Harvey on Industrial Relations and Employment Law

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

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

LEGISLATION

Revised Code of Practice on flexible working

ACAS have published their revised Code of Practice on requests for flexible working (replacing the code of practice set out at **S [310]**), following a consultation exercise in 2023. It is to be brought into force by order; the aim is for this to be in April 2024. It will be incorporated into Div S in Issue 314.

Immigration law changes

The maximum penalty for contravention by an employer of the rules on employing people subject to immigration control (see **AII [20.07]**) is raised by SI 2024/132 from £20,000 to £60,000. This was originally to be from 22 January but that was subject to slippage which meant that the alternative date of 'the twenty-first day after the day on which it is made' became applicable. The SI was made on 23 January, which means (if your humble editor has used his fingers and toes correctly) that the change comes into force on 13 February. The SI states that the increase does not apply to a contravention occurring solely before that date.

By virtue of the Immigration (Restrictions on Employment and Residential Accommodation) (Codes of Practice) (Amendment) Order 2024 SI 2024/78 the code of practice set out at **S [2701]** is updated and replaced by the 'Code of Practice on illegal working: Right to Work scheme for employers'. This was issued on 23 January 2024 and also comes into force on 13 February.

These changes will be incorporated into Div S in Issue 314 and covered in Div AII in Issue 315.

Removal of an exception to the national minimum wage

The exception in the Minimum Wage Regulations 2015 SI 2015/621 reg 57(3) relating to workers residing in the employer's home and 'treated as' family has

caused problems of interpretation and potential incompatibility with EU law (see **BI [181]**). Although the latter problem was liable to disappear with the demise of EU principles of interpretation, the Low Pay Commission recommended getting rid of the exception altogether. This is now effected by the National Minimum Wage (Amendment) Regulations 2024 SI 2024/75, as from 1 April. The 'pure' family worker exception in s 57(2) is unaffected. This change will be incorporated into Div R in Issue 314.

New rules on the composition of employment tribunals and the EAT

As was reported in **Bulletin 545**, the provisions of the Judicial Review and Courts Act 2022 ss 35, 36 and 38 came into force on 7 November 2023, substituting the ETA 1996 ss 4 and 28, to replace (in relation to the composition of ETs and the EAT) the previous detailed rules with regulation-making powers. These have now been exercised in the Employment Tribunals and Employment Appeal Tribunal (Composition of Tribunal) Regulations 2024 SI 2024/94 which set out in regs 3–6 the replacement provisions. Regs 7 and 8 make heavy amendments to the EAT Rules 1993 and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237. Reg 9 stipulates that until the Senior President of Tribunals makes the necessary directions under regs 3, 4 and 6, constitution of ETs and the EAT is to remain as previously. These changes will be made in Div R in Issue 314 and in Div PI in Issue 316.

DIVISION CIII WHISTLEBLOWING

Exclusion of job applicants; effect of European Convention

CIII [8], CIII [10], CIII [130]

***Sullivan v Isle of Wight Council [2024] EAT 3* (*22 January 2024, unreported*)**

One principal limitation on the otherwise wide protection of genuine whistleblowers is that it does not apply to job *applicants*. This is why, when that was perceived to be a particular problem in the NHS, special legislative provision was made to cover that organisation (see **CIII [130]** ff). This case before Ellenbogen J in the EAT was an attempt to fill this gap generally by using the European Convention. The argument (on behalf of such a job applicant claiming to have been disadvantaged because of whistleblowing by her) was that the lack of coverage was contrary to art 10 on freedom of expression, which then brought into play art 14 on non-discrimination due to coverage by one of the other articles or 'some other status'. If this was established, the argument was that this then required the ERA 1996 s 47K (which extends the coverage to enumerated categories) to be supplemented by court decision to include job applicants.

