Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to **1 March**.

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LEGISLATION

Amendment – now IP completion date, not exit day

In **Bulletin 499** it was said that a number of very technical legislative amendments consequent on Brexit were to come into force on 'exit day', ie 31 January 2020. Unfortunately, this was immediately superseded by the European Union (Withdrawal Agreement) Act 2020 Sch 5 para 1 which altered this to 'IP completion date' wherever it appears. At the moment, this is to be 31 December 2020. Issue 280 will contain the amendments, with the amended commencement date.

DIVISION AI CATEGORIES OF WORKER

Policy considerations; tort precedents; policy against multiple contemporaneous employers

AI [12]

***Patel v Specsavers Optical Group Ltd UKEAT/0286/18* (*13 September 2019, unreported*)**

The claimant was an optician working through the well-known high street optician. When his work was terminated, he brought ET proceedings inter alia for unfair dismissal, but his claim went wrong procedurally, in such a way that he was ultimately forced back on to an argument that he had been employed by two companies contemporaneously, which Judge Stacey in the EAT held is in general impossible in an employment law context, even though possible in a tort claim.

The problem arose because his position came within the scope of three different Specsaver companies. With Co A (the national company) he had a shareholder agreement. There was then Co B which ran the local operation

where he worked, but the work was contracted out to Co C, with which the claimant had a service contract. When the claimant brought proceedings he did so against Co A, in respect to which he obtained the necessary ACAS EC certificate. However, grave doubts arose as to whether he was Co A's 'employee' and he sought to rely on his service contract with Co C, with which he had no EC certificate. The ET, having refused an amendment, dismissed his claim, holding that he had a contract of employment with Co C but no right of action against it in the lack of the certificate.

The EAT dismissed his appeal. It held that the ET had been right to reject any claim against Co C because of the lack of a certificate and also right that the shareholder agreement with Co A fell far short of a contract of employment. This was why the claimant had to fall back on the argument that he had been contemporaneously employed by *both* Co A and Co C. In the context of vicarious liability in tort, there can indeed be more than one employer, traditionally in the area of the 'borrowed servant' cases and recently more generally in *Viasystems (Tyneside) Ltd v Thermal Transfers (Northern) Ltd* [2005] EWCA Civ 1151, [2005] IRLR 983. However, in the instant case it was held that this was because of policy factors particular to tort actions for damages which do not apply in a purely employment law case.

Citing binding authority gleaned from James Corden (One man, two guv'nors) and Laurel and Hardy, Judge Stacey (a judge after my own heart on matters of precedent) held that it is in general not possible to have two employers at the same time in relation to the same work. This was said to go back to *Laugher v Pointer* (1826) 5 B & C 547, [1824-34] All ER Rep 368 and can be seen clearly in the agency worker case of *Cairns v Visteon UK Ltd* [2007] IRLR 175, [2007] ICR 616, EAT where it was held that because the agency worker had a contract of employment with their agency it was not necessary to imply one with the end-user too. At [43] of the judgment in the instant case there is cited the policy reasons put forward in *Cairns* for this approach:

> 'In *Cairns* Judge Peter Clark went on to explore some of the practical complications that would flow from a finding of dual employment given the structure of ERA 1996. Which employer would be responsible for conducting the disciplinary hearing? In a redundancy situation upon whom would the consultation obligations fall? How would any unfair dismissal compensation be apportioned as between dual employers? Not insurmountable he concluded, but all requiring further consideration.'

It is possible that there can be (a) *separate* contracts of employment with more than one employer in relation to the same work or (b) *severable* contracts with the same employer (as in *Land v West Yorkshire MCC* [1981] IRLR 87, [1981] ICR 334, CA) but neither of these exceptions applied here.

Just as a postscript, if you actually read the case of *Laugher v Pointer* there are certain peculiarities. Not only did the four-judge court split 2–2, and Abbott CJ take part in this reference to the judges having himself given the judgment in it at first instance, but the facts may not fit the point of law for

which it is cited. It was in fact a *tort* claim for damages. The defendant had hired horses *and driver* from a stable owner (who employed the driver) to pull his coach when in London. While doing so, the driver negligently caused damage to the plaintiff, who sued the coach owner, not the stable owner. Even if you accept that the ratio of the case is that there is a general rule against dual employment (in spite of the 2–2 split), (i) the *result* of the reference was that the plaintiff's action was allowed to continue and (more significantly) (ii) arguably this would now be viewed as a 'borrowed servant' case where there *can* be dual employment, with the lender remaining the long-term employer in employment law but the borrower being liable for any tort committed during the hiring because of the element of control. Perhaps this is one of those examples of a case being important for what is later taken to be its ratio, rather than what it actually was at the time.

Illegality; fraud on the revenue; later lawful conduct; possibility of severance

AI [68], AI [74], AI [76]

***Robinson v Qasimi UKEAT/0106/19* (*4 February 2020, unreported*)**

Much of this decision by Lewis J in the EAT concerned allegations of whistleblowing which were rejected on the facts by the ET and EAT. However, this arose out of a dispute over liability for payment of tax and NI contributions, which then raised issues of illegality. The particular interest of the case in this context is that the potential illegality had *ceased* by the time that the claimant brought ET proceedings.

