Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to **30 March**.

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

LEGISLATION

Increase of employment protection limits

By virtue of the Employment Rights (Increase of Limits) Order 2023 SI 2023/318 the usual annual uprating takes place as from 6 April, the increase being of 12.6% (the increase in RPI from September 2021 to September 2022). The maximum week's pay for statutory purposes goes to £643, giving a maximum statutory redundancy payment and basic award for unfair dismissal of £19,290. The maximum compensatory award goes up to £105,707, and so the combined maximum in an ordinary unfair dismissal case goes up to £124,997. The special basic awards for certain provisions of TULR(C)A 1992 and for certain forms of automatically unfair dismissal are also raised by the same percentage.

These changes will be made in Div Q in Issue 307.

Social security benefits up-rated

By virtue of the Social Security Benefits Up-rating Order 2023 SI 2023/316 from 6 April statutory sick pay is increased from £99.35 pw to £109.40. From 2 April statutory maternity pay, statutory paternity pay, statutory adoption pay, statutory shared parental pay and statutory parental bereavement pay are increased from £156.66 pw to £172.48.

These changes will be made in Div Q and Div R in Issue 307.

Increases in the national minimum wages

By virtue of the National Minimum Wage (Amendment) Regulations 2023 SI 2023/354 from 1 April the national living wage under the National Minimum Wage Regulations 2015 reg 4 is increased from £9.50 to £10.42. The figures for the national minimum wage for those qualifying at a different

wage, under reg 4A, are increased from £9.18 to £10.18, from £6.83 to £7.49 and from £4.81 to £5.28 (in both places).

These changes will be made in Div R in Issue 307.

Vento scales increased

Presidential guidance has raised the *Vento* scales for injury to feelings in discrimination cases to the following:

Lower level	£1,100 to 11,200
Middle level	£11,200 to 33,700
Upper level	£33,700 to 56,200

These apply to claims presented on or after 6 April and will be incorporated into Div Q in Issue 307.

DIVISION AI CATEGORIES OF WORKER

Part-time workers; definition; comparison with full-timers; justification

AI [133.02], AI [143.01], AI [148]

***Ministry of Justice v Dodds [2023] EAT 31* (*7 March 2023, unreported*)**

The text points out that, in spite of the definition of 'part-time worker' in reg 2 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 **R [1289]** being very vague and arguably circular (not a full-time worker, just as the Oxford English Dictionary has always defined a bean as a kidney-shaped object and a kidney as a bean-shaped object), there has hitherto been little litigation on this fundamental point. However, this case before Heather Williams J in the EAT makes up for that, as that point was at the heart of the dispute. It concerned proceedings under the 2000 Regulations brought (as a test case for others) by three circuit judges and one district judge who objected to being paid their normal salary when 'acting up' as High Court judges and as a circuit judge. Their case was that when so acting up they were part-time workers, who had suffered less favourable treatment by not being paid at the higher rate, for no justifiable reason. The ET accepted this case and the Ministry and Lord Chancellor appealed.

The EAT allowed their appeal and remitted the case for rehearing. The judgment is long and complex, involving consideration of the statutory provisions on judicial office holding as well as the 2002 Regulations. However, the main points were as follows:

(1) Were they part-time workers? The claimants failed on this essential point. Acting up was held to be part of their normal salaried work, which was not to be divided up in this way. The ET had erred in allowing such a division, partly by only looking at the time of so acting which, on a literal view, would always be 'part-time'. Legally, however,

it was necessary to look at their work in its entirety. The judicial functions here were not to be equated with a worker having two separate jobs (one full-time and another part-time) at different times of the day (see [130]). Moreover, the ET had also erred by (a) separating out 'core' and 'non-core' functions and (b) applying a 'fairness and equity' approach to the definition of part-timer, which is instead to be resolved by applying the statutory wording. There is a prelude to this at the beginning of the judgment where there are cited the words of Judge Richardson in *Engels v Ministry of Justice* UKEAT/0279/18, [2017] ICR 277 where he said at [18] that 'the purpose of the legislation is not to redress any and all injustices that may exist; it is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time'.