The ET rejected these arguments and its decision was largely upheld by the EAT. Applying the four tests set out in *Gilham v Ministry of Justice* [2019]

UKSC 44, [2020] IRLR 1655 (the district judge case, see **CIII [9]**) on challenges under the Convention (set out at para [30] of the EAT judgment), the claimant here failed on two – she had not shown that she had been treated unfavourably in comparison with others who were factually analogous, and being a job applicant did not come within some other status within art 14. The ET had then not applied the justification element properly, but in the circumstances that did not affect the result. It was also held that, even if the claimant had succeeded, it would not have been possible to amend s 47K so fundamentally. The end result was that the accepted gap in the protection would have to be filled, if at all, by amending legislation.

DIVISION DI UNFAIR DISMISSAL

Compensatory award; loss caused by the dismissal; applicability of novus actus interveniens

DI [2528.02]

McNicholas v Care and Learning Alliance [2023] EAT 127, [2023] IRLR 975, [2024] ICR 45

As the text points out at **DI [2528.02]**, the requirement that the compensatory award reflect loss sustained 'in consequence of the dismissal' imports an element of causation. This is of course a well-known aspect of both contract and tort generally. This case before Lord Fairley in the Scottish EAT had to consider the applicability of one particular common law concept here, namely the defence of *novus actus interveniens*. Its result is that that concept can apply in employment law, but that it is of narrow scope and an ET should handle it with care.

The claimant was a teacher of early years and children with autism. She brought proceedings for detriment due to whistleblowing, which were accepted by the ET. It also found that as part of the fallout from these events, the employers had made complaints about her fitness to teach to the General Teaching Council for Scotland, which were made in bad faith and with little substance. Nevertheless, the Council did decide to investigate her, which caused her considerable distress. When the ET came to remedies, it awarded compensation *but* only up to the date that the Council decided to investigate, on the basis that that constituted a *novus actus interveniens*.

The EAT allowed her appeal. It held that, applying general common law authority, for there to be a *novus actus* the intervening event has to become the sole and reasonable cause of the future loss, completely replacing the original cause. Conversely, there will be no *novus actus* if the third party's acts were a natural and reasonable *consequence* of the original wrongful act(s). On the facts here, the Council's decision clearly came within the second category, especially in the light of the factual finding of bad faith and the complaints to the Council being motivated by retribution against the claimant.

This is potentially an important point because there have been allegations in the press for some time now of employers of employees in regulated employments using the threat (or, as here, the actuality) of reference to the

regulator as a tactic in a dispute. This case shows that if an employer is found to have done so cynically and without good cause, the employee can expect *full* compensation.

Compensatory award; Polkey reduction and contributory fault; effect of temporary new employment; limits of joint liability

DI [2582], DI [2724.01]; L [852]

***Astha Ltd v Grewal [2023] EAT 170* (*30 November 2023, unreported*)**

In this case before Carr DHCJ in the EAT the claimant won his claims for unfair dismissal, EqA 2010 s 15 discrimination arising in consequence of disability and failure to provide written particulars of employment (EmA 2002 s 38). His claims were against both the employer and a named individual, and compensation was awarded against both, under the employment rights legislation and the EqA 2010. On the employer's appeal on remedy, three important elements arose:

(1) The ET had declined to make a reduction for contributory fault because it had already made a reduction to reflect the likelihood of loss of employment anyway, under what was referred to as the '*Chagger/Polkey'* principle (the reference to *Chagger* being the discrimination law equivalent of the *Polkey* reduction; see **L [852]**). Its authority for this was *Lenlyn UK Ltd v Kular* UKEAT/0108/16 (22 November 2016, unreported) (see **DI [2724.01]**). The employer argued that that case was wrongly decided, but the EAT disagreed; it establishes that in these circumstances an ET must be *careful* that it does not produce double counting for any circumstances counting against the claimant; the ET had applied that properly on the facts here. The same principle applies in a discrimination case.

