# Harvey on Industrial Relations and Employment Law

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

Bulletin Editor
Ian Smith MA, LLB (Cantab); Barrister
Emeritus Professor of Employment Law at the Norwich Law School, University of East Anglia.

## LEGISLATION

### Reimbursement of SSP

The Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) Regulations 2020 SI 2020/512 enact the promised temporary system for reimbursement of small and medium sized employers (up to certain limits) for SSP payable because of coronavirus absences. They came into force on 26 May and apply to periods of absence back to 13 March. They will be put into Div R in Issue 283.

### Further extension of SSP cover

The Statutory Sick Pay (General) (Coronavirus Amendment) (No 4) Regulations 2020 SI 2020/539 extend the scope of deemed sickness in a coronavirus case to cover those told to self-isolate under the Test and Trace system. They came into force on 28 May and will be put into Div R in Issue 283.

## DIVISION AII CONTRACTS OF EMPLOYMENT

### Duties of employee; confidentiality; Trade Secrets Regulations

**AII [176.08]**

***Trailfinders Ltd v Travel Counsellors Ltd [2020] EWHC 591 (IPEC), [2020] IRLR 448***

The Trade Secrets (Enforcement, etc) Regulations 2018 SI 2018/597 transposed Directive (EU) 2016/943 and give new forms of enforcement in cases of breach of confidence. They adopt in effect the existing substantive domestic law on confidence, but they also transpose the Directive's definition of 'trade secret'. This is set out at **AII [176.08]** where it is queried whether, though it is

said to apply only for the purposes of an action under the Regulations themselves, there might in fact be an element of 'read over' into common law actions. This first instance decision, the first to consider the Regulations, suggests that this is the case.

The claimant employer brought proceedings against several ex-employees who left to set up in competition, via the defendant company set up for the purpose. Much depended on whether the information that they had taken away with them was confidential in law. In deciding that it was, the judge said at [29]: 'The best guide to the distinction between information which is confidential and that which is not is now to be found in the definition of "trade secret" in art 2(1) of Directive 2016/943'. This is now in reg 2 of the Regulations. Applying the three tests laid out there, the result was a finding for the claimant.

## Remedies for breach of contract; wrongful dismissal; length of service irrelevant

**AII [474]**

***East Coast Main Line Co Ltd v Cameron UKEAT/0212/19***
**(*31 January 2020, unreported*)**

This is another good case example of the difference between wrongful dismissal and unfair dismissal and the importance of keeping them separate for most purposes. The claimant was summarily dismissed after causing a potentially serious breach of health and safety rules in his work on the respondent's railway. It was a one-off incident and so raised familiar questions about summary dismissal for single acts of negligence. However, the point in question arose on his claim for *wrongful* dismissal. He had been employed for 26 years with no such previous incidents. In upholding his common law claim the ET took that length of service into account. Applying basic principle here, Deputy High Court Judge Ellenbogen allowed the employer's appeal, holding that matters such as length of service are relevant to overall fairness in unfair dismissal, but not in wrongful dismissal which concentrates on whether the employer has been in breach of contract. The question here is whether summary dismissal was objectively justified by gross misconduct, not whether the outcome was fair or not.

# DIVISION CI WORKING TIME

## Holidays; who has the right; meaning of 'worker' in EU law

**CI [45]**

***B v Yodel Delivery Network Ltd C-692/19***

The Watford ET remitted this case to the ECJ on the question whether a contractor with an unfettered substitution clause in the contract could be a 'worker' entitled to holiday pay under the Working Time Directive. The facts were that the claimant was a parcel delivery operative whose contract

described him as an independent contractor, gave him discretion as to how many parcels to deliver and when, allowed him to work for other employers and contained an unrestricted right of substitution (provided any substitute was suitably qualified). The ECJ considered that the key in EU law is whether the individual is 'subordinate' in a work hierarchy; an independent contractor can be a worker if his or her independence is fictitious, but that did not appear to be so here. The case was sent back to the ET to take a final decision on the facts. The ruling of the court was as follows:

> 'Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a "worker" for the purposes of that directive, where that person is afforded discretion:
>
> – to use subcontractors or substitutes to perform the service which he has undertaken to provide;
>
> – to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
>
> – to provide his services to any third party, including direct competitors of the putative employer, and
>
> – to fix his own hours of "work" within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,
>
> provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88.'

