Harvey on Industrial Relations and Employment Law

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

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

DIVISION AI CATEGORIES OF WORKER

Employees; the general rule against multiple employers

AI [14.01]; M [844]

***Fire Brigades Union v Embery [2023] EAT 51* (*14 April 2023, unreported*)**

This decision of the EAT under Bourne J is an application of the relatively recent decision of Judge Stacey (as she then was) in *Patel v Specsavers Optical Group Ltd* UKEAT/0286/18 (13 September 2019, unreported) which reaffirmed an old principle that an individual in general cannot be employed contemporaneously by two employers. It did so in a rather unusual context.

The claimant was employed by the London Fire Brigade (LFB) as a firefighter. He was elected as a senior official of the respondent union, as a result of which he was seconded full-time to the union by the LFB, in return for a monetary sum from the union. He worked full time for the union until 2019 when he was disciplined by it for breaching its rules by speaking at a pro-Brexit event. He was barred from office for two years. As part of his litigation against the union, he brought proceedings for unfair dismissal against it. The ET upheld his claim, applying the general tests for employment. The EAT allowed the union's appeal and dismissed the claim on the fundamental ground that he had not been the union's employee.

The basis for this decision was the rule against two employers. The precise ground for allowing the appeal was that the ET judgment did not reflect the union's arguments on this point. However, the EAT went on to consider the substantive law here. It is clear that in many circumstances a union officer can be the employee of the union (see **M [844]**), but this point was different. The claimant relied on the judgment of Silber J in *Prison Officers Association v Gough* UKEAT/0405/09 (17 December 2009, unreported) where it was held

that an employee of the prison service *could* be an employee of the POA when seconded to it. He relied on the well-known *tort/vicarious liability* case of *Viasysytems (Tyneside) Ltd v Thermal Transfers (Northern) Ltd* [2005] EWCA Civ 1151, [2005] IRLR 983 (see **AI [13]**) and said that no distinction was to be made between tort and employment cases here. However, the EAT in the instant case said that, although it might be possible to distinguish *Gough* on its facts (just), its view was that it 'would respectfully doubt the EAT's reasoning in that case'. The point is that *Gough* is now inconsistent with *Patel* where this whole matter was reviewed and it was held directly that tort and employment cases are *not* the same here, being subject to different policy considerations, as was held in *Cairns v Visteon UK Ltd* [2007] IRLR 175, [2007] ICR 616, EAT. For good measure, the judgment went on to say that, even if employment by the union also had been possible, it would have failed on the facts due to lack of sufficient contractual payment, control and power of discipline. However, the main point is the reaffirmation of *Patel* and the rule against multiple employers.

DIVISION AII CONTRACTS OF EMPLOYMENT

Restraint of trade; injunction; severance

AII [236], AII [268]

Boydell v NZP Ltd [2023] EWCA Civ 373

The principles applying to cases challenging the legality of a restraint clause are generally well established, with authorities going back over a century. Most cases that now arise therefore tend not to break new ground. This decision of the Court of Appeal falls into that category *but* it is arguably a good example of the application of those principles on fairly classic facts and has some interesting comments in the court's judgment by Bean LJ.

The respondent had been a senior employee of the claimant scientific manufacturing company. He was subject to several restraint clauses in his employment contract and a shareholder agreement. These covered non-solicitation and non-dealing, but the principal one was against going to work for a competitor for a period of a year after leaving. This was made subject to an interim injunction by the first instance judge, after the severance of certain aspects, including a reference to a wider group of companies than really applied to him. A two-year restraint in the shareholder agreement was not enforced.

On the respondent's appeal, the Court of Appeal upheld the judge's decision, making the following points:

(1) Construction – it is open to a judge to decide what the clause in question was really meant to cover and to discount any 'fantastical' interpretations which might be literally possible.

(2) Severance – this is covered by what is now the leading case of *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2019] IRLR 838 which is considered at **BI [236]** ff. Here, the judge had applied it properly, including considering if the clause was *still* too wide after the severance exercise (which it was not).

