Harvey on Industrial Relations and Employment Law

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

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

LEGISLATION

New legislation on predictability of terms and conditions

The Workers (Predictable Terms and Conditions) Act 2023 obtained royal assent on 18 September. It is to come into force by order, which (according to a government statement) is likely to be in a year's time in order for employers to make any necessary changes, for the government to produce the necessary supporting regulations and for ACAS to produce a Code of Practice on the matter. In the meantime it will be put into Div Q as it stands in Issue 311. The new rights to request changes to increase predictability were suggested in the Taylor Review of 2017 and this is another Private Member's Bill adopted by the government. The Act operates by adding new provisions to the ERA 1996, as follows:

Part 8A on flexible working is expanded to include a new Part 2, ss 80IA–80IE (predictable work pattern: workers (except agency workers)), new Part 3, ss 80IF–80IL (predictable work pattern: agency workers), new Part 4, ss 80IM and 80IN (restrictions on multiple applications under this Part). The Schedule contains substantial amendments to the existing legislation (including to the Employment Relations (Flexible Working) Act 2023 before it comes into force).

New EAT Practice Direction

The President has issued a new Practice Direction (2023) to replace the 2018 Practice Direction (**PI [1901]**) and the EAT Practice Statements 2005 and 2015 (**PI [1965]**). It is available on the EAT website, under 'Practice Direction and Statements'. It came into force on 30 September and applies to appeals

commenced on or after that date, but *also* to appeals commenced before that date for steps that take place on or after it. It will be included in Division PI in Issue 311.

Amendments to the EAT Rules

The EAT Rules 1993 are amended by the Employment Appeal Tribunal (Amendment) Rules 2023 SI 2023/967, as from 30 September. Some of the changes are generally tidying up (eg removing vestigial references to the fees regime) and catching up with modern communications by specifically asking for not just telephone numbers but also email addresses in the forms in the Schedule to the 1993 rules. However, two more substantive changes can arguably be seen in the context of recent case law reported in these Bulletins:

(1) on the question specifically of appellants (especially litigants in person) making minor but potentially drastic mistakes when filling out the appeal forms; here, the following is added to r 37 **R [750]**:

> '(5) If the appellant makes a minor error in complying with the requirement under rule 3(1) to submit relevant documents to the Appeal Tribunal, and rectifies that error (on a request from the Appeal Tribunal or otherwise), the time prescribed for the institution of an appeal under rule 3 may be extended if it is considered just to do so having regard to all the circumstances, including the manner in which, and the timeliness with which, the error has been rectified and any prejudice to any respondent.'

(2) on the question more widely of ignoring of instructions to appellants, failing to comply with administrative orders and bad or uncooperative behaviour generally, a version of the following is added to each of the forms in the Schedule:

> 'Before submitting a Notice of Appeal, you should read and consider the relevant sections of the Appeal Tribunal Practice Direction. If you decide to submit an appeal, you must comply with the sections of the Appeal Tribunal Practice Direction relevant to each step you take in the appeal. You must also comply with the overriding objective and communicate with the Appeal Tribunal and the other party or parties in a respectful and appropriate manner.'

DIVISION DI UNFAIR DISMISSAL

Alternatives to dismissal; termination by agreement

DI [335]

Riley v Direct Line Insurance Group plc [2023] EAT 118
(*6 September 2023*)

The text considers the long-standing law on when a contract is ended by mutual consent, rather than dismissal, the essential point being that such consent is possible if freely entered into, especially to take up valuable

consideration, but equally an ET must test it thoroughly so that it is not too easy a card for an employer to play to avoid statutory rights. Not surprisingly, most of this territory has been fought over in the context of termination for redundancy. However, in this case before Judge Shanks in the EAT the context was (unusually) illness incapacity, but the same rules were applied.

