Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

Annual up-rating of limits

The Employment Rights (Increase of Limits) Order 2020 SI 2020/205 contains the annual uprating of the monetary limits on the various employment rights. The principal change is a rise in the maximum 'week's pay' for the specified purposes from £525 to £538, giving a maximum statutory redundancy payment and basic award for unfair dismissal of £16,140. When added to the new maximum compensatory award of £88,519, this gives a normal maximum for unfair dismissal of £104,659. Certain other maxima and minima in relation to trade union law and certain specific reasons for dismissal go up by a similar percentage.

The new rates apply from 6 April 2020 and will be incorporated into Divs Q and R in Issue 282.

Annual up-rating of social security benefits

The Social Security Benefits (Up-rating) Order 2020 SI 2020/234 raises the following benefits relevant to this work:

(1) statutory sick pay increases from £94.25 to £95.85 pw, as from 6 April 2020;

(2) statutory maternity pay, statutory paternity pay, statutory adoption pay and statutory shared parental pay increase from £148.68 to £151.20, as from 5 April 2020.

These changes will be incorporated into Divs Q and R in Issue 282.

Increase of the National Minimum Wage and further amendments

As from 1 April the National Minimum Wage (Amendment) Regulations 2020 SI 2020/338 raise the national living wage under the National Minimum Wage Regulations 2015 SI 2015/621 reg 4 **R [3185]** to £8.72. The four levels of the NMW in reg 4A for those not qualifying for the national minimum wage are raised to £8.20, £6.45, £4.55 and £4.15 respectively. The amount in reg 6 concerning accommodation is raised to £8.20.

In addition, the National Minimum Wage (Amendment) (No 2) Regulations 2020 SI 2020/339 make substantive amendments to the principal Regulations to: (1) amend the rules on salaried hours work to cover specifically the treatment of salary premia; (2) alter the rules on the worker's calculation year to permit the employer to define/alter it (subject to certain safeguards, including three months' notice to the worker); and (3) amend regs 12 and 13 on the purchasing of goods and services from the employer.

These increases and amendments will be made in Div R in Issue 282.

Parental bereavement scheme in force

The statutory scheme for parental bereavement leave and pay comes into force on 6 April 2020 with the details being set out in the following SIs:

— Statutory Parental Bereavement Pay (General) Regulations 2020 SI 2020/233

— Statutory Parental Bereavement Pay (Administration) Regulations 2020 SI 2020/246

— Parental Bereavement Leave Regulations 2020 SI 2020/249

— Statutory Parental Bereavement Pay (Persons Abroad and Mariners) Regulations 2020 SI 2020/252

These will be put into Div R in Issue 282.

Coronavirus Act 2020

There are two aspects of this Act which are of particular relevance here.

The first is that ss 39–41 (ss 42–44 for Northern Ireland) give the vires powers for the production of the emergency changes to SSP (below). These came into force on 25 March.

The second is that s 8 and Sch 7 contain new provisions on 'emergency volunteering leave'. Part 1 of the Schedule sets out the right to leave for continuous periods of two, three or four weeks. Part 2 covers the effects of taking the leave, in particular providing for the preservation of terms and conditions of employment, a right to return and allied pension rights. Part 3 makes amendments to the ERA 1996; the most important are a new s 47H giving a right not to be subjected to detriment because of the leave and a new s 104H making a dismissal automatically unfair if the reason or principal

reason was that the employee took, sought to take or made use of the benefits of emergency volunteering leave. This will also cover a dismissal because the employer thought the employee likely to take the leave, and there are parallel amendments to s 105 to cover automatically unfair dismissal for redundancy. These provisions are to be brought into force by regulations.

Coronavirus amendments to statutory sick pay (SSP)

The SSP (General) (Coronavirus Amendment) Regulations 2020 SI 2020/287 amend reg 2 of the SSP (General) Regulations 1982 SI 1982/894 to deem unfit for work a person who is self-isolating in accordance with official guidance. They came into force on 13 March.

The SSP (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020 SI 2020/374 amend the SSCBA 1992 s 155 to remove the usual three waiting days before SSP is payable in a coronavirus case. They also add a Schedule 7 'Isolation due to Coronavirus' to the SSP (General) Regulations 1982 to spell out further when a person is deemed incapable of work. They came into force on 28 March.

