Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Workers; provider of NHS medical services

AI [87]

Community Based Care Health Ltd v Narayan UKEAT/0162/18 (26 July 2019, unreported)

This decision of Kerr J in the EAT is the latest in a series of cases concerning whether doctors operating outside the classic GP surgery model can claim to be 'workers'. The result (in the doctor's favour) caused speculation in the press about potential costs to the NHS, but it may not be as simple as suggested.

The claimant was a GP who worked through the respondent not-for-profit company providing GPs for the NHS. She had done so for 12 years before being removed from its books after a dispute. She claimed unfair dismissal, sex/race discrimination, breach of contract and outstanding holiday pay. The full facts as found by the ET are set out at [10]. She had not been obliged to take any particular work and the company was not bound to provide any, but in practice she had worked consistently as one of 12 doctors performing the necessary shifts. She looked after tax herself and a few years earlier had formed her own service company for tax reasons. She had to work to national standards and abide by the company's rules on shift working. In the ET it was held that she was not an 'employee' and so could not claim unfair dismissal. However, it was held that she was a 'worker' within the ERA 1996 s 230 **Q [854]** (and so also an 'employee' for EqA 2010 purposes).

By the time the company's appeal got to the EAT, the only issue was 'worker' status for holiday pay purposes. The company argued that she was in fact self-employed (their understanding all along). The issue was complicated by arguments over whether her service company had operated as an undisclosed

principal. However, once that was cleared out of the way, the classic arguments surfaced on worker status. The company relied on *Suhail v Hertfordshire Urgent Care* UKEAT/0416/11 (14 November 2012, unreported) where the EAT held that an out-of-hours GP working for three providers of GPs was *not* a worker because of an active substitution clause and lack of sufficient control or supervision. However, in the instant case the EAT distinguished that case and held that the ET had had sufficient evidence before them to justify a finding of worker status, so that her holiday pay claim could proceed.

As stated above, there was press coverage of the decision, suggesting a large bill for the NHS for back holiday pay for non-standard doctors. However, there are problems with any such blanket argument. It may be noted that the judgment does not consider two other 'doctor' cases which are discussed at **AI [87]**. The first is the second *Suhail* case (*Suhail v Barking, Havering and Redbridge NHS Trust* UKEAT/0536/13 (11 June 2015, unreported) where the doctor (again as an out-of-hours GP) again failed to establish worker status, this time in a whistleblowing context. The second is the decision of the Court of Appeal in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005, [2012] IRLR 834. In that case worker status *was* established, largely through the regularity of his contractual work on minor operations for a private health provider. However, the judgment in that case shows the overall problem here because the court emphasised that it was not laying down any hard and fast rules on medical cases, that each case had to be decided on its facts (with different possible factors in play) and that 'it is a case of deploying appropriate tools in relation to different factual matrices'. The point is that, contrary to the press impression, the instant case does not establish a general right to holiday pay for all non-standard doctors. Instead, there will be a spectrum of possibilities, along which at some point the dividing line for 'worker' will be crossed. Claims for holiday pay would have to be established in *individual* cases, if necessary in individual litigation.

DIVISION DI UNFAIR DISMISSAL

Automatically unfair dismissals; WTR reasons; WTR-related detriment; meaning of 'refuse'

DI [1953.01]; DII [134]

***Pazur v Lexington Catering Services Ltd UKEAT/0008/19* (*20 August 2019, unreported*)**

The text at **DI [1953.01]** states that there has been an apparent conflict of opinion in the EAT as to the meaning of 'refuse' in the ERA 1996 s 101A(1(a) **Q [725.01]** which renders unfair a dismissal because the employee has 'refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998'. The same wording is used in s 45A **Q [669.01]** and so the same point arises – does there have to have been some form of *explicit*

refusal by the employee, or is it enough that the employee (for example) declined to comply with a requirement from the employer that would have breached the Regulations?

Both matters arose in this case. The claimant was a restaurant porter supplied to clients by the employer. With one client, he was not given his statutory rest breaks and he refused an order to return there. He was threatened with dismissal and then dismissed summarily. He claimed detriment and automatically unfair dismissal. The ET rejected these claims because he had not adduced sufficient evidence that he had specifically refused to comply, or that his refusal to return had been the reason for dismissal.

