the rest enforced against the employee.

The difficult nature of all of this can be seen from the outcomes in the courts. The trial judge held that the clause did not apply to shareholding and so the whole clause was to be enforced by injunction. The Court of Appeal allowed the employee's appeal; the phrase did catch shareholding, the clause as a whole was invalid and (crucially) the phrase could *not* be severed (relying largely on the nearly-century-old standard authority of *Attwood v Lamont* [1920] 3 KB 571, CA). On further appeal, the Supreme Court (in a unanimous judgment given by Lord Wilson) allowed the firm's appeal and reinstated the injunction, overruling and replacing *Attwood* in the process.

The judgment contains a very interesting historical review of the swings and roundabouts of both the doctrine itself and the particular issue of severance over the last century. Before getting on to that key question of severance, it clears up two general points (both going against the employer on the facts):

(1) The doctrine of restraint of trade *does* apply to ownership interests such as shareholding, certainly when they arise in an employment context.

(2) The 'validation' principle (*ut res magis valeat quam pereat* or you should try when interpreting to validate rather than destroy a provision in an agreement, see **AII [225]**) only applies if there really *are* two competing, *realistic* possible interpretations; here, overturning the Court of Appeal, the phrase 'interested in' *clearly* covered shareholding, there was no ambiguity and so the firm could not rely on the validation principle.

Thus, there was here a case of invalidity and so the court moved on to the firm's last argument, ie that given it had failed so far, it should still succeed because the phrase could be severed and the rest enforced. Here, the firm finally won. The judgment notes that from an original approach of being relatively generous in allowing severance, the courts had swung to the opposite position in *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL (per Lord Moulton) and *Attwood v Lamont* (per Younger LJ). The overall problem has been that since later cases such as *T Lucas & Co Ltd v Mitchell* [1974] Ch 129, [1972] 3 All ER 689, CA, there has arguably been a loosening of that restrictive view, the problem being how to square that with the old cases, especially the emphasis in *Attwood* on two particular principles: (a) there could only be severance if the clause was really *separate* covenants, not one overall covenant, however expressed; and (b) only 'trivial and technical' elements of a clause could be severed. In *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] IRLR 793, [2007] ICR 1539 the Court of Appeal sought to clarify the law by steering it away from these restrictions, though being unable to remove them legally. However, the Supreme Court were of course free to reconsider *all* the previous case law and their answer was: (1) to overrule *Attwood* (at least to the extent of the two above principles, which the court thought ultimately unworkable anyway); and (2) to effectively adopt the three tests proposed in *Beckett*, as follows:

(1) The 'blue pencil' test continues to apply, ie it must be possible to remove the words in question without having to redraft what remains.

The judgment accepts that this traditional test can be difficult to apply and may produce odd results, but states that it is still to be the necessary (but not sufficient) starting point.

(2) What remains must still be supported by consideration. The judgment states that, while this is legally sound, it is unlikely to be a real issue in ordinary post-employment restraint cases.

(3) The removal of the wording in question must not generate any major change in the overall effect of the totality of the restraints in the contract; this refers to their *legal* effects, not any wider effects they have on the practical position of the parties. Arguably, this third test is at the heart of the correct approach now, and is well summed up at [87]:

> 'The third criterion is that "the removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'". This is the crucial criterion and I find it impossible to equate it with the *Attwood* requirement, as suggested by the Court of Appeal. In my view this third criterion was rightly imported into the general jurisprudence by the *Beckett* case and has rightly been applied by our courts ever since then, otherwise than in the decision under appeal. But I suggest, with respect, that the criterion would better be expressed as being whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract. It is for the employer to establish that its removal would not do so. The focus is on the legal effect of the restraints, which will remain constant, not on their perhaps changing significance for the parties and in particular for the employee.'

Applying these tests, the court held that 'or interested in' could indeed be severed and the remainder of the clause enforced against the ex-employee. Three subsidiary points are suggested:

(i) The judgment taken with the result seems at first sight to be a significant shift in the law in the employer's interest generally, but there are also dicta stating that severance must still be approached with caution. One aspect of this is the idea that in signing a contract with restraints in it, a new CEO may be expected to have some bargaining influence and be able to look after himself or herself, but that an ordinary mortal of a prospective employee will not usually be in that position (though how such a distinction is to be applied is not laid out, and may cause future dispute).