(2) The ET had also erred on the question of causation, again by impermissibly grafting on a test of fairness and equity instead of the statutory 'because of' test.

(3) The ET had also erred on justification by (a) wrongly rejecting the Ministry's arguments on allocation of resources and (b) wrongly categorising its defence as being based *only* on cost saving. Of interest on the latter is the citation of *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487, [2021] IRLR 132, an age discrimination case, where Underhill LJ at [89] summed up the law on the notorious 'cost or cost-plus' arguments in the discrimination context, but accepted here as applying under the 2002 Regulations. The relevant passages are set out at **L [374.04]**. Of particular relevance here is the statement at the end that 'It is better, in any case where the issue arises, to consider how the employer's aim can most fairly be characterised, looking at the total picture. It is only if the fair characterisation is indeed that the aim was solely to avoid increased costs that it is to be treated as illegitimate.'

DIVISION BI PAY

Deductions from wages; meaning of properly payable; discretionary bonuses

BI [339], BI [342]

***Thom v Hobart Real Estate Partners Ltd [2023] EAT 37* (*24 March 2023, unreported*)**

This decision of Judge Tayler in the EAT is a useful addition to the case law on the question of the recovery of a discretionary bonus as an unlawful deduction from wages under the ERA 1996 ss 13 and 27 **Q [637]**, **Q [651]**. It shows that, while it is the case that the discretionary nature does not per se disqualify, care must be taken with the statutory requirement that the amount claimed must have been 'properly paid'.

As will often be the case, the terms of the relevant contractual clause were important. It stated that 'You may receive a minimum 10% of the company's performance fee …The terms and percentage of each performance fee will be

negotiated with you and agreed in advance of each project …' The claimant entered into an email conversation with her superiors as to what she should receive. They said that the percentage was to be 10% but she was holding out for 25%. There was also no identification of the performance fee in question. This remained the case when she was made redundant. She brought ET proceedings for a redundancy payment and also for what she said she should have been awarded under the clause. The EJ held that, contrary to her principal argument, there had been no agreement, either as to percentage or fee, either fully or at least sufficient to invoke the principle that a discretion must not be exercised capriciously. There was therefore nothing properly payable and the ET had no jurisdiction to entertain this part of her claim.

The EAT dismissed her appeal, holding that there must have been some agreement as to the percentage and the fee (the multiplier and the multiplicand) and that the EJ had been right to find that this had not been the case, especially as she had not accepted even the 10% ('The email correspondence ended with the parties still at odds'). Moreover, even if the 10% could be relied on, the EAT would have held that the multiplicand was still missing. The judgment sets out the case law on discretionary bonuses, in particular the guidance given by Nelson J in *Farrell, Matthews & Weir v Hansen* [2005] IRLR 160, [2005] ICR 509, EAT (see **BI [347]**), including the dichotomy that '… until the discretion is exercised in favour of granting a bonus, provided the discretion is exercised properly, no bonus is payable. Once however an employer tells an employee that he is going to receive bonus payments on certain terms he is, or ought to be, obliged to pay that bonus in accordance with those terms …'. On the facts here, the claimant fell on the wrong side of this line. The judgment concludes at [43]:

> 'I consider that [the EJ] was right to conclude that there was no sum that the claimant could establish was properly payable. There was no specific sum that could be calculated as being payable to the claimant. Nor was there a sum it might be argued any proper exercise of the discretion under the contract would necessarily result in being declared. Even if it might be argued that any rational exercise of the discretion would result in a multiplier of 10%, there was no multiplicand that necessarily would be arrived at by a rational exercise of the discretion. The terms of any performance fee had not been agreed. In the circumstances, the claim was correctly dismissed. The claim was for an unliquidated sum and there was no jurisdiction for the employment tribunal to consider the claim as an unauthorised deduction from wages. There was no "identifiable" or "quantifiable" sum that could be shown to be "properly payable" to the claimant. The appeal is dismissed.'