The claimant was employed in a call centre, but was absent from work for a significant period; an attempt at a phased return failed. After a proper procedure, it was agreed that he was unlikely to return and that he should go on to the firm's PHI scheme at the top rate. This was remarkably generous, guaranteeing 80% of earnings up to retirement age (he was 28, meaning that payment would go until at least 2056). After the meeting organising this, he commented that 'It all makes sense. I know really this is where it's been heading for the last four years.' As the PHI was to be paid directly by the firm's insurer, the firm formally terminated his employment; it did so in a letter that referred to 'dismissal' on the ground of ill health. On leaving, the claimant claimed unfair dismissal. The ET turned this down on the preliminary basis that there had been no dismissal – the negotiations had been supportive, there was no pressure from the employer and the employee understood what he was agreeing to. In these circumstances, the linguistic point of the letter referring to dismissal was not determinative. The EAT agreed and rejected his appeal. At [23] the judgment sums the law up as follows:

> '(1) Whatever the respective actions of the employer and employee at the time when the contract is terminated, at the end of the day the question always remains the same: "Who really terminated the contract?" The issue is one of causation.
>
> (2) Termination of the contract of employment by the freely given mutual consent of both the employer and the employee is not a dismissal under section 95(1)(a).
>
> (3) The question how the contract was terminated is ultimately one of fact and degree and the tribunal must look at the realities rather than the form of the relevant transactions.
>
> (4) Because of the consequences for the employee that flow from a finding of consensual termination the tribunal must be astute to find clear evidence that a termination was indeed free and consensual. Such a conclusion cannot apply if there is deceit, coercion or undue pressure, in particular if the employee is under direct threat of dismissal by the employer. Conversely, where there has been negotiation and discussion and an opportunity for the employee to seek legal advice, a consensual termination may properly be inferred.
>
> (5) There is a distinction between an employee consenting to the termination of his employment and consenting to being dismissed by his employer. The latter analysis has often been considered appropriate in cases where employees volunteer for redundancy (probably as a matter of fairness because entitlement to a statutory redundancy

payment itself requires a "dismissal") but the existence or non-existence of a redundancy situation is not determinative.'

The reason for the dismissal; question of fact, not speculation

DI [799]

Greater Glasgow Health Board v Mullen [2023] EAT 122 (14 September 2023, unreported)

The main point at issue in this case before Lord Fairlie in the EAT is a short but important one – once an ET has determined as a matter of fact what the employer's reason (or principal reason) was and that the employer genuinely believed it to be so, it must adjudicate on fairness on that basis, not on a suspicion that there must have been some other 'real' reason behind it.

The employee was dismissed summarily for aggressive conduct to a colleague. On his claim for unfair dismissal, the ET found that the employer genuinely believed on reasonable grounds that he had been guilty of this. It went on to find that there were certain procedural glitches in the dismissal procedure, but instead of considering if these in themselves made the dismissal unfair, it conflated them with the reason for dismissal, which it found unfair because the glitches showed that there must have been some other reason operating. The EAT allowed the employer's appeal, holding that this was improper. At [28] the judgment states:

> 'Having unequivocally established the facts as to the principal reason for the dismissal, and concluded that the employer's belief in the existence of that reason was genuinely held, it was inconsistent with those findings for the Tribunal to base its decision on fairness (whether in whole or in part) upon a different factual hypothesis as to the reason for the dismissal.'

This could be seen as the flip side of another (venerable) principle in this area, namely that if an employer puts forward one reason for dismissal and fails to establish it, that makes the dismissal unfair even if there may have been another reason that could have justified it (see **DI [799]**).

