Harvey on Industrial Relations and Employment Law

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

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DIVISION AII CONTRACTS OF EMPLOYMENT

Confidentiality and privacy; covert monitoring at work; use of material gained in dismissal

AII [194.22]; DI [1482.04]

López Ribalda v Spain, Applications 1874/13 and 8567/13, [2019] ECHR 1874/13, ECtHR, Grand Chamber

When this case was heard two years ago by the lower chamber of the ECtHR it caused some consternation because, in holding that the use of covert surveillance of tills by a supermarket which had established guilt of theft (or facilitating theft by others) by multiple employees was nevertheless a breach of art 6 (private and family life), it had gone against the gist not just of previous domestic case law in this country, but also against the court's own previous decision in *Köpke v Germany* 420/07 (5 October 2010, unreported) where such anti-theft surveillance had been held justified. The reasoning of the lower chamber has been criticised in the text (see **DI [1482.04]**) not least because to insist that the employees should have been informed of the cameras might have stopped *further* thefts but could not have discovered those guilty of the existing, significant stock losses. Now, however, the employer has taken the case to the Grand Chamber and won.

In holding that art 8 was engaged but not breached because the employer acted proportionately, the Grand Chamber at [116] set out the following factors to be considered by a national court:

'(i) Whether the employee has been notified of the possibility of video-surveillance measures being adopted by the employer and of the implementation of such measures. While in practice employees may be notified in various ways, depending on the particular factual

circumstances of each case, the notification should normally be clear about the nature of the monitoring and be given prior to implementation.

(ii) The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy. In this connection, the level of privacy in the area being monitored should be taken into account, together with any limitations in time and space and the number of people who have access to the results.

(iii) Whether the employer has provided legitimate reasons to justify monitoring and the extent thereof. The more intrusive the monitoring, the weightier the justification that will be required.

(iv) Whether it would have been possible to set up a monitoring system based on less intrusive methods and measures. In this connection, there should be an assessment in the light of the particular circumstances of each case as to whether the aim pursued by the employer could have been achieved through a lesser degree of interference with the employee's privacy.

(v) The consequences of the monitoring for the employee subjected to it. Account should be taken, in particular, of the use made by the employer of the results of the monitoring and whether such results have been used to achieve the stated aim of the measure.

(vi) Whether the employee has been provided with appropriate safeguards, especially where the employer's monitoring operations are of an intrusive nature. Such safeguards may take the form, among others, of the provision of information to the employees concerned or the staff representatives as to the installation and extent of the monitoring, a declaration of such a measure to an independent body or the possibility of making a complaint.'

In a case of seeking to uncover continuing criminality (as here), the employer will of course breach factor (i) and so a domestic court will have to conduct a balancing exercise to set that off against other factors in its favour. Here, factor (ii) is likely to be of greatest significance, and in the Chamber's judgment the following elements here meant that the Spanish courts (unanimously) had been entitled to hold that the employer had acted proportionately:

(a) the employer had a genuine interest in discovering and punishing those responsible;

(b) the recordings were restricted to the cash-out areas (the source of the problem) and had only been made as long as necessary (which had been for full shifts but only amounted to ten days in total);

(c) the expectation of an employee for privacy at work is less in open areas such as a supermarket floor (as opposed to in a restricted office or toilets);

(d) the employer had deliberately restricted use of the recordings – only the manager and the employees' TU representative had seen them;

(e) the suspected criminality was not just by one individual but by several in concert, creating a general atmosphere of mistrust in the workplace.