DIVISION L EQUAL OPPORTUNITIES

Direct discrimination; reason for the less favourable treatment; age-related assumptions

L [270]

Imperial College Healthcare NHS Trust v Matan [2023] EAT 1, [2023] IRLR 264

In the area of sex discrimination it has long been the case that sex-based *assumptions* by an employer can be important in a discrimination claim. This decision of Eady P in the EAT shows that this can also be the case in relation to age.

The claimant was a locum consultant, in his late 50s, intending to take early retirement at 60. When a problem arose about the registration of such consultants, the employer encouraged another consultant 20 years younger to apply for proper registration, offering him alternative (lesser) work in the meantime. However, this was not done for the claimant, the assumption being that he would be retiring soon and would not be interested in a lesser post anyway. When he brought ET proceedings, inter alia under the EqA 2010 s 13 **Q [1466]** for direct age discrimination, the ET held in his favour, on the basis that this treatment was based on his age, that he had shown a prima facie case and that the employer had failed to provide cogent evidence that the treatment was in no sense because of his age.

The employer appealed, but the EAT rejected the appeal. There was an issue as to the language used by the ET, which had not specifically applied the test 'was the treatment because of age?' but instead had looked primarily at the age-related assumptions made by the employer. However, the EAT held that, taking their judgment 'in the round', such assumptions had been properly considered as evidence of a prima facie case, putting on the employer the burden of proof which it had not discharged.

Disability discrimination; arising as a consequence; causation

L [374]

***McQueen v General Optical Council [2023] EAT 36* (*10 March 2023, unreported*)**

Cases on the application of the EqA 2010 s 15 **Q [1468]** tend to revolve around the element of the unfavourable treatment being 'because of' the 'something' in question, but this case before Kerr J in the EAT emphasises that, although the wording comes after 'because of', there can be a prior causation question as to whether that something was 'arising in consequence of B's disability'. It does so on facts which make it a good example.

The claimant was disabled due to dyslexia, Asperger's syndrome, neurodiversity and partial deafness. Some adjustments had been made, but there was still a history of difficulties with other members of staff, including his

superior. Towards the end of his employment, these ended up in disciplinary action relating to several incidents including one particular 'meltdown' when dealing with his superior. Eventually, he left the employment and brought ET proceedings under s 15. The ET held that, although the disabilities could have had effects on his conduct, on these particular facts these incidents (particularly the meltdown) were *not* caused by his disabilities. Instead, they were due to resentment at being told what to do and loss of his already short temper. His claim was dismissed.

He appealed to the EAT but this was turned down. It was held that these findings of fact were open to the ET, it had not erected too high a bar on causation, the effects of his disabilities here had not played a part in his conduct and so the claim failed at that point; a further question of whether any unfavourable treatment had been 'because of something' did not arise.

One problem that the EAT had in deciding the case was that it found the ET's judgment not well structured, although ultimately it was possible to discern its essential findings of fact. At [51] and [52] the following guidance is given:

> 'It would have been better if the tribunal had structured its decision by asking itself the questions (i) what are the disabilities (ii) what are their effects (iii) what unfavourable treatment is alleged in time and proved and (iv) was that unfavourable treatment "because of" an effect or effects of the disabilities. Or, the tribunal could have reversed the order of the questions and asked instead (i) what unfavourable treatment is alleged in time and proved (ii) what was the reason for that unfavourable treatment (iii) what were the effects of the disabilities and (iv) was the reason for the unfavourable treatment an effect or effects of the disabilities. Whichever way a tribunal decides to approach the issues, it should structure its decision so that a reader can understand clearly what question is being asked and answered at each stage of the analysis.'