These regulations will be incorporated into Div R in Issue 282.

Coronavirus amendment to statutory holidays

The Working Time (Coronavirus) (Amendment) Regulations 2020 SI 2020/365 make amendments to regs 13 and 14 of the Working Time Regulations 1998 SI 1998/1833 in order to provide that a worker can carry forward statutory holiday entitlement into the next two holiday years if it is not reasonably possible to take them at the normal time due to the effects of the virus. This applies to the basic four-week entitlement in reg 13, but not to the additional annual leave under reg 13A. This came into force on 26 March and will be incorporated into Div R in Issue 282.

Vento scales up-rated

The Presidents of ETs for England and Wales and Scotland have increased amounts in the *Vento* scales for injury to feelings in discrimination cases. As from 6 April, the new amounts are:

Lower level	£900 – £9,000
Middle level	£9,000 – £27,000
Higher level	£27,000 – £45,000 (with the possibility of a higher award in the most serious cases)

DIVISION AII CONTRACTS OF EMPLOYMENT

Implied terms; honesty; non-disclosure of misdeeds

AII [161.01]

Human Kind Charity v Gittens UKEAT/0086/18 (25 October 2019, unreported)

The principal effect of the well-established principle that employment is not a fiduciary (*uberrimae fidei*) relationship is that in general an employee is not

under an implied obligation in law to disclose his or her misdeeds to the employer. A straight question must be answered honestly, but there is no obligation to *volunteer* information. This case before Griffiths J in the EAT, however, shows an important limitation or, to be more precise, a refusal to extend that dispensation beyond its existing bounds.

The claimant was a manager who was asked to investigate excessive use of employer electronic equipment. In fact it was she who had been responsible. She wrote a report saying it was not possible to point to anyone in particular, in the hope of covering herself. When the employer found this out, she was dismissed for gross misconduct. She challenged this, seeking to rely on this specific form of a privilege not to incriminate herself. The ET held in her favour in her claim for wrongful dismissal at common law, finding at least an analogy with cases of non-disclosure (in particular *Ranson v Customer Systems Ltd* [2012] EWCA Civ 841, [2012] IRLR 769, considered at **AII [161.02]**). However, the EAT allowed the employer's appeal. Such an analogy was not to be drawn and the privilege does *not* extend to deliberately misleading statements by the employee in default. Nothing in *Ranson* suggests otherwise. As the text points out, it had been suggested in *Sybron Corpn v Rochem Ltd* [1983] IRLR 253, [1983] ICR 801, CA that even the right to remain silent might not apply to a case of fraudulent concealment and this decision seems to affirm that directly. Having disposed of her defence on this ground, the judgment goes on to cite **AII [161]** and its statement of basic principle that 'The employee must behave honestly. Dishonesty usually justifies summary dismissal at common law.' Here, there had been such dishonesty and the dismissal was not wrongful.

In spite of that relatively simple starting point, this whole area has proved a difficult one in which to draw exact lines of liability and non-liability. The line drawn in this case arguably has a parallel in the law of tort where in general liability may not attach to sins of omission, but it does to sins of commission.

Implied terms; trust and confidence; limitation

AII [186]

Wells v Cathay Investments 2 Ltd [2019] EWHC 2996 (QB), [2020] IRLR 281

The text at **AII [186]** gives a series of case examples of the successful use of the implied 'T & C' term in a variety of circumstances. This first instance decision is an interesting example of reliance on that term *not* succeeding, in effect a case of an argument too far. The claimants sought to exercise share rights requiring the employer to purchase them for fair value, which automatically terminated their employment on three months' notice. During that time, the employer investigated them and discovered three breaches of their employee duties: (1) sending offensive and sexist emails, including about colleagues; (2) accessing porn sites; and (3) disclosing confidential information to another organisation. Having found them guilty, the employer dismissed them for gross misconduct. This changed their status under the shares

