Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

Increase of employment protection limits

By virtue of the Employment Rights (Increase of Limits) Order 2024 SI 2024/213 the usual annual uprating takes place from 6 April, the increase being of 8.9% (the increase in RPI from September 2022 to September 2023). The maximum pay for statutory purposes goes to £700 pw, giving a maximum statutory redundancy payment and basic award for unfair dismissal of £21,000. The maximum compensatory award goes up to £115,115, giving a combined maximum in an ordinary unfair dismissal case of £136,115. The special basic awards for certain provisions of TULR(C)A 1992 and for certain forms of automatically unfair dismissal are raised by the same percentage.

These changes will be made in Div Q in Issue 316.

Changes to paternity leave and pay

The Paternity Leave (Amendment) Regulations 2024 (still in draft at the time of writing) and the Statutory Paternity Pay (Amendment) Regulations 2024 (SI 2024/121) will amend the law on paternity leave. The principal changes are that employed fathers and partners will have: (a) the additional choice to take the current entitlement of up to two weeks of paid leave in two non-consecutive blocks of one week of leave; and (b) the ability to take paid leave at any time in the first year, rather than just in the first eight weeks after birth or placement for adoption. In the birth case, the notice of intention to take leave period will be shortened to only 28 days before the dates that it is intended to take each period of leave (and pay, where they qualify). In adoption cases, the period of notice will remain at seven days from the

adopter having received notice of having been matched with a child. The changes will come into force on 6 April 2024 and will be incorporated into Div R in Issue 316.

Trade union subscription changes

By virtue of TULR(C)A 1992 s 116B **Q [350.02]**, the rules governing the deduction of trade union subscriptions are to change in relation to public sector employments, as from 9 May 2024. The section states that various matters of detail are to be fleshed out in regulations. This has now been done in the Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2024 SI 2024/143. Regulations 2 and 4 set out the public authorities affected, along with a list of 207 specific bodies in the Schedule. Regulation 3 covers who is deemed to be the employer for these purposes and reg 5 amends contracts of employment and collective agreements where necessary to contain provisions prohibiting deductions otherwise than in accordance with s 116B(1). Like the section, the Regulations come into force on 9 May and will be incorporated into Div R in Issue 316.

Replacement code of practice on picketing

The Code of Practice (Picketing) Order 2024 SI 2024/245 brings into force on 11 March the replacement code that the Secretary of State has produced to take into account the provisions of TULR(C)A 1992 s 234E (Work activities: no protection if union fails to take reasonable steps) which were introduced by the Strikes (Minimum Service Levels) Act 2023. The new code will be incorporated into Div S in Issue 316.

DIVISION BI TAXATION OF EMPLOYMENT INCOME

Termination payments; the charge to tax

BI [207.03]

Mathur v Revenue and Customs Commissioners [2024] UKUT 88 (TCC)

The facts of this case are given at **BI [207.03]** as a useful reminder of the need for reality when deciding on the nature of a terminal payment for the purposes of the wide charge to tax in relation to such a payment under ITEPA 2003 s 401 (see **BI [207]**). The First Tier Tribunal held that the ex-employee who had settled her discrimination claims for a significant sum had not managed to break the chain of causation between the payment and the termination. Her argument that it was just a matter of coincidence is referred to in the text as 'bold' (or, as Sir Humphrey would have put it in *Yes, Minister*, 'brave'). That view has now been vindicated by the decision of the Upper Tribunal to dismiss her appeal. It held that the lower tribunal had not given too wide an interpretation to the words 'indirectly in consequence of' and 'otherwise in connection with' in s 401, did have sufficient evidence to support its finding that the taxpayer's termination was central to the discrimination claims made in the employment tribunal proceedings, and did not err

in law in concluding that the taxpayer had not advanced any evidence or argument in support of apportioning the payment between taxable and non-taxable elements.

DIVISION K EQUAL PAY

Material factor defence; discrimination

K [519]

***Barnard v Hampshire and Isle of Wight Fire and Rescue Authority [2024] EAT 12* (*14 February 2024, unreported*)**

Where employees are on different pay systems, problems can arise if one on the lower terms 'acts up' to jobs normally done by those on the higher terms. However, this case before Judge Auerbach in the EAT concerns the opposite possibility of higher-terms employees 'acting down' to jobs normally done by lower-terms employees. The case has in fact been to the EAT twice before on jurisdictional points (see **K [672.01]**). However, this third stage was on the merits and the claim has failed on the facts.