(ii) In addition, there may well be a final downside for an employer even if it manages to secure severance of an invalid element in its drafting – it was after all the fault in its own drafting that gave rise to the litigation, and this may be reflected in *costs*. Adopting a rather neat phrase from an earlier case, the judgment ends with this:

> 'The court should also invite submissions on the proper orders in respect of the costs incurred in each of the three courts. In para 104 of his judgment on the interim inquiry into the *Freshasia Foods* case [*Freshasia Foods Ltd v Lu* [2018] EWHC 3644 (Ch)] the deputy judge described as "legal litter" the unreasonable parts of post-employment restrictions to which employers extract the agreement of prospective employees; and he added that they "cast an unfair burden on others to clear them up". It is a neat metaphor. In my view the company should win … but there might be a sting in the tail.'

(iii) Finally, does the long-term received wisdom on drafting still apply, namely that if seeking to incorporate a series of different restraints into a contract of employment it is advisable to draft them as separate clauses? This is not covered in the judgment, *but* the clear retention of the blue pencil test (for all its potential difficulties) may suggest that this is still good drafting technique, potentially allowing that blue pencil to be wielded more surgically.

DIVISION BI PAY

National Minimum Wage; requirement to keep records; effect of a TUPE transfer

BI [236]

***Mears Homecare Ltd v Bradburn UKEAT/170/18* (*2 May 2019, unreported*)**

The claimants here required production of pay records (to be kept under the National Minimum Wage Act 1998 s 9 **Q [1038]**) for the last twelve months. Normally this is straightforward, but here there was the complication that three months before the end of that period there had been a TUPE transfer from employer A to employer B. Employer A did not produce the relevant records under s 10(9), as a result of which the ET ordered it to pay £800 to each claimant for that failure. By an exercise in purposive interpretation, the ET held that A's obligation in this context did *not* transfer to B under TUPE SI 2006/246 reg 4.

On appeal, Chaudhury P in the EAT reversed that interpretation and held that the obligation to maintain records *does* transfer under reg 4, so that A was under no further obligation to do so and, crucially here, was under no continuing obligation to comply with a production notice. This was partly because, quite simply, that is what reg 4 says and means, there being no express exception in the case of NMW matters and no justification for implying one as a matter of policy. Moreover, Parliament could have chosen to apply joint and several liability to reg 9 but did not do so. There was, however, one other argument for the claimants that had to be addressed – s 54 of the NMWA 1998 uses the classic definition of an 'employee' as a person under a contract of employment or, where the employment has ceased, a person who was under one. Were not these claimants just such

ex-employees of Co A? The answer was that they were not because their employment had not ceased; the whole basis of a TUPE transfer is that there is *no* termination, but instead a transfer such that the employees are deemed always to have been employed by B. Once again, TUPE means what it says.

Not surprisingly, the claimants had argued that this result could cause significant difficulties in practice in these circumstances, leading to an 'empty right' under s 9 if the old employer could not be required to produce essential records; moreover, the new employer could then be liable for the s 10 'fine' because it did not have those records. The judgment accepts that this might be possible, but said that the answer lay, not in straining the clear meaning of TUPE, but in the parties to the TUPE transfer agreeing that the transferor shall hand over the NMW records (relatively easy if held electronically), failing which the transferee should insist on an indemnity provision in case subsequently caught being unable to comply with a production order.

DIVISION DI UNFAIR DISMISSAL

Redundancy and reasonableness; objectivity a factor but no more

DI [1701.01]

***Canning v National Institute for Health and Care Excellence UKEAT/0241/18* (*6 March 2019, unreported*)**

Although objectivity in applying a redundancy selection procedure is an important factor in determining its fairness, the text at **DI [1701.01]** starts by saying 'However, objectivity cannot be considered an absolute requirement and ultimately this all remains a matter of balance'; having considered the case law the paragraph concludes by saying that, although an employer is well advised to make criteria and their application as objective as possible, 'a challenge by a selected employee *purely* on the ground that one or more criteria were too subjective may now be dubious'. This decision of Judge Shanks in the EAT is a good factual example of this view.

The claimant was selected for redundancy when her department was reduced in size, having performed badly in a selection interview. She claimed unfair dismissal on the basis that the ground rules in *Williams v Compair Maxam Ltd* [1982] IRLR 83, EAT (see **DI [1666.04]**) had not been followed. Her principal claim, however, was that the carrying out of the procedure had left too much subjectivity to the managers concerned. On the facts, this claim was weakened by the ET finding against her allegation that one of the managers had been personally biased against her, but of more importance legally was the approach of the ET and EAT to the whole question of subjectivity. The ET found that it was outweighed here by the fact that the employer had built in significant 'checks and balances' to the procedure (eg making sure in advance that the same questions were asked to each employee at interview) to make up for the level of discretion left to the managers. This balancing exercise was approved by the EAT in dismissing her appeal. Case law guidance, even as hallowed by long usage as that in

Williams, remains just that – guidance. Ultimately, there is no substitute to applying the statutory wording of the ERA 1996 s 98(4) on overall fairness, which the ET had done properly here.