agreement, meaning that they were only due a nominal value for the shares. They commenced court proceedings to challenge this. One argument (relevant for present purposes) was that: (1) the employer's real motivation for the investigation was to find a reason to avoid paying out the share entitlements; and (2) this was in breach of an implied term that the employer would not instigate such an investigation or act on its results if that was the motivation. Finding generally against the claimants, the High Court on this point held that there was no justification for such an implied term, either as a free-standing one *or under the general T & C term*. The difference between a 'good leaver' and a 'bad leaver' (though these terms were not used) were set out in the share agreement and the employer was entitled to take steps to ascertain which category applied to them objectively. There was no scope to restrict that right by invocation of what may or may not have been the employer's motivation. Holding further that the employer could rely on matters discovered and relied upon later to justify summary dismissal at common law (applying the rule in *Boston Deep Sea Fishing and Ice Co Ltd v Ansell* (1888) 39 Ch D 339, [1886–90] All ER Rep 65, CA, see **AII [474]**), the court went on to hold that infractions (1) and (2) above were not serious enough to constitute gross misconduct, but that (3) (disclosure of confidential information) was. On that basis, the dismissals were not wrongful.

DIVISION BI PAY

National minimum wage; items that reduce NMW pay; deductions and payments

BI [202.02], BI [203.03]

Revenue and Customs Commissioners v Middlesbrough Football and Athletic Company (1986) Ltd UKEAT/0234/19 (20 March 2020, unreported)

The text makes the point that there has long been a problem in the NMW legislation in relation to cases where the employer and worker agree for the employer to provide goods, services or a benefit, with the worker paying for it or them by deductions from wages. If that deduction takes the eventual payable wage below the NMW the employer may be guilty of a breach of the NMW Regulations 2015 and liable for a penalty as well as an order to repay the deficit. There has been argument (see **BI [202.06]**) that this discourages genuine salary sacrifice schemes etc, which could well be for the worker's benefit.

The way that this can operate is shown clearly by this decision of Judge Auerbach in the EAT. The employer football club operated a scheme whereby its employees could purchase season tickets for family, paying for them by deductions over time from their wages. Unfortunately, this took some of their payable wages below the NMW and HMRC issued an enforcement notice. The club appealed to an ET which allowed their appeal and discharged the notice. The problem legally is that under reg 12(1) **R [3193]** any deduction from wages or payment by the worker that is for the employer's 'use or benefit' is to be treated as a 'reduction' in calculating pay, potentially taking

the wage below the NMW. There are then exceptions (in effect, permitted reductions) in reg 12(2), the most relevant here being (2)(e) relating to the purchase by the worker of goods and services from the employer. However, this contains a drafting problem – unlike (a) to (d), it applies not to 'deductions or payments', but only to 'payments'. Did that apply here where the essence of the arrangement was a deduction from the wage? The ET thought it could, by an exercise in purposive interpretation.

HMRC appealed to the EAT which upheld the appeal and reinstated the notice. The key holding was that this was a deduction, *not* a payment, and so (2)(e) could not apply and there had been NMW breaches. This was so as a matter of straightforward linguistic interpretation (with no room for a purposive one instead) but also as a matter of authority. In the leading case of *Leisure Employment Services Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 92, [2007] IRLR 450 the Court of Appeal upheld the decision of Elias P that the exclusion of deductions in (2)(e) is deliberate and meant to protect low-paid and possibly vulnerable workers from possible employer sharp practice: by limiting the power to charge for goods and services, at least the worker has to be *handed* the full amount in the first place, then (hopefully freely) handing *back* the agreed amount (see **BI [203.03]**). The EAT judgment here makes the following subsidiary points:

(1) Under reg 12(1) this deduction *was* for the employer's use and benefit because it went into its general funds to be used as it wanted. Also on the authority of *Leisure Employment*, the fact that overall the arrangement was *also* for the workers' benefit was irrelevant.

(2) The exception in reg 12(2)(a) (deductions or payments in respect of the worker's conduct) was also not applicable because that is aimed at cases of employee misconduct (eg workplace fines): *Commissioners for Revenue and Customs v Lorne Stewart plc* [2015] IRLR 187, EAT (see **BI [203.02]**).

(3) Neither was reg 12(2)(b) (recovery of loans or advances of wages) applicable to these facts.

