Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

The meaning of 'worker'; the use of the term in the legislation; judicial officeholder

AI [83.01], AI [108], AI [115.03], AI [134]; BI [327.04]; CIII [9]; H [1161.01]

Gilham v Ministry of Justice [2019] UKSC 44

The most prominent case this month was this decision of the Supreme Court that a judge *can* be a 'worker' for the purposes of bringing a whistleblowing detriment claim (which is now to go ahead on its merits). As the text at **AI [83.01]** states, the ET, EAT and Court of Appeal had held that she was not a 'limb (b) worker' within the ERA 1996 s 230(3) **Q [854]**, primarily because, as a judicial office-holder, she did not have the necessary contractual relationship. In the Supreme Court it was in fact held that this was correct – there cannot be shown to be a contract between a judge and the Ministry, still less with the Lord Chief Justice (a relief for Lord Burnett who will not be personally liable for NI contributions!). For good measure, judges did not qualify as 'Crown employees' under s 191 either.

However, that was far from the end of it because the focus then became on whether the law *excluding* judges from whistleblowing protection was *itself* unlawful. There had been argument in the lower courts that it might contravene art 10 on freedom of expression. This had failed, but a different version of it had emerged at Court of Appeal level, namely whether (irrespective of any *actual* breach of art 10) the inability of a judge to rely on art 10 contravened art 14, under which individuals must have access to the other articles without discrimination on the basis of the usual protected characteristics or (crucially) 'other status'. This argument failed in the Court of Appeal, but became the ground of judgment for the claimant in the Supreme Court. Giving the judgment of the court, Lady Hale held that

judicial office-holding *is* 'other status', thus activating art 14. The question then became whether the exclusion could be justified. Applying the usual formulation, it was held that no 'legitimate aim' had been shown here – there was no evidence of the position of judges ever having been deliberately considered and indeed it could be argued that (far from prejudicing judicial independence by granting them normal worker status) that independence would be enhanced by giving them whistleblowing rights. As there was no legitimate aim, the question of proportionate means did not arise.

Finally, the question became as to remedy. This was addressed under the duty to interpret in the light of the Convention in the HRA 1998 s 3. Could it be done here? The Ministry argued that it could not, without going against the grain of the legislation. This argument was rejected, partly on the ground that it has already been done in relation to judges in the context of EU law-backed domestic provisions, see *O'Brien v Ministry of Justice* [2013] UKSC 6, [2013] IRLR 315, [2013] ICR 499, considered at **AI [134]** ff. The final result of this can be seen at [43] and [44] of the judgment which contain (in added italics) the formula suggested:

> 'It would not be difficult to include within limb (b) *an individual who works or worked by virtue of appointment to an office whereby the office-holder undertakes to do or perform personally any work or services otherwise than for persons who are clients or customers of a profession or business carried on by the office-holder.* The legislation contemplates disclosure to an employer or others responsible for the conduct in question, which in this case would be the leadership judges or the HMCTS or the Ministry of Justice, depending upon the nature of the conduct. It also prohibits both the employer and fellow employees from subjecting the whistle-blower to any detriment, which again would have to embrace fellow judges and those in a position to inflict such detriments. None of this would go against the grain of the legislation. When considering whether the disclosures had been made in the public interest, it would of course be relevant to consider whether there were other more appropriate ways of trying to resolve the situation. This would include the judicial grievance procedures policies (currently, policy no 1 relates to grievances between judicial office-holders and policy no 3 relates to grievances between judicial officer-holders and HMCTS staff); however, the appellant did invoke the grievance procedure and the investigating judge, Tomlinson LJ, commented that it was not a suitable means of dealing with the sort of systemic failures which were being alleged.
>
> Bearing in mind, therefore, the parallel seen in *Ghaidan v Godin-Mendoza* between section 3(1) and conforming interpretation in EU law, its strictures against attaching decisive importance to the precise adjustment needed to the language of the provisions, and the ease with which this court interpreted identical language to include judges as limb (b) workers in *O'Brien*, I can reach no other conclusion than that the Employment Rights Act should be read and given effect so as to extend its whistle-blowing protection to the holders of judicial office.'

