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Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Workers; 'employee' or 'worker'; position of couriers

AI [81.05]

***Stuart Deliveries Ltd v Augustine UKEATl0219l18* (*5 December 2019, unreported*)**

With the appeal to the Supreme Court in the *Uber* litigation on taxi drivers (see **AI [81.05]**) eagerly awaited in the new year, this decision of the EAT under Judge Stacey on the status of a delivery driver operating in the 'gig economy' is of considerable interest, in showing the continued trend generally to establish 'worker' status for such individuals (if not 'employee' status), but also showing how fact-sensitive these cases are.

The claimant was a motor bike courier delivering for a company that was the UK arm of a larger French firm. Their system was for their couriers to be on a formal 'slot' system or on ad hoc hirings. In fact, in the case of this claimant it was only the former version that was in issue. The system was for the individual to sign up for three-hour slots in advance. They were then entitled to a guaranteed minimum hourly rate (irrespective of how many deliveries were actually made). During such a slot, the contract stated that the individual was not allowed to leave the area in question and was obliged to undertake deliveries allocated to them; moreover, he or she could not undertake work for another firm during a slot (but could more generally, though in practice the company paid more). If the individual did not want to work a slot thus allocated, they could *ask* to be released but had no control over this (or who would take it on); if no alternative came forward, they had to perform the slot, with graduated penalties for missed work, possibly ending in being 'off-boarded' (yet another candidate for the time-honoured list of inventive employer euphemisms for 'sacked').

The claimant brought a series of claims which required either employee or worker status. By the time it came to the EAT it was only those requiring worker status that remained in contention (deductions from wages, holiday pay, part-time worker rights and national minimum wage entitlement). The ET held that:

(1) he was not an employee, due to lack of mutuality and the absence of an umbrella contract;

(2) he was a worker on ordinary principles *during the slots* (which was sufficient for the above claimed rights);

(3) the system for seeking release from an arranged slot did *not* constitute a power of substitution; and

(4) he was *not* in business on his own account, with the company as his client.

The EAT rejected the company's appeal, holding that these were rulings that were open to the ET on these particular facts. The ET had applied correctly the law relating to: (i) worker status while actually working (applying *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] IRLR 872, [2018] ICR 1511, **AI [81.01]**); and (ii) the 'own business' element of the worker definition (applying *Jivraj v Hashwani* [2011] UKSC 40, [2011] IRLR 827, [2011] ICR 1004, **L [557.02]**). Moreover, the ET were correct on the specific point of substitution; at [62] this is neatly summed up as follows:

> 'The Tribunal's primary finding is correct – it is not a right of substitution at all. It is merely a right to hope that someone else in the pool will relieve you of your obligation. If not, you have to work the slot yourself. You cannot, for example, get your mate to do it for you, even if s/he is well qualified. All you can do is release your slot back into the pool.'

The claimant had also challenged the ET's finding on employee status. The EAT accepted the ET's view on the absence of an umbrella contract but found that it had not considered the claimant's secondary argument for employee status only during slots. However, as no rights now depended on that, the matter was academic and did not have to be decided.

Part-time workers; remedies; time limit in judicial pension cases

AI [153]

Miller v Ministry of Justice [2019] UKSC 60

The long-standing litigation over pensions for the part-time judiciary seems to be coming to a close, with this decision of the Supreme Court on the question of whether claims were made in time in the first place. Under reg 8 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 **R [1295]** they were made out of time if the relevant date was the end of each judicial appointment (and some judges had had several over time and/or contemporaneously) but were in time if the relevant

date was when they eventually *retired*. The EJ held that it was the end of each appointment, and then went on to hold that it was not just and equitable to extend time. The latter point (considered at **AI [153.01]**) was upheld by the EAT and formed no part of the present appeal, leaving just the stark 'relevant date' issue.

The Supreme Court overturned the decision of the EJ and found for the judges. The court pointed out that there is an inherent difficulty in these circumstances because the judges are not 'workers' as such because they do not have contracts (though they are to be *treated* as such under EU law, see **AI [135]**, and now in domestic law generally, see *Gilham v Ministry of Justice* [2018] EWCA Civ 2321, [2019] IRLR 52, **Bulletin 496**), but the anti-discrimination provision in reg 5 of the Regulations refer to less favourable treatment 'as regards the terms of his contract'. Moreover, the very particular circumstances of the part-time judiciary are reflected in their statutory scheme which operates by aggregating periods of appointments over time. In the longer term, this may all mean that this decision is unlikely to be relevant in the general run of cases, important though it is here. In the short term, it meant that the court had to do its best to fit the Regulations to the facts.