Disciplinary procedures; voluntary procedures; injunctions for breach

AII [309.09]

Al-Obaidi v Frimley Health NHS Foundation Trust [2019] EWHC 2357 (QB), [2019] IRLR 1065

The claimant was a doctor facing disciplinary proceedings under the relevant NHS procedures. He sought an injunction to nip these in the bud by striking down the case manager's decision that there was a case to answer for gross misconduct. Laing J considered the case law set out in the text, in particular *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [2014] IRLR 227, [2014] ICR 194 and *Ardron v Sussex Partnership NHS Trust* [2018] EWHC 1535 (QB), [2018] IRLR 917 and came to the conclusion that under this procedure the case manager has to consider three questions: (1) was there a prima facie case to be investigated (a question of fact); (2) was the conduct capable of being gross misconduct (mixed fact and law); and (3) was it appropriate to hold disciplinary proceedings? The claimant here had wanted the court to take its own decision as to whether there was a prima facie case of gross misconduct, but the court held that in these circumstances its function was more limited. There would be implied into the claimant's contract a term that these matters would be considered in good faith and rationally. However, that meant that the court's function was to review the case manager's decision to see if it passed these (essentially public law) tests, not to substitute it. On the facts here, the manager had taken a valid decision that there was indeed such a prima facie case and so the injunction was refused.

DIVISION CI WORKING TIME

Holidays; carrying forward untaken leave; holidays in excess of four weeks

CI [144]

Terveys- ja sosiaalialan neuvottelujärjestö (TSN) v Hyvinvointialan liitto C-609/17

At **CI [144]** the text cites the advice of the Advocate-General in this case to the effect that the Working Time Directive does not require the carrying forward of untaken annual leave into a subsequent year where it constitutes leave granted by national law in excess of the obligatory four weeks in the directive. This applies even where the leave was not taken because of illness. That advice has now been adopted by the ECJ in this judgment. The court's decision is summed up as follows:

> 'Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in that provision, and yet exclude the carrying over of those days of leave on the grounds of illness.'

This validates under EU law the domestic decision to like effect (in relation to the additional holiday entitlement in the Working Time Regulations 1998 SI 1998/1833 reg 13A **R [1084.01]**) in *Sood Enterprises Ltd v Healey* [2013] IRLR 865, [2013] ICR 1361, EAT, also considered at **CI [144**].

DIVISION CIII WHISTLEBLOWING

Qualifying disclosure; public interest; belief or motive?

CIII [49], CIII [52]

Ibrahim v HCA International Ltd [2019] EWCA Civ 2007

Two issues arose in this case relating to whistleblowing: (1) was a claim that the claimant had been defamed at work enough to constitute failure to comply with a 'legal obligation' under the ERA 1996 s 43B(1) **Q [668.02]**; and (2) had the claimant shown an actual and reasonable belief that the potential disclosure was in the public interest?

On issue (1) the EAT held that this could be sufficient, see **CIII [52]**. There was no further appeal on this point and so the Court of Appeal did not have to rule on it. To that extent, the EAT's decision stands, *but* at [10] of Bean LJ's judgment of the court he states obiter that it may be 'counterintuitive' for such an allegation to found a protected disclosure and that it 'remains open to challenge in this court in a future case'. We thus may not have heard the last of this.

The appeal was principally about issue (2), where there had been a timing problem: the leading case of *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2017] IRLR 837, [2017] ICR 731 (see **CIII [45]**) was handed down after the liability hearing. It was dealt with by further submissions from the parties but without hearing any further evidence. Although the decision of the Court of Appeal in the instant case relates most immediately to the need for such further evidence from the clamant on one particular point, the appeal raised important questions more generally about how an ET is to approach the mental element in the 'public interest' aspect and the distinction between belief and motive; the two were interrelated.