On appeal, Judge Eady (as she then was) in the EAT considered the cases of *McLean v Rainbow Homeloans Ltd* [2007] IRLR 14, EAT where Lady Smith had considered that it was enough for the employee not to have acceded to a requirement (in effect, impliedly refused) and subsequently *Ajayi v Aitch Care Homes (London) Ltd* UKEAT/0464/11 (3 February 2012, unreported), where Langstaff J held that s 101A requires an express invocation of the statutory right, ie an actual refusal on this ground. The judgment in the instant case points out that *McLean* was not cited in *Ajayi* and that when the matter came before the same judge in *Gale v Mid & West Wales Fire Service* UKEAT/0365/14 (10 April 2015, unreported) she had had neither case cited to her. However, in spite of doubting how divergent the cases are, the judgment then comes down clearly on the side of *Ajayi* (and the result in *Gale*), ie that there must have been an actual refusal (though with the important qualification that the employee is not required to adopt any specific means or quote chapter and verse on the law). At [29] it states:

> 'The refusal has to relate to the imposition of, or proposal to impose, a requirement that would contravene the WTR; the worker is not required to identify the particular contravention. On the other hand, as the EAT held in *Ajayi*, there has to have been an explicit communication of the Claimant's refusal, or proposal to refuse, to comply with the employer's requirement. If it was sufficient that the worker, as a matter of fact, did not comply with the requirement that the employer had imposed, or proposed to impose, in contravention of the WTR, there would have been no need for Parliament to include the requirement that the worker had done so.'

This looked as though it meant that the claimant was going to lose, but there was then a considerable twist in the tale. The claimant had also claimed wrongful dismissal at common law, which had succeeded. In so holding, the ET had said that summary dismissal was not justified by his refusal to work without rest breaks. The EAT held that this finding could be carried over into the statutory actions. Even here, however, there was a further complication. Under s 45A it is enough if the refusal had a 'material influence' on the imposition of the detriment, and so that element of the claim succeeded. However, under s 101A there is the higher bar of whether the refusal was the 'sole or principal reason' for the dismissal'. As this was more arguable on the facts, it was remitted to the ET for rehearing.

DIVISION E REDUNDANCY

Contractual redundancy schemes; relationship with statutory redundancy payments

E [682]

***Ugradar v Lancashire Care NHS Foundation Trust UKEAT/0301/18* (*20 June 2019, unreported*)**

The claimant was made redundant. Her contract gave an entitlement to an enhanced payment, in her case amounting to £43,949. Her entitlement to a statutory redundancy payment was £5,868. The relevant contractual provision stated that the statutory amount was to be set off against any contractual entitlement. The employer refused to pay, arguing that she had refused suitable alternative employment. In ET proceedings it was held that she had not and so was entitled to payment. The question was – how much?

The problem arose because she had to claim the contractual amount under the Extension of Jurisdiction (England and Wales) Order 1994 **R [778]** but this is of course capped at £25,000. She accepted this, but not the approach of the ET to the statutory payment – it held that this was subsumed into the £43,949, leaving a figure of £38,081, which was *then* capped at £25,000. This was the award, the ET refusing to order the statutory £5,868 as well. On the claimant's appeal, the employer argued that this was correct in the light of *Fraser v HLMAD Ltd* [2006] EWCA Civ 738, [2006] IRLR 687, [2006] ICR 1395 (no second common law action to claim the excess over the £25,000 awarded by the ET). However, allowing the appeal, Judge Richardson in the EAT held that *Fraser* did not apply here because there were two separate causes of action. Even if it was right that the statutory payment was to be set off against the contractual one at the outset for purely contractual purposes, that could not affect her entitlement on the facts under the ERA 1996; indeed, if it purported to do so it would be ineffective under s 203 (agreements to contract out of the Act are void). Moreover, the 1994 Regulations' cap was not applicable to the separate claim to the statutory payment. Thus, the claimant was entitled to the contractual payment, capped at £25,000, *plus* £5,868.