Remedies; compensation; contributory fault; making a covert recording of a meeting

DI [2721]

***Phoenix House Ltd v Stockman UKEAT/0284/18* (*5 July 2019, unreported*)**

The dismissal in this case was held to be unfair and the ET decided upon monetary compensation rather than reinstatement. The employer appealed and the employee cross-appealed on various aspects of this, but the legally significant aspect of the judgment of the EAT under Judge Richardson arose because of one particular fact – it had become known to the employer post-termination that the employee had at one stage of the internal procedure taken a covert recording of a meeting about her position. The ET had, in assessing compensation, made a general deduction for contributory fault of 20% and then added a further 10% in relation to the recording.

On appeal, the employer argued that covert recording was unacceptable per se, constituting a breach of trust and confidence, and that instead of a mere 10% reduction the ET should have found that if the employer had known about it before termination it would have dismissed her for gross misconduct on that ground anyway, thus awarding nil compensation. The EAT rejected that absolutist approach and adopted a much more nuanced approach, upholding the ET's decision on the facts. In doing so, at [77] and [78] it gave the following useful guidance on this important problem, worth setting out in full:

> 'There was a time when an employee – or for that matter an employer – had to go to a great deal of trouble to record a meeting covertly. At that time it would be straightforward to draw the conclusion that the recording had been undertaken to entrap or otherwise gain an unfair advantage. But in our judgment times have changed. Most people carry with them a mobile telephone which is capable of making a recording; and it is the work of a moment to switch it on. In our collective experience it is now not uncommon to find that an employee has recorded a meeting without saying so. In our experience such a recording is not necessarily undertaken to entrap or gain a dishonest advantage. It may have been done to keep a record; or protect the employee from any risk of being misrepresented when faced with an accusation or an investigation; or to enable the employee to obtain advice from a union or elsewhere.
>
> We do not think that an ET is bound to conclude that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee. An ET is entitled to make

an assessment of the circumstances. The purpose of the recording will be relevant: and in our experience the purpose may vary widely from the highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to keep a record or guard against misrepresentation. There may … be rare cases where pressing circumstances completely justified the recording. The extent of the employee's blameworthiness may also be relevant; it may vary from an employee who has specifically been told that a recording must not be kept, or has lied about making a recording, to the inexperienced or distressed employee who has scarcely thought about the blameworthiness of making such a recording. What is recorded may also be relevant: it may vary between a meeting concerned with the employee of which a record would normally be kept and shared in any event, and a meeting where highly confidential business or personal information relating to the employer or another employee is discussed (in which case the recording may involve a serious breach of the rights of one or more others). Any evidence of the attitude of the employer to such conduct may also be relevant. It is in our experience still relatively rare for covert recording to appear on a list of instances of gross misconduct in a disciplinary procedure; but this may soon change.'

Here, there was no evidence of intent to entrap, it had only happened on one occasion and the meeting was solely about her own position.

DIVISION K EQUAL PAY

Material factor defence; provision, criterion or practice; disparity within a pay band

K [545.01]

McNeil v Revenue and Customs Commissioners [2019] EWCA Civ 1112

The question in this case involved distribution of male and female earnings *within* one pay band in the Civil Service pay structure. The claimants' complaint was that there was 'clustering' in practice, with more men at the upper end of the scale and more women at the lower end. On a general level, this looked like an infringement of equal pay law (in particular the indirect discrimination version of it in the EqA 2019 s 69(1)(b) and (2) **Q [1511]**). However, it was of course necessary to bring the case within the detailed rules. The ET held against the claimants. The relevant 'factor' relied on here (equivalent to 'provision, criterion or practice' in s 19) was accepted as being length of service, but the ET held that on the facts here that did not put either women generally or the claimants themselves at the necessary 'particular disadvantage'.