Going back to the point about criticism of the stringency of these rules, as being difficult to understand and possibly involving a benevolent employer in HMRC prosecution for something in the worker's favour, BEIS last year conducted a consultation on various aspects of the NMW allegedly causing difficulties for employers. The result was the NMW (Amendment) (No 2) Regulations 2020 SI 2020/339 considered above. However, although reg 12(2)(e) is reworded, that is for other purposes and it *still* only applies to payments, not deductions, so that the result in this case is unaffected. The reaction of the department can be found at www.beis.gov.uk under NMW (or at www.gov.uk/government/consultations/salaried-workers-and-salary-sacrifice-schemes-changing-the-national-minimum-wage-rules). This document makes it clear that this omission to change the wording is deliberate, again on the basis of protecting vulnerable, low-paid workers. The only concessions to employers faced with this problem of deductions for goods and services are twofold: (1) there is to be more and clearer guidance (written,

and by the possibility of routing individual enquiries to HMRC through ACAS on 0300 123 1190); and (2) by an HMRC policy statement (mentioned in the EAT judgment but not relevant to the decision) that in a case such as this they will only order repayment of the amount deducted (ie without a penalty) and not put the employer on to their 'naming and shaming' list if (a) it is not a case of employee expenditure in connection with their work, (b) the worker has consented to the deduction and (c) the employer has fully complied with the agreement for the goods or services.

DIVISION CIII WHISTLEBLOWING

Protected disclosure; need for sufficient factual content

CIII [21.01]

***Williams v Michelle Brown AM UKEAT/0044/19* (*29 October 2019, unreported*)**

The claimant was employed by a member of the Welsh Assembly. As that relationship deteriorated, allegations were made as to his conduct, leading first to suspension and then dismissal. Lacking the two years' service for ordinary unfair dismissal, he brought proceedings for protection as a whistle-blower against detriment (the suspension) and dismissal. The basis for the protected disclosure that he argued had been the real reason for this treatment was one sentence in one letter to the AM concerning their deteriorating relationship. Referring to an application by the AM's brother Richard for a public post which the appointment panel (on which the claimant had sat) had given to someone else, the sentence read: 'Richard just did not make the grade despite you trying your best to manipulate the process beforehand so that he could be employed'. He maintained that this was protected as an allegation of an offence of fraud under the Fraud Act 2006.

The ET considered whether this was a qualifying disclosure and held that it was not. It rehearsed the '*Kilraine*' test (see **CIII [21.01]**) as to whether there was 'sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) of s 43B' **Q [668.02]** (here, head (a) a criminal offence) and decided on these facts that there was not – the use of the word 'manipulate' was too vague to indicate a relevant criminal offence (just as the word 'inappropriate' had been too vague in *Kilraine* itself) and in addition there was insufficient factual content to back it up. In spite of arguments for the claimant on appeal that the ET had taken too stringent approach, Judge Auerbach in the EAT held that the ET had applied the correct law and come to a permissible decision on the facts.

To a large extent this is a case dependent on its particular facts, but it is interesting to see where the 'sufficiency' line is being drawn in the post-*Kilraine* case law. One specific point of interest here is that it was argued for the claimant that he had had reason to think (rightly or wrongly) that his ex-employer had been acting improperly with regard to recruitment and had had reasons for only making his allegation in short form in that one letter; on that basis, the ET should have considered that sentence *in context*. However, the EAT held against that argument. Thus, to be a protected disclosure the

statement, etc must *itself* pass the sufficiency test, without having to pray in aid extrinsic material, a possible object lesson for anyone wanting to claim whistleblower protection.

DIVISION DII DETRIMENT

Health and safety detriment; designated; place of work

DII [78]; NI [3585]

***Castano v London General Transport Services Ltd UKEAT/0150/19* (*29 October 2019, unreported*)**

The two important points on the interpretation of the health and safety (H & S) protection provisions in the ERA 1996 s 44 **Q [668.14]** (detriment) and s 100 **Q [724]** (dismissal) established in this case before Eady J in the EAT are that:

(1) in the case of ss 44(1)(a) and 100(1)(a), the protection is for those 'designated' by the employer for H & S duties, in addition to their normal contractual work; it is not enough that in the course of that normal work they have general H & S responsibilities as an employee;

(2) in the case of ss 44(1)(c) and 100(1)(c) (no safety rep in the place of work), that place of work in the case of a mobile employee is where the work is administered from, not anywhere he or she happens to be performing it.

