Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Employees; illegality; statutory illegality; breach of immigration law

AI [67], AI [76.05]

Okedina v Chikale [2019] EWCA Civ 1393

The result in this case is of obvious importance wherever the facts show that a vulnerable individual was brought into this country to work in poor conditions and with dubious (or non-existent) immigration status. The result was that when the proverbial worm turned and brought legal action for multiple breaches of employment law, the employers could *not* rely on the defence of illegality (through the claimant's breach of immigration law which was in fact largely down to them) to evade liability. However, the judgment of Underhill LJ may be of wider significance for its comprehensive review of how the defence of illegality works in employment law *generally*.

The claimant was brought to this country from Malawi to perform domestic work for the husband and wife employers, fellow Malawians. She had a six-month visa initially, but when this ran out the employers told her that the necessary steps had been taken to extend this. They kept her passport. They did in fact apply (forging her signature) but this was rejected. The claimant was not told. She worked long hours for little pay; when she asked for more she was summarily dismissed and ejected from the house. When she brought proceedings under a range of headings, the employers pleaded illegality through her breaches of immigration law, in particular ss 15 and 21 of the Immigration, Asylum and Nationality Act 2006 (see **AII [20.04]**). The ET rejected this, finding as a fact that she did not know the true position. This was upheld by the EAT (see **AI [76.05]**).

On further appeal purely on the question of illegality, the Court of Appeal again upheld the ET's decision. The judgment starts by setting out the basic division in 'contractual' cases (ie non-discrimination ones) as follows (at [12]):

> 'The essential starting-point is to recognise that there are two distinct bases on which a claim under, or arising out of, a contract may be defeated on the ground of illegality. These are nowadays generally referred to as "statutory" and "common law" illegality. Put very briefly:
>
> (1) Statutory illegality applies where a legislative provision either (a) prohibits the making of a contract so that it is unenforceable by either party or (b) provides that it, or some particular term, is unenforceable by one or other party. The underlying principle is straightforward: if the legislation itself has provided that the contract is unenforceable, in full or in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute.
>
> (2) Common law illegality arises where the formation, purpose or performance of the contract involves conduct that is illegal or contrary to public policy and where to deny enforcement to one or other party is an appropriate response to that conduct …'

Any defence under (2) was bound to fail here because of the claimant's lack of knowledge (its essence being categorised as 'participation plus knowledge') and so the employers were essentially relying on statutory illegality. Here, the case law (considered in some detail) meant that they had to show that the above sections of the Immigration Act were to be construed as Parliament intending that any contract entered into in breach of them was to be void in the sense of being unenforceable by *either* party, even an 'innocent' one. The upshot was that, in the light of policy considerations concerning the protection of vulnerable persons in these difficult circumstances, there was *no* need to construe the sections as rendering contracts completely unenforceable. Moreover, the mere fact that penalties are imposed on one party (the employer) does not indicate voidness altogether. As Davies LJ put it in a short assent, ss 15 and 21 are aimed at the employer, not the employee.

Of course, most employment law cases on illegality (including the principal category of fraud on the Revenue, see **AI [68]**) will come under common law illegality, not statutory. The judgment contains some interesting observations on this category, albeit that it was not directly in play on the facts. One in particular is very much in line with one argument in the text, concerning the Supreme Court decision in *Patel v Mirza* [2016] UKSC 42, [2017] 1 All ER 191. This contains a serious review of the general contract law on illegality, but *without* considering the specific employment-related case law. It is suggested at **AI [76.05]** that these cases should continue to be followed unless there is any *necessary* amendment of their reasoning. Towards the end of the court's judgment in the instant case in [62] there is the following passage:

'In his judgment in *Patel v Mirza* Lord Toulson was attempting to identify the broad principles underlying the illegality rule. His judgment does not require a reconsideration of how the rule has been applied in the previous case-law except where such an application is inconsistent with those principles. In the case of a contract of employment which has been illegally performed, there is nothing in *Patel v Mirza* inconsistent with the well-established approach in [*Hall v Woolston Hall Leisure Ltd* [2000] IRLR 578, CA] as regards [common law] cases. As [counsel] put it, *Hall* is how *Patel v Mirza* plays out in that particular type of case.'