Although the case itself concerned judicial office-holders and art 10 (because of the whistleblowing context), it is notable that the above italicised formula does *not* contain the word 'judicial' and so is potentially applicable to other office-holders, and there has been speculation whether other substantive articles could be used in a similar way when combined with the anti-discrimination provisions in art 14, now that it has been let out of its box by the Supreme Court President, Lady Pandora.

DIVISION BI PAY

Deductions from pay; bringing a claim; the two-year cap on back pay

BI [377]

Bath Hill Court (Bournemouth) Management Co Ltd v Coletta [2019] EWCA Civ 1707

The decision of the EAT in this case is set out in head (iv) of **BI [377]**. It was held that the claimant in an action to recover underpayments of the NMW as unlawful deductions from pay could claim back-pay back to the first underpayment in a series (here, back 15 years to the inception of the NMW), not being restricted to the normal six years for debt. That decision has now been upheld by the Court of Appeal.

It is of course the case that this back-dating could only be done because the claim was entered before 1 July 2015 when the law was changed to impose a two-year limit on back claims in such an action (see now the ERA 1996 s 23(4A) **Q [647]**). The decision in this case therefore has limited application.

DIVISION E REDUNDANCY

Renewed employment post-termination; statutory trial period; when it starts

E [184], E [195]

East London NHS Foundation Trust v O'Connor UKEAT/0113/19 (29 October 2019, unreported)

The statutory four-week trial period for an employee faced with redundancy and offered alternative work (provided by the ERA 1996 s 138(2) **Q [762]**) goes back to the Jurassic period of employment law in 1975 (with your humble editor being one of the dinosaurs from that period). It spawned a lot of early case law, especially as some of its terms are quite strict. One of the issues was as to its duration (see **E [195]** ff) and the question there has normally been when it ends. However, in the instant case before Judge Auerbach in the EAT the question was rather when it *starts*.

Section 138(3) defines it as 'beginning at the end of the employee's employment under the previous contract'. In March 2017 the claimant was told that his specific role would be ending as from 3 July, as part of a reorganisation. On 3 July he started a trial of an alternative role. The parties disagreed as to

whether it was suitable alternative employment for him. He raised a grievance but it was unsuccessful. The employer subsequently offered it to him again but he refused it and was formally dismissed in December. In his ET claim for a redundancy payment, the main point was going to be suitability, but a preliminary point arose as to the operation (if at all) of the statutory trial period in these circumstances. The employer argued that the claimant had already been dismissed prior to starting the new role on 3 July, that dismissal being effected by the March communication; a statutory trial period had only run from July to August.

The ET held on a preliminary point that his dismissal had only eventually happened in December, so that this was not a case of his having run out of the trial period. The employer appealed, again arguing that dismissal had taken place in March. However, the EAT, dismissing the appeal, held that there is no special redundancy law rule that notification of impending redundancies constitutes a dismissal. The above provision of s 138 relating to the end of the employment means 'dismissal' and this imports the general definition of dismissal in s 136. The question therefore became the application of the *general* law on 'dismissal'. Normally, that must be adequately communicated along with an ascertainable date to the employee to be effective. The judgment accepts that (as relied on by the employer) there can be a dismissal by conduct (citing *Sandle v Adecco UK Ltd* [2016] IRLR 941, EAT, see **DI [207.02]**) but again there is a requirement of unambiguity. On the facts here, that was not the case. Although his role was a very specific one (with no flexibility clause), being told that it *would* be ended remained merely a warning, not an actual dismissal. Thus, the claimant was not in breach of the trial period rules and so his case could proceed to be determined on the principal substantive grounds of whether the eventual dismissal had been for redundancy and whether the alternative employment offered had been suitable.

DIVISION L EQUAL OPPORTUNITIES

Protected characteristics; religion and belief; meaning of belief

L [211.03]

Gray v Mulberry Co (Design) Ltd [2019] EWCA Civ 1720

The text at **L [211.03]** gives the decision of the EAT in this case as an example of a case where the application of the leading case law on what can constitute a protected 'belief' for the purposes of the EqA 2010 led to the conclusion that the claimed belief did *not* qualify. The alleged belief related to 'the statutory human and moral right to own the copyright and moral rights of her own creative works and output'. The claimant had refused to sign a contract of employment which required her to sign away copyright and was dismissed after only eight months. Lacking the qualifying period for unfair dismissal, she instead brought proceedings for (indirect) belief discrimination. The ET and EAT dismissed this claim, and the Court of Appeal have dismissed her further appeal. However, their reasoning was slightly different.