On the first question, the Court of Appeal in *Chesterton* at [27]–[37] had laid down clearly a two-stage approach for an ET: (i) did the clamant believe that the disclosure was in the public interest, then (ii) was it reasonable for them to have done so? This had not been adopted by the ET (expressly or implicitly) with the result that the claimant had not been *asked* whether he had had such a belief at the relevant time. The case was remitted for this stage to be covered properly. Possibly more important legally was *why* the ET had not asked the

two separate questions. This was because of the second question, namely the significance (or otherwise) of the claimant's *motivation*. The facts were (see **CIII [52]**) that the claimant had raised a grievance about rumours circulating at work about him; on termination he could not claim ordinary unfair dismissal (he was not an employee) and so claimed whistleblower protection. The ET held (and the EAT upheld) that this failed because his motivation at the time was to clear his name, a personal matter lacking public interest. As the ET put it: '… disclosure was not in the public interest, *but rather* with a view to the claimant clearing his name and re-establishing his reputation'. The added italics contain what the Court of Appeal found wrong in this. As Underhill LJ put it, 'the necessary belief is simply that the disclosure in question was in the public interest' and 'the particular reasons why the worker believed that it be so are not of the essence'. The question at this stage is simply whether the worker actually believed it; given the ET's formulation of the test, this had not had to be decided, hence the remission.

Whistleblowing dismissal; establishing the reason in an organisation

CIII [98.01], CIII [98.02], CIII [126]; DI [821.01]; DII [466.05]; L [274.04], L [285.03], L [406.03], L [500]; NI [432]

Royal Mail Group v Jhuti [2019] UKSC 55

As can be seen from the extent of the division citations above, this is an important case across several areas of employment and discrimination law. It concerns the very concept of a 'reason' for dismissal where the employer is an organisation but the dismissal is effected by an individual decision-making manager. Where there have been pressures/interventions by another individual for legally challengeable motives, the question is – which individual is to be aligned with 'the employer'? The facts and issues are set out with admirable clarity and brevity at the beginning of Lord Wilson's judgment of the court:

> '(a) Ms Jhuti made protected disclosures within the meaning of section 43A of the Act, colloquially described as whistleblowing, to her line manager;
>
> (b) the line manager's response to her disclosures was to seek to pretend over the course of several months that Ms Jhuti's performance of her duties under her contract of employment with the company was in various respects inadequate;
>
> (c) in due course the company appointed another officer to decide whether Ms Jhuti should be dismissed; and
>
> (d) having no reason to doubt the truthfulness of the material indicative of Ms Jhuti's inadequate performance, the other officer decided that she should be dismissed for that reason.
>
> So what was the reason for Ms Jhuti's dismissal? Was it that her performance was inadequate? Or was it that she had made protected

disclosures? These specific questions generate the following question of law of general importance which brings the appeal to this court:

In a claim for unfair dismissal can the reason for the dismissal be other than that given to the employee by the decision-maker?'

It can immediately be seen from this that, although this issue is of particular importance in whistleblowing cases (such as this), the decision is applicable across the whole of unfair dismissal law.

The ET had dismissed the claimant's s 103A claim because it had to look only at the motivation of the actual decision-maker. The EAT allowed the claimant's appeal, applying a wider approach but, as seen at **CIII [126]**, the Court of Appeal had allowed the employer's further appeal on the basis that the decision-maker was crucial (and the case did not come into its category of possible exceptions where the other manager was involved in the investigation/disciplining).

The decision of the Supreme Court allowing the claimant's final appeal looks at other areas of law where 'the company' has to be invested with the motivation or reasoning of an individual manager, showing that it has to be considered in context. More immediately, however, it cites venerable employment precedents, particularly *West Midlands Co-operative Society v Tipton* [1986] AC 536, [1986] IRLR 112, HL (approving the now-classic definition of a 'reason' for dismissal in *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, CA) to the effect that that 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. Applying that approach, concentration on only the decision-maker is too narrow. The judgment at [60] states that normally of course it will indeed be that individual who will be the subject of scrutiny (especially where the employee disputes his or her overt reason) *but* that there will be cases where a wider inquiry will be appropriate:

'In the present case, however, the reason for the dismissal given in good faith by [the decision-maker] turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here … Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.'

As with the introduction, this sums up the *ratio* of the case neatly. The last sentence sets out its main limitation ('hierarchy').