## DIVISION DI UNFAIR DISMISSAL

### Constructive dismissal; the 'last straw' doctrine; affirmation

**DI [480], DI [541.02]**

***Williams v Alderman Davies Church in Wales Primary School UKEATl0108l19* (*20 January 2020, unreported*)**

The claimant, a teacher, complained of a series of events stemming from unspecified safeguarding issues being raised against him leading to his suspension. A grievance was rejected and he was subjected to further disciplinary investigation over alleged data breaches. When he was made aware that a fellow teacher had been instructed not to discuss matters with

him he resigned. He claimed constructive unfair dismissal, but the ET rejected the constructive element on the basis that this final episode with the fellow teacher was not a breach of contract (trust and confidence) by the employer. Judge Auerbach in the EAT allowed his appeal on this point.

So far, it appears to be a relatively straightforward application of the 'last straw' doctrine, with that proverbial straw not itself having to be repudiatory (see **DI [480]**). However, as the detailed judgment makes clear, it in fact raised a specific point of law concerning a refinement of the guidance given on this area by Underhill LJ in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, [2018] IRLR 833. This is set out at **DI [541.02]**. In point (4) (after asking if the final matter was itself repudiatory) the guidance asks 'If not, was it nevertheless a part … of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?' It then states 'If it was, there is no need for any separate consideration of a possible affirmation'. The problem identified in the judgment is that the guidance does not cover the position if the answer is 'No', ie it was different in kind from the previous course of conduct. This seems to have been taken by the ET here to mean that in such a case there is *no* constructive dismissal if the final matter was not itself repudiatory. The judgment holds that this is not the case – there can still be a constructive dismissal here if: (1) the earlier course of conduct was repudiatory; (2) there has been no affirmation on the facts by the claimant; and (3) the final matter at least *contributed to* the eventual decision to resign. These are very much matters of fact and these questions were remitted to the ET.

## Order for re-engagement; non-compliance; additional compensation

**DI [2420]**

***Fotheringhame v Barclays Services Ltd UKEAT/0208/19* (*1 May 2020*)**

It has often been pointed out that the reference in the legislation to an 'order' for reinstatement or re-engagement is a misnomer because ultimately it cannot be enforced directly. The position is that it can lawfully be ignored, subject to financial results/penalties specified in the legislation. That is clearly shown in this case before Judge Barklem in the EAT.

The claimant was found to have been unfairly dismissed and in August 2018 the ET made an order for re-engagement, including a formula for calculating the sum payable to him under the ERA 1996 s 115(2) **Q [739]**. In the event, he was not taken back on. A subsequent hearing in January 2019 assessed compensation instead (leading to a very substantial sum). The claimant had claimed in addition interest on the formulaic sum that should have been paid under the original order. The ET rejected this aspect of the claim and the claimant appealed against this.

The EAT dismissed the appeal. It held that an order under s 115 is conditional and ultimately does not have to be obeyed. When there was

non-compliance here, the effect was that the August order 'fell away' and it was then s 117 that applied instead, leading to the award in January of the enhanced compensation. There could thus be no interest on a previous conditional award where the condition had not come about.

## DIVISION F TRANSFER OF UNDERTAKINGS

### Variation of contract; variations which are advantageous to the employee; abuse of law

**F [134.03]**

***Ferguson v Astrea Asset Management Ltd UKEAT/0139/19* (*15 May 2020, unreported*)**

The end result of this important decision of Judge Shanks in the EAT could be seen as the application of that well-known principle of equity – what's sauce for the goose is sauce for the gander. It holds that under TUPE SI 2006/246 reg 4(4) **R [2293]** *any* change of terms whose sole or principal reason is the transfer is void (subject only to the statutory exception in reg 4(5) for an ETO reason), even if the change is to the employee's *advantage*. It has to be said that the facts were rather extreme, *possibly* facilitating future arguments for distinguishing it, but on the other hand its secondary ground of decision, the EU law principle of 'abuse of law', may act in such a case as belt and braces.

The four claimants were directors and employees of Co A which operated a lucrative management contract with Co X. The latter gave a year's notice to end that contract and give it to Co B (in what was accepted would be a TUPE transfer). A few months before the transfer they altered their own contracts to add in guaranteed bonuses (50% of salary) and generous new termination terms in the event of their dismissal. Perhaps tellingly, these changes were not to take place if the transfer did not go ahead. When Co B took over there were issues as to whether two of them were transferred, but more importantly Co B (eventually dismissing them) claimed that they were not bound by the new terms because they were transfer-related and so void under reg 4(4).