The Ministry had argued for only the end of each appointment to count; the judges had argued for only the date of retirement to count. In fact, the court gave them half a baby each (but this ultimately coming down on the claimants' side). They held that in these circumstances it can be *either*. The basis for this is that the judge could *either* claim at the end of each appointment that provision was not being made for his or her future pension entitlement *or* claim on retirement that such arrangements had not been made and so no pension was now being paid. At [35] the judgment states:

> 'It may be that the appellants could have complained of less favourable treatment, as compared to their full-time colleagues, by reference to the lack of any equivalent provision for a pension in their terms of office. But that does not detract in any way from the less favourable treatment they undoubtedly suffered, or would suffer, at the point of retirement.'

DIVISION CIII WHISTLEBLOWING

Whistleblowing detriment; protection restricted to detriment in the employment field

CIII [90]

Tiplady v City of Bradford Metropolitan District Council [2019] EWCA Civ 2180

The particular context of this case is not likely to arise very often, but if and when it does the decision of the Court of Appeal is important in confirming that, wide though the idea of 'detriment' may be in the ERA 1996 s 47B **Q [671.03]**, it is subject to one major limitation which has hitherto not been subject to direct authority, namely that the detriment(s) in question must

have occurred *in the employment field*. The decision is also of more general interest in its consideration of the relationship between whistleblower protection law and discrimination law.

The claimant was an employee of the council. She and her husband were engaged over two-and-a-half years in an acrimonious dispute with the council in relation to their house. She eventually raised a grievance about this and left employment, claiming constructive dismissal and detriment through having made protected disclosures. The problem was that these disclosures and the claimed detriments related to their *housing* dispute and the treatment they alleged they had suffered had arisen in that context. The ET rejected all their claims. On the question of detriment, it held that she had not in fact been subjected to the detriments alleged, but even if she had the ET had no jurisdiction because she had not suffered them in the employment field, but as a local resident. The EAT dismissed her appeals.

She was eventually given leave to appeal to the Court of Appeal only on this point of interpretation. Linguistically, the point was a neat one. Section 47B has no direct reference to the employment field, and indeed refers to 'any detriment'. She therefore argued that there was no restriction to employment matters, which she said was in line with the protective intent of whistleblowing law generally. On the other hand, s 47B sits within Part V of the Act, which is entitled 'Protection from suffering detriment in employment'.

Giving the judgment of the court, Underhill LJ first pointed out that ultimately she could not succeed because of the ET's finding of fact that there had not actually been detriments (the point about the employment field having only been a secondary ground of decision). However, they agreed to hear the point because of the lack of previous authority. In the light of that, the court looked at certain cases on discrimination law where a similar issue had arisen. In particular, there is a passage in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] IRLR 285, [2003] ICR 337, to the effect that discrimination is to be in the employment field, which was applied in *Martin v London Borough of Waltham Forest* UKEAT/0069/11, [2011] EqLR 1067 where a claim that a local authority had discriminated against one of its bus drivers by prosecuting him for benefit fraud was disallowed because the council's action had been against him as a local resident. Moreover, this point is backed by the fact that discrimination law states that employment issues go to an ET but *other* matters (e g provision of services) go to the county court. The court accepted that *Shamoon* was only persuasive here, but represented the better view. It accorded with what the court thought the better interpretation of s 47B anyway and the claimant's appeal was dismissed.

Two subsidiary points are also important:

(1) Having decided that any detriment must arise in the employment field, the question became how to *define* that field. The court thought that the best approach was that the individual must have suffered the detriment 'as an employee' (ie the emphasis being on the individual's position, not the employer's functions). It was added, however, that this

was not to be construed too narrowly (accepting the protective intent of s 47B); in particular, it is not necessarily confined to actions at the place of work or during hours of work *and* it is *not* to be identified with the age-old formula 'in the course of employment' (at which point any industrial injury lawyers out there will have given an audible sigh of relief!).

(2) Was it right to have relied on discrimination law precedents? Underhill LJ accepted that recently in *Timis v Osipov* [2018] EWCA Civ 2321, [2019] IRLR 52 he had cited a dictum by Mummery LJ in *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] IRLR 530, [2008] ICR 799, that a court should not simply read over discrimination cases into employment law, but went on to hold that in the case of whistleblowing the similarities are such that where possible the scope of whistleblowing and discrimination law legislation should be the same, as Ward LJ had said in *Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] IRLR 677, [2006] ICR 1436.

