Harvey on Industrial Relations and Employment Law

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LEGISLATION

'Exit day' changes

Several sets of Regulations applicable to employment law have been sitting in the wings waiting for their commencement on 'exit day', in particular the Employment Rights (Amendment) (EU Exit) Regulations 2019 SI 2019/535. After two false starts, exit day has now been fixed as 31 January 2020, when these changes (mostly of a technical nature) came into force. They will be incorporated into Divs Q and R in Issue 280.

Bereavement Leave and Pay

The Parental Bereavement (Leave and Pay) Act 2018 **Q [1735]** was brought into force on 18 January 2020 by SI 2020/45. It operates primarily by inserting a new Chapter 4 (ss 80EA–80EE) into the ERA 1996 and a new Part 12ZD (ss 171ZZ6–171ZZ15) into the SSCBA 1992. These amendments will be made in Div Q in Issue 280. Detailed rules are to be set out in supporting regulations which, at the time of writing, were still before Parliament. The intention is for the whole scheme to come into effect on 6 April.

DIVISION AI CATEGORIES OF WORKER

The technical meaning of 'worker'; application to private hire driver

AI [81]

***Augustine v Econnect Cars Ltd UKEAT/0231/18* (*20 December 2019, unreported*)**

There was reported in **Bulletin 498** the decision of the EAT in *Stuart Deliveries Ltd v Augustine* UKEAT/0219/18 (5 December 2019) that a motor

bike courier had properly been categorised by the ET as not an 'employee' but a 'worker'. The same claimant has also succeeded in the instant case before Kerr J in the EAT in establishing the same result (not employee, but worker) in relation to his work as a private hire driver for an electric car company.

He was described in documentation as self-employed and paid tax accordingly. He rented his car for a fee and lodged a security bond in relation to it. There was a normal work commitment of five shifts per week (amounting to about 50 hours), but this could be altered by the driver; in fact, this claimant worked about 20 hours per week. There was no substitution clause and personal service was expected. There were written procedures covering availability, operation of the car, taking breaks and signing on and off. There was a confidentiality clause and a post-termination restraint for a year (according to the judgment, 'of doubtful enforceability'!). In return for all this, he retained 62.5% of each fee.

After a row over a proposed new 'points' system for car operation, the claimant left and brought several claims. Some (in particular unfair dismissal) failed because of the holding that he was not an employee. Others depended on the lesser 'worker' status and were considered by the ET which held that on the facts he had not been a whistleblower and also, rather oddly, that he could not claim detriment for being a part-time worker because he did not qualify as such (being instead a pieceworker). The EAT held that the finding of worker (but not employee) status was one that was open to the ET, which had applied the correct approach. The finding against whistleblowing was also upheld, but the claimant's appeal on the part-time issue was allowed. There was evidence of 'normal' working of about 50 hours and the ET should have considered his 20 hours in relation to this. The only proper inference on these facts was that he *was* a part-time worker within the comparative test in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 and the question whether he had been subject to such treatment was remitted to the ET.

DIVISION DI UNFAIR DISMISSAL

Reasonableness; general principles; overlap with human rights

DI [987]

***Q v Secretary of State for Justice UKEAT/0120/19* (*10 January 2020, unreported*)**

The key point in this case before Judge Auerbach in the EAT is the affirmation of the approach taken by the Court of Appeal in *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] IRLR 107 that the range of reasonable responses test for unfair dismissal is basically compatible with arguments on human rights, especially under art 8 (privacy and private life), so that if a dismissal is fair under domestic law there is unlikely to be a

breach of the article. Moreover, the judgment disapproves an attempt to raise the bar on justification under art 8 if the employer is a public authority.

On facts not a million miles from those in the well-known case of *Pay v Lancashire Probation Service* (Appl no 32792/05) [2009] IRLR 139, ECtHR, the claimant was a probation officer who in 2014 had her child placed on the child protection register for reasons that she continued to dispute. When social services informed her employer of this, she was disciplined for not divulging it, but not dismissed. There was a further such episode in 2015 and again she did not divulge it to the employer. She was again disciplined, but this time dismissed for gross misconduct, the reasons being failure to disclose, reputational damage to the employer and unprofessional conduct. On her claim for unfair dismissal, the ET held that the employer had acted within the 'range' test. It also addressed her argument that the employer had breached her art 8 rights, holding against this and citing *Pay*. Her further appeal was turned down by the EAT, relying on the principles set out at **DI [982]** from *X v Y* [2004] EWCA Civ 662, [2004] IRLR 625, and also *Turner*. The claimant had tried to open up a divide between *Turner* and *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274, [2013] ICR 691, EAT, by arguing that where (as in the latter) the employer is in the public sector there is a double application of human rights law, ie that it bears on the ET in applying the law (as in the case of a private employer) *and* on the employer itself when deciding whether to dismiss in the first place. The argument was that this raised the bar on employer justification ('necessary in a democratic society') and so in this case the ET should have found a breach of art 8. While the EAT accepted that conceptually there is this double application, it rejected the idea that this made a fundamental difference. At [79] and [80] this is explained as follows:

> '… at a doctrinal level [counsel] is right that *Hill* identifies that there is an additional legal consequence which applies where the claim is against a public body. This is that, in addition to the Tribunal having a duty to weigh the impact of the dismissal upon Convention rights, and whether it is proportionate (which it must, whether the employer is a public or a private body), a public employer also itself has that same duty when taking its decision.
>
> However, while that is doctrinally correct, I am doubtful that this added feature makes any real difference in practice. When I raised this with [counsel] he was unable to give me an example of any scenario in which it would. I say this because, whether the case involves a public or a private employer, the Tribunal must, in deciding whether the dismissal is fair or unfair, come to its own view as to whether the imposition of the sanction of dismissal involved a disproportionate and unjustified interference with Convention rights, or not. If it did, then this will take the dismissal outside the band of reasonable responses. If not, then this feature of the case will not do so. That will be the position regardless of whether the employer had a duty of its own, whether, if so, it applied its mind to the question, and, if it did, whatever conclusion it came to. It is always the Tribunal's conclusion that, ultimately, must decide the point.'

Misconduct; reasonableness; proper investigation; significance of an investigatory hearing

DI [1485], DI [1492], DI [1501], DI [1503]

***Sunshine Hotel Ltd v Goddard UKEAT/0154/19* (*15 October 2019, unreported*)**

Sattar v Citibank NA [2019] EWCA Civ 2000, [2020] IRLR 104

In these two cases, questions arose as to the longstanding and immutable issue as to what constitutes a 'proper investigation' and procedure in a misconduct case within the basic rules in *BHS v Burchell* [1978] IRLR 379, [1980] ICR 303n, EAT.

In the *Sunshine Hotel* case Griffiths J in the EAT addressed a relatively precise aspect of this wider issue. The ET had held a dismissal procedurally unfair and in doing so had appeared to concentrate on the lack of an investigatory hearing, as well as the eventual disciplinary hearing. The judgment of the ET used the phrase that the claimant had been deprived of 'a basic employment right'. The respondent appealed on the basis that in law there is *no* rule that there must in all cases be an investigatory *hearing*, the correct approach under *Burchell* being that the employer must undertake *as much* investigation into the matter as is reasonable in the circumstances of the case. The EAT agreed with this interpretation of the law here, pointing out that in many cases this will take the form of such a meeting, but not in all. Turning to the facts, however, the EAT (dismissing the respondent's appeal) held that the ET *had* applied this correct test and that when taken in the round what the judgment meant was that on these facts (*including* the lack of a meeting) the claimant had been deprived of a proper investigation and thereby the chance of providing a full explanation. It was *this* that was the basic employment right in question.

In *Sattar* the claimant was a senior bank employee with 40 years' service who was arrested by HMRC on suspicion of tax fraud. He was immediately investigated by the employer which claimed to have found evidence of serious breaches of its financial rules for personal reasons. Before this investigation was completed, he was suspended and then subject to disciplinary proceedings. At the hearing (held on paper because of medical problems with his attending) he was dismissed for gross misconduct.