Both of these are well illustrated on the facts, and meant that the claimant's claims failed.

The claimant was a bus driver operating out of Putney garage, where there was an H & S representative. The claimant, a bus driver, was dismissed for misconduct within the two-year qualifying period for unfair dismissal. He brought proceedings for detriment and automatically unfair dismissal, arguing that the real reason for the employer's treatment of him was that he had raised H & S concerns. He relied on sub-para (a) on the basis that as a bus driver he had H & S responsibilities to passengers and other road users (enough to make him 'designated') and on sub-para (c) on the basis that his place of work was his bus route, during which there was no (available) H & S rep, so that he was covered when he made the complaints in question.

The ET held against these arguments and struck out his claim. Before the EAT he argued that H & S responsibilities were placed on bus drivers by both EU and domestic legislation and that it is well established that 'H & S' in these sections can cover the safety of other members of the public, not just fellow employees. However, the EAT dismissed the appeal. On sub-para (a), it was held that, even though there were statutory responsibilities in relation to bus drivers, they were general ones on drivers while in the course of their employment, not specific ones in addition; they were thus too vague to establish that he had been 'designated' by the employer for H & S purposes.

On sub-para (c) his place of work was the Putney garage, not his individual bus route. There was a safety rep there who was available to deal with his complaints.

DIVISION PI PRACTICE AND PROCEDURE

Case management; list of issues; duty to call evidence; duty of ET towards unrepresented parties

PI [381], PI [860]

Mervyn v BW Controls Ltd [2020] EWCA Civ 393

The extent to which an ET can be expected to help an unrepresented claimant without committing the cardinal sin of 'descending into the arena' has always been a difficult line to draw. In this case it intersected with the question of the extent to which a list of issues agreed at a preliminary hearing should be adhered to at the substantive hearing. The approach of the Court of Appeal may be seen as perhaps more liberal towards the unrepresented claimant. It is significant that the EAT had thought itself obliged *not* to intervene in the light of earlier case law, but had given permission to appeal because it was thought that its decision was 'unfair'.

The claimant had had a rapidly deteriorating relationship with her employer, which eventually came to an acrimonious end. She brought proceedings for unfair dismissal by herself, and in her ET1 and supporting statement she detailed these problems before she left, in a way that would normally be construed as claiming constructive dismissal. However, when it came to a telephone preliminary hearing she was adamant, for whatever reason, that she had *not* resigned, but had been dismissed in the ordinary way. This was reflected in the list of issues then drawn up. At the full hearing, the ET stuck to that list and did not consider the possibility of constructive dismissal. The result was a finding that she had not been dismissed and so her claim of unfair dismissal failed. On appeal, the EAT felt unable to find fault with the ET's reasoning.

On further appeal, the Court of Appeal (in a judgment given by Bean LJ) considered the case law, in particular *Parekh v London Borough of Brent* [2012] EWCA Civ 1630 (**PI [382]**), *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531, CA (**PI [859]**) and *Muschett v HM Prison Service* [2010] IRLR 451, CA (**PI [860.02]**). These set out the problems here, but interestingly the judgment also quotes and applies a pithy summary of the point here by Judge Auerbach in *McLeary v One Housing Group Ltd* UKEAT/0124/18 (6 February 2019, unreported) that an ET *should* consider intervening to clarify an issue (as opposed to inventing a new one) if the facts 'shout out' that the list of issues does not reflect the real case. Here, the ET1's particulars *did* shout out that the real burden of the claimant's case was that she had walked out and was claiming unfair *constructive* dismissal.

The judgment states that in general it is good practice at the start of the substantive hearing to ask an unrepresented party if the list of issues does reflect the significant aspects of the clam; if not, the ET should consider an

adjournment to consider amending it. Here, just asking the claimant to confirm the list had not been enough and to have raised the constructive dismissal point would not, in the court's view, have been to cross the line into descending into the arena, especially as on the facts any adjournment to sort it out would have been short. The point was remitted to the original ET.