Six subsidiary points may be noticed:

(1) The Court of Appeal had felt itself bound by its earlier decision in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] IRLR 317, [2011]

ICR 704 (**CIII [126.01]**) where it was held in a non-whistleblowing unfair dismissal claim that in these circumstances the organisation is to be identified with the motivation of the individual deputed to carry out the employer's functions on dismissal. However, the Supreme Court here pointed out that that was a difficult case with unclear facts, where there had been a majority decision but a strong dissent and which was 'not a satisfactory vehicle for any full, reasoned articulation of principle' on this issue. The court did not find it necessary to overrule it formally, but perhaps this is the sort of 'restrictive distinguishing' that amounts to the same thing.

(2) As pointed out at **CIII [126]**, Underhill LJ had set this particular hare running in *Co-operative Group Ltd v Baddeley* [2014] EWCA Civ 658 when he had suggested the 'manager involved in the investigation' exception. This case is not mentioned, but presumably would now be decided under the court's wider principle (though whether with the same or different outcome is debatable because of the particular facts of the case).

(3) The claimant here had also brought a claim for whistleblowing *detriment* under the ERA 1996 s 47B. This was still current because it raised an issue about the relationship between detriment and dismissal in these cases which has yet to be resolved and so did not arise for decision in this appeal. However, it did feature indirectly because one employer argument was that the existence of the s 47B remedy meant that there was no need to give a wide interpretation to 'the employer' in s 103A. However, the court held against this, partly for the very reason that it is not certain whether detriment can be used in a case ending in dismissal. Thus, the claimant was not restricted to a s 47B claim.

(4) The invocation of s 47B does however also show one gap in the protection here. The court's decision is confined to cases (admittedly, likely to be the large majority) where the interfering individual is higher in the hierarchy than the claimant. Whereas s 47B(1A)–(1E) **Q [671.03]** specifically covers the position of detriment by a fellow worker (making the employer vicariously liable, subject to an 'all reasonable steps' defence), there is *no* such provision in s 103A in a dismissal case. Thus, if false information was passed to an 'innocent' dismissing officer by an employee of similar or lesser status, the court's extension of liability would not work.

(5) There has been an alternative source for the restrictive theory that only the mental processes of the decision-maker can be taken into account, namely the *discrimination* case of *Reynolds v CLFIS (UK) Ltd* [2015] EWCA Civ 439, [2015] IRLR 562, [2015] ICR 1010, see **L [274.04]** where the text says that it may need reconsideration when the Supreme Court has heard *Jhuti*. The case is not cited in the Supreme Court's judgment, but should it now be considered impliedly overruled? Or could it still be argued that there should still be a difference between discrimination law and employment law on this point?

(6) As it happens, this month also saw the EAT decision in *Cadent Gas Ltd v Singh* UKEAT/0024/19 (8 October 2019, unreported) on the same issue but in yet another context, namely dismissal for trade union reasons (see **NI [432]**). The dismissing manager was found not to be prejudiced against the claimant's union activities, but the *éminence grise* behind the whole affair was. The employer argued that the normal rule (at that time, under the decision of the Court of Appeal in *Jhuti*) should apply, restricting the ET to the motivation of the dismissing manager, but the EAT accepted the claimant's argument that this came within the then-exception because the orchestrating manager had been 'knee-deep' in the eventual decision to dismiss. This would now be decided the same way, but as a matter of principle, not as an exception.

One final minor point. In these cases at Court of Appeal level Underhill LJ has been the prime mover. As such, he coined the memorable phrase that these were 'Iago cases', which has been much used ever since. At [53] in the Supreme Court's judgment it cites this but describes it delphically as 'perhaps questionably'. Your humble author has to confess that this has gone over his head. Any thoughts out there as to why such an apparently apt and erudite epithet might not be accurate?