(2) The claimant had obtained new employment after termination, but that had not lasted long. The ET had allowed compensation to reflect a period going beyond that loss of the new job. The employer argued that the new employment broke the chain of causation, but again the EAT disagreed. It applied the established principle in *Dench v Flynn & Partners* [1998] IRLR 653, CA (see **DI [2582]**) that compensation can continue in such circumstances. At [22] the judgment states:

> **'**On the facts of this case, when the Claimant secured alternative employment at a lower rate of pay and then lost that employment through no fault of his own, it seems to me that there is no scope for excluding loss of earnings after he had lost that employment due to unrelated factors over which he had no control. Therefore, that subsequent dismissal did not, in my view, provide a basis on which the Tribunal might have reached a conclusion that the chain of causation had been broken.'

In one sense, that conclusion was easier to reach here because, as stated, the new employment was at a *lower* wage, so that there was continuing *net* loss through that period anyway; the harder case here is where the dismissed employee gains temporary alternative work at a higher wage. However, the application of *Dench* was clear, and again accepted as equally applicable to a discrimination case.

(3) While there can be joint liability between employer and named individual in discrimination law, there is no provision for it in the employment rights legislation. Thus, the award against the individual in relation to the award for unfair dismissal could not stand. The EAT also held that the same applied to an award under the EmA 2002 s 38.

Subject to the adjustments under point (3), the ET had applied the compensatory principles properly.

DIVISION F TRANSFER OF UNDERTAKINGS

Transferring rights and obligations; statutory rights; transfer of perpetrator

F [122]

***Sean Pong Tyres Ltd v Moore [2024] EAT 1* (*29 January 2024, unreported*)**

This is a TUPE case with a difference, raising a point of interpretation, as Judge Stout says at the beginning of her judgment, on which there has been no previous direct authority. It concerned facts whereby the claimant had *not* transferred but the individual who he alleged had harassed him *had* transferred. Did liability for that person's acts pass to the transferee employer? The answer was that it did not, but the process for getting there was not straightforward.

The claimant was employed by the respondent company A. He resigned on 19 April due, he said to the actions of fellow employee O. He brought ET proceedings for constructive unfair dismissal under the ERA 1996 and age and race harassment under the EqA 2010; these were brought against Co A, but not against O himself. Before the ET, at a late stage, Co A divulged that on 1 July there had been a TUPE transfer to Co B, which included O. On that basis it sought an amendment to add Co B as a respondent which, it said, should become liable for O's acts under TUPE SI 2013/246 reg 4 **R [2293]**. The ET held that the regulation did not apply because the claimant had not been subject to the transfer and the opposite situation of O having transferred was not covered. In any event, even if the regulation did apply, the request to amend was rejected on ordinary *Selkent* principles.

Co A appealed to the EAT, which dismissed the appeal. The short answer was that the ET had applied the amendment rules properly and so the TUPE transfer point could not be taken. However, given the unusual nature of that point the judgment goes on to consider it and again finds that the ET got it right. The first point that it clears up is that in any event reg 4 could not apply

to liability for unfair dismissal because the ERA 1996 does *not* operate on the basis of vicarious liability – liability is personal to 'the employer' and there are no provisions for making individuals personally liable. The problems arose because, in contrast, the EqA 2010 does encompass personal liability and vicarious liability (s 109). Thus, the question of the effect of a transfer of O to Co B did arise.

Counsel for Co A had found a county court judgment in which it was held that vicarious liability for personal injury caused by Co X's employee did transfer to Co Y when that individual tortfeasor was TUPE transferred to Co Y. Did that apply here? The judgment accepts that it was not a binding precedent, but says that it was a well-considered decision which may well be right in tort law. However, it goes on to distinguish it as not applicable to the specific scheme of the EqA 2010. At para [32] the judgment sets out nine reasons ((a) to (i)) why this is so. These are too long to set out here, but it is suggested that they read particularly convincingly. This is important because the judgment also makes clear that, not only was the point novel and the case resolvable anyway on the amendment point, but also, because the claimant (originally a litigant in person) was debarred from appearing, the EAT had not heard adversarial arguments from both sides. In spite of that health warning, however, the level of analysis of the TUPE point suggests that the case should be treated seriously on this fascinatingly odd point (fascinating at least to TUPE geeks – you know who you are).