The claimant worked for the respondent from March 2007 until her dismissal in May 2017. Although the ET eventually held that she had been an 'employee' all along, the position initially was murky and later the subject of dispute. Her contract stipulated that she was responsible for her own tax, but from March 2007 until July 2014 she knowingly neither declared nor paid any. This changed and from July 2014 until May 2017 she made the necessary declarations. There was still a dispute between the parties as to who was liable for payment (the respondent still maintaining she was self-employed, but putting the amounts into a separate account and ultimately paying it to HMRC).

In her ET proceedings, although the ET rejected whistleblowing, it did hold that normally it would have found for her statutory claim for unfair dismissal (through inadequate procedure) and her common law claim for wrongful dismissal (lack of ten weeks' notice). However, it held that it could not uphold these claims at all because of the major element of tax illegality which meant that her contract could not be enforced.

The EAT allowed her appeal on this aspect. The ET had failed to take into account the change in tax matters in July 2014. Since then, the illegality had ceased. Thus, the ET had been right on illegality up to then, but wrong to disallow her claim in May 2017 when affairs had been regularised sufficiently (albeit still subject to the inter-parties dispute). The judgment then gave a secondary ground for this conclusion, namely that if necessary the later

lawful period could be *severed,* as in *Blue Chip Trading Co Ltd v Helbawi* [2009] IRLR 128, EAT, where a foreign student working illegally during term time but legally during vacations could claim the NMW minima during the latter periods (see **AI [76]**).

The question then became how this affected remedies. As for unfair dismissal, the claimant was entitled to a compensatory award of a month's pay representing the time it would have taken for a fair procedure. The basic award was more complicated by the earlier period of illegality, the point being that this award is compensated by reference to the whole period of past employment. Illegality did taint the earlier period, and the way this was dealt with was by recourse to the power to reduce a basic award for the claimant's own conduct (ERA 1996 s 122(2) **Q [746]**). Here, it was just and equitable to confine the basic award entitlement to the later period of July 2014 to May 2017. For good measure, the judgment states that this result would also have occurred if severance had been used. Finally, what about the wrongful dismissal claim? It might have been thought that the ten weeks' notice would have been subject to the same pro rata reduction as the basic award, but in fact it was awarded in full, presumably on the basis that the common law right only *crystallised* in May 2017, by which time the contract was not illegal. It might be thought, however, that this distinction is a thin one.

DIVISION CI WORKING TIME

Sunday working; unfair dismissal; reason or principal reason

CI [263]

***Ikejiuba v W M Morrison Supermarkets plc UKEAT/0049/19* (*15 August 2019, unreported*)**

Although the end result of this case was that it was largely a question of fact for the ET, the decision of Laing J in the EAT is worth a read, not just as a rare example of an appellate case on Sunday working and unfair dismissal, but also because of its insistence on the reason or principal reason being shown. The end result shows that, although the general category of 'automatically unfair reasons' is deliberately wide as a matter of policy, it is not the case that the relevant form of it (here, the ERA 1996 s 101 **Q [725]**) will always succeed just because the dismissal occurred in the *context* of an assertion of the right in question.

In September 2017 the claimant was offered a job as a pharmacist after an interview. The claimant accepted it and signed contractual documents which provided for a 43-hour week, worked flexibly to cover seven days a week. It was accepted that her contract of employment started then, though her start date was deferred to December. Before this, it became clear to her that she would have to work certain Sundays, to which she objected on religious grounds. The handbook contained the right not to work Sundays, on three months' notice, but said that in such a case, although the employer would try to rearrange the work pattern, it could not guarantee making up the full 43

hours. In fact, the employer did not wait for her to exercise this right, but offered her a variation of contract to exclude Sundays, but on the basis of reduced hours (the relevant manager later giving evidence to the ET of the genuine budgetary reasons for this). The claimant at first accepted this variation, but then withdrew that acceptance. Three days before her due start date, the offer of employment was withdrawn (which the employer acknowledges was a 'dismissal').

On her claim for automatically unfair dismissal under s 101(3) (proposing to opt out of Sunday working) the ET held against her, on the basis that she had failed to show that the reason for dismissal was the proposal opt-out, but was instead the withdrawal of her acceptance of the revised terms. She appealed, arguing that it was enough in a case such as this that the dismissal was closely *related* to the proposed opt-out, or that the test was a 'but-for' one. The EAT rejected this and held that the ET had applied the right test on reasons and, beyond that, that the end result on the facts was one which was open to the ET to decide.

DIVISION CIII WHISTLEBLOWING

Detriment; meaning of the term; the reason for the act or omission

CIII [95], CIII [99]; DII [14]

Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73

This litigation has a long history, with this whistleblowing claim being but part. Between 2009 and 2014 the claimant, an eminent surgeon, made a series of complaints about the hospital's practices. The Royal College of Surgeons at one point investigated and dismissed most of his claims, but not all, and made recommendations to the hospital for improvements. In 2012 the claimant had resigned, but continued with litigation. The results were mixed, with the ET rejecting his whistleblowing claims, considering him an unreliable witness and the EAT upholding that decision. One particular element of his claims ended up before the Court of Appeal, namely an allegation of detriment based on communications from the hospital during their disputes to the effect that *all* of his allegations had been dismissed by professional bodies. In deciding on this, and dismissing his appeal, the Court of Appeal addressed two important points of law:

(1) what is the correct definition of 'detriment' in whistleblowing law?