At the end of his judgment, Judge Richardson commented that the cap itself has never been raised and is now seriously out of line with the ET's other powers. Its low level can cause injustice in a case such as this where the claimant had to take a substantial financial hit to her entitlement as a condition of using the ET system to enforce it.

DIVISION L EQUAL OPPORTUNITIES

Disability; definition; long-term effects; timing

L [165]

Parnaby v Leicester City Council UKEAT/0025/19 (19 July 2019, unreported)

This decision of Judge Eady affirms an important point on *timing* in relation to the statutory definition of disability. The claimant suffered from a workplace-stress-related illness from January to July 2017. The latter date was when she was dismissed, an event that gave rise to her claim of disability discrimination. The ET held that, although this had had a substantial effect on her day-to-day activities, it was not 'long-term' within the EqA 2010 Sch 1 para 2 **Q [1594]** because it had not lasted for 12 months or more, given that the termination of her employment had ended the work-related stress.

The EAT allowed her appeal, perhaps not surprisingly given that the ET's reasoning amounted to something of a self-fulfilling prophesy. The ET had concentrated on para 2(1)(a) (had it actually lasted for more than 12 months?) but in a case such as this, where the dismissal was itself the basis for the discrimination claim, what the ET should have done was to apply para 2(1)(b) (was it likely to last 12 months or more?) applying that question as at the time of the alleged discrimination.

Two comments are ventured:

(1) The decision is very much in line with the earlier EAT decision in *Nissa v Waverly Education Foundation Ltd* UKEAT/0135/18 (19 November 2018, unreported) which is considered at **L [165]**.

(2) There is an interesting parallel here with a well-known divergence of approach in the Law of Tort. In relation to questions of causation and damages, one view (as referred to notably by Lord Wilberforce in *Jobling v Associated Dairies Ltd* [1982] AC 794, [1981] 2 All ER 752, HL where a later disabling illness arising by the time of trial broke the chain of causation back to the original accident caused by the defendant employer) is that a court should not speculate when it knows, which could have validated the original ET decision here. However, the eventual decision of the EAT is more akin to the more usual approach in tort that in determining liability generally one should not use hindsight.

Prohibited conduct; justification of age discrimination

L [359]

National Union of Rail, Maritime and Transport Workers v Lloyd [2019] IRLR 897, EAT

The learned editor of the IRLR refers to this case as a 'rare successful age discrimination case'. As well as that interest to it, it also reaffirms a

significant point about the importance of the *effectiveness* in reality of factors claimed by a respondent to constitute justification for direct age discrimination.

The claimant was debarred from running for union office on the National Executive Committee (NEC) by a rule that excluded any person who would turn 65 during his or her three-year term. When he complained of age discrimination, it was admitted that there was direct age discrimination but the union defended on the basis of three factors relating to this exclusion which it said constituted justification under the EqA 2010 s 13 **Q [1466]**:

(1) inter-generational fairness, allowing more of an age spread on the NEC;

(2) efficient planning of the NEC's business, especially in not having to have by-elections when a member retired;

(3) consistency with union negotiating policy to seek to lower retirement ages for members, contrary to government moves to raise it.

The ET held that the union had not established justification because none of these constituted a 'legitimate aim' (the first requirement for justification). On appeal, Soole J in the EAT agreed and dismissed the appeal. The key point here was that ET had found that, with regard to (1) the facts did not show that the rule had affected inter-generational fairness in reality and so that was not a legitimate aim here; with regard to (2) that had not been a real aim since there had only ever been one by-election, and paid officials were not subject to the rule and there had been some by-elections in relation to them without problems; with regard to (3) this could not be a legitimate aim because in the policy sphere there had to be public benefit, which could not be shown if the rule was going against the social policy of the state (relying on the leading authority of *Seldon v Clarkson, Wright & James* [2012] UKSC 16, [2012] IRLR 590, see **L [363]**). In agreeing, the EAT held that in the cases of (1) and (2) the aims had been *potentially* legitimate, but not on the facts. In case (3) the ET had correctly construed *Seldon*. The union had argued that the ET had erred in taking into account what actually happened in practice (and the effectiveness in practice of the factors) at this first stage of 'legitimate aim', whereas it should only have come in later at the stage of 'proportionate means', but the EAT disapproved of this argument expressly. At [51] the judgment states:

> 'I consider that evidence as to the effectiveness of the relevant measure is relevant to both enquiries, namely for the purpose of testing whether, through subsequent rationalisation or otherwise, it was a true aim; alternatively, whether in the particular circumstances it was a legitimate aim. I do not accept that the evidence of effectiveness is relevant only at the subsequent stage, if it arises, of the balancing exercise on proportionality. If the evidence shows that the Rule has been ineffective in this respect, it is potentially relevant to the issue of whether the aim is legitimate.'