(3) Interim injunction – the starting point of course is still the *American Cyanamid* principles which are considered at **BI [268]** ff. However, the judgment states that these are 'neither a statute nor a biblical text' and the test ultimately is what is just and equitable. In particular, in spite of the emphasis on whether there is a 'serious issue' to be tried, in employment cases it may well be appropriate to go further and give at least a preliminary consideration to the likelihood of success. The other issue arising here was the caution that a court should adopt if there remain disputes of fact between the parties that really need to be decided at full trial. However, that is not an absolute rule and in this case these outstanding issues were relatively limited and did not prevent the issue of the injunction.

DIVISION BI PAY

National minimum wage; family member/domestic worker exemption; disapplication

BI [182.06]

***Thukalil v Puthenveettil [2023] EAT 47* (*5 April 2023, unreported*)**

The text at BI **[182.06]** sets out the decision in the previous hearing of this case (sub nom *Puthenveettil v Alexander* UKEAT/0165/17 (30 January 2018, unreported)) where it was held that the family member/domestic worker exemption in the NMW Regulations 1999 reg 2 (now the NMW Regulations 2015 SI 2015/621 reg 57 **R [3238]**) were open to challenge under EU law and to be disapplied by an ET under the European Communities Act 1972. This second appeal is from the reconsideration hearing where the ET did indeed decide that it was to be disapplied. It did so not just on the basis that it was indirectly discriminatory against women, but more specifically under art 157 of the TFEU on equal pay. In the EAT the employer argued that that article would only apply if the claimant had actually brought an equal pay action, but Kerr J in the EAT held that it could apply more widely to cases of indirect discrimination. On that basis, the ET had been entitled to hold that the regulation was not a proportionate means of attaining a legitimate end.

The key point to note now about this decision, however, is that it is of historic importance only. The hearing and decision took place during the Brexit transition period from 31 January 2020 to 31 December 2020. After the latter date, it is no longer possible for an ET to disapply under EU law and the 1972 Act. Thus, a person in the claimant's position now would not be able to claim the NMW because of the continuing exemption in (now) reg 57.

DIVISION DI UNFAIR DISMISSAL

Remedies; compensation; contributory fault

DI [2509], DI [2721]

***Topps Tiles plc v Hardy [2023] EAT 56* (*15 April 2023, unreported*)**

The claimant was dismissed because of an altercation with a customer. He brought ET proceedings for discrimination arising from disability (EqA 2010

s 15) and for unfair dismissal. In relation to the latter, the ET held (in advance of the remedies hearing) that the claimant was not guilty of contributory fault. The employer's appeal on disability discrimination was rejected by the EAT under Judge Walker. However, its appeal in relation to the contribution point was allowed, being remitted to the ET to reconsider at the remedy hearing.

The problem was that isolated in *Renewi UK Services Ltd v Pamment* EA-2021–000584 (26 October 2021, unreported) which is considered at **DI [2509]** in relation to the basic award and (more importantly) at **DI [2721]** in relation to the compensatory award. The case is authority that it is important to keep distinct the consideration of whether the employee's culpable or blameworthy conduct has contributed to the dismissal, from the counterfactual question of whether the respondent would have dismissed the claimant for that conduct if it had acted properly, reasonably and fairly. In the instant case, the ET had found culpable conduct on the facts relating to the altercation, but had gone on to find it did not cause or contribute to the dismissal 'because we do not agree that a reasonable employer could treat the claimant's handling of the episode, faulty though it was, as an act of gross misconduct in the overall circumstances of the case'. This was held to fall on the wrong side of the distinction isolated in *Renewi* and so the holding on contribution in the compensatory award could not stand. Moreover, on the facts the ET had not properly applied the separate test for the basic award ('just and equitable') and so the whole question of contribution remained at large.

DIVISION L EQUAL OPPORTUNITIES

Age discrimination; justification; cost or cost-plus

L [347.01], L [365]

Cook v Gentoo Group Ltd [2023] IRLR 357, EAT

The question of whether cost factors can constitute justification is particularly important in age discrimination cases because of the possibility of justifying *direct* discrimination. In the light of *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330, [2012] IRLR 491 (considered at **L [347.01]** ff) there is usually said to be a distinction between a bare cost defence and a 'cost-plus' one. This decision of the EAT under Judger Tayler is a good example of this in operation, arguably showing how careful an ET has to be in operating it.