(2) can it be such a detriment if the employer makes such a remark in the course of defending itself against allegations?

As to the first point, the tendency for some time now has been to equate whistleblowing law with discrimination law, as they both concern singling out employees unfairly because of what they are or have done. On that basis, the argument has been that, although there is no statutory definition of 'detriment' in the ERA 1996 s 47B **Q [671.03]**, there is considerable case authority

on its meaning in discrimination law (see **L [476]**, **L [571.01]**) and this should be read over into s 47B. In a general review of the statutory scheme here, the court's judgment (given by Sir Patrick Elias) accepts this expressly and applies the relevant mixed subjective/objective test (at [27], [28], italics added):

> 'In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. *There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment.* The concept is well established in discrimination law and it has the same meaning in whistleblowing cases. In *Derbyshire v St. Helens MBC* **[2007] UKHL 16**; **[2007] ICR 841**, paras. 67–68 Lord Neuberger described the position thus:
>
> > "… In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah* **[1980] ICR 13** at 31A that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'.
> >
> > That observation was cited with apparent approval by Lord Hoffmann in *Khan* **[2001] ICR 1065**, para 53. More recently it has been cited with approved in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* **[2003] ICR 337**. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of 'materiality', also said that an 'unjustified sense of grievance cannot amount to "detriment" '. In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: 'If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice'."
>
> Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.'

It may be noted that the decision of Lewis J in *Robinson v Qasimi* (above) also addressed this point (before the instant decision) and came to the same conclusion, pointing out that it was consistent with the Court of Appeal decision last year in *Tiplady v City of Bradford MC* [2019] EWCA Civ 2180, [2020] IRLR 230, though that case principally concerned a different point (see **Bulletin 498**).

As to the second point, while this is a much more precise one, it could well be important in a case such as this involving large-scale litigation and particularly serious allegations by the whistleblower against an organisation. The employer argued that, although the communications had been overstated (ie that *all* his allegations had been proved false), they could not be a

detriment because they were made in the course of defending the hospital in litigation and more widely. The ET agreed, as did the EAT, but the Court of Appeal disapproved this argument. The overstatement was just as capable of qualifying as a detriment under the above definition as would an allegation of bad faith. The employer's motivation did not affect this. However, there was a considerable sting in the tail, because it was then held that that motivation *was* relevant at the next stage, of deciding if the detriment was 'on the ground that' the claimant had blown the whistle (the 'reason why question'). On the facts, the court held that the communications were made to defend the hospital and had not been because of the whistleblowing:

> 'In short, the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.'

It was on this basis that the s 47B claim failed.

DIVISION DI UNFAIR DISMISSAL

Reason for the dismissal; establishing the reason; knowledge of another manager

DI [821.01]

***Uddin v London Borough of Ealing UKEAT\0165\19* (*13 February 2020, unreported*)**

The decision of the Supreme Court in *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55, [2020] IRLR 129 held that the conduct/motivation of a third party manager can be imputed to the employer in a dismissal case, even if the dismissing manager did not know of that conduct/motivation and dismissed for another reason. It concerned the classic 'Iago case' of a line manager engineering the dismissal of a whistleblower by inducing the dismissing manager to act on a different reason. The instant case before Judge Auerbach in the EAT holds that this principle can extend to the *knowledge of facts* by the third party manager, which can be imputed to the employer, even if those facts were unknown to the dismissing manager.

The claimant was dismissed after allegations of improper sexual conduct towards another employee in a bar. A complaint had been made to the police about the incident, but this was later retracted. This retraction was known to the investigating manager, but he had not passed it on to the dismissing officer. The latter said that if she had known, she would have wanted further details of it. On the claimant's complaint of unfair dismissal, the ET held it was fair, because on the facts he could have been fairly dismissed anyway, regardless of the police complaint. On appeal, this was held by the EAT to have been wrong in law. It considered that the narrow ratio of *Jhuti* did not apply to this case, because it concerned the *reason* for the dismissal (under the

ERA 1996 s 98(1)). However, there were sufficient dicta in the Supreme Court judgment to justify applying a similar approach to the question of *fairness* under s 98(4). On the facts, the failure of the investigating manager to pass on the information about the retraction, when allied with the gravity of the allegations in question, were sufficient to render the dismissal unfair. Any question of whether he could have been dismissed anyway was only relevant on remedy. At [78] it is stated very clearly:

> 'Drawing it all together, I conclude that Lord Wilson (and his fellow Justices) were of the view, first, that the question of whether the knowledge or conduct of a person other than the person who actually decided to dismiss, could be relevant to the fairness of a dismissal, could arise *both* in relation to the Tribunal's consideration of the reason for dismissal under section 98(1) and/or its consideration of the section 98(4) question; and that, in a case where someone responsible for the conduct of a pre-investigation did not share a material fact with the decision-maker, that *could* be regarded as relevant to the Tribunal's adjudication of the section 98(4) question.'