Enforcement; burden of proof

L [796]

***Raj v Capita Business Services Ltd UKEAT/0074/19* (*6 June 2019, unreported*)**

The claimant complained of harassment on the grounds that his female superior had massaged his neck on certain occasions in an open plan office in such a way as to give rise to discomfort and embarrassment on his part. The ET rejected her claim just to have brushed past him on one occasion, but accepted her evidence that what she had done was in a gauche attempt to encourage him in his work. The ET rejected his complaint, holding that, although he had shown the necessary unwanted conduct creating an intimidating etc environment, he had not established that this was because of his sex. On appeal, he argued that the ET had failed to apply the statutory burden of proof in the EqA 2010 s 136 **Q [1548]**. Dismissing the appeal, Heather Williams QC in the EAT said that although the ET had not been specific on this point, it had overall approached the matter properly and held that this was not a case for the reversed burden. In doing so, she disapproved two particular arguments for the claimant:

(1) to satisfy s 136 it is not enough to show a prima facie argument for *some* of the elements of the statutory offence; an ET will not assume the existence of other elements, and here there was no prima facie evidence of a link with his sex;

(2) there is no rule of law that an ET must reverse the burden if it disbelieves some of the respondent's evidence; the claimant had relied on dicta by Langstaff J in *Birmingham City Council v Millwood* UKEAT/0564/11, [2012] EqLR 910 on this matter, but the EAT held that all that that said was that in an appropriate case it is *open* to an ET to take lies and inconsistency in the respondent's evidence into account under s 136, not that it is obliged to do so.

Remedies; compensation; injury to feelings

L [897]

***Komeng v Creative Support UKEAT/0275/18* (*5 April 2019, unreported*)**

The text at **L [897]** states that the purpose of compensation for unlawful discrimination should be compensatory, not to punish the respondent. This decision of Judge Stacey in the EAT is a good example of this.

The claimant succeeded in his claim of race discrimination by the employer in not backing him in seeking a further professional qualification (in contrast to other staff) and in requiring him to work more weekends. This was not, however, a termination case and the claimant remained in the employment and the evidence did not show that if he had obtained the qualification he would have been promoted. The ET proceeded to fix compensation but the claimant was not satisfied with it and appealed to the EAT. He succeeded on

two grounds, namely that the ET had not applied the *Simmons v Castle* 10% uplift (see **L [886.01]**) and had failed to add the interest due. However, the legal interest in the case concerns the third ground of appeal.

This was against the ET's decision that injury to feelings came only within the lowest band of the *Vento* scale (albeit at the top of it). The EAT dismissed the appeal on this ground. This was largely on the very basic ground that fixing the right level on the scale is very much for the ET, with an appellate body unlikely to intervene. Two other points are of interest, however:

(1) The judgment reiterates that the purpose is compensatory, not to reflect the gravity of the acts of the respondent employer (citing *Cagogan Hotel Partners Ltd v Ozog* UKEAT/0001/14, [2014] EqLR 691 and *Essa v Laing Ltd* [2004] EWCA Civ 02, [2004] IRLR 313, [2004] ICR 76). Here, the facts showed that there was no distress through lack of promotion and the claimant remained in the employment. The ET's assessment had been made on the correct approach.

(2) Secondly, the EAT made clear that there is *no* rule that the lowest band in *Vento* is only to be used for one-off acts by the employer.