Procedure at the hearing; representation; litigation friends

PI [826.03]

***Royal Bank of Scotland plc v AB UKEAT/0266/18* (*27 February 2020, unreported*)**

Since the decision of Simler P in *Jhuti v Royal Mail Group Ltd* UKEAT/0061/17 (26 June 2017, unreported) it has been accepted that, although there is no express provision in the ET rules for appointing a litigation friend for a party lacking mental capacity, an ET has an inherent power to do so. The case law on this is set out in the text at **PI [826.03]** ff. The instant decision of Swift J in the EAT now adds important guidance here as to the prior question as to *when* an ET should consider that there is such a lack of capacity. This is usefully summed up at [22] of the judgment as follows:

> 'The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the … presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way. As Simler P pointed out in *Jhuti*, a litigant who lacks capacity is effectively unrepresented in proceedings since she is unable to take decisions on her own behalf and unable to give instructions to her lawyers. Thus, although any Tribunal should be alert to guard against attempts by litigants to use arguments about capacity improperly, if, considered objectively, there is good cause for concern that a litigant may lack litigation capacity, an assessment of capacity should be undertaken. What amounts to "good cause" will always require careful consideration, and it is not a conclusion to be reached lightly. For example, good cause will rarely exist simply because a Tribunal considers that a litigant is conducting litigation in a way with which it disagrees, or even considers unreasonable or vexatious. There is likely to be no correlation at all between a Tribunal's view of what is the "common-sense" conduct of a piece of litigation and whether a litigant has capacity to conduct that litigation. Something qualitatively different is required.'

Privacy and restrictions on disclosures; when an order may be rescinded by a later ET

PI [932]

***Home Secretary v Parr UKEAT/0046/20* (*6 March 2020, unreported*)**

At a preliminary hearing the ET made a r 50 privacy order at the respondent employer's request and against the wishes of the claimant, a litigant in person. The order stated that it would be open to a later ET at the substantive hearing to review and possibly change the order. This is what actually happened – the claimant was by that time legally represented, the matter was reconsidered in the light of a fuller consideration of the case authorities and the order was rescinded completely. The employer appealed.

In the EAT (Griffiths J) the first point was the validity of the first ET's caveat about reconsideration. It was held that this was lawful and so the second ET could reconsider the order, subject to the normal requirement for reconsideration that it is in the interests of justice, in particular that there has been a material change of circumstances (otherwise there is too great a danger of arbitrary and inconsistent decisions).

However, the more important aspect of this judgment (given that in most cases there will not have been such an express caveat in the original order) is that it goes on to hold that the second ET had this power to alter/rescind *anyway* under r 29. Applying the leading authority there of *Serco Ltd v Wells* UKEAT/0330/15, [2016] ICR 768 (see **PI [374.02]**) with again its emphasis on the interests of justice and change of circumstances, the facts of this case justified the second ET's decision. Three particular points are to be noted:

(1) This general r 29 power is not (as the employer had argued) limited by r 50(4) **R [2807]** which concerns revocation or discharge of an order *but* was held by the EAT to affect only an application to do so by a *party*. It does not affect the ET's general power under r 29.

(2) The material changes of circumstances here were:

  (i) the fact that the second ET had much fuller access to the documentation in the case, giving a better overview of the balance between open justice and an argued need for privacy;

  (ii) the professional representation of the claimant at the second hearing which meant that on that occasion there was a much more comprehensive citation of the case authorities on achieving this difficult balance, which had not been the case before the first ET.

(3) The EAT gave a warning, however, that (a) obtaining legal advice will not *by itself* justify a reconsideration and (b) neither will a simple desire to adduce other authorities that a party now *wishes* that it had brought forward earlier.