Misconduct; exceptions to the need for reasonable belief; dismissal on suspicion

DI [1481.01]

***Lafferty v Nuffield Health UKEATS\0006\19* (*15 August 2019, unreported*)**

The text at **DI [1481.01]** considers in some detail the decision of the Court of Appeal in *Leach v OFCOM* [2012] EWCA Civ 959, [2012] IRLR 839, [2012] ICR 1269 which is the leading case on the difficult area of a possible fair dismissal based on *suspicion* of misconduct, falling short of the usual requirement of reasonable belief. The instant case before the EAT under Choudhury P is an interesting application of the approach set out in *Leach*, again coming to a conclusion that the dismissal was fair.

The claimant was employed by the respondent charity as a surgical porter, responsible for taking patients back from the operating theatres. He was a longstanding employee with a good record, but he was charged by the police with assaulting a patient with intent to rape. He protested his innocence. In the light of the charges, the employer considered his position and the possible effects on the charity of the charges. He supplied some details of these, but there was no prospect of an imminent trial. The decision was taken to dismiss him, and an appeal against this was turned down. He brought unfair dismissal proceedings, which raised the classic *Leach* problem of possible grave injustice to an innocent person, but serious pressures on the employer to be seen to be dealing immediately with a potential danger to patients. The ET found that the dismissal was fair. The claimant's appeal to the EAT was dismissed. Applying *Leach*, the judgment stresses two key elements in a case such as this: (1) the longstanding unfair dismissal test is not whether there was injustice to the employee but whether the employer acted reasonably in dealing with the problem; and (2) (as the ET had found on the facts) the

employer had not dismissed because of belief in guilt, but because of concerns over the serious reputational damage to the charity of not dismissing. The ET had found that this concern was genuine and pressing, because of the position as a charity and the fact that such charities had been under pressure from the Charity Commission to deal promptly with such potential dangers. The EAT held that these (along with a generally fair procedure and the fact that there was no sign of a forthcoming trial) were properly weighed in this difficult balance by the ET, which had come to a proper conclusion.

In one sense, these facts were stronger than those in *Leach* because in that case the employee suspected of child abuse abroad had not been in a position in his employment to deal with children, so that the reputational damage was on a more general level, whereas here the claimant's job was the very context in which the allegations had arisen. Moreover, the facts here distinguished the case from the other precedent discussed, the case of *Z v A* UKEAT/0380/13 (9 December 2013, unreported) (see **DI [1481.02]**) where the dismissal was unfair because the employer had jumped the gun by dismissing shortly before the termination of a police enquiry.

There is one rather unusual element to this case that only becomes clear at the end of the judgment. At the time of the dismissal, the employer had told the claimant that if he was acquitted it would reinstate him (though not with arrears of pay). Such an acquittal eventually occurred and by the time of the litigation he had indeed been reinstated. The judgment comments that it seemed that the whole unfair dismissal action was really about recovering the unpaid remuneration for the period between dismissal and reinstatement, which the EAT said ought to have been resolved in some other way.

DIVISION L EQUAL OPPORTUNITIES

Meaning of disability; long-term impairment; timing

L [165]

***Tesco Stores Ltd v Tennant UKEAT/0167/19* (*15 November 2019, unreported*)**

It is said that in cricket timing is everything. This decision of Judge Shanks in the EAT shows that the same thing can be said of the definition of a 'long-term' impairment in disability law, at least where the claimant is relying on the EqA 2010 Sch 1 para 2(a) **Q [1459]**. It will be recalled that this sub-paragraph of the definition of 'long-term' requires the impairment to have *lasted* for twelve months. Para 2(b) then includes a case where the impairment is *expected to last* for twelve months (with para 2(c) applying to lifelong conditions).

The claimant went off sick with depression on 6 September 2016. She brought proceedings for disability discrimination on 11 September 2017, based on occurrences between these two dates. The ET held that she had indeed been subject to the impairment for the necessary period by the time of the hearing and so could complain of these occurrences. The EAT allowed the employer's appeal. On a plain reading of para 2(a) the claimant must

have suffered the impairment for twelve months *at the relevant time,* ie at the time of the actions or inactions complained of. Here, she did not become 'disabled' until 6 September 2018 and so could only complain of occurrences (if any) between that date and 11 September 2018.

It is possible that this is the first appellate decision making this point expressly and so it is an important ruling on para 2(a). For good measure, it was further held that this interpretation is not inconsistent with the generally wide approach to be taken to para 2 as a whole (see **L [165]**). However, it might be asked – what about para 2(b) in such circumstances? Might it not have been clear much earlier that her depression *would* last for the required period? The simple point is that this was *not* relied on in the ET, which noted that it had had no evidence of prognosis put before it and reliance had been on para 2(a) only.