Employee shareholders; revoking the agreement

AI [130]

***Barrosso v New Look Retailers Ltd UKEAT/0079/19* (*22 August 2019, unreported*)**

The intended effect of the category of 'employee shareholder' has in practice not come about and the legislative provision for it (ERA 1996 s 205A **Q [829.01]**) has generally been viewed as a dead letter. It is therefore interesting to see this rare decision of Judge Eady in the EAT on the section. It is largely a matter of fact, but contains two particular points of law.

The claimant was a senior executive who signed an employee shareholder agreement which, it was accepted, complied with the procedural requirements. However, in a strange twist, he was assured that this was just 'for tax purposes' and the employer also executed a deed guaranteeing him rights equivalent to those given up, but by contract. Two years later he was given a new service agreement which stated that it was a 'whole agreement', except in relation to the deed. The following year he was dismissed and sought to claim unfair dismissal. To do so, he had to argue that the original shareholder agreement no longer applied. The ET ruled against this and the EAT rejected his appeal. As a matter of construction, it was held that the service agreement did not abrogate the shareholder agreement, by which he was still bound.

The two points of law were:

(1) The claimant had argued that to rely on a shareholder agreement the employer had to reaffirm it at the point of dismissal. The EAT held that there is no such requirement – it is enough that the agreement was valid at the time of its entering.

(2) The claimant had also pointed out that s 205A is silent on how such an agreement is to be *terminated* (except for sub-s (12) which allows the Secretary of State to produce rules on this, which had never been done). The EAT held that, as a contractual agreement it may be terminated in usual contractual ways, but on the facts here that had not happened. Indeed, the fact that the service agreement had specifically retained the contractual reinstatement of rights was only explicable on the basis that the s 205A exclusions continued to apply.

Having finally seen one of these things in a reported case, your humble editor is now looking forward to seeing a real unicorn.

DIVISION AII CONTRACTS OF EMPLOYMENT

Characteristics of the relationship; privacy and confidentiality; material from employee's phone

AII [194.25]; DI [982]; L [97.01]

Garamukanwa v United Kingdom [2019] IRLR 853, ECtHR

The facts of this case are set out at **AII [194.25]**. Essentially, the dispute was over the use by the employer at a disciplinary hearing leading to dismissal of material found on the claimant's phone by police during an investigation into allegations of anonymous harassment by him of a colleague with whom he had had a relationship. The police decided not to prosecute but the employer proceeded with disciplinary proceedings, based largely on the police material. The ET found his dismissal fair and the EAT dismissed his appeal, both generally and on the specific ground that art 8 of the Convention was not engaged. The Court of Appeal refused leave to appeal, and he took his case to the ECtHR under art 8. That court has now given judgment, rejecting his application. The ground for this was essentially the same as in the EAT, namely that he had had no *expectation* of privacy in these circumstances. Four factors in particular were important:

(1) He had had notice for at least a year after the original complaints of harassment were made that this material was the basis for the complaints and that the employer was going to investigate. On this basis, the leading case of *Barbulescu v Romania* [2017] IRLR 1032, ECtHR was distinguishable because there the employee did not have notice of the nature and extent of the employer monitoring.

(2) He knew that the communications were not going to be kept private.

(3) He had not challenged the use of this material at the disciplinary hearing.

(4) In fact, at that hearing he had volunteered further communications from the same source.