Costs; the order; ability to pay; placing a cap on costs to be assessed

PI [1049]

***Kuwait Oil Co v Al-Tarkait UKEATPA/0210/19* (*4 December 2019, unreported*)**

In a high-value costs case with costs orders for each side, the ET awarded costs for the employer subject to a cap. The order was made under SI 2013/1237 r 78(1)(b) **R [2835]**, ie to be assessed and the cap was imposed under r 84 (ability to pay). It took the form of a formula rather than an actual amount. Appealing against this, the employer argued that the ET had no power to make such an order because it usurped the assessing ET or county court costs judge's discretion. However, Kerr J in the EAT disagreed. It was only the maximum that was set, not the actual amount to be assessed. At [56] the judgment states:

> 'In my judgment, the employment tribunal's power to take account of ability to pay is untrammelled; the tribunal may have regard to it in deciding both whether to make a costs order and "if so in what amount." '

This was held to be the natural meaning of rr 78 and 84 and also as a matter of authority. In *Jilley v Birmingham Solihull Mental Health NHS Trust* UKEAT/0584/06 (21 November 2007, unreported) (see **PI [1052]**) it was held that a detailed assessment could be ordered subject to limitations based on ability to pay. That case was decided under the 2004 Rules, but the EAT here held that in spite of some changes of wording, it still remains authoritative. Moreover, in *Swissport Ltd v Exley* UKEAT/0007/16, [2017] ICR 1288 the EAT had accepted without demur an order for costs to be assessed which was limited to 10% of any amount awarded; this was in the light of the indemnity principle, not ability to pay, but it was viewed as analogous. One final point was that r 78(1)(b) talks of ordering the whole *or a specified part* of the costs to be assessed. On the facts here, the formula approach adopted by the original ET was held to satisfy this element, but the judgment comments that it is better for an ET to quantify any limit, rather than use such a formulaic approach.

EAT; institution of appeal; time limit

PI [1444]

***Fincham v Alpha Grove Community Trust UKEATPA/0993/18* (*18 October 2019, unreported*)**

In *Woods v Suffolk Mental Health Partnership NHS Trust* [2007] EWCA Civ 1180 Ward LJ famously referred to the EAT, in relation to extending the time limit for appealing, as a 'hard hearted lot', lacking the milk of human kindness in normally refusing any extension of time, no matter how technical the appellant's failure in the matter. This hard approach has in the past applied not just to complete failure to appeal in time but also to an appeal

apparently in time but missing required documentation. In the light of that, it is interesting to see this decision of Judge Auerbach in the EAT allowing an extension; of particular interest are his two reasons for doing so; of course each case will be decided on its own facts, but the judgment does perhaps suggest a possible approach for an appellant to adopt where the breach is only technical and he or she is otherwise blameless.

The losing unrepresented claimant before an ET wanted to appeal. Within the 42-day limit (albeit towards the end) he put everything together, and even attended the EAT office to hand them in personally to ensure delivery. Unfortunately, he had omitted one page of the ET3 in the required documentation. The EAT staff realised this and told him; he added it the next day. However, by this time it was 20 days past the deadline.

The Registrar decided that the original lodging was defective and refused a request for an extension. The EAT agreed about the defect, but granted the extension. At [33]–[36] of the judgment there is consideration of the case law on defective documentation, in particular the Court of Appeal decisions in *Woods* (above; see **PI [1446]**) and *Sud v London Borough of Ealing* [2011] EWCA Civ 995 (see **PI [1447.02]**) and the EAT decisions in *Nationwide Leisure Ltd v Parnham* UKEATPA/0724/09 and *Hine v Talbot* UKEAT/1783/10. Pointing to the fact that the missing page had little relevance to the substance of the appeal and that there were no other failures (in fact quite the opposite), it was held at [39] that:

> 'In all the circumstances, therefore, having regard particularly to the fact this page does not seem to me to have contained material information necessary to the consideration of the Grounds of Appeal, I conclude that this is an exceptional case in which the extension of time should be granted. I am reinforced in that view by the fact that it seems to me that, although he did make this mistake, the Claimant did, in other respects, make every effort to be diligent and conscientious. He did, subject to the fact that this page was missing, take on board which documents were required, he was cognisant of when the time limit was due to expire, and, believing that it was a better way of making sure that nothing went wrong, he decided to come to the EAT's offices in person to deliver his documents by hand. As I have said, he also acted promptly when the fact that there was a page missing was drawn to his attention. Apart from the crucial mistake, this is not a case of a party in any other respect having been lax or dilatory in their approach to complying with the requirements of the Rules and Practice Direction.'

REFERENCE UPDATE

499	*Basfar v Wong*	[2020] IRLR 248, EAT
499	*Walker v Wallem Ship Management Ltd*	[2020] IRLR 257, EAT

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