Instead of concentrating on whether this was intrinsically capable of being a 'belief', the judgment focuses on a finding of fact that what the claimant was really objecting to when refusing to sign was her fear that the relevant clause was so wide that it could catch personal writing, etc, not just work-related material. On that basis, the court held that even if it was capable of being a protected belief, there was no causal link between that belief itself and her refusal to sign, for which she was dismissed:

> 'We take a slightly different route from the ET and EAT, although it leads to the same conclusion. If the belief relied on is confined … to the view set out … [above], then whether or not it amounts to a philosophical belief within the terms of s 10 is irrelevant, because it did not put the Claimant at a disadvantage. There was no causal link between that belief and either the Claimant's refusal to sign the Copyright Agreement (original or amended) or the Respondent's decision to dismiss her. As the ET found, what led to her refusal to sign and thus to her dismissal was her concern or theory that the wording of the relevant clause, in either version, leaned too far in the direction of the employer or failed sufficiently to protect her own interest. We agree with the ET that this debate or dispute about the wording or interpretation of an agreement could not be a philosophical belief within the meaning of s 10.'

In any event, turning to the normal requirements of indirect discrimination, she also failed to show group disadvantage (there were another 1500 employees in a similar position but none had taken her stance); moreover, it was likely that an employer defence of justification would have succeeded. Arguably, therefore, the decision adds little to the standard '*Grainger*' test for an acceptable belief (see **L [211]**).

Other prohibited conduct; third party harassment

L [461]

***Bessong v Pennine Care NHS Foundation Trust UKEAT/0247/18* (*18 October 2019, unreported*)**

The EqA 2010 s 40(2)–(4) **Q [1482]** used to contain special provisions imposing liability on an employer for third party harassment of an employee (eg by a customer), subject to a 'due diligence' defence for the employer. These provisions were repealed as from October 2013 (see **L [463]**). This appeal was an attempt to reintroduce such liability by another route, but it failed.

The claimant was a mental health nurse who was assaulted by a patient on racial grounds. He argued that the employer had failed to take sufficient steps to prevent this (which might well have been enough to activate the original s 40 provisions), but could not show that this had itself been on racial grounds. The ET (although allowing a parallel indirect discrimination claim) held that the employer could not be liable for harassment under s 26 **Q [1479]**. On appeal, the claimant argued that s 26(1) was to be interpreted to include third party harassment when read along with art 2(3) of the Race

Directive 2000/43/EC **PII [726]** which applies whenever harassment 'takes place' (even if not 'related to' race, as required by s 26(1)). However, Choudhury P in the EAT disapproved of such an interpretation as being too wide (for example, potentially imposing strict liability on an employer because of not including the 'employer defence as in the repealed provisions).

That being the case, s 26 was to be applied in the light of *UNITE the Union v Nailard* [2018] EWCA Civ 1203, [2018] IRLR 730 (see **L [502]**) where the effects of the repeal were considered directly and it was stated quite simply that '… there is now no explicit liability on an employer for failing to prevent third party harassment'. The instant decision shows that there is no implicit liability either. In these circumstances, the employer will only be in the firing line if it can be shown that the failure was itself related to the protected characteristic itself, which was not the case here.

Burden of proof and drawing of inferences; cases since the reversal of the burden of proof

L [805]

Iwuchukwu v City Hospitals Sunderland [2019] EWCA Civ 498, [2019] IRLR 1022

Base Childrenswear Ltd v Otshudi [2019] EWCA Civ 1648

The circumstances in which it is proper to apply the statutory reversal of the burden of proof in discrimination cases under the EqA 2010 s 136 **Q [1548]** are of course very much questions of fact for the ET. This is not an area for rigid ideas of precedent, but it is always interesting to see cases in which that reversal has been invoked, if only to give a flavour. These two Court of Appeal cases are good examples.