It may be that that makes this an unusual case, but the ruling on the interpretation of para 2(a) emphasises the importance in a case of detriments etc, going back over a period towards the beginning of the impairment, of giving serious consideration to reliance on para 2(b) as well and laying an evidential base for it (even though a formal medical prognosis is not an absolute requirement, see *Nissa v Waverly Educational Foundation Ltd* UKEAT/0135/18 (19 November 2018, unreported), considered at **L [165]**). As in batting, a badly timed shot may be fatal.

Indirect discrimination; reasonable adjustments; meaning of 'practice' in PCP

L [297.02], L [389.01]

Ishola v Transport for London [2020] EWCA Civ 112

London Borough of Haringay v Oksuzoglu UKEAT/0248/18 (20 August 2019, unreported)

This decision of the Court of Appeal in *Ishola* given by Simler LJ addresses a point of interpretation concerning both indirect discrimination under the EqA 2010 s 19 **Q [1472]** and reasonable adjustments under s 20 **Q [1473]** which has had potentially differing views on it at EAT level. The point is the meaning of a 'practice' in the well-known phrase 'provision, criterion or practice', in particular whether a one-off act or decision can constitute such a practice.

The claimant was disabled with depression and migraines. He went off sick in May 2015 and was eventually dismissed for medical incapability in June 2016. He brought several ET claims, most of which were rejected by the ET. By the time the case got to the Court of Appeal, only one was still live, namely a s 20 claim of failure to make adjustments, on which he argued that the ET did not take a broad enough view of what can constitute a PCP. He defined it in his case as a 'practice' of requiring him to return to work while a grievance he had raised still had not been properly dealt with. The ET rejected this on the basis that it was 'a one-off act in dealing with one individual'. The EAT agreed.

In the Court of Appeal, he argued that there is no obstacle to a one-off act being a practice. He relied on the EHRC Code of Practice para 6.10 **S [485]** which includes one-offs and also on *British Airways plc v Starmer* [2005] IRLR 862, EAT (see **L [297.02]**) where a decision that the employee had to work either full-time or 75% was held to be a practice. He argued that the later case of *Nottingham City Transport Ltd v Harvey* UKEAT/0032/12, [2013] EqLR 4 (see **L [389.01]**) in which it was held that a faulty exercise of a disciplinary procedure was *not* a practice, because it lacked an element of repetition or applicability to others, was wrongly decided. The court dismissed his appeal. It clearly rejected the argument that a one-off can always be a practice and in effect took much the same line as that of Langstaff P in *Harvey.* There is a requirement of 'repetition' or 'state of affairs' *but* this does not rule out one-offs altogether. The key point seems to be that to qualify a one-off needs to be capable of applying again and/or to other employees; to mitigate this, it was accepted that this could be judged on a hypothetical basis (ie what *might* happen, to a *possible* comparator). This is summed up at [37]:

> 'In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J [in the EAT], I consider that although a one-off decision or act can be a practice, it is not necessarily one.'

On that basis, the court held that the two cases cited by the claimant are in fact consistent, saying at [38]:

> 'In that sense, the one-off decision treated as a PCP in *Starmer* is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the *Nottingham* case in contrast to *Starmer*, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way.'

Applying this very instructive distinction here, this claimant fell on the wrong side of the line. One final point of interest is the following warning given by Simler LJ at [39]:

> 'In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.'

As it happens, this same point had arisen in *Oksuzoglu* before Judge Barklem in the EAT. As this was decided last August, but only released this month, it came before the Court of Appeal's judgment. However, it came to a similar conclusion. The disabled employee was in the process of being dismissed for incapability; she should have been put through a redeployment procedure, but due to a mistake as to timing the person responsible thought that she had already been dismissed and did not operate the procedure. The ET held that this made the dismissal unfair (which was not challenged by the employer) and went on to hold it was also a failure to make reasonable adjustments. The EAT overturned this holding on the basis that failure to operate the procedure was a one-off with no evidence of anything other than unfair treatment of one person. The claimant had relied on *Harvey* above (the case, not the bible) but the EAT also cited two other EAT cases. In *Gan Menachem Hendon Ltd v De Groen* [2019] IRLR 410, EAT, Swift J cited Langstaff P's requirement in *Harvey* of 'a practice of more general application' and added that there must be either direct evidence of this or evidence from which an ET could infer it. He said that this distinguished *Harvey* (no such evidence) from *Pendleton v Derbyshire CC* [2016] IRLR 580, EAT, where there was evidence that the employer would probably have treated others in these circumstances similarly (see **L [297.01]**). In *Gan Menachem* itself, the employer's reaction to the issue of the employee's (lack of) marital status was an 'ad hoc measure' to deal with a particular perceived problem, and so no PCP.

Arguably, in the light of the Court of Appeal's decision, all of these EAT decisions applied the correct law and were properly decided on their particular facts.