DIVISION L EQUAL OPPORTUNITIES

Duty to make reasonable adjustments; employer's knowledge

L [406]

***Glasson v The Insolvency Service [2024] EAT 5* (*23 January 2024, unreported*)**

There is an interesting remark in Judge Auerbach's judgment in this EAT decision that, whereas it is often the case that lawyers should be careful with using jargon, the phrase 'constructive knowledge' is so well worn and frequently used (here, to summarise the provisions of the EqA 2010 Sch 8 para 20 **Q [1597]** on employer's knowledge in a reasonable adjustments case) that its use is entirely legitimate. What the case shows, however, is that it is not an infinitely elastic concept and care may need to be taken to ensure that any alleged such knowledge must relate to the exact disadvantage relied on; the facts show this clearly.

The claimant, a longstanding existing employee, applied for a promotion. He had a stammer, which was known to the employer. On the pre-interview form that he completed he mentioned this and said that it meant he might need more time to answer questions. He did not get one of the two posts in question because, although he was told later that he had performed well, he narrowly came third overall. He brought proceedings for disability discrimination, primarily on the basis of failure to make reasonable adjustments.

However, a complication arose because he did not found this on a need for extra time but because he said that his stutter meant that he had gone into 'restrictive mode' during the interview, giving shorter answers than he otherwise might have done. This was not actually known by the employer, so the question arose whether it had had constructive notice of it. The ET looked at all the facts and held that such notice could not be imputed to the employer. The EAT rejected the claimant's appeal. There was some evidence that he had given shorter answers, but this was not enough to put the employer sufficiently on notice as to this condition of which it knew nothing (reading over into reasonable adjustments the guidance on employer knowledge under EqA 2010 s 15 in *A Ltd v Z* [2019] IRLR 952, [2020] ICR 199, EAT which is set out at **L [374.10]**). The ET had permissibly held that other factors negated the short answers point, in particular that the claimant had not mentioned this condition in the pre-interview form, he had performed well at the interview, he had undertaken a similar interview on a previous occasion at which he had raised no such concerns and his previous employment generally had been so satisfactory. The moral of the story for employees in similar circumstances seems to be to raise concerns fully *before* an interview, not leave it to afterwards to claim that the employer *must* have realised the position.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time for presenting complaint; 'just and equitable' extension; mistake or ignorance by the claimant

PI [282]

***Holbrook v Cosgrove [2023] EAT 168* (*10 January 2024, unreported*)**

One of the ways in which the 'just and equitable' extension power in the discrimination legislation is wider than the 'not reasonably practicable' power in the employment legislation is that, as pointed out at **PI [282.02]**, there can be an extension under the former based on a change in the law meaning that the claimant now potentially has a legal claim which did not seem possible at the time that the primary time limit expired. A key case here is *Foster v Glamorgan Health Authority* [1988] IRLR 277, [1988] ICR 526, EAT, the facts of which are set out at **PI [282.03]**. The instant case before Choudhury J in the EAT follows the approach of that case and is an interesting example of the basic principle that there are no rules of law here and that each case must be considered on its facts.

The claimant, a practising barrister, was expelled from his Chambers after sending a tweet which was considered by his colleagues to be discriminatory and offensive. He considered that his treatment was because of his belief in social conservatism, in particular in relation to identity politics. His expulsion took effect from 1 February 2021, but he did not present his claim of belief discrimination until 30 September 2021, five months out of time. He sought an extension of time claiming that his failure to lodge the claim in time was