The text at **F [134.01]** discusses at length the decision in *Regent Security Services Ltd v Power* [2007] IRLR 226, [2007] ICR 970, CA, where it was held that, as TUPE is to be given a purposive interpretation in the light of the policy to protect employee interests, it should only strike down TUPE-related changes which are to the employee's *disadvantage*, allowing the employee to choose to enforce changes in his or her favour. That case was obviously relied on by the employees in the instant case, but there was a problem – that case was decided under the 1981 TUPE Regulations SI 1981/1794 which had a weaker form of the present reg 4(4) which is in much more mandatory language. The EAT took the view that that change made the difference, along with concern over (if *Power* still applied) how to decide if a particular term is or is not 'favourable' and also the consideration that here the aim of the changes was to put the claimants into a vastly *more* favourable position

through the transfer, not just to protect their existing employee rights. The result was a holding that these changes were indeed void under reg 4(4). This is summed up at [19] as follows:

> 'It is important to recognise that in Mr Power's case (a) the contractual term which the transferee/employer was seeking to avoid (namely that Mr Power's retirement age was 65) was one which *it* had put forward *after* the transfer; (b) there was no provision like regulation 4(4) applying at the relevant time (although by the time the case was decided TUPE 2006 had come into force); and (c) the transferee employer was seeking to rely, as against the employee, on the anti-avoidance provision found in regulation 12 of TUPE 1981. I do not consider that the case stands as authority for the proposition that regulation 4(4) should be interpreted as applying only to changes which are adverse to the employee for two reasons: first, on the narrow basis that the wording and context of regulation 12 of TUPE 1981 are quite different to those of regulation 4(4) of TUPE 2006; and, second, because what the Court of Appeal says is that the "public policy reflected in the Directive" does not "*prevent* an employee from reaching an agreement with the transferee employer under which he obtains an *additional* right by reason of the transfer"; the Court does not say that the Directive positively *requires* that variations to the employee's terms agreed with either transferor or transferee employer by reason of the transfer which the employee considers advantageous cannot be deemed void consistently with the purposes of the Directive. Further, it is notable that, although the decision is understandable on the merits, the Court of Appeal do not really address the issue of what Mr Power's contractual retirement age was after he had signed the new terms and it highlights the difficulty inherent in deciding what is an "adverse" and what is an advantageous or positive term. Although the solution of saying that it was open to employee to choose which of the two terms to rely on worked in the context of Mr Power's case, this would not always be satisfactory, and it would leave open the prospect that contractual rights would be dependent on the subjective view of the individual employee, who might change his mind from time to time.'

As stated above, these were pretty extreme facts, with a significant element of manipulation of the TUPE rules, *but* the decision is also supported by recourse to the EU law provenance of the Regulations. The judgment goes on to say that in any event the result would be the same under the EU principle of abuse of law which can apply where: (1) the real purpose of the EU rules in question has not been achieved; and (2) there has been an intention to obtain an advantage by artificially applying those rules. On the facts, that applied here.

## DIVISION H CONTINUITY OF EMPLOYMENT, ETC

### Basis of calculation of continuity; start date

**H [7]**

***O'Sullivan v DSM Demolition Ltd UKEAT/0257/19* (*15 May 2020, unreported*)**

The provision in the ERA 1996 s 211(1) **Q [835]** that statutory continuity 'begins with the day on which the employee starts work' is deceptively simple; being based, according to the case law when he or she starts work *under the contract,* conflict can arise if the individual in fact performs some work in advance of the contract coming into effect. The matter was reviewed in *Koenig v Mind Gym Ltd* UKEAT/0201/12 (8 March 2013, unreported) which is considered at **H [7.03]**. The instant case before Judge Auerbach in the EAT is a good example of the application of the approach there.

The issue (as usual in these cases) was whether the claimant had the necessary two years' service to claim unfair dismissal. This depended on when he had started work. He had been recruited to work for the employer and had done some work physically in the week beginning 26 October 2015. He therefore argued that that was his start date, giving him the necessary service. However, the employer argued that the correct start date was 2 November, on the bases that:

(1) that date was specified in the drafting of his Statement of Terms for the new employment;

(2) he was put on the payroll and started submitting work sheets only from that date;

(3) the employer's client had not been charged for his work in that previous week beginning 26 October; and

(4) he had been paid £100 in cash on the site for his work during that week and had not queried that.