The claimant was a senior manager in the respondent social housing organisation. Following a critical report by a regulator, it was decided to restructure, including dispensing with the claimant. Normally this would require board approval, but that would take time, during which the claimant would reach 55 and qualify for enhanced redundancy rights which would cost the organisation an extra £80,000. The decision was taken to expedite the procedure to avoid this. He was dismissed for redundancy quickly and brought ET proceedings for unfair dismissal and direct age discrimination.

The ET upheld the former but dismissed the latter on the basis that saving cost was a legitimate aim and the 'plus' element was the public interest in complying with the adverse report.

The claimant appealed against the age discrimination decision and the EAT upheld that appeal. The judgment contains an interesting discussion of *Woodcock* and holds that the ET had not applied it properly. One key distinction was that in that case the employer had employed proper procedures to avoid the extra cost, whereas here the employer had short-circuited its own procedures. Moreover, the ET had: (a) failed to consider the lengthy guidance given on justification in *Seldon v Clarkson, Wright & Jakes* [2012] UKSC 16, [2012] IRLR 590, [2012] ICR 716, and *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487, [2021] IRLR 132, [2021] ICR 110; and (b) had not carried out sufficiently the necessary balancing exercise between the employer's needs and the discrimination involved.

DIVISION NI LABOUR RELATIONS

Health and safety; detriment and unfair dismissal; rights of employees

NI [3589]

Miles v Driver and Vehicle Standards Agency [2023] EAT 62 (28 April 2023, unreported)

Like the leading case of *Rodgers v Leeds Laser Cutting Ltd* [2023] EWCA Civ 1659, [2023] IRLR 222, [2023] ICR 356, this decision of the EAT under Judge Tayler concerned the application of the special protection for employees/workers refusing to return to work (ERA 1996 ss 44 and 100 **Q [668.14]**, **Q [724]**) during the Covid pandemic. As in *Rodgers*, the claim here failed on its facts. However, the judgment contains one point of interpretation concerning the availability of health and safety representatives/committees which may be of importance in future cases.

The claimant was a driving examiner working at the Pontefract office. He had a kidney complaint that made him vulnerable. Tests ceased altogether in March 2020 due to Covid. When they resumed in July he was required to return to work. The employer had made certain adjustments to working practices and said that only those *extremely* vulnerable would be excused. The claimant was adamant that only two metre distancing was sufficient and refused to return. His pay was stopped and in August he resigned. He brought claims for health and safety detriment and (constructive) unfair dismissal and disability discrimination. These were all rejected by the ET and he appealed to the EAT.

On the health and safety issue, he had relied on sub-ss (1)(c) and (d) of ERA 1996 ss 44 and 100 (NOTE: the case arose before the 2021 amendments to s 44 – see **Q [668.14]** n 'General'):

(1) Sub-s (1)(c) – this applies to raising concerns over circumstances harmful to health, but only if the claimant was 'an employee at a place

where … there was no [H & S] representative'. The ET held that, although there was no rep actually *at* the Pontefract office, there was such a rep *covering it*, with whom the claimant could have raised his concerns. The EAT held that this was the right construction, disapproving his argument for a literal interpretation because of the possible anomalies and absurdities such an interpretation would bring. At [30] it is put thus:

> 'While the most literal reading of section 44(1)(c) ERA would require the safety representative or committee to be at the same place where the employee works, we consider that the section can also be sensibly interpreted to require that the place at which the employee works is one where there is such a representative or committee, albeit that the representative or committee is based at some other location, provided they cover the place at which the employee works. We consider the latter interpretation avoids absurdity and is consistent with the purpose of the provision. As the employment tribunal noted, the claimant's construction would mean that the respondent would have to have a safety representative or committee at each of its 1000 testing centres, even if there is a safety representative for the test centre who is easily contactable. Part of the purpose of the provision is to encourage employers to have safety representatives or committees and to encourage employees to raise straightforward health and safety concerns with them in the first place. On the claimant's literal reading of the provision, the existence of a safety representative or committee would not assist the employer if, for example, on the day in question the safety representative was working from home, as might commonly have been the case during the Coronavirus pandemic or was on holiday. It should be remembered that there is always the fall back of raising the matter with the employer even if there is a safety representative or committee if it was not reasonably practicable for the employee to raise the matter with the representative or committee, because, for example, they could not be contacted or were absent.'