DIVISION L EQUAL OPPORTUNITIES

Time limits; failure to do something; duty to make reasonable adjustments

L [829]

Fernandez v Department of Work and Pensions [2023] EAT 114 (14 September 2023, unreported)

Omissions to act in some way will naturally pose greater problems in relation to the start date for time limits than positive acts. What is the 'date' of an omission? The EqA 2010 seeks to deal with this in s 123(4) **Q [1535]**, but its application has not been easy. In the discrimination field, the text points out

that this issue will be particularly acute in an action for disability discrimination based on failure to make reasonable adjustments, for example where the employer needs to provide something but drags its heels (though the employee is given to understand that it is 'in hand'). This was much the case here in this decision of Judge Beard in the EAT. The ET took the view that during a significant period complicated by the COVID lockdown, working from home and family problems, the relevant date was too early for the claimant's eventual claim to be in time (and refused to extend time). It did so on the basis that it had to decide 'when the respondent [employer] might reasonably have been expected to make necessary reasonable adjustments', ie a wholly objective question.

On appeal, the EAT held that this was an insufficient application of the law here. Tracing the evolution of the interpretation of s 123(4) through *Matuszowicz v Kingston-upon-Hull City Council* [2009] EWCA Civ 22, [2009] IRLR 288, [2009] ICR 1170, and *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] IRLR 1050, [2018] ICR 1050 (see **L [829.01]**, **L [829.02]**), the judgment at [16] sums up the correct position as follows:

> 'a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.
>
> b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.
>
> c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.
>
> d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee.'

Head c refers to s 123(4)(a) which was not in issue here. Head d is the important one, adding the essential element missing from the ET's approach to s 123(4)(b) which was to consider the reasonable date from the point of view of factors known by, or reasonably knowable to, *the claimant*. The test ultimately is an objective one (not just what the claimant subjectively thought), but arguably the qualification here will be particularly important in these 'dragging out' cases and must be applied properly by an ET.

DIVISION PI PRACTICE AND PROCEDURE

The claim; amendment; adding a new claim out of time

PI [311.15]

***MacFarlane v Commissioner of Police for the Metropolis [2023] EAT 111* (*12 September 2023, unreported*)**

The determination of an application to amend an existing claim is usually very much a question of fact for the ET. However, in this case before Ford DHCJ in the EAT there arose a significant issue of law. The judgment comes down on the side advocated in the text.

The claimant brought a claim for unfair dismissal. At a preliminary hearing, she confirmed that she was not alleging breach of the whistleblowing provisions. Shortly afterwards, however, she sought to amend her claim to include whistleblowing dismissal. The EJ rejected this, partly because of her assurance at the preliminary hearing, but more importantly because she was trying to add a new type of legal claim reliant on new factual allegations. It was also held that the balance of disadvantage of an amendment was in the employer's favour.

The claimant appealed against the refusal, arguing that the allegation of whistleblowing dismissal under the ERA 1996 s 103A was simply a *form* of unfair dismissal generally, the subject of her original (in time) claim. She relied on *Pruzhanskaya v International Trade and Exhibitors (JV) Ltd* UKEAT/0046/18 (17 July 2018, unreported) which, on similar facts, had adopted this view of their relationship (see **PI [311.16]**). However, the EAT rejected this argument and dismissed the appeal. As is argued at **PI [311.17]**, it held that the decision in *Pruzhanskaya* is wrong on this point because it is inconsistent with: (1) the general principles of justice in the context of amendments; (2) the basic authority of *Selkent Bus Co Ltd v Moore* [1996] IRLR 661, [1996] ICR 836, EAT; and (3) the decision of the Court of Appeal in *Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148, [2013] IRLR 953, [2013] ICR 209. The correct approach is that in *Arian v The Spitalfields Practice* [2022] EAT 67 (22 February 2022, unreported), again on similar facts, where it was held that there is *no* rule that all forms of unfair dismissal come within one overall categorisation for these purposes, see **PI [311.17]**.