As the text points out at **K [545.01]**, this decision was upheld by the EAT on similar reasoning, backed by the fact that length of service was only one of several factors explaining an employee's position in the band (given that this

was *not* the old lengthy band system with people moving up in it automatically each year). The Court of Appeal have now dismissed the claimants' further appeal. The judgment rejects their argument for 'distribution analysis', favouring instead a more straightforward averaging process, under which the necessary disadvantage was not shown. Two more general points are suggested:

(1) Like the EAT, the Court of Appeal as a matter of policy were wary of the claimants' arguments because they could penalise an employer for (as in the Civil Service) getting rid of old-fashioned and potentially discriminatory lengthy pay spines with automatic progression and replacing them with shorter, more merit-based ones, while at the same time trying to recruit more women on to them.

(2) The court's decision backs the point made in the text that the overall effect of the case is that 'the differential distribution of men and women within a pay scale will not of itself give rise to a prima facie case of indirect discrimination in relation to pay, such that an employer is required to show objective justification in order to have a valid defence'.

DIVISION L EQUAL OPPORTUNITIES

Discrimination arising from disability; constructive knowledge

L [368]

***A Ltd v Z UKEAT/0273/18* (*28 March 2019, unreported*)**

Under the EqA 2010 s 15(2) **Q [1468]** the employer has a defence if it can show that it did not have knowledge of the claimant's disability; this means actual *or constructive* knowledge, the latter depending on whether it 'could reasonably be expected to know'. The concept of constructive knowledge also appears in EqA 2010 s 20 on reasonable adjustments, which is where the case law on it has hitherto arisen (see **L [406]**).However, this case before Judge Eady in the EAT considered it in the context of s 15, using that case law and again stressing that reasonableness is the key, though adding what might be seen as an element of causation to it.

The claimant had had mental and emotional problems which may well have contributed to her dismissal. However, she had, for personal reasons, kept these hidden. When she claimed discrimination under s 15 it was clear that the employer had not had actual knowledge but the ET held that it must be considered to have had constructive knowledge because there were further enquiries that it could have made. However, when considering remedy the ET had gone on to hold on the facts that the claimant would have continued in any event to hide her disability. On appeal, the EAT obviously thought that this was inconsistent with the finding on liability and allowed the employer's appeal. The ET had only considered what further enquiries might have been made, not their result. Even if the employer had made those further enquiries, it was likely that it would still not have discovered the truth and so it was not reasonable to expect it to have had the necessary knowledge.

Discrimination arising from disability; justification; proportionality; objective test

L [377]

***Birtenshaw v Oldfield UKEAT/0288/18* (*11 April 2019, unreported*)**

The significance of this decision of Soole J in the EAT is that it holds that when applying the 'proportionality' limb of the justification defence to a claim of discrimination arising from disability under the EqA 2010 s 15 **Q [1468]** an ET is to consider (as part of the balancing exercise) whether lesser measures could have been adopted, *but* in doing so need not consider whether any such lesser measures would in fact have been effective in the circumstances; this is because the test is a wholly objective one.

The claimant had worked temporarily in a care home and applied for an available permanent job. The home was required by the Children's Homes (England) Regulations 2015 SI 2015/541 to ensure that employees are physically and mentally fit for the work. An offer was made but subject to medical clearance. The OH report showed a history of emotional and psychological health difficulties in the past, though ultimately said she was fit to employ. The manager however took a different view and withdrew the offer. The claimant brought proceedings for s 15 discrimination.

The ET accepted that the home was pursuing a legitimate aim under the 2015 Regulations and in relation to the proportionality of the withdrawal applied the objective balancing act required by *Hampson v Department of Education and Science* [1989] IRLR 69, [1989] ICR 179, CA. It found that there had been three lesser courses of action that the home could have taken and so upheld the claim. On appeal, the home argued that in doing so the ET had failed to consider if those lesser measures would in fact have had the effect of inducing the manager to decide not to withdraw the offer. The EAT ruled against that approach and dismissed the appeal.

The home had argued that a parallel was to be drawn between s 15 and the provisions of EqA 2010 s 20 on reasonable adjustments where it is necessary to consider whether the adjustment(s) being put forward would actually have been effective in removing the disadvantage in question. However, the EAT denied that there is such a parallel, pointing out that the sections have different drafting: s 20 concerns whether the adjustment would have avoided the disadvantage, but s 15 is concerned with whether the unfavourable treatment is a proportionate means of achieving the legitimate aim, allowing the ET to consider whether any lesser measures might have secured that aim. While it is true that in balancing the competing factors the ET should give the decision-taker a reasonable margin, the test is fundamentally objective. At [38] this is put as follows:

> 'The tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly: see *O'Brien*. However it does not follow that the tribunal has to be satisfied that any suggested lesser

measure would or might have been acceptable to the decision-maker or otherwise caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the Respondent's decision-maker.'