In *Iwuchukwu* the claimant was the only black consultant in the hospital. Following an investigation into his competence he was put on restricted duties for 20 months. He raised grievances, but these were not progressed properly under the hospital's procedures, partly because the management thought (on slim evidence) that he was trying to frustrate the competence inquiry. He was eventually dismissed after a competence panel hearing. He brought clams for race discrimination and unfair dismissal. The EAT upheld his claims, founding the discrimination decision on the failure to investigate his grievances. The EAT allowed the employer's appeal on discrimination, saying that the ET had made unwarranted inferences. However, the Court of Appeal reversed that. It held that the EAT had not appreciated that the ET had been using a reversed burden of proof. It had accused the ET of making an 'unjustified leap of reasoning', but once it was accepted that this was indeed a suitable case for a statutory reversal, this was instead a *justified* leap of reasoning. The judgment comments that a case such as this, where an unsustainable reason had been put forward for the employer's failure (here, the suspicion of his wanting to avoid the competence review), and where it is difficult for an employee to know just what was in the employer's mind, is just the sort of case for which Parliament provided the statutory reversal.

In *Base Childrenswear* the claimant was made redundant. She thought it was because of race. The employer for some time stuck to its version that the decision had been for 'purely financial' reasons. However, during the progress of her discrimination claim before the ET it amended its case to add a second reason, ie that items of clothing had been found concealed and it was suspected that she was going to steal them. The evidence for this was thin. The manager's explanation for the initial emphasis on redundancy was that it had been in order to minimise potential confrontation and to ease her termination. The ET and EAT held in her favour and the Court of Appeal confirmed this.

The court held that the manager's continuing reliance on redundancy (especially as it continued even after she had brought proceedings) was sufficient to activate the s 136 reversal. The employer had then failed on the evidence to show that race had played no part, justifying the ET's decision. One final aspect was that, even if it was accepted that the manager in question had genuinely believed in the intent to steal (albeit on unreasonable grounds), the ET had been within its rights to ascribe this to stereotypical prejudice against black people.

It might finally be noted that there may be cases where a desire by an employer to sugar the pill of dismissal is legally acceptable, the real reason only emerging later, *but* this case suggests that in a case with discrimination elements this may be a dangerous tactic, against the backdrop of the statutory reversal.

DIVISION PI PRACTICE AND PROCEDURE

The claim; amending the claim

PI [311]

***Pontoon* (*Europe*) *Ltd v Shinh UKEATl0094l18* (*4 October 2019, unreported*)**

The claimant had a service company that had a contract with P Ltd, which provided its services to the National Grid. This arrangement was terminated by P after a dispute. The claimant brought proceedings against the National Grid for whistleblowing dismissal, claiming to be a 'worker' for the purposes of the ERA 1996 s 43K. At case management stage, he applied to amend his claim to include P Ltd as a respondent, and to add an allegation of detriment (through being blacklisted). The ET allowed these changes and P Ltd appealed against that decision. It argued in the EAT that the ET had failed to apply the relevant tests laid out in the leading case on amendment, *Selkent Bus Co Ltd v Moore* [1996] IRLR 661, [1996] ICR 836, EAT (see **PI [311.02]**). A particular allegation was that the ET had failed (adequately or at all) to consider the 'balance of disadvantage' factor in that judgment. Dismissing the appeal, Lavender J accepted that the ET's judgment dealt with some of these matters shortly, but taking it as a whole it was clear that the ET had had the relevant factors in mind, especially as it had cited *Selkent*. The text makes the point that that case lays down 'relevant circumstances *on a non-exhaustive basis'* and this case is perhaps a good example of that. Ultimately, the

decision on amendment is one for the discretion of the ET (a point reinforced by the fact that the 2013 ET Rules no longer treat it separately, but instead as one aspect of case management powers) and so it is not necessary always to use the *Selkent* analysis as a template. In the words of the old cliché, such 'rules' are guidelines, not tramlines.

Confidentiality of pre-termination negotiations in unfair dismissal cases

PI [887.07]