The fire authority operated two pay 'books'. Non-operational staff such as the claimant were on Green Book terms; operational firefighters were on Grey Book terms, which were more onerous as to duties and requirements, but correspondingly more generous as to pay, hours and holidays. The instant case was not an attempt to establish equal pay generally, but rather arose from one set of circumstances, namely that for the period in question two Grey Book operational employees were seconded to non-operational roles similar to those of the claimant. She claimed equality of pay with them for that period. The ET found that: (1) there was indeed equal work; (2) but the difference in pay was due to genuine material factors, in particular that while on the non-operational work the two comparators were still required to maintain certain operational competences and readiness; and (3) there was an element of indirect discrimination but the arrangement was a proportionate means of achieving a legitimate end.

Her appeal to the EAT concentrated on two main points:

(1) It challenged the factual basis for operational competences/readiness being a material factor because, it was argued, the ET had given insufficient weight to her argument that in practice the comparators had not in fact been required to do much in that direction. The EAT disagreed, holding that sufficient consideration had been given, but added that even if there was some doubt as to this, the employer could still argue that its requirements remained genuine and showed legitimate aims. It was accepted that there could be cases where the evidence showed in effect substantial abandonment of any such requirements which might mean that the defence did not apply, but this was not one.

(2) The claimant also argued that certain head office staff on Green Book terms had had their pay increased to parity with colleagues there on Grey Book terms. She said that there was no reason why she could not have been treated similarly. However, the EAT held that this did not

negate the employer's case that in her case the maintenance of differentials with her two comparators was still necessary and proportionate.

DIVISION L EQUAL OPPORTUNITIES

Direct discrimination; actual and hypothetical comparators; relationship with reversal of the burden of proof

L [246.01]

***Martin v Governors of St Francis Xavier 6th Form College [2024] EAT 22* (*27 February 2024, unreported*)**

This case before the EAT under Cavanagh J concerned the use of appropriate comparators in direct discrimination claims and the relationship between these and the statutory reversal of the burden of proof under the EqA 2010 s 136. The judgment is worth reading in full for its consideration of these issues.

Factually it was an interesting case. The claimant, a black teacher, was late for work which compromised a public examination. When threatened with disciplinary action, he left and claimed constructive dismissal and direct race discrimination. With regard to the latter, he claimed comparison with two other white teachers, C1 and C2, who had not been disciplined; the school relied on one other white teacher, C3, who had been subjected to disciplinary procedures in relation to the same event. The ET, dismissing his claim (along with the constructive dismissal claim), held by a majority on the facts that C3 was a true comparator, but that C1 was not (he had also been late, but this had not come to light and also he did not have a history of lateness issues, as the claimant had) and neither was C2 (who had not been late, had contributed otherwise to the problem, but was new to the job). On the claimant's appeal, the EAT held that the ET had applied the law properly, had not come to perverse conclusions and so their decision stood.

The judgment approaches the two main issues in the discrimination claim. The first was the nature of comparators generally. It splits them into three kinds:

(1) actual (or statutory) comparators – these are subject to the overall requirement in the EqA 2010 s 23 that there must be no material differences with the position of the claimant;

(2) evidential comparators – these are where s 23 is not satisfied, but there are still relevant similarities;

(3) hypothetical comparators – the question here is how they would have been treated and again s 23 applies.

Citing the speech of Lord Scott in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337, HL it is emphasised that these categories are 'useful tools' but not ends in themselves, and are ultimately there to help the ET come to conclusions on the facts. This is summed up at [63]–[65]:

'The question, in direct discrimination cases, as to whether the situations of the claimant, on the one hand, and the proposed comparator, whether actual or evidential, on the other, are comparable is a question of fact and degree: *Hewage v Grampian Health Board* [2012] UKSC 37; [2012] ICR 1034. The Supreme Court upheld the view of the Inner House of the Court of Session, restoring the decision of the Employment Tribunal, that unless the Employment Tribunal's judgment could be said to be absurd or perverse it was not for the Appeal Tribunal to impose its own judgment on the point. To like effect, in *Kalu v Brighton & Sussex University Hospitals NHS Trust* (UKEAT/0609/12), Langstaff P said, at paragraph 24, that the identification of a comparator is a question of fact.

In order for a comparator to be an actual or statutory comparator, is not necessary that the circumstances are the same in every particular. In *Vento*, above, Lindsay J said, at paragraph 12:

> "… It is all too easy to become nit-picking and pedantic in the approach to comparators. It is not required that a minutely exact actual comparator has to be found."