Ancillary matters; vicarious liability; use of social media

L [503]

***Forbes v LHR Airport Ltd UKEATl0174l18* (*28 February 2019, unreported*)**

Vicarious liability in discrimination law is governed by the EqA 2010 s 109 **Q [1527]** which uses the time-honoured phrase 'in the course of employment'. This decision of the EAT under Chaudhury P reviews the case law from the leading case of *Jones v Tower Boot Co Ltd* [1997] IRLR 168, [1997] ICR 254, CA onwards and holds that the law as it has evolved on this in the case of physical misdeeds by employees also apply to misdeeds in the virtual/social media world, *but* with added possible complications. The facts of the case show some of these problems and the decision contains some indications of the approach an ET might take (though stressing the factual nature of the question and that no hard-and-fast rules can be laid down).

Ms A, a colleague of the claimant, posted in her own time a picture of a golliwog on her private Facebook page with the comment 'Let's see how far he can travel before Facebook takes him off'. She shared it with her Facebook friends; the only work colleague on that list was Mr B who showed it to the claimant (apparently without any malicious intent). The claimant complained to the employer who disciplined Ms A with a final warning; Ms A also apologised. The claimant brought a claim of harassment against the employer, arguing that it was vicariously liable under s 109. The ET rejected her claim, partly because there had been no actual harassment but also because the employer was not vicariously liable on these facts.

The EAT dismissed the claimant's appeal. On vicarious liability, the ET's decision was one that was open to it on the facts. In particular, it had been properly swayed by the following factors relating to social media usage: (1) Ms A had not been at work when making the post; (2) the post had made no reference to the claimant or any other work colleagues; (3) she had not used the employer's equipment. Moreover, contrary to the claimant's argument, the fact that the employer had disciplined Ms A was *not* to be construed as a tacit acceptance that she had been acting in the course of employment; there may well be cases of such disciplining for outside-work activities (the case posited was the one where weekend football hooligans were disciplined by their employer for bringing it into disrepute by their actions).

One further point of interest arose in relation to harassment itself under s 26 **Q [1479]**. This concerned Ms A's apology. Under s 26(4)(b) an ET can take into account 'the other circumstances of the case'. The EAT accepted that this can apply to matters arising after the misconduct in question, which in turn may include a timely apology, which on the facts may defuse what would

otherwise be an intimidating, hostile, degrading, humiliating or offensive environment. Of course, this would be heavily a question of fact, but it does mean that an employer should not be too wary of such an apology on the basis that it might be viewed as an admission of guilt.

DIVISION M TRADE UNIONS

Listing; definition of 'worker'; not applicable to foster carers

M [42]

***National Union of Professional Foster Carers v Certification Officer UKEATl0285l17* (*23 July 2019, unreported*)**

The NUPFC was formed to advance the interests of foster carers. It applied to the Certification Officer for listing as a trade union, as the necessary preliminary step to gaining wider statutory rights. However, the CO declined to list, on the basis that under TULR(C)A 1992 s 1 it was not an organisation 'wholly or mainly of workers'. In turn, this was because foster carers are not 'workers' at all. The CO considered himself bound by previous authority so to hold. In *Rowlands v City of Bradford MBC* [1999] EWCA Civ 1116, [1999] Lexis Citation 4522 the Court of Appeal held that a foster carer was not an 'employee' for the purposes of a race discrimination claim ('employee' for these purposes meaning the same as 'worker' elsewhere) and in *Bullock v Norfolk CC* UKEAT/230/10, [2011] All ER (D) 209 (Jan) the EAT held that a carer was not a 'worker' for the purposes of claiming the statutory right to be accompanied at a disciplinary hearing (see the discussion at **AII [367.01]**).

On the NUPFC's appeal it argued that these cases should be considered no longer good law, but the EAT under Chaudhury P held that they continue to be authoritative and the CO had been right to decline to list. The basic point is that the standard 'worker' definition (here, under TULR(C)A 1996 s 296 **Q [538]**) requires there to be a contract of employment or (crucially) 'any other contract' requiring personal service. A foster carer operates under a statutory foster carers agreement which is *not* contractual in nature. There is some interesting discussion in the judgment about a contractual relationship being fundamentally inconsistent with the nature of fostering, but ultimately it was the statutory nature of the relationship that ruled out a contract. The second half of this long judgment is concerned with the NUPFC's secondary argument, namely that if its primary argument for contractual status was ruled out, that constituted a breach of its rights under art 11 of the European Convention. There is considerable coverage of the applicability of the article in the trade union / collective bargaining context (always a contentious point), but the result was that, given that the article was engaged here, it had not been breached on the facts and, even if it had been, any interference would have been justified under art 11(2).