DIVISION K EQUAL PAY

Material factor defence; who proves what; continuance of a successful defence

K [517]

***Co-operative Group v Walker UKEAT/0087/19* (*11 October 2019, unreported*)**

The question in this appeal before Lord Summers in the EAT concerned the duration of a successful 'material factor' established by the employer. The claimant, a senior HR manager, had been caught up in the employer's financial difficulties, leading to a pay agreement in February 2014 in which several such senior managers were offered increases to keep them. As some of these colleagues were considered more indispensable, they were given more than her. However, some time later financial circumstances changed, it was less essential to keep the others and her functions were increased, but still on the lower pay. In February 2015 a Hay evaluation study showed that she was being underpaid but nothing was done about it. When she was later dismissed, she brought an equal pay claim. The ET considered that 'some time between February 2014 and February 2015' the factors justifying inequality originally had changed and so any award could go back beyond the study.

The employers appealed and the EAT upheld their appeal. It was held that in law a material factor defence continues to apply unless and until there is a fresh decision by the employer on pay which can no longer be so justified (or, at the least, that there is evidence that the material factors have ceased to exist). At [15] this is put as follows:

> 'The law requires a decision that can be characterised as unlawful. Here all the ET could say was that there had been a slide from a position where there were material factors which justified the pay differential between the Respondent and her comparators, to a position about a

> year later where the original justifications had gone. But there was no evidence that the Appellants had made a decision to permit this unsatisfactory state to continue nor was there any evidence that the Appellants had even noticed that a problem might have occurred. It was only when the Hays study came to hand that facts that [sic] indicated that the objective justifications originally relied upon no longer persisted. I consider that *Benveniste v University of Southampton* [1989] ICR 617 supports the proposition that a new decision must be made which is tainted by sex discrimination before a prior legitimate decision can be set aside.'

The result in *Benevista* was then distinguished because there the university had made a subsequent decision not to award her a further pay rise, ending the previous effectiveness of the defence. In the instant case, the EAT considered that there was no evidence from either side to justify such a conclusion.

Remedies; time limit; stable employment relationship; effect of promotion

K [673]

Barnard v Hampshire Fire and Rescue Authority UKEAT/0145/19 (19 December 2019, unreported)

The text at **K [675.01]** sets out the decision of Judge Barklem in the first EAT decision in this case in May 2019. It concerned the application of the difficult concept of a 'stable employment relationship' when applying the time limit for equal pay claims, in circumstances where the claimant had been continuously employed by the same employer for eight years, progressing by promotions from administrative grade to technical roles and then finally into management. The ET had held that each promotion broke a stable relationship, so that she could only claim in respect of her final (managerial) appointment. The EAT held that this was wrong in law and remitted the case.

This second decision of the EAT (Eady J and side members) concerned the second ET decision on remission. It held that the necessary stable relationship existed through the earlier promotions, but was ended by the promotion into management (producing much the same result). The EAT however again held that the ET had erred in law. It had failed generally to adopt the necessary broad, non-technical approach mandated by *North Cumbria University Hospitals NHS Trust v Fox* [2010] EWCA Civ 729, [2010] IRLR 804 (see **K [675]**) and in particular had treated the elevation to management as *in itself* enough to break the stable relationship, without seeing it in context. Here, the facts showed that this promotion was still part of an overall incremental progression into higher grades, as shown by the fact that when she went into management it was at first on a temporary basis, retaining her existing contract. As all this pointed only to one conclusion, namely a continuing stable relationship, the EAT held that another remission was not necessary and substituted their own decision.

DIVISION M TRADE UNIONS

Breach of rules; application to the Certification Officer; legality of further proceedings on the same matter

M [3904], M [4012]

***McFadden v UNITE the Union UKEAT/0147/19* (*19 December 2019, unreported*)**

This case on union disciplinary proceedings raised issues relating to the application of *res judicata* to proceedings before the Certification Officer. The judgment of Lavender J in the EAT did not have to decide the most difficult point (whether it applies to successive union disciplinary proceedings about the same matter) but did deal with its effects in relation to a CO's ruling under the TULR(C)A 1992 s 108A **Q [342.01]**.