In *Kalu*, at paragraph 24, Langstaff P said, "The purpose of making the comparison … needs to be understood before a comparator may properly be identified." In our judgment, this is of central importance. Whether a point of difference has any significance or not depends on the nature of the less favourable treatment about which complaint is made. So, for example, if the complaint is about the claimant not being selected for a job, whilst the comparator was selected, the fact that the claimant and comparator have similar academic qualifications may well be relevant if the job required developed intellectual skills, but it is not relevant if the job requires solely manual labour or (to use one of Langstaff P's examples) is to model clothing.'

The second main issue was the relationship of this with the statutory reversal of proof. Here, the judgment draws heavily on the recent decision of Judge Tayler in *Virgin Active v Hughes* [2023] EAT 131, [2024] IRLR 4, considered in **Bulletin 546**, where the key passage is set out. It is pointed out in the instant judgment that the existence of an actual comparator may be strong evidence allowing the reversal, but it is still a question of fact and therefore not automatically so. Evidence relating to a person who was in materially different circumstances (including a hypothetical comparator) may still be used but will be inherently less persuasive in reversing the burden. The judgment states that 'This distinction is not always sufficiently considered when applying the burden of proof provisions in s 136'.

Religion and belief; ban on head coverings; whether discrimination

L [214.08]

OP v Commune d'Ans C-148/22, [2024] IRLR 206, ECJ

A Belgian public authority introduced terms into contracts of employment aimed at securing a regime of 'exclusive neutrality' at work. These said that there was to be no proselytising of religious views and no wearing of overt signs revealing employees' religious or philosophical affiliations or political or religious beliefs. This applied to both public-facing posts and within departments (in relation to supervisors and fellow employees). The claimant, a Muslim employee, was refused permission to wear a hijab under these terms and claimed religious discrimination. The Belgian court referred the matter to the ECJ to consider under art 2(2) of the Equal Treatment Directive 2000/78/EC.

The ECJ considered both direct and indirect discrimination. With regard to direct discrimination, it held that if the relevant rule was applied to all, in a 'general and undifferentiated way', then there could be no such discrimination. With regard to indirect discrimination, there can be a prima facie case if the ostensibly neutral rule results in particular disadvantage to one religion. However, this form is of course subject to a defence of justification, and a desire to establish a neutral administrative environment is capable of qualifying. However, in such a case there must be shown to be a genuine need for such an environment, the limitation in question must be no more than is strictly necessary and it must be applied consistently and across all employees.

The decision is fairly orthodox and follows several other such cases before the ECJ on this issue (see **L [214.08]** ff) and in one sense adds little to these (which are subject to hardly any discussion in the judgment). However, the case itself may be seen of some interest for two particular points: (1) as the court says, most of the case law so far has concerned private sector employment, but this case concerns the public sector; (2) moreover, cases also have tended to concern the application of such rules to public-facing roles, but this case also concerns relations with other employees within the organisation.

The final point to notice is that, while the court takes the standard view that it only had to set out the interpretation of the Directive, leaving it to the national court to apply that to the facts, there are indications that that will not be simple here, for three reasons: (1) the respondent had claimed that the idea of neutrality was taken from the Belgian constitution, but it transpired that that was not clear; (2) more importantly, on the vital question of consistent application, there was some evidence of an element of toleration of *some* low-level wearing of symbols, which would have to be assessed by the national court; and (3) it was the case that the contractual changes had been introduced in order to deal with the claimant's request to wear the hijab, so there could be an issue of impartiality.

Justification of age discrimination; application of the test for justification

L [359], L [365]

***Fasano v Reckitt Benkiser Group [2024] EAT 7* (*31 January 2024, unreported*)**

The justification of age discrimination is always unusual and this decision of Judge Shanks in the EAT shows that, where a provision, criterion or practice (PCP) is in issue, it is important that any justification relates directly to that PCP, not to other matters more generally.

The claimant was a senior employee of the second respondent (R2), a wholly-owned subsidiary of the first respondent (R1). R1 had a long-term incentive plan under which the claimant had shares and options for 2017, dependent on R1's share performance for 2017/2019. The claimant left in June 2019, as a 'good leaver' and so prima facie entitled under the plan. However, it had become clear in 2019 that due to poor performance the amounts relating to 2017 would not vest at all. In the light of this, and to mitigate the effects, in September the company changed the terms to allow a pay out anyway, in order to retain senior employees. The key point for the claimant, however, was that in order to benefit from this change an employee had to be in post in September 2019. Thus, the claimant did not qualify.

He brought ET proceedings for indirect age discrimination. The ET dismissed his claim, holding that there was a PCP of still being in employment and it had disadvantaged him (and others in a similar position), *but* it was justified on the ground put forward by the employer, ie staff retention, and was a proportionate means of pursuing a legitimate aim. The EAT allowed his appeal on this question of justification (though he actually failed on another point relating to the corporate structure). It was held that the plan *changes* may have been justified on the employer's ground *but* the actual PCP here was the requirement of still being employed in September, which could not be justified on that ground because the claimant (and others like him) had already left and so could not be incentivised to stay.