Remedies; compensation; mitigation

L [852]

***Edward v Tavistock and Portman NHS Foundation Trust [2023] EAT 33* (*17 March 2023,unreported*)**

The judgment of Mansfield DHCJ in the EAT in this case contains a detailed consideration of how the common law concept of mitigation of loss is to be applied when setting compensation in a discrimination case under the EqA 2010 s 124 **Q [1536]**. Its essential holding is that this is to be done by applying the classic approach (adopted in unfair dismissal law) of fixing a period by which the claimant should have obtained new employment to defray continuing loss of income, not by applying a percentage discount (even though such a percentage exercise is used elsewhere in employment law).

The claimant was an NHS band 5 data officer who was demoted to band 4 and then dismissed, ostensibly because there were no band 4 jobs. The ET found that this dismissal constituted victimisation because of his having

previously made allegations of discrimination. When it came to fixing compensation, several issues arose (including future loss and pension matters), but for present purposes the important point is that a serious question arose as to whether he had made reasonable attempts to mitigate his loss. He was unemployed for two and a half years before obtaining work at a higher rate. However, during this time he had not applied for any band 4 jobs. The ET dealt with this by giving him a period of grace before doing so, then applying a 50% deduction from his loss going forward.

On his appeal, the EAT held that the ET had erred in general by not showing that it had applied the basic questions of the burden of proof being on the respondent and whether the claimant had acted unreasonably. For general principles the judgment relied on the guidance given by Langstaff P in *Lindsey v Cooper Contracting Ltd* UKEAT/0184/15 (22 October 2015, unreported) which is set out at **L [852]**. The case was remitted on that basis. However, the judgment then went on to consider the percentage approach specifically and held that the ET had erred on this too. On this point, it was held that the EAT was bound by its early decision in the unfair dismissal case of *Gardiner-Hill v Roland Berger v Technics Ltd* [1982] IRLR 498, EAT, which is discussed at **DI [2665]** ff. At [46]–[64] of the judgment in the instant case there is detailed consideration of this case, its antecedents and the subsequent case law applying it. The respondent had argued that it was time to reconsider its validity, but the EAT declined to do so. Although it seemed to be accepted that there *might* be cases where a percentage approach could be taken, if there was a dearth of better evidence, it will normally be necessary for the ET to take a dating approach, which it was accepted meant engaging in a 'counterfactual' exercise as to what might have happened if other steps had been taken and by when.

At [81] (a)–(f) of the judgment the judge makes certain general points about dealing with an allegation of failure to mitigate, which may be of use in future cases. Finally, one general point made may be noted that perhaps sums up the ET's function here – the judgment states that an ET 'should not strive for a false appearance of precision; the tribunal is entitled to use its own judgment to fix a point in time'. As in other areas of compensation law, we are in 'broad brush' territory here.

DIVISION PI PRACTICE AND PROCEDURE

Case management; unless orders

PI [390], PI [404.01]

***Rojha v Zinc Media Group plc [2023] EAT 39* (*14 March 2023, unreported*)**

***Minnoch v Interservefm Ltd [2023] EAT 35* (*15 March 2023, unreported*)**

These two cases concern unless orders. The first is an example of a particular point about the consequences of breach; the second contains a more wide-ranging discussion of these orders generally, motivated by a concern about the number of appeals on them that the EAT has seen recently.

There was reported in **Bulletin 536** the case of *Mohammed v Guy's and St Thomas' NHS Foundation Trust* [2023] EAT 6 (24 February 2023, unreported) where Judge Tayler warned against too ready a strike out of the party's *whole* case, where the order in fact related to only part of it. However, it was accepted that there *may* be circumstances in which it is nevertheless appropriate to do so. Hot on its heels has come the decision of Eady P in *Rojha* upholding such a complete strike out by an ET. These are of course ultimately questions of fact, but what is interesting is to see the sort of factors at play in the case. The claimant had claimed sex, race and marital discrimination, unlawful deductions, unfair dismissal and a redundancy payment. She did not attend a case management hearing, at which the EJ made an order for further particulars on the race and deductions claims and a statement of all claimed losses. There was also a deposit order covering the sex and marital claims. The claimant did not provide the information or statement and did not pay the deposit. At a further hearing the EJ made unless orders in relation to these, stating that failure would lead to striking out of the whole claim, which was done. This included the unfair dismissal and redundancy claims. On her appeal, the EAT upheld the ET's strike out. The main factors were: (1) there were certain common features between the unfair dismissal/redundancy claims and the discrimination ones; (2) the statement of losses would have covered all claims; and (3) the conduct of the claimant in pursuing the claim. Taken together, these meant that the complete strike out was a necessary and proportionate measure.