***Harrison v Aryma Ltd UKEAT/0085/19* (*27 August 2019, unreported*)**

The claimant received a letter from her employer in August 2016 suggesting termination with a settlement agreement. She considered that they wanted to be rid of her because of her pregnancy, believing that this had also happened to others. She resigned and claimed constructive unfair dismissal and pregnancy discrimination. The employer's defence included the argument that she could not refer (in the unfair dismissal claim) to the August 2016 letter because of the ERA 1996 s 111A, which was introduced in 2013 to provide confidentiality for negotiations before termination of employment. The claimant at first argued that this was not a genuine attempt to negotiate, but later abandoned this argument. At a second preliminary hearing, the ET considered this point and held that s 111A applied. The claimant appealed on the basis that the ET had only looked at s 111A(1) and had not considered sub-s (3) (not applicable to automatically unfair dismissals) or sub-s (4) (not applicable in a case of improper behaviour). The question in the appeal then became whether the claimant had, by the time of the second hearing, done sufficient to raise these points as live issues. After a lengthy consideration of the facts, Judge Auerbach in the EAT held that, taken as a whole, there had been sufficient material before the ET to have required it to address these two exceptions, especially in the light of the claimant's views as to the relevance of her pregnancy. The appeal was allowed and the case emitted to the ET. In coming to that conclusion, the judgment makes two points on s 111A of more general importance:

(1) If there is no or insufficient evidence as to sub-ss (3) and (4) applying, an ET is not required to consider them off its own bat.

(2) If they do arise, however, it is important to realise that (although they may apply independently or together) they *operate* differently. At [34] this is explained as follows:

> 'I note two preliminary points about the architecture of Section 111A. Firstly, each of subsections (3) and (4) operates independently of the other. There may be some cases where one applies but not the other, either way around, but there may also be cases where both are engaged. Where either applies Section 111A as a whole will not apply. Secondly, there is a potentially important difference in their mechanisms. Section 111A(3) applies wherever a claimant puts their case a certain way, regardless of whether that case proves ultimately to be well founded. The

application of Section 111A(3), therefore, depends on a proper consideration simply of how the case is being put. Section 111A(4), however, requires the Tribunal to form an opinion – effectively to make a finding – that something has been said or been done which amounts to improper behaviour; and, if it is of that opinion, to go on to consider to what extent it is just and equitable for that to affect the application of Section 111A.'

Duty to act fairly; opportunity to be heard

PI [900]

City of London Corporation v McDonnell UKEAT/196/17, [2019] ICR 1175

The claimant was suspended because of alleged work performance and problems with colleagues. He in turn made allegations of fraudulent activities by managers and two elected members. A disciplinary hearing was held, after which he was dismissed for gross misconduct. He claimed automatically unfair dismissal for whistleblowing, contrary to the ERA 1996 s 103A. Representing himself at the hearing, he failed to state specifically that the disclosures were the sole or principal reason for his dismissal, in spite of questioning by the EJ. The ET still held for him, on the bases that: (i) the disclosures were the principal reason; (ii) the disclosures had been in the public interest; and (iii) the dismissal was automatically unfair.

On appeal, the employer argued inter alia that finding (i) had been made on the evidence, not of the claimant, but of the manager chairing the disciplinary hearing. The problem then arose that the ET had not given him and/or the employer an opportunity to address that point. Allowing the appeal, Choudhury P in the EAT held that the ET had not made specific enough findings as to the disclosures in question to allow the employer to know the exact case against it. Moreover, if an ET is to make findings that amount to bad faith or improper reasons on the part of a decision-taking manager, it is likely to be a serious procedural irregularity not to give that decision-maker an opportunity to respond.

Clearly, whistleblowing cases can be particularly difficult evidentially (they are often compared to discrimination cases in this respect) but at the same time it is important not to lose sight of basic concepts of procedural fairness.

REFERENCE UPDATE

487	*Ameyaw v Pricewaterhousecoopers Services Ltd*	[2019] ICR 976, EAT
487	*Asda Stores Ltd v Brierley*	[2019] ICR 1118, CA
488	*Galloway v Wood Group UK Ltd*	[2019] ICR 995, EAT

488	*Gan Menachem Hendon Ltd v de Groen*	[2019] ICR 1023, EAT
488	*Amissah v Trainpeople.co.uk Ltd*	[2019] ICR 1115, CA
489	*BMC Software Ltd v Shaikh*	[2019] ICR 1050, CA
493	*Egon Zehnder Ltd v Tillman*	[2019] ICR 1223, SC
493	*Birtenshaw v Oldfield*	[2019] IRLR 946, EAT
493	*A Ltd v Z*	[2019] IRLR 952, EAT
493	*Phoenix House Ltd v Stockman*	[2019] IRLR 960, EAT
494	*Harpur Trust v Brazel*	[2019] IRLR 1012, CA
494	*L v Q Ltd*	[2019] IRLR 1033, CA

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