Disability discrimination; arising from disability; unfavourable treatment; justification

L [374.01], L [377]

***Chief Constable of Gwent Police v Parsons UKEAT/0143/18* (*25 February 2020, unreported*)**

Cases on the relationship between the EqA 2010 s 15 **Q [1468]** and terminal payments (or imposing caps thereon) have tended to find that the employer's

actions, though prima facie constituting unfavourable treatment arising from disability, were justified on the facts, especially if the claimant would otherwise receive a windfall. In *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65, [2019] IRLR 306, [2019] ICR 230 the Supreme Court held, even more fundamentally, that granting a disabled person a pension was not unfavourable in the first place (even if the claimant thought it could have been *more* generous). In the light of all this, the decision of Judge Shanks in the EAT in the instant case makes interesting reading, leading to a finding that the employer *failed* to justify its actions, on grounds that should act as a warning to employers in such cases.

The claimants were longstanding police officers who had become unable to undertake normal duties due to disability. Instead of offering retirement, the force at first put them on to restricted duties. Some time later, however, in the process of making cuts, they were put on to early retirement, allowed to be immediate because of their disabled status. Under the ad hoc statutory scheme for doing this, they were entitled to the equivalent of a redundancy payment, but theirs were capped at a lower level because of going on to early retirement. They challenged this as s 15 disability discrimination. At first sight, this looked like a *Williams*-type case, but the ET found for them.

On appeal, the EAT upheld the ET's right to do so. Applying the straightforward *Williams* approach to 'unfavourable treatment' (see **L [374.01]**), there was such treatment here and so the question became one of justification. The EAT considered two age discrimination justification cases concerning access to or capping of voluntary redundancy schemes, *Kraft Foods UK Ltd v Hastie* [2010] ICR 1355, [2011] 3 All ER 956, EAT and *Loxley v BAE Land Systems Munitions and Ordnance Ltd* [2008] IRLR 853, [2008] ICR 1348, EAT (both considered at **L [365]**) and, in a potentially very useful summary for cases such as this, at [24] extracted the following principles from them:

'(1) Once a prima facie case of discrimination arising from disability is shown the onus is on the employer to establish justification;

(2) This involves showing that the unfavourable treatment (ie in this case capping the payments to the Claimants) was a reasonably necessary and proportionate means of achieving a "legitimate aim";

(3) Saving money is not in itself a legitimate aim but preventing a "windfall" could in principle be one;

(4) Entitlement to receive immediate benefits from a pension fund might justify exclusion from (or a cap or limit on the amount of) a payment under a redundancy scheme but that is not inevitable in every case; it will depend on the nature of the redundancy scheme and the pension scheme and an analysis of the financial benefits which would arise under them (see: *Loxley* case at paras [37] to [41]) … ;

(5) However, a cap imposed to prevent an employee recovering more under a redundancy scheme designed to compensate him for loss of earnings than he would have received in earnings if he had remained in his employment and worked to retirement age will necessarily

constitute a proportionate means of achieving the legitimate aim of preventing a windfall (see: *Loxley* at para [37] and the decision in *Hastie*).'

Applying that here, the key point was that the Chief Constable had only produced generalised financial information about the position of the force and had *not* produced detailed evidence as to the position of the individual *claimants*, especially on the windfall point which had been alleged but not proved (see point (1) above). That is the moral for employers here.

Disability discrimination; arising from disability; justification; relationship with unfair dismissal

L [377.03]

***Scott v Kenton Schools Academy Trust UKEATl0031l19* (*30 September 2019, unreported*)**

In *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, [2017] IRLR 547, [2017] ICR 737, it was said that where discrimination arising from disability (EqA 2010 s 15) is raised along with unfair dismissal, it is likely to be the case that the defence of justification/proportionality to the former and the range of reasonable responses test for the latter will align and that complications should not be introduced into an already complex area by seeking to show differences. However, as the text points out at **L [377.03]**, in the subsequent case of *City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492, it was held that this was only an expression of what will *often* be the case; it does not establish that in law the tests are the same. Thus, there can be cases where an ET properly finds for the claimant on one, but against them on the other. This case before Judge Auerbach in the EAT is a good example.

The claimant's appeal largely concerned the ET's rejection of his claim for s 15 discrimination (along with failure to make reasonable adjustments) when he was dismissed for professional failings, in spite of evidence of his suffering from a disability at the time. The EAT found that the ET had used too high a bar for showing whether the treatment had been because of the disability and had incorrectly applied the proportionality test, allowing the appeal and remitting the discrimination claim. However, the ET had also dismissed his claim for unfair dismissal. Not surprisingly, the claimant argued that this too should be overturned (in the light of the ruling on proportionality) but the EAT held that this did not follow. Accepting the above view that *Grosset* had explained the true meaning of the earlier decision in *O'Brien*, there was no automatic conflict between the ET's error on discrimination and its decision on unfair dismissal. It was accepted that an ET can err if it *does* tie the two together, but here the EAT accepted that the ET had not done so. It had properly approached the application of the range of reasonable responses test *separately* and in doing so had reached a conclusion of no unfair dismissal (especially in the light of the fair procedure adopted) that was open to it in law. The claimant's appeal on this claim was dismissed.