He brought proceedings for unfair dismissal, based largely on unfair procedure, arguing that: (1) the decision to take disciplinary action was taken before the investigation was complete; (2) he had not had an investigatory hearing; and (3) he had not been properly informed of the charges against him. In spite of some of these involving breaches of the employer's own procedures, the ET dismissed his claim, considering that overall the procedure had not been unfair. The EAT dismissed his appeal and the Court of Appeal (in a judgment given by Sir Patrick Elias) dismissed his further appeal. As to the three above grounds:

(1) an employer may act reasonably in proceeding to disciplinary matters (including suspension) while further investigations are undertaken. At [51] the judgment states:

> 'It will often be necessary for an employee to be suspended as soon as investigations have unearthed serious matters which will be, or are likely to be, the subject of disciplinary action, even though the full investigation into those matters has not been completed. One reason may be concerns about the response of the regulators if the matter is not thought to have been treated with the appropriate gravity. Another may be a concern that the employee might interfere in some way with the evidence if he remains at work, as indeed was a concern here. As Wood J observed, giving the judgment of the EAT in *ILEA v Gravett* [1988] IRLR 497, para 16, in the course of a disciplinary process:
>
> > "… [t]here will no doubt come a moment when the employer will need to face the employee with the information which he has. This may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing. It may be that after hearing the employee's version of accounts, further investigation ought fairly to be made, but this need not be so in every case."
>
> Continuing the investigation is not a flaw in the proceedings and does not render them unreasonable provided that the employee is given a full and fair opportunity to engage with any new charges or new material which might emerge as a consequence of that process. That opportunity may be at the disciplinary hearing itself.'

(2) Following up that last point (and in line with *Sunshine Hotel* above), a formal investigatory hearing will not always be necessary, especially if there are no major conflicts of fact.

(3) It is obviously the case, however, that it is an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the employer's obligation to put that case so that on a fair and commonsense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. That duty is not met if the employee has to speculate what may be in issue and what may not.

Applying those principles here, the claimant's case failed on the facts and the ET had been entitled to find a fair dismissal.

Compensation; contributory fault; applying the correct test

DI [2716]

***Wheeley v University Hospitals Birmingham NHS Trust UKEAT/0259/18* (*3 September 2019, unreported*)**

At **DI [2716]** the text considers the decision of Langstaff P in *Steen v ASP Packaging Ltd* UKEAT/0023/13, [2014] ICR 56, where he set out four tests to apply when deciding on a possible reduction of compensation for contributory fault: (1) what was the conduct in question; (2) was it blameworthy; (3) did it cause or contribute to the dismissal; and (4) if so, to what extent should the compensation be reduced? As always, such a judgment is only guidance, but this decision of Judge Barklem in the EAT is a good example of the possible pitfalls of an ET not following it; moreover, it arose in a potentially sensitive context.

The claimant, a long-serving employee with a clear disciplinary record, became unhappy with a proposed reorganisation and during this dispute started sending inappropriate and unacceptable emails and on one occasion went to the home of one of the managers. She was disciplined and dismissed. The complicating factor was that during this procedure she received a late diagnosis of bi-polar disorder and medical evidence before the employer suggested that this may well have had an effect on her actions, though there continued to be disagreement between the parties as to whether this accounted for it or merely exacerbated what she may have done anyway. On her claim of unfair dismissal, the ET found for her on liability, but reduced her award by 25% for contributory fault. It did so in relatively short form and without going through the four stages set out in *Steen*.

The EAT allowed her appeal on this point, remitting the case to the ET for reconsideration. It was held that the ET had not properly covered the *Steen* questions, especially (2) – was it blameworthy? Much of this would depend on the role that the bi-polar disorder played, which had not been expressly covered. Moreover, under (4) the ET had not explained *why* it had come to the figure of 25%. Had it gone through the guidance, it would not have fallen into these errors. One further point of interest in the judgment is the secondary ground of allowing the appeal, namely that overall the decision on contributory fault was not '*Meek* compliant' in its reasons. Thus, although the *Steen* guidance is not binding, if it is not followed (in the absence of good reason) there is a danger not just that the ET may fall into error in principle, but that the eventual fixing of contributory fault may fall foul of the *Meek* requirement of adequate reasons.

DIVISION PIII JURISDICTION

Express territorial jurisdiction provisions; ships, hovercraft and mariners

PIII [172]; H [1136.03]

***Walker v Wallen Shipmanagement Ltd UKEAT/0236/18* (*16 January 2020, unreported*)**

The EqA 2010 s 81 **Q [1523]** lays the foundation for discrimination law to apply to work on ships and hovercraft, and work more generally by seafarers. The detailed rules on this (as to territorial jurisdiction) are then set out in the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 SI 2011/1771. So far, so good, *but* this decision of the EAT under Kerr J shows that a combination of s 81 and reg 4 of the Regulations **R [2719]** contains a surprising lacuna in this coverage.