Harassment; related to the prohibited grounds

L [426]

Blanc de Provence Ltd v Ha [2023] EAT 160, [2024] IRLR 184, EAT

The causal element in the EqA 2010 s 26 on harassment **Q [1479]** is that the proscribed behaviour must have 'related to' the protected characteristic. The fact that this is potentially wider than the phrase 'because of' used elsewhere in the Act is emphasised in this decision of Judge Tayler in the EAT. However, it also shows that, wide though this s 26 formulation is, it is not of infinite width and that if an ET is to make a particular finding as to that relationship it must ensure that an alleged harasser is given an opportunity to respond.

The claimant had had certain disciplinary issues and when redundancies arose it was determined that she had to go. Her dismissal was effected by manager Mr C who attended her workplace with Mr L a director. They told the two other women working there to leave and locked the door, in spite of the claimant's objections. They then stood over her and told her she was dismissed and was to collect her things and go. The door was then unlocked and she was allowed to leave. She claimed harassment on the grounds of sex, which was upheld by the ET.

On the company's appeal, the EAT set out at [31] the relevant law on the causal link as follows

> 'It is clear that the test of whether conduct is "related to [sex]" is different to that of whether it is "because of [sex]" as is required to make out a claim of direct sex discrimination. The term "related to [sex]" is wider and more flexible than "because of [sex]". Conduct could be found to be "related to [sex]" where it was done "because of [sex]", but that is not a requirement. So, for example, if A subjects B to unwanted conduct with the purpose of "creating an intimidating environment for B" in circumstances in which it is established that A would not have subjected a man to the same conduct, that would establish that the conduct was "related to [sex]". But there are many other ways in which conduct could be "related to [sex]" such as where there is conduct that is inherently sexist such as telling sexist jokes.'

However, in spite of the width of this approach (and the fairly extreme nature of the facts), the EAT allowed the employer's appeal. The reason was that the case had hinged on the claimant's argument that Mr C would not have treated her in this way had she been a man *but* the ET's conclusion on this was cast in terms that they were 'not convinced' that Mr C would have felt able to treat her in this manner if she had been man. Adding to the above analysis the further consideration that there must still have been *some* proved connection with her sex , even on this lower standard (citing Judge Auerbach in *Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, EAT, see **L [426.04]**) it was held that: (i) the ET's finding was not strong enough on the evidence to satisfy this; and (ii) in addition, this allegation had not been put directly to Mr C for his response to it. On his latter point, the judgment states at [32]:

> 'Where it is asserted that the conduct is said to be "related to [sex]" because the alleged perpetrator would have treated a man differently (so that the treatment is "because of [sex]") that allegation should generally be put fairly and squarely to the alleged perpetrator.'

The EAT accepted, going back to para [31], that there could have been other factors here which *could* have established harassment independently of the hypothetical treatment of a man (such as the ordering out of the other female employees and the locking of the door) but the case had not been put that way. The result was that the case was remitted to a different ET for such matters to be considered.

DIVISION NII INDUSTRIAL ACTION

Balloting requirements; linking the ballot to the industrial action

NII [2622.02]

Warrington Borough Council v UNITE the Union [2023] EWHC 3093 (KB), [2024] IRLR 190

Under TULR(C)A 1992 s 226 **Q [460]** a trade union must hold a ballot 'in respect of the industrial action' in question. The question as to how strictly or otherwise that requirement is to be construed was the subject of this decision of Eady J in the High Court in turning down the council's application for an injunction to restrain threatened strike action which, it argued was not supported by a ballot.

Three unions were in dispute with national employers for local authorities in relation to the 2023/24 pay claim. UNITE had the fewest members involved. A final offer was made by the employers which was initially declined. UNITE balloted successfully for strike action in relation to one council and certain workers, but offering to settle for certain specific improvements for these people. In the meantime, there was a settlement at national level, but UNITE did not join in with it and proceeded with its industrial action. The council sought an injunction, arguing that what the union was now striking about was different from the original dispute to which the ballot related; it was instead a localised dispute for only specific workers on matter not related to the 2023/24 pay claim.

Reviewing the law here, the judgment makes the following points:

(1) Ultimately, it is a question of fact whether there is the necessary connection to satisfy s 226.

(2) Industrial disputes are not like commercial negotiations, where there will often be a narrowing down of matters to reach an agreement.

(3) Conversely, in industrial disputes there will often be much fluidity, possibly raising other matters which may be used to resolve the original dispute.