DIVISION NII INDUSTRIAL ACTION

The tort of Lumley v Gye; knowledge and intention; effect of legal advice

NII [1092.02]; AII [263]

Allen v Pollock [2020] EWCA Civ 258

This rare case on the economic tort of inducing breach of contract considers a point on the necessary state of mind of the defendant which has been *approached* previously in case law but not actually decided. Moreover, it did so not in the usual trade union law context but in relation to breach of restraint clauses by a departing employee. The end result was, essentially, to re-emphasise the need for actual knowledge by the defendant of the impending breach of the relevant contract, not just the possibility that there *might* be a breach. The role of legal advice here was also central.

P was an employee of the claimant A, subject to twelve-month restraint clauses in his contract. He was offered a job by competitor D Ltd, the defendant, and left to take it up immediately. Before he did so, D took legal advice about the enforceability of the clauses; the conclusion was that it was not without risk, but it was more likely than not that they would be held unenforceable. In fact, in later litigation it was held that, with certain modifications, they were actually enforceable. A brought proceedings in tort against D for inducement to breach of contract. The judge found for D on the basis that it had not turned a blind eye to the possibility of breach (the 'Nelson extension' of ordinary knowledge) and had acted in honest reliance on legal advice, albeit later shown to have been wrong.

A appealed but the Court of Appeal dismissed the appeal. A had argued that knowing of a *possibility* of breach was enough to establish liability and that D should have to bear the consequences of having taken the *risk*. However, the court in a judgment given by Lewison LJ did not agree.

The problem was that the facts here fell between two fairly well-established principles in this notoriously difficult area:

(1) the defendant must know that it is inducing a breach of contract; it is not enough that it knows it is inducing something that in law or contract turns out to be a breach, or that it *ought reasonably* to have realised that there would be a breach (unless it amounts to deliberate Nelsonian blindness);

(2) an honest belief by the defendant that there will *not* be a breach will not found liability, even if that belief was illogical.

This case concerned a middle category – knowledge that there *could* be a breach, but a belief that that was not likely (based on legal advice).

The judgment considers generally the leading case of *OBG Ltd v Allan* [2007] UKHL 21, [2007] IRLR 608 (see **NII [1092]**) but then also considers three other cases which approached the present issue. The old case of *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 was interpreted as

establishing that 'mere suspicion is not enough; the touchstone is knowledge'. The case of *Mainstream Properties Ltd v Young* (heard along with *OBG*) established that honest belief is a defence. However, the case of *Meretz Investments Ltd v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244 seemed more in favour of A here because it involved legal advice and, though approving of reliance on *firm* advice, suggested obiter that reliance on equivocal advice was 'arguable'. Ultimately, however, the court here relied on indications in *OBG.* At [27] it is stated that:

> 'Lord Hoffmann's broad proposition in *OBG* was that in order to be liable for the tort of inducing a breach of contract, you must know that you *are* inducing a breach of contract. "Are" is not the same as "might be". You must *actually realize* that the act you are procuring *will have* the effect of breaching the contract in question. "Will have" is not the same as "might have". That is consistent with earlier authority. Lord Nicholls' formulation was much the same. With knowledge of the contract, the defendant proceeded to induce the other contracting party to act in a way the defendant knew *was* a breach of that party's obligations under the contract. Again, "was" is not the same as "might be". It is also important that both their Lordships expressed the test in positive terms: it is for the claimant to prove the defendant's actual knowledge of the breach; not for the defendant to prove an absolute belief that there would be no breach.'

The court rejected the claimant's argument that there needed to be a 'bright line' distinction that only positive belief in *no* breach can excuse. The judgment concludes with three interesting points of policy as to why a defendant must be shown to have had actual knowledge and this defendant was not liable:

(1) the recent tide of authority here has been to *restrict* the ambit of the economic torts, not to extend it;

(2) people should not be deterred from acting on legal advice which in its nature will often be equivocal (especially, one might add, in the area of the enforceability of restraint clauses);

(3) if a defendant could only rely (as A had argued) on definitive legal advice, how would 'definitive' be defined?

Finally, one loose end was deliberately left – it was acknowledged that there could be cases where the advice was *too* equivocal to be relied on, but (a) that was not the case here and did not have to be decided and (b) in such a case there could be a difficult borderline with the separate principle here that negligence is not enough (see **NII [1119]**).

DIVISION PI PRACTICE AND PROCEDURE

ET hearing; reasonable adjustments for disability

PI [752]

***Heal v University of Oxford UKEAT/0070/19* (*4 February 2020, unreported*)**

It is well established that there is a duty on an ET in an appropriate case to make reasonable adjustments for a disabled party (usually claimant) who may otherwise have difficulties at a hearing due to that disability. The text considers at **PI [752]** the leading case of *Rackham v NHS Professionals Ltd* UKEAT/0110/15 (16 December 2016, unreported). In the instant case before Choudhury P in the EAT there is an exploration of one particular aspect of this, namely the possibility of allowing the party to use a recording device at the hearing if he or she has difficulty making a contemporaneous note (here, because of dyspraxia). The decision retains an ET's discretion as to *how* to deal with such a request and contains guidance as to its resolution. The whole issue was complicated by the Contempt of Court Act 1981 s 9 which bans the use of such devices (unless there is express permission), allied to the fact that today it is not a case of lugging something the size of a suitcase into court, and starting it with a loud 'click', because other, small devices such as smart phones have recording facilities.