The claimant who had completed training as a seagoing officer applied in this country to a nautical employment agency based in Hong Kong for work on a foreign-flagged ship operating in the Far East. She was told that she could not have the job because she was a woman. Call me old fashioned, but there seems to be at least an arguable case here for direct sex discrimination (!). She brought such proceedings before an ET. It held that normally it would have found for her and awarded her compensation, but it felt obliged to uphold the argument of the respondent that it had no jurisdiction to do so. On her appeal, the EAT considered in detail this argument and also felt obliged to hold that on a straightforward interpretation of the section and regulation she was not covered by the jurisdiction-providing rules. At [39]–[41] the judgment starts:

> 'It is, in our judgment, an uncomfortable but inescapable proposition that the 2011 Regulations permit an offshore employment service provider to discriminate, on United Kingdom soil, on the ground of any of the protected characteristics in the 2010 Act, when recruiting in this country personnel to serve on its clients' foreign flagged ships sailing outside United Kingdom waters.
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> No international law obligation of the United Kingdom requires UK domestic law to permit such discrimination. It is, at least, doubtful whether the 2011 Regulations conform to the provisions of Directive 2006/54/EC (the Equal Treatment Directive). The claimant has no remedy against the respondent because the latter is not an emanation of the state. The claimant's remedy, if any, lies against the United Kingdom itself.
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> The three members of this appeal tribunal consider that the Secretary of State would be wise to revisit the scope of the 2011 Regulations. We note that he or she is obliged by regulation 6 of the 2011 Regulations to review the impact of regulations 3 to 5 every five years. The next quinquennial review must be done by 31 July 2021. The conclusions must be published in a report. The scope of the review includes

reference to three directives on equal treatment, including Directive 2006/54/EC. We would not be surprised if the present case and the injustice suffered by the claimant were to feature in that review.'

Diplomatic immunity; whether employment of a trafficked individual is a 'commercial activity'

PIII [202]

***Basfar v Wong UKEAT/0223/19* (*20 November 2019, unreported*)**

The facts of this case are very similar to those of *Reyes v al-Malki* [2017] UKSC 61, [2018] IRLR 267, [2017] ICR 1417, which is considered at length at **PIII [202]** ff. It again concerned a claim for various employment rights by an employee of a foreign diplomat, against a background of alleged people trafficking. The diplomat was claiming immunity from suit under the Diplomatic Privileges Act 1964. The claimant argued that such immunity was removed by the exception in s 3(1) for 'action relating to any …commercial activity' of the diplomat. As pointed out in the text, the neat problem of interpretation was that: (1) in *Reyes* the Court of Appeal had held that this exception did not apply; (2) when the case went to the Supreme Court it was decided on other grounds; (3) in the Supreme Court two Justices had considered the point obiter and agreed with the Court of Appeal; but (4) three Justices had taken a much more cautious approach of merely expressing 'doubts' as to whether the view of the minority and lower court were right. Apart from giving law school examiners of first year courses on precedent a field day, this left the law in an unfortunate state, as shown by the course of the instant case to date. The ET struck out the claim of diplomatic immunity, holding that the Court of Appeal decision in *Reyes* was not binding and that the obiter view of the majority in the Supreme Court was to be preferred. However, Soole J in the EAT has now held that, although as a matter of precedent the ET was right about the Court of Appeal decision, that decision remained highly persuasive and the ET should have paid more regard to the more considered opinion of the minority in the Supreme Court. Thus, in spite of strong policy arguments for withholding immunity in cases of alleged trafficking, the result was the reversal of the ET's decision and the upholding of the immunity claim.

The decision is of importance on this difficult issue *but* arguably what is more important is the next stage because (as Daniel Barnett points out) permission has been given for a leap-frog appeal directly to the Supreme Court in order to sort this all out, the first time this power has been exercised since it was introduced in 2016 (see **PI [1761]**).

REFERENCE UPDATE

496	*Base Childrenswear Ltd v Otshudi*	[2020] IRLR 118, CA
496	*Bath Hill Court (Bournemouth) Management Co Ltd v Coletta*	[2020] IRLR 124, CA

497	*Cadent as Ltd v Singh*	[2020] IRLR 86, EAT
497	*Hancock v Ter-Berg*	[2020] IRLR 97, EAT
497	*TSN ry v Hyvinvointialan liitto ry* C-609/17	[2020] IRLR 141, ECJ
497	*Royal Mail Group Ltd v Jhuti*	[2020] IRLR 129, SC

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