In *Minnoch*, the decision of Judge Tayler in the EAT was to reverse an unless order strike out, more simply because it did not appear that the EJ had addressed the applicable law properly, in particular in relation to the question whether there had been material compliance. However, the interest and likely importance of the case is that in the judgment there is significant guidance for ETs as to how to apply that law properly, hopefully to avoid appeals. At [31] the judgment states that 'Appeals concerning unless orders are too large a part of the diet of the EAT'. It sets out at [21]–[30] the leading case law, including the judge's own decision in *Mohammed* above, concluding:

> 'The caution that these judgments express about the use of unless orders derives, in part, from the highly unusual feature of such orders in that they involve a degree of prejudgment. At stage 1, when deciding to make the order, a judge is essentially deciding that if there is material noncompliance, whatever the reason, the claim will automatically be struck out, subject only to the possibility of relief from sanction. Judges who make unless orders sometimes come to regret them as things can take an unexpected turn, resulting in extensive delay and extra work, giving the opportunity to repent at leisure an unless order made in haste.'

Of greater import, at [31]–[33] it then engages in 'Drawing the strings together' into a list of considerations to be addressed when applying each of the three necessary stages, namely (i) making an unless order, (ii) giving notice of the consequences and (iii) considering the possibility of relief from

sanctions. These paragraphs are too long to set out here, but should be consulted directly and may provide a checklist for ETs in the future.

Appeal to the EAT; time limit; extension of time; effect of mental illness

PI [1447.03]

Palihakkara v The English Sport Council [2023] EAT 27
(*21 February 2023, unreported*)

This decision of Eady P in the EAT raised the question of extension of time for appealing and the effect in such a case of mental illness, but in a case with a very long delay. It involved applying the guidance given in *J v K* [2019] EWCA Civ 5, [2019] IRLR 723, which is set out fully at **PI [1447.03]**.

The claimant was 675 days late in seeking to bring an appeal to the EAT. She relied on her mental health condition through that period. The Registrar refused to extend time and she appealed. The EAT, pointing out that in such a case it is for the EAT to retake the decision, posed the three questions set out in the *Abdelghafar* guidelines (**PI [1445]**) and para 4.7 of the EAT Practice Direction 2018 (**PI [1904]**): (1) what was the explanation for the delay? (2) was that a good explanation? (3) were there circumstances justifying the EAT in taking the unusual step of extending time? Here, there was evidence of depression and anxiety, but it was found to be partial and not wholly backed by medical evidence. The extension was refused, taking into account:

(i) the length of the delay;

(ii) the illness did not explain the delay throughout the whole of that period;

(iii) the claimant had been able, during it, to identify and set out her claims, including in a separate appeal;

(iv) her case was factually weak and, by this time, partly academic; normally it is not appropriate to take prospects of success (or otherwise) into account, but in a case such as this it was.

REFERENCE UPDATE

Bulletin	Case	Reference
533	*Tyne & Wear Passenger Transport Executive v NURMT*	[2023] ICR 148, CA
533	*Element v Tesco Stores Ltd*	[2023] ICR 208, EAT
533	*Marangaki v Iceland Foods Ltd*	[2023] ICR 250, EAT

Reference Update

Bulletin	Case	Reference
535	*Arvunescu v Quick Release (Automotive) Ltd*	[2023] ICR 271, CA
535	*Ellis v Bacon*	[2023] IRLR 262, EAT
535	*Davies v E E Ltd*	[2023] IRLR 258, EAT
535	*Clifford v Millicom Services Ltd*	[2023] IRLR 295, CA

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

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