The compensatory nature of the remedy here is well established, but one remark in the judgment perhaps illustrates a potential problem with it. This was that on the facts the claimant had shown 'remarkable resilience in the face of discriminatory treatment that he had suffered over a considerable amount of time'. To the extent that this was a factor in placing the case in the lowest band, it shows that those who cope best may receive least and by contrast (while eschewing any loaded remarks about 'snowflakes') that the meek shall inherit, if not the world, at least a higher level of compensation.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time; not reasonably practicable

PI [187]

***Pearce v Bank of America Merrill Lynch UKEAT/0067/19* (*17 June 2019, unreported*)**

The claimant in this case of whistleblowing detriment was significantly late in bringing proceedings. It was accepted that during much of the primary limitation period he had been ill, affecting his ability to commence proceedings. After the expiry of the primary period he had used the ACAS EC system but then not brought proceedings for another month. The ET held that he could not use the 'not reasonably practicable' formula for an extension because he had not brought proceedings as soon as reasonably practicable after the initial incapacity.

On his appeal, Judge Eady in the EAT held that the ET had applied the correct approach and come to a permissible conclusion in relation to the later period. The claimant had argued that the ET should in effect have 'rolled over' the evidence of the initial illness and inferred that this was still operating through the later period. This argument was disapproved. The

claimant had the burden of adducing evidence as to the reason for further delay in a case such as this and here he had failed to do so.

There was one further point of interest to those advising in this area. The ET took the view that, if anything was to be inferred from these facts, it was that the further delay of just one month was due to those professionally advising him by this stage assuming that he could have the extra month allowed for going through the EC process. However, the EAT pointed out that this can only apply where the claim has been properly commenced *within* the primary limitation period, which had *not* been the case here.

Response to a claim; limited further participation by respondent

PI [352]

***Limoine v Sharma UKEAT/0094/19* (*9 July 2019, unreported*)**

The claimant brought proceedings for unpaid wages and breach of contract. The respondent employer counterclaimed for breach of contract and the claimant omitted to enter a response to this. In spite of this the case proceeded to a hearing, at which the ET gave judgment for the respondent on the counterclaim because it was undefended. On appeal on this point, two issues arose under the ET Rules r 21 **R [2778]**. As to r 21(2), Judge Auerbach in the EAT held that it is wrong for an ET to enter judgment for a respondent to a (counter)claim *simply* because it is undefended. The ET must first satisfy itself that the necessary elements of the (counter)claim are made out on the material before it. As to r 21(3), where a respondent to an undefended (counter)claim wants to be allowed to participate in proceedings, the ET must consider and decide judicially whether they should be permitted to do so (citing *Office Equipment Systems Ltd v Hughes* [2019] EWCA Civ 1842, [2019] IRLR 748 (see **PI [353.01]**)). Guidance is given at [36]–[39] which suggests that in the case of a r 21(3) application to participate at remedy stage only, there may be more to be said for allowing at least some participation *but* that, if the application is to participate at liability stage, different (and more restrictive) factors come into play:

> 'The Rule 21(3) power cannot be lightly invoked in order to subvert or circumvent the essential framework of Rules which support the obvious importance of defences to claims being properly set out in a timely pleading, so that the party bringing a claim knows clearly what elements of it are contested and on what basis, and there is then fair and orderly preparation, and in due course trial, of the contested aspects.
>
> If there is a Rule 21(3) application to participate in a Liability Hearing in an undefended case, the Tribunal will therefore need to give particularly close and careful consideration to the balance of prejudice and the practical implications of allowing such participation in one form or another, if at all, in that hearing. Certainly, it should not be assumed that the respondent to an undefended claim who simply turns up to a

Liability Hearing of that claim will easily be able to persuade the Judge to allow it to participate, even in a limited way.'

REFERENCE UPDATE

143	*National Union of Professional Foster Carers v CAC*	[2019] IRLR 860, EAT
143	*Mears Homecare Ltd v Bradburn*	[2019] IRLR 882, EAT
143	*Forbes v LHR Airport Ltd*	[2019] IRLR 890, EAT
143	*McNeil v Commissioners for HMRC*	[2019] IRLR 915, CA
143	*Kocur v Angard Staffing Solutions Ltd*	[2019] IRLR 933, CA
144	*Okedina v Chikale*	[2019] IRLR 905, CA

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