DIVISION CI WORKING TIME

Entitlement to annual leave; holiday pay; amount due to part-year worker

CI [193.25]

The Harpur Trust v Braze [2019] EWCA Civ 1402

The decision of Judge Barklem in this case in the EAT is set out at **CI [193.25]**. It reversed the decision of the ET which held that where a music teacher was under a permanent contract but with no normal working hours and no work at all in the school vacations, holiday pay was to be pro-rated (alternatively, capped) at the normal 12.07% of annual earnings (5.6/46.4)

that a full-time worker would receive, even though a straightforward application of the ERA 1996 rules on calculating a 'week's pay' (ss 224 onwards, which are adopted by the Working Time Regulations 1998 SI 1998/1833 reg 16 **R [1087]**), would have given the higher amount of 17.5% of earnings. The EAT reversed this, holding that there was no authority for pro-rating and that the normal ERA calculation was to be adopted, even if it led to anomalies.

That approach has now been upheld by the Court of Appeal in a judgment by Underhill LJ, on very similar reasoning. The judgment starts by saying at [30] that:

> 'In short, therefore, the essential difference between the parties is whether the calculation of the Claimant's holiday entitlement or holiday pay should be pro-rated to that of a full-year worker in order to reflect the fact that she does not work throughout the year.'

It then proceeds to consider the employer's arguments for the pro-rata approach. As a matter of EU law, it notes that the ECJ has used an 'accrual' approach, most recently in *Hein v Albert Holzkamm GmbH & Co KG* C-385/17 (considered at **CI [193.26]**), *but*: (i) the court points out that the pro-rating there was primarily in relation to the *amount* of holiday per annum, not payment for it; and (ii) in any event, it is open to member states to have more generous provision. Turning to national law, it could be said that the claimant was in a form of part-time work, but that did not justify reading the pro-rata principle of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 over into the Working Time Regulations. Indeed, to do so could materially complicate the necessary calculations, given the wide variety of possible forms of part-time working, including the 'part-year working' involved here. The price for this—possible overpayment in comparison with ordinary full-time workers—was one that had to be accepted. The final result is summed up at [78]:

> 'Although the reasoning above has had at times to be somewhat dense, my basic reasoning can be summarised shortly. The WTR do not provide for the kind of pro-rating for which the Trust argues and which underlies the application of the 12.07% formula in the case of a part-year worker. The exercise required by regulation 16 and the incorporated provisions of the 1996 Act is straightforward and should be followed.'

In one newspaper report of the case, there was speculation as to a further appeal to the Supreme Court.

Two comments are ventured:

(1) As in equal pay law, equality of treatment does not always result in equality of outcome. All workers are equal, but some may lawfully be treated more equally than others.

(2) Unfortunately, one size does not always fit all.

DIVISION L EQUAL OPPORTUNITIES

Definition of disability; UN Convention does not have direct effect

L [132]

***Britliff v Birmingham City Council UKEAT/0291/18* (*16 August 2019, unreported*)**

The point of law decided in this decision of Judge Auerbach in the EAT was a precise but potentially important one. On the facts, the claimant had eventually succeeded in qualifying as 'disabled' under the EqA 2010, but in the course of the ET proceedings he had argued that in any event he could rely directly on the (potentially wider) concept of disability in the UN Convention on the Rights of Persons with Disabilities (2006). The ET rejected this argument and the EAT upheld that decision. The Convention is an unadopted treaty. Applying the judgment of Bean LJ in *R (Davy) v Oxfordshire County Council* [2017] EWCA Civ 1308, [2018] PTSR 281, it was held that, while there is an element of indirect effect, in that a domestic court or tribunal should seek to interpret UK law so as to be consistent with international obligations, the Convention does *not* have direct effect. This means that it cannot be used to provide a route to a disability discrimination claim outside the EqA 2010.

DIVISION M TRADE UNIONS

Interpreting the rules; general approach; reasonable interpretation

M [562]

***Musicians' Union v Kelly UKEAT/0111/19* (*18 June 2019, unreported*)**

The point of interpretation of the union's disciplinary rules in this case was a neat one and its results both before the Certification Officer (CO) and then the EAT show the possible approaches to 'reasonable interpretation' as set out in the text.