because of the high-profile ET decision in *Forstater* that a person's gender-critical belief did not qualify for protection under the Eq A 2010 which he understood as meaning that his claim of belief discrimination also stood very little chance of success. The decision of the ET in *Forstater* was overturned by the EAT on appeal on 10 June 2021 (*Forstater v CGD Europe* [2021] IRLR 706, [2022] ICR 1, see **L [211.11]**) but he did not read that judgment until 23 August 2021. He said that was because he was preoccupied with Bar Standards Board proceedings against him in relation to his Twitter activity but that as soon as he did read the EAT judgment, he realised he might have a claim and sought advice and presented his claim within a short time thereafter. He contended that, in these circumstances, he had not acted unreasonably in failing to present his claim in time. The ET, rejecting his claim, held that his belief that his claim would not succeed was not reasonably held; that the BSB proceedings were not a good reason for him not to read the EAT's judgment in *Forstater* and to consider and pursue a potential claim; and that the balance of prejudice pointed to the refusal of an extension of time. The claimant appealed but the EAT dismissed the appeal. It held that: (1) his prospects of establishing social conservatism as a protected belief were no poorer than for a host of beliefs, political, religious or otherwise, in respect of which there had been no adverse, binding ruling by any court or tribunal; (2) the ET's decision in *Forstater* was a first instance decision on a different belief and was far from directly analogous; (3) the fact that his understanding of the legal position was shared by some academics and legal commentators did not mean that his misapprehension as to the legal position was reasonable; (4) the ET was entitled to reject his case that he was so preoccupied with the BSB proceedings that nothing else crossed his mind; and (5) as to the balance of prejudice, there was no error of law or principle in the ET's approach to the exercise of its broad discretion in relation to whether it would be just and equitable to extend time.

Extension of time for presenting claim; 'just and equitable' extension; strictness of test

PI [279]

***Jones v Secretary of State for Health and Social Care [2024] EAT 2* (*23 January 2024, unreported*)**

In this case in the EAT under Judge Tayler, the claimant had applied internally for a post. On 2 April it was given to a competitor; it was then only on 3 July that he found this out. He asked for details of the ethnicity of the appointee but there was no reply, and indeed this was not divulged by the employer until it lodged its ET3. On 29 October the claimant issued a claim for race discrimination. The ET held that time ran from 2 April, the claim was out of time and it was not just and equitable to extend time. The claimant appealed, relying on the double delays in finding out the appointment and then finding out the ethnicity of the appointee. However, the EAT dismissed the appeal, on the basis that it could only reverse the ET if its decision was perverse, and that the ET had considered the relevant factors fully, inter alia taking the view that the claimant had had suspicions about the

appointment even in the absence of the ethnicity information, which meant he should have claimed in time. Its decision therefore stood.

Those are the bare bones of the decision, but it has wider interest for three reasons:

(1) It arguably shows the difficulties that a claimant can have in these circumstances; it was accepted that lack of knowledge of crucial information (such as race) can justify an extension of time, but that is by no means certain.

(2) The correct approach for an ET to take was considered fully by the EAT. It starts by pointing out that reference has often been made to the judgment of Auld LJ in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434 where he said that time limits should be applied 'strictly in employment cases' and that an extension should be the exception, not the rule. The EAT in the instant case disagreed and said that use of that mantra 'should stop'. Instead, ETs should be guided instead by the views expressed (stressing the wide discretion available instead) in *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327 (see **PI [279]**) and by Leggatt LJ in *Abertawe Bro Morgannwg University Hospital Board v Morgan* [2018] EWCA Civ 640, [2018] IRLR 1050, [2018] ICR 1194, which are quoted extensively in the judgment which points out that this was also the approach taken in the recent case of *Owen v Network Rail Infrastructure Ltd* [2023] EAT 106 (1 August 2023, unreported) (see **Bulletin 542**).

(3) The judgment ends by making two comments about cases such as these:

  (i) It is critical of employers who do not disclose important information (in this case, relating to ethnicity) at an earlier stage, pointing out the danger that, if they do not do so, that could be a factor in the ET deciding that a prima facie case has been made out, such as to justify a statutory reversal of the burden of proof. However (as the claimant here might point out) that assumes that the claim has been able to proceed in the first place.