Thus, this part of the claim failed as a matter of law.

(2) Sub-s (1)(d) – this applies where the employee (s 100) or worker (now s 44(1A)) leaves work or refuses to return to it, reasonably believing that (in circumstances of danger) it is serious and imminent. Here, the ET (in spite of not deciding the case pre-*Rodgers*) had taken the right legal approach that reasonable belief applies to both the seriousness / imminence *and* the existence of the circumstances of danger. However, the ET had held that, although the Covid background had constituted circumstances harmful to health under sub-s (1)(c), it did not constitute serious and imminent danger in which the claimant had a reasonable belief under sub-s (1)(d). Thus, this part of the claim failed on the facts.

The appeal was however allowed in relation to disability discrimination because of inconsistent findings of fact between that claim and the health and safety claims, and the case was remitted on that ground.

DIVISION PI PRACTICE AND PROCEDURE

Early conciliation; rejection of claim form for errors in EC requirements

PI [289]

Sainsbury's Supermarkets Ltd v Clark [2023] EWCA Civ 386

This latest episode in this long-running multiple equal pay claim was reported at EAT stage in **Bulletin 531**. The issue arose because, while the individual claimants had complied with the early conciliation (EC) procedure, the ET1s in question did not contain all the EC numbers. The respondents argued at a late stage that these claims were invalid for breach of ET Rules r 10 **R [2767]** which states in effect what must be in the ET1. The EAT held that the EC rules must be applied liberally and non-technically and that r 10 says what it means, namely that the claim must contain each claimant's name, but only *an* EC number. This was enough to satisfy the EC 'gatekeeping' function.

On the respondent's further appeal, the Court of Appeal have now upheld that decision. This was done firstly by agreeing with this literal interpretation of r 10. However, equally importantly, the court judgment given by Bean LJ goes on to give a second reason based more fundamentally on the procedure for an application. At [42] and [43] the judgment states that if the tribunal staff reject a claim under r 10 (or an employment judge rejects it under r 12), the claimant may seek reconsideration on the basis that either the decision to reject was wrong or the notified defect can be rectified, under r 13(1). However, if no such rejection occurs it is not open to a respondent to argue that the claim should have been rejected. Their remedy (if at all) is to raise any points about non-compliance with the Rules and to seek dismissal of the claim under r 27 or apply for it to be struck out under r 37. But even here this is not automatic because where such an application is made then the wide waiver power under r 6 is applicable and this applies to any failure to comply with any provision of the Rules (other than the requirement to use a prescribed form to present a claim or response).

Employment tribunals; civil proceedings orders

PI [675.02]

Williamson v Bishop of London [2023] EWCA Civ 379

The decision of the EAT in this case is considered at **PI [675.02]**. The claimant, who was subject to a civil proceedings order (CPO) under the Senior Courts Act 1981 s 42(1) barring him from bringing civil proceedings without permission, had brought an ET case for age discrimination without such permission. He then claimed to have been given retrospective permission by a judge. The ET held that this was not possible. The EAT agreed and that decision has now been upheld by the Court of Appeal.

Giving judgment, Simler LJ said that the point was whether proceedings without permission were a nullity altogether or were such that they could just be stayed unless and until the necessary permission had been given. Here, a deputy High Court judge had given permission on the basis that *these* proceedings were not themselves an abuse of process. The claimant relied on this in circumstances where, if a nullity was the result, his claim would be out of time. The judgment points out that there was no binding authority on the effect of s 42, which in its terms does not spell out its consequences. However, holding that the result is indeed a nullity, the court relied on the two cases discussed in the text at **PI [289]**, namely *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [2007] 4 All ER 177 (a similar nullity result under an equivalent provision in the mental health legislation), as applied at first instance under s 42 in *HM A-G v Edwards* [2015] EWHC 1653 (Admin). It was held that: (a) the wording of s 42 is in mandatory terms, imposing a condition precedent of permission, leaving no room for retrospective permission; and (b) in addition, the purpose of the section as intended by Parliament was to act as 'a filter not a barrier' (a well-known phrase here), and such a filter would not be effective if it could be overridden later. It was further held that both domestic and Convention law accepts that CPOs do not contravene human rights laws and that by definition the claimant knows of the order and so can apply for permission to sue in good time, even against the backdrop of the short three-month time limit for ET actions. The judgment concludes at [50]:

> 'There are good reasons why as a matter of general principle procedural failures should not lead to proceedings being a nullity. But that does depend on the purpose and importance of the provision in its statutory context. It seems to me to be evident for all the reasons I have given, that the express terms of section 42 SCA 1981, read in context and in light of the object and purpose of the section, impose a jurisdictional (and not merely a procedural) barrier on a litigant subject to a CPO wishing to institute proceedings. In my judgment Parliament intended to make leave under section 42 SCA 1981 a jurisdictional bar to the institution of effective proceedings where a CPO has been made. Neither the prospective respondent nor the court is required to take action where a proposed claim is made by a vexatious litigant unless and until the proceedings have the required leave of a High Court judge. As with section 139(2) MHA and as Lord Brown observed in *Seal*, the very inflexibility of the provision is an integral part of the protection it affords.'

Privacy; anonymity orders

PI [944]

Geraghty v Forose [2023] NICA 2, [2023] IRLR 376

The claimant, a girl of 15 employed part-time in the respondent ice cream shop, was sexually harassed by G there. Her complaint of sex discrimination was upheld by the NI industrial tribunal, before which the employer was given anonymity. By the time the case went to the NICA the relevant NI

tribunal rule on anonymity orders had been altered, bringing it into line with the GB ET Rules SI 2013/127 Sch 1 r 50 **R [2807]**, in particular by giving the tribunal greater discretion in making such an order. Under this rule, the NICA revoked the order. Important factors in doing so were:

(1) the claimant's wish for publicity to demonstrate what had happened and encourage others to object to such conduct;

(2) the fact that G had been criminally prosecuted for these actions, which had been reported in the local press; and

(3) there had been similar misconduct by G four years previously with other young girls; such similar fact evidence was permissible under the new rule and well within the tribunal's discretion.

The respondent's appeal was allowed in part on remedy, but on the principal point of anonymity he lost.

EAT; the right to a fair hearing; recusal of side member

PI [1612]

***Higgs v Farmor's School [2023] EAT 45* (*31 March 2023, unreported*)**

There was reported in **Bulletin 531** the first instalment in this case concerning recusal of an EAT side member on the basis of apparent bias (see [2022] IRLR 827, [2022] ICR 101, EAT) where the claimant, challenging her dismissal for tweets on the sensitive area of gender identity, successfully objected to one member because of their views and publications on the subject which were directly opposed to those of the claimant. When the substantive hearing of the appeal was imminent, the claimant objected to the other side member, but this time on a slightly different basis (which gives the case its legal interest), namely the *organisation* that he belonged to. He had been, at the relevant time, Associate General Secretary of the National Education Union which had taken a strong and campaigning position on issues relating to relationship education and gender identity in schools which, the claimant said, went to the heart of her case.

There being no allegations of actual bias against the member personally, Eady P in the EAT, as in the previous case, applied the well-known test for apparent bias in *Porter v Magill* [2002] 2 AC 357, [2002] 1 All ER 465 (see **PI [1613]**) as to whether a fair-minded and informed observer would think there was a real possibility of bias. The judgment acknowledges the difficulty of applying that to tribunal side members, especially in the case of a perceived conflict with their organisation – it is the very membership of such an organisation (trade union, commercial organisation, third sector concern) that may provide the sort of experience that side members are there to contribute. However, a line has to be drawn and here it was crossed, taking into account that the union had been campaigning about these issues in the school context that was the backdrop to the claimant's case. Having so found, the judgment points out that that does not give the forum (here the EAT) a discretion – it *must* order recusal. That was in spite of the lateness of the

objection. The end result was that, with the agreement of the sides, the President ordered that the substantive hearing be held before a judge alone.

REFERENCE UPDATE

Bulletin	Case	Reference
536	*Meaker v Cyxtera Technology UK Ltd*	[2023] IRLR 365, EAT
536	*Benyatov v Credit Suisse (Securities) Ltd*	[2023] IRLR 381, CA

Subscription and filing enquiries should be directed to LexisNexis Customer Services Department (tel: +44 (0)330 161 1234; fax: +44 (0)330 161 3000; email: customer.services@lexisnexis.co.uk).

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).

Published by LexisNexis