The claimant union member and officer was accused of unacceptably touching a female member at a non-union function. The union instigated disciplinary proceedings on her complaint, though without being specific as to the rule being invoked. He denied the charge (and indeed argued that this was all politically motivated, though that did not have to be determined here). The union found against him, removed him from office and barred him from office-holding. He brought a complaint to the Certification Officer under s 108A. The Assistant CO (ACO) appointed to hear the complaint found the union in breach of its rules. In relation to the sub-rule deemed to have been relied on, the incident had not been at a union event and had not been in the workplace. His order was that disciplinary penalties were null and void and that the union should reinstate him in office. The union complied.

The problem in the EAT case was that the union then brought a *second* disciplinary case against him in relation to the same incident, this time relying on three other sub-rules of a more general nature. He was again found guilty, suspended and then barred indefinitely from office. The claimant complained again to the CO, arguing that the union was estopped from doing so. In the alternative, he argued that the second proceedings were in breach of the ACO's ruling in the first case. The CO rejected this complaint, holding that there was no estoppel raised by the union's first proceedings. On appeal from this, the EAT considered the general law on estoppel, but held that it was unnecessary to decide if, as a general matter of law, the doctrine can apply to a body such as a union's disciplinary committee (as opposed to a court or tribunal). Instead, the judgment considered its effect in relation to the ACO's original decision. It was held that his decision would directly estop a second disciplinary charge under the same sub-rule, but not under the other sub-rules. However, such a second charge *did* come within the wider (indirect) purview of the leading case of *Henderson v Henderson* (1843) 3 Hare 100, which bars a second bite of the cherry in relation to allegations which *could and should* have been brought in the initial proceedings. That was the case here and so the appeal against the CO's decision was allowed. On a more general level, the judgment also holds that in any event the bringing of the second proceedings by the union was in breach of the ACO's order to

reinstate him into his office. The point was made that while it would have been lawful to bring second proceedings in relation to different charges, it was not lawful to bring them in relation to the same charge.

DIVISION NII INDUSTRIAL ACTION

Strike ballots; full, free and fair; interception of mail

NII [2792]

Royal Mail Group Ltd v Communication Workers Union [2019] EWCA Civ 2150

This was the appeal by the CWU against the injunction granted by the High Court to restrain threatened industrial action by Royal Mail workers which could have affected the general election. That possible interference (though newsworthy) was actually irrelevant legally. The question was a much more restricted one relating to the meaning of the requirement that a strike ballot must be conducted in such a way as to be free from 'interference' (TULR(C)A 1992 s 230(1) **Q [467]**). There are also requirements in sub-ss (2) and (4) that the voting paper must be sent by post to the member's home address and he or she must be able to vote in secret. The actual result of the ballot here was unequivocal, with a huge majority in favour, *but* a problem arose because the workers in question were the ones actually in charge of the posting of the papers.

The employers objected that the union had encouraged its members not to wait to receive the papers in the post but to take them *out* of the post at their sorting office, fill them out there and then and send them back collectively. They argued that this infringed the three statutory requirements above. The judge agreed and granted the injunction. On appeal, the union argued that there had been no 'interference' because that meant 'improper' interference, as was suggested in *RJB Mining (UK) Ltd v National Union of Mineworkers* [1997] IRLR 621 (see **NII [2793]**). However, the Court of Appeal (in a judgment given by Males LJ) held that the word 'improper ' is unhelpful, that the word 'interference' is to be given its ordinary meaning in its statutory context and that there is no requirement of nefarious conduct such as intimidation, coercion or fraud. The judge had been right to construe it as covering the (non-fraudulent) conduct here, especially as it had also meant that the papers had not been sent to the individuals' homes. At [49] the judgment states:

> '… the word "interference" in section 230(1) must be seen in its context as part of the phrase "without interference from or constraint imposed by" the union or its members, officials or employees. In that context it is directed to conduct, whether by words or action, which has the effect of preventing or hindering the ordinary course of events with which the section is concerned, that is to say, the process of voting in a ballot for industrial action. It is not in my judgment limited to conduct which amounts to intimidation, coercion, fraud or the like.'

In the circumstances, it was not necessary to determine whether the requirement of secret balloting had also been infringed. It was also held that an injunction would not infringe art 11 of the European Convention.

Three points may be noted:

(1) the court accepted that simply to try to persuade members to vote in a particular way will *not* normally constitute interference; likewise, there is no objection to members filling out the paper away from their home or talking about how they have voted;

(2) it was emphasised that this particular form of interference is only likely to occur (if at all) in this particular employment where members can have direct access to the post before it is delivered;

(3) sympathy was expressed for the union, given that the result of the ballot was so overwhelming that the interference in question was most unlikely to have had any actual effect on the balloting, but the function of the court was to apply s 230 as Parliament had intended.