The claimant was a longstanding union member who was accused of harassment, discrimination and bullying. The General Secretary investigated these allegations, leading to disciplinary proceedings as a result of which he was expelled for ten years. The problem was with the relevant rule which said that where a complaint is made within 28 days of the alleged offence the General Secretary was to investigate whether charges were justified. In this case, the allegations were of conduct outside that 28-day period. The claimant brought proceedings before the CO under TULR(C)A 1992 s 108A. The CO accepted his argument that on a literal interpretation the charges were out of time and she issued an enforcement order quashing the expulsion.

On appeal to the EAT, the union argued that the 28-day period was not mandatory/exclusive, either as a matter of construction or under an implied

term allowing disciplinary proceedings outside that period, especially in the case of serious misconduct. Soole J in the EAT allowed the union's appeal on both grounds and discharged the enforcement order. The arguments of counsel on both sides cite the authorities on the reasonable interpretation of union rules. The judgment takes the view that under the relevant rule *if* a complaint is brought within 28 days the General Secretary *must* investigate, but it does not go further and rule out any complaint not within that period. To do so would be inconsistent with the enforcement of other rules on misconduct and could lead to absurdities. Thus it was the *whole* of the rules that were to be considered. This view could only then be negated if there was an implied term restricting action to 28-day complaints. On these facts, not only was there no such implied term, but the proper implication was to the contrary, namely that there was a discretion for the General Secretary to entertain a complaint outside the period, for much the same reasons as those applying to the primary question of interpretation.

DIVISION NIII EMPLOYEE INVOLVEMENT

Transnational consultations; content of consultation; no need to wait for EWC opinion

NIII [821.02]

***Hinrichs v Oracle Corpn UK Ltd UKEAT/0194/18* (*31 July 2019, unreported*)**

The Transnational Information and Consultation of Employees Regulations 1999 SI 1999/3323 require an employer with a European Works Council (EWC) to inform and consult with it in certain circumstances affecting transnational employment. What this decision of Slade J in the EAT (affirming the decision of the CAC, see **NIII [821.02]**) shows is that these two requirements fall far short of any question of negotiation, to the extent that the EWC's opinion is not formally integrated into the decision-making process.

On 27 March 2017, the international company told its EWC in a conference call of its intention to move certain processes to Romania, affecting 380 jobs elsewhere. On 28 March, it announced redundancies in relation to this and carried them out on 5 April. The complainants brought proceedings before the CAC on the basis that: (1) the conference call was not the sort of meeting that could qualify as an 'emergency meeting' under the Regulations; and (2) in any event, the company was in default by proceeding with its declared intentions before giving the EWC a reasonable opportunity to produce an opinion for it to consider.

The CAC held for the complainants on ground (1); it was accepted that there can be a 'virtual' meeting, but this conference call did not qualify. However, crucially the CAC rejected the second, more fundamental, argument, holding that there is nothing in the Regulations requiring an employer to *wait* for a possible opinion from the EWC before taking its proposed action.

On appeal to the EAT, the company conceded point (1) but successfully defended the CAC's view on point (2) which meant that the complaint overall failed. It was held again that there is nothing in the Regulations requiring awaiting the response of the EWC. Moreover, there is also no such requirement in the backing directive, which indeed seeks to hold a balance by preserving the employer's right to manage and take necessary decisions. The complainants had argued that the directive went further and that wording should be read into the Regulations to incorporate a more formal role for any opinion produced by the EWC, but this was rejected.

Two comments are suggested:

(1) At [44] the judgment accepts that there could be an argument on appropriate facts that a refusal to give the EWC a reasonable opportunity to respond amounted to a failure by the employer to consult *in good faith*, which is a requirement. Where, however, such a Rubicon would be set legally is debatable.

(2) The text at **NIII [821.02]** cites Recital (23) of the directive (referred to in the judgment) which envisages the EWC being able to give an opinion which will 'be useful in the decision-making process'. In the light of the actual decision in the case, this can only be seen as a hope in most cases.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time for claiming; not reasonably practicable

PI [187]

***Inchcape Retail Ltd v Shelton UKEAT/0142/19* (*7 June 2019, unreported*)**

The decision of Judge Richardson in the EAT in this case is yet another good example of the difficulty in achieving the right, fair balance in applying the 'not reasonably practicable' test in an unfair dismissal case under the ERA 1996 s 111 **Q [735]**, and thereby showing again the different, wider approach in discrimination cases ('just and equitable').