The procedural issue arose because the claimant wanted his request dealt with on paper in advance but the ET decided to do so at a preliminary hearing. The claimant appealed against this but the EAT held that this was a course properly open to the ET, especially under ET Rules of Procedure r 30 **R [2787]** which provide for either course of action. There was nothing here to suggest that the ET had exercised its discretion unfairly. One subsidiary point argued by the claimant was that unless he was permitted the device in advance he would commit an offence under s 9 merely by *bringing* the device into the hearing. However, the judgment points out that that part of the section only applies to bringing it in 'for use'.

Having dismissed the appeal on this ground, para [27](e) gives the following guidance to ETs as to dealing with such a request:

> 'Where the adjustment sought is for permission for a party to record proceedings or parts thereof because of a disability-related inability to take contemporaneous notes or follow proceedings, the Tribunal may take account of the following matters, which are not exhaustive, in determining whether to grant permission:
>
> i. The extent of the inability and any medical or other evidence in support;
>
> ii. Whether the disadvantage in question can be alleviated by other means, such as assistance from another person, the provision of additional time or additional breaks in proceedings;
>
> iii. The extent to which the recording of proceedings will alleviate the disadvantage in question;

iv. The risk that the recording will be used for prohibited purposes, such as to publish recorded material, or extracts therefrom;

v. The views of the other party or parties involved, and, in particular, whether the knowledge that a recording is being made by one party would worry or distract witnesses;

vi. Whether there should be any specific directions or limitations as to the use to which any recorded material may be put;

vii. The means of recording and whether this is likely to cause unreasonable disruption or delay to proceedings.'

Procedure at the hearing; expert evidence

PI [887.01]

***Morgan v Abertawe Bro Morgannwg University Local Health Board UKEAT/0114/19* (*12 September 2019, unreported*)**

The key case on expert evidence before an ET is *De Keyser Ltd v Wilson* [2001] IRLR 324, EAT, the guidance in which is set out at length at **PI [887.01]**. This decision of Judge Auerbach in the EAT points out that there are *two* questions to be posed by an ET when faced with a request to adduce expert evidence. *De Keyser* addresses the second of these – what form should that evidence take? However, it is necessary first to consider the primary question – should it be ordered in the first place? These questions should be addressed in this order.

The claimant succeeded in a claim for unfair dismissal and disability discrimination, the latter based on failure to make reasonable adjustments. On remedy, she argued that if such adjustments had been made (as recommended by the company doctor) her condition would have improved and the employer would not have decided to dismiss her for incapability. She sought to use expert evidence to support this generally. However, the ET directed that, for her application to be considered *at all*, she needed to obtain and table an expert report, based *solely* on a review of the existing medical records. The claimant having done so, the ET, on the basis of an appraisal of that particular report, in fact refused her application completely.

On her appeal, the EAT held that the ET had erred in two particular ways. First, it had started with the second question and, while it was accepted that *De Keyser*, although not binding, is 'invaluable and should always be consulted', the ET should have considered initially whether to order the evidence. On this point, the EAT held that, as the ET Rules are silent on this point, as a matter of practice an ET should adopt by analogy CPR 35.1 which starts that 'Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings'. Secondly, the ET here had considered that any further report would not have been 'any assistance' but the EAT held that this erected too high a bar for the proper 'reasonably required' test. The end result was that the limitation to a preliminary, existing-reports-based exercise was wrong in principle.

Equally interesting, in deciding on what to do about the decision to quash the ET's decision, the EAT decided that it was not necessary to remit the case because on the facts there was only one possible outcome, namely the ordering of full expert evidence. In so deciding, the EAT took into account the opinion of Underhill P in *Morris v Royal Bank of Scotland* UKEAT/0436/10, [2012] EqLR 406 that although there is no rule of law on the point, in a disability discrimination complaint it will often be the case that expert evidence should be ordered because it will not be enough for the ET to proceed only on existing medical records.

REFERENCE UPDATE

491	*Federacion de Sesrvicios Comisiones Obreras v Deutsche Bank SAE* C-55/18	[2020] ICR 48, ECJ
491	*Capita Customer Management Ltd v Ali; Hextall v Chief Constable of Lincolnshire Police*	[2020] ICR 87, CA
492	*Chief Constable of Norfolk v Coffey*	[2020] ICR 145, CA
493	*Mears Homecare Ltd v Bradburn*	[2020] ICR 31, EAT
493	*Kocur v Angard Staffing Solutions Ltd*	[2020] ICR 170, CA
497	*Jagex Ltd v McCambridge*	[2020] IRLR 187, EAT
497	*Royal Mail Group Ltd v Communication Workers Union*	[2020] IRLR 213, CA
497	*Ibrahim v HCA International Ltd*	[2020] IRLR 224, CA
498	*Barnard v Hampshire Fire and Rescue Authority*	[2020] IRLR 176, EAT
498	*Tiplady v City of Bradford MDC*	[2020] IRLR 224, CA
498	*Miller v Ministry of Justice*	[2020] IRLR 239, SC

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