Strike notice requirement; defective or missing notice; form and content of notice

NII [2975], NII [2653]

British Airways plc v British Airline Pilots Association [2019] EWCA Civ 1663, [2020] IRLR 43

The question in this second Court of Appeal case concerning the legality of industrial action was whether the union had given the employer sufficient information about the proposed action, under TULR(C)A 1992 s 226A **Q [461]**, in particular whether the union had complied with sub-ss (2)(c)(i), (2A) which stipulate a list of the *categories* of employee to which the employees concerned belong. The union had given such a list containing the overall number of aircrew to be balloted, the different types of staff and their places of work. The employer argued that it should also have split them up into short-haul and long-haul operations. The judge disagreed and refused the injunction, and the Court of Appeal agreed and dismissed the appeal.

The case was complicated by a legislative change in 2004. Prior to that, the relevant provision had required the union to give such information 'as would help the employer to make plans'. Although that was repealed by the Employment Relations Act 2004, the employer argued that this was still to be implied into s 226A. Giving the judgment of the court, Simler LJ held that this was no longer a legal yardstick for applying the section. She accepted that it could still be seen as part of its overall *rationale*, but the change itself showed that it was now necessary to balance this against a secondary consideration behind the change, namely the need for the notice requirement to be capable of being clearly and certainly applied by a union, without creating too great a burden on it. Moreover, (1) the word 'categories' is to be applied in a commonsense fashion, against the backdrop of the nature of the industrial action; and (2) the question is not whether the union *could* have

supplied more detail (which will often be the case), but whether it had done *enough* to satisfy the section. Applying that here, the union had indeed done enough and the judge had been right to refuse the injunction.

DIVISION PI PRACTICE AND PROCEDURE

Status of an employment tribunal; whether a 'court' for statutory purposes

PI [3]

***Watson v Hemingway Design Ltd* (*in liq*) *UKEAT/0007/19* (*16 December 2019, unreported*)**

An employment tribunal may be called many things (especially by a disappointed litigant) but the question of law in this case before Kerr J in the EAT was whether it can properly be called a 'court' for the purposes of the Third Parties (Rights against Insurers) Act 2010. On this point of interpretation depended whether the ET claimant for unfair dismissal and discrimination against his insolvent ex-employer could bring a claim against that ex-employer's insurer in the ET or (as the insurer was arguing) had to proceed in the civil courts instead.

The claimant was dismissed shortly before the insolvency. The ex-employer had an insurance policy with the insurer that would normally have covered its liability, including in ET proceedings. The claimant sought to invoke third party rights under the 2010 Act and to do so in the ET. Section 2 of the Act allows such a claim to be adjudicated by a 'court' hearing the underlying claim, hence the question whether the ET was a 'court' for these purposes. There is a reference also to a 'tribunal' in s 2 but this was held to refer to an arbitral tribunal provided for by the Act.

The ET held that it had no jurisdiction, because matters pertaining to insurance third party rights are too far outside the normal statutory purview of an ET. However, the EAT allowed the claimant's appeal. The judgment points out that ETs often have to decide questions of general law as incidental matters to the principal employment issue. On the other hand, there is no single legal answer to the question 'are tribunals courts?' The answer has to lie in the statutory context involved in the individual case. Thus, for some purposes an ET will not be a court (see eg *Brennan v Sunderland City Council* UKEAT/0286/11, [2012] ICR 1183, where it was not, for the purposes of apportionment under the Civil Liability (Contribution) Act 1978, see **L [865.03]**). However, the text at **PI [3]** ff has examples of the opposite result and a couple of these were relied on by the EAT, especially *Peach Grey & Co v Sommers* [1995] IRLR 363, [1995] ICR 549, DC. What about the 2010 Act? The decision that an ET is a court for its purposes was heavily based on Parliamentary intent – the Law Commission *travaux préparatoires* behind the Act showed that the aim (or, in classic interpretation terms, the 'mischief') was to cure the defect in the previous legislation requiring a claimant to go to *two* fora to rely on their rights. Thus, to allow

ETs to qualify as courts (and thus deal with the employment and insurance issues together) was the way to pursue that policy.