The actual decision was to uphold a respondent employer's appeal against a *granting* of an extension under s 111 (usually it is the other way around) on the basis that the ET had erred in concentrating only on the claimant's belief that he had to exhaust internal appeals before claiming, without going on to consider what steps he had taken to check this and whether he should have taken further steps during the time in question. Perhaps of greater longer-term interest, however, is the following passage at the end of the judgment giving the judge's overall view:

> 'Whether the reasonable practicability test should continue to apply has recently been the subject of a Law Commission consultation: see Consultation Paper 239 on Employment Law Hearing Structures dated 26 September 2018 at paragraphs 2.46 to 2.49. Responses to the consultation paper are currently under consideration. Circumstances

such as those in this case might be thought to provide powerful support for the proposition that justice can better be achieved by the broader test, especially given the short (3-month) time limit. However that ultimately is a matter for the Law Commission and Parliament. The EJ had to apply the law as it presently stands; and, for the reasons I have explained, I conclude that he left out of account a critical question. Therefore the appeal must be allowed.'

The claim; where the claim is accepted; incorrect information not fatal

PI [300]

Campbell v James Stevens (Kensington) Ltd UKEAT/0097/19 (8 July 2019, unreported)

Where the ET accepts a claim it must send a copy of the ET1 to the respondent, under ET Rules of Procedure r 15 **R [2772]**. Here, the claimant had given the respondent's name wrongly and had used the address where she used to work, rather than the employer's registered address. She went through the EC procedure properly (but unsuccessfully) using that information and was then told by the ET by letter that her claim had been accepted. There were then delays during which the respondent did not reply. Eventually, however, the respondent argued that r 15 had not been properly complied with. The ET proceeded on that basis, but the claimant objected and appealed. In the EAT Swift J held that r 15 had indeed been complied with. He cited analogous case law on the EC procedure which shows that the EAT has consistently avoided over-technicality. A similar approach was to be taken to r 15, in order to comply with the overriding objective in r 2. Here, all other communications had reached the respondent in spite of the inaccuracies and so the ET1 had been properly admitted. As a matter of principle, the correct approach is set out at [27]:

> 'Where there has been an alleged failure to comply with Rule 15 what is likely to be required is a common sense, evidence-based enquiry as to what happened. Did what happen [sic]comprise compliance with the requirement to send the documents to the respondent? Where the Respondent is a company the question is likely to be whether the documents were sent to an appropriate address, for example, a place of business and addressed in such a manner that it was apparent the documents were sent to the person who was the Respondent to the claim. An inaccurate name is not the be all and end all. Compliance with Rule 15 depends on an assessment of the facts.'

One possible problem here was the previous decision in *Chowles t/a Granary Pine v West* UKEAT/0473/08 (8 January 2008, unreported) in which, as the text points out at **PI [300]**, it was held that giving a wrong version of a name together with two errors in the address meant that r 15 had not been complied with. However, the judgment in the instant case treats this as a case on its own facts and at [23] states:

'In their different ways all these judgments [ie on the EC procedure] have underlined the importance of the principles now stated in Rule 2 of the 2013 Rules. Rule 15 is to be applied consistently with those principles. To the extent that it might be thought that the judgment of HHJ McMullen QC in *Chowles* suggest [sic] otherwise, I would have no hesitation in saying that it was wrongly decided.'