DIVISION DI UNFAIR DISMISSAL

The reason for the dismissal; constructive dismissal cases

DI [802]

***Retirement Security Ltd v Wilson UKEAT/0019/19* (*11 July 2019, unreported*)**

The text makes the point that there is an obvious awkwardness in applying the ERA 1996 s 98 **Q [722]** (employer to establish the reason or principal reason for the dismissal and that it is capable of being fair) to a case of constructive dismissal, where the employer is arguing that it did not dismiss the claimant *at all*. However, as the case law cited at **DI [803]** ff shows, the employer must simply do its best in the circumstances, as s 98 must still be applied. Of course, a constructive dismissal will often be unfair in practice, but that is not necessarily the case in law. This decision of Judge Eady in the EAT reinforces these points and shows the importance of the employer laying the groundwork for a secondary plea of fairness (if that is its intention), in case its defence of 'no constructive dismissal' fails.

The claimant left employment after an investigatory meeting that he considered so badly handled that it breached the implied term of trust and confidence. He claimed constructive dismissal. The ET agreed and held that this constructive dismissal was unfair. On appeal, the employer argued that the ET had erred by concentrating only on the constructive element and not going on to consider whether there had been a potentially fair reason for the dismissal coming within the range of reasonable responses. Dismissing the appeal, the EAT held that there was no evidence of the employer having

raised this element before the ET. There was a mention of dismissal for SOSR at one point in the pleadings, but no further elucidation or particularisation had arisen. To counter this, the employer relied on the inherent difficulties in a constructive dismissal claim ('I didn't dismiss him, and anyway it was fair') and developed this into an argument that in a case such as this the ET itself should investigate what may have been the reason. This was clearly rejected in the judgment. The burden remains on the employer in spite of the difficulties and the ET has no inquisitorial duty here.

Compensation; the character of contributory fault; relationship with gross misconduct

DI [2721]

***Jagex Ltd v McCambridge UKEAT/0041/19* (*11 September 2019, unreported*)**

The claimant in this case had found a document left in a photocopier (there-but-for-the-grace-of-god alert!) detailing an executive's salary. He did not do much about it, except for telling a couple of colleagues about its existence, but unfortunately this spread and it ended up the subject of a rather public 'guess the bosses' salaries' version of a seventies quiz show ('Higher, higher'; 'Lower, lower'). He was disciplined and dismissed for *gross* misconduct. In his ET complaint of unfair and wrongful dismissal, the ET held that this had not been gross misconduct; he had been harshly treated (substantively and procedurally) and both claims succeeded. It was further held that no *Polkey* reduction was to be made, nor any decrease for contributory fault.

The employer appealed on liability and remedy. The judgment of Judge Stacey in the EAT upheld the decision that there had been no gross misconduct and that the ET had taken a permissible decision on *Polkey*. To that extent, it is in the nature of an interesting application of these well-worn rules. However, on the contributory fault issue it makes an important point of interpretation. The ET had considered that *because* gross misconduct had been ruled out, *therefore* there should be no reduction. This element of the ET's judgment was disapproved (and remitted to the ET) because what it had done was to conflate contributory fault with the high threshold for gross misconduct. What it should have done was to apply the unvarnished statutory language of the ERA 1996 ss 122(2) and 123(6) **Q [746]**, **Q [747]** which apply much more generalised tests, most certainly *not* restricted to cases of gross misconduct.

DIVISION L EQUAL OPPORTUNITIES

Time limits; continuing acts

L [822]; PI [113]

***South Western Ambulance Service NHS Foundation Trust v King UKEATl0056l19* (*3 October 2019, unreported*)**

***Caterham School Ltd v Rose UKEATl0149l19* (*22 August 2019, unreported*)**

Two EAT decisions on the meaning of a continuing act for the purposes of applying the discrimination law time limit under the EqA 2010 s 132 **Q [1535]** show interesting aspects of the application of this exceptional category.

In *King* the claimant left employment after her grievance about an internal report on her was dismissed, along with an appeal. She brought proceedings inter alia for victimisation. Of the several aspects alleged to constitute victimisation, only one fell within the primary limitation period. She relied on s 123(3) on the basis that it was just the last of a linked series of continuing acts. At the ET it was held that only the first of these (the original report) was discriminatory. However, the ET proceeded to hold that there was still 'conduct extending over a period' and so the claim was in time.