There was one other issue that arose on the facts but was not directly before the EAT – even if the ET was a court, was the claimant still bound by a term in the insurance contract between the ex-employer and the insurer requiring them to use *arbitration* to resolve a dispute (which would still short-circuit the ET proceedings)? The claimant argued, not that he was not a party to it (after all, he was claiming third party rights), but that such a clause is invalid under the ERA 1996 s 203 and the EqA 2010 s 144 because its effect would be to prevent him from asserting his rights under those Acts. There is authority that an arbitration clause directly in an employer-employee contract can be attacked on this ground (*Clyde & Co LLP v Van Winklehof* [2011] EWHC 668 (QB), [2011] IRLR 467, see **PI [727]**) but there is no authority on such a clause in a third party contract. However, at the end of the judgment Kerr J states that in his obiter opinion the 'better view' is that ss 203 and 144 *can* apply in these circumstances.

Early conciliation; rejection of the claim because of errors; challenging the validity of the certificate

PI [289.02], PI [290.07]

***Peacock v Murrayfield Lodge Ltd UKEAT/0117/19* (*24 September 2019, unreported*)**

This case arose from a misunderstanding between the claimant (initially acting personally) and her subsequent advisers. She submitted an EC form giving as the respondent's address a place she had once attended a meeting with one of the directors. It was neither its registered address nor its normal place of business, though the director did work there and ACAS did in fact manage to contact the respondent there. A certificate was issued. Subsequently, the advisers submitted a second EC form, unaware of the first. A second certificate was issued. Proceedings were then issued, but challenged by the respondent.

The problem that arose was that the proceedings were within time if the second EC certificate was used, *but* out of time if the first one was used. In law, there cannot be two certificates for one case (*Commissioners for HMRC v Garau* UKEAT/0348/16, [2017] ICR 1121, see **PI [288.02]**) and so, to progress, the claimant had to show that the first one was invalid because of the wrong address. The requirements of notifying the respondent's name and address are contained in rule 3 of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254 **R [2911]** but, in a mismatch commented on in the EAT's judgment, the relevant procedural provision in rule 12(1)(f) of the Rules of Procedure 2013 **R [2769]** only makes failure to give the correct *name* a potential reason to reject a claim (subject to an EJ's discretion to allow it to proceed in the interests of justice). Judge Barklem in the EAT held for the respondent, on alternative grounds:

(1) rule 12(1)(f) cannot be interpreted as impliedly covering the address as well as the name and so the address is not covered by the prima facie invalidity;

(2) in any case, applying the general non-technical approach in the case law to date on the whole EC system, it is sufficient to give an address where business 'in relation to' the respondent is carried out; there is no requirement that it be the registered or normal office.

Thus, the first EC certificate was valid and the claim was out of time. There is one obvious peculiarity to this case – normally the non-technical approach operates in a claimant's favour, but here it was fatal to her claim.

The response; respondent barred; limited further participation on remedy

PI [353.01]

***Talash Hotels v Smith UKEATl0050l19* (*19 December, 2019, unreported*)**

The text at **PI [353.01]** sets out the decision in *Office Equipment Systems Ltd v Hughes* [2018] EWCA Civ 1842, [2019] IRLR 748, the leading case on the extent to which a respondent barred from taking part in a liability hearing may still be permitted to take part in some way in a subsequent remedies hearing. In particular, the Court of Appeal said that where computation of an award was not straightforward it would normally be an error of law for an ET to refuse to allow participation, and more so to refuse to allow the respondent to make written representations. This case before Judge Barklem in the EAT is a good illustration of this relatively liberal approach.

The claimant brought proceedings for deductions from wages and unpaid holiday pay. The respondent's ET3 was six days late and the ET refused to extend time. Judgment on liability was entered. The claimant produced figures for the amounts being claimed. These were not sent to the respondent which was unable to comment on them (even though some of them were rather high, given the claimant's previous earnings). The ET awarded the amounts in full and refused respondent requests to review the decisions to disallow participation and to withhold the calculations, without giving reasons. Applying *Hughes*, the EAT held that the ET had erred in these decisions and allowed the respondent's appeal.

REFERENCE UPDATE

496	*Bessong v Pennine Care NHS Foundation Trust*	[2020] IRLR 4, EAT
496	*East London NHS Foundation Trust v O'Connor*	[2020] IRLR 16, EAT

496	*Gray v Mulberry Co (Design) Ltd*	[2020] IRLR 29, CA
496	*Gilham v Ministry of Justice*	[2020] IRLR 52, SC
497	*Lopez Ribalda v Spain*	[2020] IRLR 60, ECtHR

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