Employment Tribunals; representation; litigant in person

PI [772]

Andrews v Bryson Charitable Group [2023] NICA 26, [2023] IRLR 847

The question of representation, or more precisely accompaniment, for a litigant in person arose in this case before the NI Court of Appeal in a rather unusual way. The claimant brought a whistleblowing dismissal case. She was a litigant in person and her claim was rejected. In her appeal she argued that she had been denied a fair hearing. The problem was that she had wanted to be accompanied by someone acting as a Mackenzie friend and for her two

witnesses to stay with her but this had been refused by the EJ. The reasons for this were: (1) restricted seating during COVID; and (2) the existing seats were largely taken up by trainee barristers shadowing the ET as part of their training. The Court of Appeal allowed her appeal. They accepted the COVID limitation and that the trainees had a perfectly good reason to be there *but* held that they should not have been given priority to the claimant's disadvantage, especially as she was finding the whole procedure stressful and similar restrictions had not affected the respondent employer which was legally represented.

Form of ET judgments; attitude of EAT to ET judgments

PI [981], PI [1401]

Edwards v Pick Everard [2023] EAT 61, [2023] ICR 975

This case concerned an unsuccessful claim for disability discrimination by an employee dismissed for over-use of a mobile phone and storing documents wrongfully. The ET held that these matters were not related to her disability. The EAT agreed and said that having permissibly come to that conclusion the ET did not have to look into the claim further. So far, so ordinary, but the interest in the case is the general guidance given by Judge Tayler at [28]–[39] as to the writing of ET judgments and the approach that the EAT should take to considering them on appeal. Part of this appears to be a *cri de coeur* about what may be seen as the tendency of ET judgments to get ever longer.

These paragraphs merit reading in full. A précis is as follows:

(1) The fundamental requirements of an ET judgment are set out in the ET Rules SI 2013/1237 Sch 1 r 62(5) **R [2819]**. However, this is to be read in the light of the fundamental objectives, and the extent of explanation in the judgment must be proportionate to the ET's 'limited resources'.

(2) There must be a fair hearing overall, with an opportunity for the parties to make their cases and to be given reasons.

(3) There has been a tendency for ET judgments to get ever longer, even though an ET has limited time. 'Concision is something to be recommended', to keep judgments to a reasonable length.

(4) The EAT on appeal should read judgments fairly and in their entirety, and should not indulge in what Mummery LJ called 'pernickety critiques'.

(5) While the basic law may need to be set out, the ET should avoid 'extensive quotations of law in an age of the word processor that may not be relevant to the particular case'.

(6) Where there has been a proper summary of the relevant law, the EAT should be slow to conclude that the ET has not applied it properly.

(7) Rule 62(5) itself only requires the setting out of the 'relevant' law and the ET should stick to this.

(8) 'It is also worth noting that, while judgments are set out in a structured format, the process of deliberation is often iterative. During deliberations the employment tribunal will come to focus on the core issues. The judgment and the reasons are designed to show the outcome rather than the totality of the thought processes of the employment tribunal. The employment tribunal should explain why it reached its final decisions.'

REFERENCE UPDATE

Bulletin	Case	Reference
535	*Arvunescu v Quick Release (Automotive) Ltd*	[2023] ICR 954, CA
538	*Thukalil v Puthenveetil*	[2023] ICR 987, EAT
538	*Williamson v Bishop of London*	[2023] ICR 1004, CA
538	*Topps Tiles Ltd v Hardy*	[2023] IRLR 843, EAT
539	*University of Huddersfield v Duxbury*	[2023] IRLR 811, EAT
539	*Lovingangels Care Ltd v Mhindurwa*	[2023] ICR 1021, EAT
540	*Greasley-Adams v Royal Mail Group*	[2023] ICR 1031, EAT
540	*Higgs v Farmor's School*	[2023] ICR 1072, EAT
540	*Phipps v Priory Education Services Ltd*	[2023] IRLR 851, [2023] ICR 1043, CA
541	*Jackson v University Hospitals of North Midlands NHS Trust*	[2023] IRLR 796, EAT
541	*Aspect Windows (Western) Ltd v Retter*	[2023] IRLR 816, EAT
541	*R (ASLEF) v Secretary of State for Business and Trade*	[2023] IRLR 823, Admin
541	*Olsten (UK) Holdings v Adecco Group European Works Council*	[2023] IRLR 859, 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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