Case management; unless orders

PI [390]

***Uwhubetine v NHS Commission Board England UKEAT/0264/18* (*23 April 2019, unreported*)**

Judge Auerbach began his judgment in this case with the words 'This is another appeal about the perils and pitfalls of Unless Orders'. In the light of this, the judgment gives some useful guidance to ETs about the making and enforcement of such orders. The order in question was for the provision of a 'Scott Schedule' giving further details of various allegations in a complex race discrimination and whistleblowing claim. The ET considered that the order had not been complied with, leading to the dismissal of the claims. On appeal, the EAT held that, although the order was in wide and draconian terms, it could not interfere as there had been no appeal as to the *making* of the order, and that the ET had come to a permissible decision as to whether there had or had not been material non-compliance; moreover, the claimants' representatives had had a fair chance to make submissions.

The principal points of guidance more generally in the judgment were as follows:

(1) Under r 38 **R [2795]** there are three stages: (i) the making of the unless order; (ii) the question whether it has been complied with; and (iii) the determination of any application under r 38(2) to have the order set aside on the basis that it is in the interests of justice to do so. Each of these is subject to a *separate* right of appeal.

(2) In dealing with (ii) (compliance) the ET is not to revisit the terms of the order and/or relief from sanctions.

(3) In so dealing, the ET may need to construe the order (with any ambiguity being exercised in favour of the party subject to the order) and may do so in context *but* it may not redraft the order or give it a construction it cannot bear (a distinction not a million miles from that traditionally applied by a court asked to enforce a restraint of trade clause).

(4) The test is whether there has been *material* compliance, which is a qualitative, not a quantitative, matter, eg whether *sufficient* further information has been given for the other side to understand the claim.

(5) There is no set procedure for the ET to adopt. An EJ may do it on the papers, invite written submissions or hold a hearing; the test is fairness and the overriding objective. However, if the decision is that there has

not been compliance, the ET must issue a written notice to the parties, because this then activates the right of a party under r 38(2) to apply for set-aside or relief from sanctions. Moreover, if a question of compliance arises it must be dealt with first by the ET before going on to anything else.

(6) In making an order, an ET must be specific as to its requirements and the consequences of non-compliance. Although the term 'Scott Schedule' is regularly used, it has no intrinsic, magic meaning and ultimately the question is whether the order was sufficiently clear.

Privacy and restrictions on disclosure; anonymity orders

PI [950]

L v Q Ltd [2019] EWCA Civ 1417

The claimant in this discrimination case sought several forms of confidentiality/privacy under art 8 in relation to the ET hearing, arguing that his particular disabilities would cause such embarrassment that he would rather withdraw his claims than continue without restrictions. The ET agreed to hear the case in private, to anonymise parties' and witnesses' names and to order that the judgment should not be entered in the Register. There were also significant changes to normal hearing procedure. The EAT upheld some of these but set aside the non-registration order. On the claimant's appeal, the Court of Appeal took a more rigorous approach in balancing privacy against the overriding requirement of open justice. In its judgment given by Bean LJ it doubted the correctness of the private hearing, but that had not been in issue and so could not be altered. The burden of the judgment, however, related to the non-registration point, on which a particularly strong view was taken. Adopting the approach in *Ameyaw v Pricewaterhousecoopers Services* [2019] IRLR 611, EAT (see **Bulletin 487**) the court said that it was difficult to imagine any circumstances in which such an order could properly be made either under rule 50 **R [2807]** or the ETA 1996 ss 11 and 12. There are wide powers for the ET to use in an appropriate case, eg by anonymising judgments, *but* these are not to be used either to prevent publication of a judgment or to redact it to such an extent that it becomes unintelligible.

REFERENCE UPDATE

492	*Commerzbank AG v Rajput*	[2019] IRLR 772, EAT
492	*Chief Constable of the Police Force of Northern Ireland v Agnew*	[2019] IRLR 782, NICA
492	*East of England Ambulance Service v Flowers*	[2019] IRLR 795, CA

492	*Chief Constable of Norfolk v Coffey*	[2019] IRLR 805, CA
492	*Korstal UK ltd v Dunkley*	[2019] IRLR 817, CA
493	*Tillman v Egon Zehnder Ltd*	[2019] IRLR 838, SC

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