In the EAT Choudhury P allowed the employer's appeal, because there cannot be a series of continuing acts if only one of them is discriminatory. Following the leading case of *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, [2013] IRLR 96, [2003] ICR 530, the judgment states at [36]:

> '… reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that *evidence* that discriminatory state of affairs. If such constituent acts or instances cannot be established, either because they are not established on the facts or are not found to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs.'

The claim was thus out of time; it was remitted to the ET to decide whether it would be just and equitable to extend time in the normal way.

In *Rose* the claimant again relied on the continuing acts concept. At a preliminary hearing, the EJ decided that there had indeed been such a series of acts, but only on the pleadings, without hearing direct evidence and without making findings of fact. In the EAT Judge Auerbach allowed the employer's appeal. Although a straightforward application to strike out a claim on a time limit point on the *basis* that it can have no reasonable chance of success may be dealt with on the papers, that is not the case if there has

not been such a strike out and the issue has remained a live one on the question of continuing acts. Here, the ET must hear evidence and determine the matter on the facts.

DIVISION NI LABOUR RELATIONS

Unfair dismissal; interim relief; use in whistleblowing cases; dealing with incidental matters

NI [614]; CIII [127.01]

***Hancock v Ter-Berg UKEAT/0138/19* (*25 July 2019, unreported*)**

The concept of interim relief as an immediate remedy lies primarily in trade union law, hence the primary cross-reference here to Div NI. However, it was also imported into the ERA 1996 to cover certain other forms of dismissal, principally for whistleblowing, which was the issue in this case before Choudhury P in the EAT.

The claimant in an action for whistleblowing dismissal under the ERA 1996 s 103A sought an order for interim relief. Under ERA 1996 s 129 **Q [753]** an ET may make such an order if 'it appears likely' that it will find that the reason or principal reason was within (inter alia) s 103A. It is now well established that this means that the claimant must show that he or she has a 'pretty good chance of succeeding' in this (ie the rule in *Taplin v C Shippam Ltd* [1978] IRLR 450, EAT, a trade union case). At **CIII [127.02]** there is consideration of the relevant factors in applying this test. However, in the instant case a rather different problem arose. As a preliminary point, the employer argued that the claimant was not an 'employee', but was instead self-employed and so unable to claim *at all*. Moreover, it argued that this preliminary point had to be decided on the facts by the ET before going on to consider interim relief. The claimant argued that it was sufficient for him to show that on this preliminary point it was also 'likely' that he would succeed.

The ET held against the employer's interpretation, refusing a postponement of the interim relief application, and this was upheld by the EAT – the 'likely' test applies also to any incidental matters. It has to be said that at first sight this is not what s 129 says, because it concentrates on whether the claimant can show likelihood of showing the outlawed *reason* for the dismissal. However, the decision of the EAT is couched strongly in policy considerations, the point being that to have to hold a full merits hearing on any preliminary issue would contravene the whole point of interim relief which is to preserve the status quo under the contract at the earliest possible stage *before* a full hearing. Although the burden remains on the claimant, this decision is in his or her favour in that they *only* have to show any such extra element on the 'likely' test.

REFERENCE UPDATE

489	*Gregg v North West Anglia NHS Foundation Trust*	[2019] ICR 1279, CA

490	*Graysons Restaurants Ltd v Jones*	[2019] ICR 1342, CA
491	*Dodic v Banka Koper*	[2019] ICR 1352, ECJ
491	*Anderson v Turning Point Eespro*	[2019] ICR 1362, CA
494	*Barasso v New Look Retailers Ltd*	[2019] IRLR 1042, EAT
494	*Hinrichs v Oracle Corporation UK Ltd*	[2019] IRLR 1051, EAT
495	*Raj v Capita Business Services Ltd*	[2019] IRLR 1057, EAT

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