DIVISION PI PRACTICE AND PROCEDURE

Rejection of the claim; substantive defects; incorrect EC information

PI [305]

***E.ON Control Solutions Ltd v Capsall UKEAT/0003/19* (*19 July 2019, unreported*)**

In this case the claimant gave two EC certificate numbers, but one related to a totally different case and the other gave an invalid number. For some reason her claim was not rejected at that stage. When it came to a preliminary hearing the claimant applied to amend her claim to regularise this. The ET agreed, relying on the overriding objective and the fact that this was a minor, technical mistake. However, Judge Eady in the EAT allowed the employer's appeal. This inaccuracy came within ET Rules of Procedure r 12(1)(c) **R [2769]** which is cast in mandatory terms, stating that the ET staff must refer the matter to the EJ who, if satisfied of the inaccuracy, must reject the claim, returning it to the claimant. As r 12 can apply at any stage of the proceedings, this meant that there had never been a valid claim and so there was nothing that the ET could amend. The only option for a claimant in these circumstances was to use the reconsideration procedure in r 13, which had not been done here. The claimant had relied partly on r 6 **R [2763]** which allows an ET to rectify irregularities but the EAT ruled against this because that power does not stretch to turning a mandatory requirement into a discretion (applying *Cranwell v Cullen* UKEAT/0046/14 (20 March 2015, unreported) and *Baisley v South Lanarkshire Council* UKEATS/0002/16, [2017] ICR 365).

One interesting facet of this judgment is that at the beginning the judge states that the purpose of the EC system is to avoid ET proceedings in a practical way, but that the mandatory nature of rr 10 and 12 has been causing satellite litigation which cannot have been Parliament's intention. She queried whether these provisions should now be reconsidered, but of course accepting that that is not the function of the EAT.

Attendance of witnesses; consulting the respondent before making an order

PI [518]

***Christie v Paul, Weiss, Rifkind, Wharton & Garisson LLP UKEAT/0137/19* (*20 May 2019, unreported*)**

The claimant, in pursuing claims of sex discrimination, harassment, victimisation and whistleblowing against the respondent law firm, applied for a witness order in respect of a former colleague, who initially agreed to attend as her witness, but subsequently declined, citing issues relating to her pregnancy and referring to a non-disclosure agreement with the employer. A tribunal declined to make any decision on the application without first receiving representations from the respondent. The claimant appealed, arguing that this was an impermissible procedure. However, Judge Eady in the EAT dismissed the appeal.

By virtue of ET Rules rr 32 and 92 **R [2789]**, **R [2849]**, a respondent employer must be informed of an order once it is made. However, r 92 allows the normal rules of informing to be departed from if the interests of justice so require. That applied here. Moreover, the ET had been correct in also praying in aid the overriding objective of achieving fairness. The EAT stated that there are no fixed rules here (and denied that the existence of the NDA was necessarily determinative) and acknowledged that the claimant had expressed concerns over possible difficulties if adopting this course of action in other cases where problems of confidentiality or possible intimidation arise. However, on the facts here the ET had not erred in law.

REFERENCE UPDATE

482	*Office Equipment v Hughes*	[2019] IRLR 748, CA
486	*Uber BV v Aslam*	[2019] ICR 845, CA
487	*J v K*	[2019] IRLR 723, [2019] ICR 815, EAT
487	*Asda Stores Ltd v Brierley*	[2019] ICR 910, CA
487	*Ibrahim v HCA International Ltd*	[2019] IRLR 690, EAT
491	*Anderson v Turning Point Eespro*	[2019] IRLR 748, CA
491	*Capita Customer Management Ltd v Ali; Chief Constable of Leicestershire v Hextall*	[2019] IRLR 695, CA
491	*Kuteh v Dartford & Gravesend NHS Trust*	[2019] IRLR 716, CA
491	*Foreign and Commonwealth Office v Bamieh*	[2019] IRLR 736, CA
491	*Federacion de Servicios Comisiones Obreras v Deutsche Bank*	[2019] IRLR 753, ECJ

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