  (ii) On that point, the judgment also says that this sort of information can be obtained under ET Rules SI 2013/1237 Sch 1 r 31, but again that is subject to the claim getting within the system. It points out that one of the main problems here has been the abolition of the former questionnaire procedure which allowed requests for information in discrimination cases before issuing proceedings. In its absence, a claimant can find themselves in a chicken-and-egg situation.

Settlement agreements; coverage of future claims

PI [729]

Bathgate v Technip Singapore PTE Ltd [2023] CSIH 48

The facts of this case, concerning an alleged incident of age discrimination post-dating a settlement which purported to cover such a claim, are set out at

PI [729]. The ET held that the claim was barred, but Lord Summers in the EAT allowed the claimant's appeal, holding that the requirement in the EqA 2010 s 147 that such an agreement must relate to 'the particular complaint' ruled out coverage of a future liability, if only on a textual analysis. In so holding, he went against the view of his fellow judge Lady Smith in *Hilton UK Hotels v McNaughten* UKEATS/0059/04 (20 September 2005, unreported) and *McWilliam v Glasgow City Council* [2011] IRLR 568, EAT (see **PI [729.03]**) where she held that future claims can be compromised under the statute, as long as they were sufficiently particularised.

There has been some uncertainty in this area because, although it was considered by the Court of Appeal in *Hinton v University of East London* [2005] EWCA Civ 532, [2005] IRLR 552 (see **PI [729]**, **PI [729.02]**), that case focused mainly on the 'particularity' point (being concerned about the use of generic or 'rolled-up' drafting) rather than this 'future claims' point. However, the Inner House of the Court of Session have now considered the issue directly and have overturned the EAT and reinstated the ET's decision that the claim cannot proceed. They held that: (1) the various protections for the employee built in s 147 do *not* exclude the settlement of future claims so long as the types of claim are clearly identified and the objective meaning of the words used is such as to encompass settlement of the relevant claim; (2) the requirement that the contract must 'relate to the particular complaint' does not mean that the complaint must have been known of or its grounds at least been in existence at the time of the agreement; and (3) the words 'the particular complaint' simply require an ET to ask whether the complaint being made is or is not covered by the terms of the contract; they import no temporal barrier to post-employment claims of the kind pursued here. This is summed up at [31] of the judgment:

> 'We have not found support for the EAT's approach in the words of the legislation. One would expect a Parliamentary intention to lay down rules limiting parties' freedom of contract to be expressed in clear and unequivocal terms. For the following reasons we consider that the various protections for the employee built into section 147 do not exclude the settlement of future claims so long as the types of claim are clearly identified and the objective meaning of the words used is such as to encompass settlement of the relevant claim. The requirement that the contract must "relate to the particular complaint" does not mean that the complaint must have been known of or its grounds at least in existence at the time of the agreement. The EAT suggested that the words "the particular complaint" were not apt to describe a potential future complaint … However in our view these words simply require one to ask whether the complaint being made is or is not covered by the terms of the contract. They import no temporal barrier to post-employment claims of the kind now being pursued against the respondents.'

Technically, an ET in England is not bound by this decision, but it would be surprising if it were not followed, given its clear resolution of this lingering issue.

REFERENCE UPDATE

Bulletin	Case	Reference
541	*Olsten (UK) Holdings Ltd v Adecco European Works Council*	[2024] ICR 1, CA
543	*MacFarlane v Commissioner of Police for the Metropolis*	[2024] ICR 22, EAT
544	*Chief Constable of the Police Service of NI v Agnew*	[2024] ICR 51, SC
545	*Omar v Epping Forest District Citizens Advice*	[2024] IRLR 92, EAT
545	*For Women Scotland Ltd v Scottish Ministers*	[2024] IRLR 138, CSIH
545	*Independent Workers' Union of GB v CAC*	[2024] IRLR 148, SC
545	*R (Palmer) v North Derbyshire Magistrates' Court*	[2024] IRLR 169, SC

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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).

Published by LexisNexis