(4) This means that a matter not in itself part of the original claim can be seen as an attempt to resolve that claim; here, local demands which were still ways of putting money into workers' pockets could still be relevant to an overall settlement.

(5) On these facts (as the third union) UNITE could only operate on this local level.

(6) Narrowing the dispute to only certain workers did not necessarily negate the ballot.

(7) In an action for an injunction such as this, the legal test was whether the union could show that it honestly and genuinely believed that what it was pursuing was still related to the original dispute.

At [72] the judgment states:

> '… once strike action has commenced, resolution of the trade dispute for which it has been called will generally necessitate resolving any issues that might relate to the taking of that action (e g lost pay, pension or holiday entitlement; protection of agency workers who refused to cross the picket line; etc). I do not consider that raising the question of holiday accrual for those involved in the strike action, or the issues relating to agency workers who did not cross the picket line at the depot, demonstrates that the defendant was in some way pursuing a different dispute. Equally, I do not see the narrowing down of the dispute resolution payment (from all workers, to only those who had been involved in the industrial action) to somehow signify that the defendant was pursuing a different dispute: this was again something sought in order to bring to an end the industrial action that had been taking place in relation to the continuing dispute about the 2023/24 pay deal. Certainly, I find that it is most likely that the defendant will establish at trial that it honestly and genuinely believed that these were all matters that related to the ongoing trade dispute that it had identified on the ballot.'

As can be seen in the text, there is not an abundance of authority on this important point. The judgment cites two other first instance decisions mentioned at **NII [2622.03]**, in which the decision was that the objects being pursued were *not* covered by the original ballot and injunctions were granted. Of course, each case depends on its facts, but it could be argued that this latest decision shows a rather more liberal and (in industrial relations terms) realistic approach than in those cases, more in line with the comment made in that paragraph that 'It is submitted that if the primary aim of the action is to further all or part of the trade dispute (or disputes) which was (or were) the subject of the action, the presence of subsidiary aims should not vitiate the effectiveness of the ballot'. A decision at appellate level on this point would be welcome.

DIVISION PI PRACTICE AND PROCEDURE

Employment tribunals; striking out; no fair trial possible

PI [650]

Hargreaves v Evolve Housing and Support [2023] EAT 154
(*16 November 2024, unreported*)

It is settled law that, not only is a strike-out a draconian measure, but under ET Rules SI 2013/1237 Sch 1 r 37 **R [2794]** where the ground of an application is conduct which is scandalous, unreasonable or vexatious, it is then necessary for the ET to go on to consider if by reason of that conduct there could not be a fair trial and whether a strike-out would be proportionate (which involves consideration of possible lesser sanctions). This decision of Ellenbogen J in the EAT stresses the importance of all three being present, even on facts showing conduct which easily comes within the first requirement.

The claimant had been dismissed for gross misconduct by the respondent charity. He sought to bring ET proceedings as a litigant in person, and was open that his aim was to create a damning narrative about the charity which he said was racist and had put young people into harm's way, including murder, while raking in millions from the taxpayer. His aim was at one particular trustee, whom he sought to unseat from his council post. Beyond that, he had threatened the charity with a relentless campaign through prolonged legal proceedings, producing inconvenience, harassment and expense out of all proportion.

The ET upheld the respondent's claim for a strike-out under r 37, perhaps unsurprisingly at first sight, *but* the EAT allowed his appeal. The relevant conduct under the first limb was clear, but it was held that the ET had not considered the second limb (impossibility of a fair trial) sufficiently; in particular, it had made assumptions as to the possible deleterious effect on potential witnesses with an inadequate factual base for doing so. That was the ground for the case being allowed to proceed to a preliminary hearing to consider how it was to be progressed. However, there is also consideration of the third limb (proportionality of a strike-out) which contains the observation that even if no other order (short of strike-out) could be seen as appropriate, that in itself does not justify a strike-out if overall there could still be a fair trial. At [23] it is stated that:

> '… the fact that no alternative order is merited or appropriate cannot itself serve to establish that the Draconian sanction of strike-out is warranted. Such a sanction then becomes simply a punitive measure. However justified the opprobrium which the Tribunal attached to the Claimant's conduct, the Respondents' remedy for any repetition of it lies elsewhere.'

Thus, all three limbs must, like ducks in a row, be present and defensible in a strike-out application.

REFERENCE UPDATE

Bulletin	Case	Reference
545	*R (Independent Workers' Union of Great Britain) v CAC*	[2024] ICR 189, SC
545	*Haycocks v ADR PRO UK Ltd*	[2024] IRLR 178, EAT

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