In the light of this and the judgment in *Koenig*, the EAT upheld the ET's decision that he had worked for the week in question under an informal arrangement and his statutory continuity did not begin until 2 November.

## DIVISION PI PRACTICE AND PROCEDURE

### Disclosure and inspection; party not physically in Great Britain

**PI [451]**

***Sarnoff v YZ UKEAT/0252/19* (*6 May 2020, unreported*)**

In litigation concerning sexual harassment against Harvey Weinstein and others, the claimant sought and was granted orders for discovery. One of the respondents appealed against this on the basis that he was resident and working in the USA and r 31 of the ET Rules **R [2788]** states that an order for

discovery may be made against 'any person in Great Britain'. He obviously relied on a straightforward literal interpretation of that phrase. However, the EAT rejected his appeal against the order. The claimant argued that such a literal interpretation led to absurdities in the rule's application (also meaning that many such orders would become unlawful). She also argued that the general power to make case management orders under r 29 should not be cut down and that the phrasing of r 31 was an example of bad drafting, the intention being that the 'in Great Britain' element was intended to refer to the ET being there. Also in issue in the arguments was the Scottish case of *Weatherford (UK) Ltd v Forbes* UKEATS/0038/11 (20 December 2011, unreported) (cited at **PI [451]**) which supported the literal approach.

Kerr J in the EAT held for the claimant, but on narrower grounds. There had been considerable discussion of the history of r 31, but he found this ambiguous. It was the potential absurdities that were most important. *Weatherford* was distinguished as being based on a difference between English and Scots law on the powers of civil courts – in England and Wales the County Court under the CPR can order disclosure against a person outside the jurisdiction but a sheriff court in Scotland cannot. The aim here was to align ETs with the CPR and to comply with the overriding object. On balance, it was held that the phrasing of r 31 could (just) be interpreted as applying 'in Great Britain' to the ET, not the party. An interesting contrast was made with r 32 on attendance orders which can only be made against persons in Great Britain.

## COT3 settlements; settlement agreements; enforcement of confidentiality clause

**PI [687], PI [726]**

***Duchy Farm Kennels Ltd v Steels [2020] EWHC 1208* (*QB*)**

The employee settled an employment claim under a COT3 agreement. This contained a confidentiality clause not to disclose the agreement or its terms; payment was to be in instalments. After some had been made, the employer found that the employee had in fact discussed it with other ex-employees. The employer ceased the payments on the basis that the employee had broken the contract by his disclosures and so it was no longer bound to honour it. The employee brought proceedings in the County Court to enforce the payments and won. On appeal, Cavenagh J upheld that decision.

The question was a purely contractual one – what was the nature of the clause? Because confidentiality was not of the essence of the agreement, it was held that it was not a condition of the contract (breach of which would have justified no further payments) and moreover it had not been defined as a condition. Instead, it was an 'intermediate or innominate' clause. The question then became (with such a clause or a mere warranty) whether the employee had behaved in such a way as to be in fundamental breach, allowing the employer to terminate the contract. On the facts, that was not so – the disclosures had caused no commercial damage (the aim of the clause having been to dissuade any other dissatisfied employees from suing)

and, if there had been any financial loss, damages would have been an adequate remedy, short of terminating the whole contract.

Thus, a confidentiality clause in a COT3 settlement or settlement agreement is not automatically indirectly enforceable by a threat of non-payment of the amount agreed. The advice given by Lexis®PSL in the light of this case is:

> 'Where, however, the issue of confidentiality is of fundamental importance to the parties, they should consider doing the following when formulating the wording of a COT3 agreement or a settlement agreement:
>
> - state expressly in the terms of the agreement what will happen if there is a breach of confidentiality, eg that in the event of a breach the ex-employee must repay all or a proportion of the money already paid over
> - state expressly that the confidentiality clause is a "condition" of the agreement; this means in contract law that any breach of it will be regarded as fundamental, which allows the innocent party to:
> — treat its obligations under the agreement (eg to make further instalment payments under the agreement) as at an end as a result of the breach
> — go to court to seek an injunction to prevent any further breach
> - provide sensible express exceptions to the confidentiality clause, eg making it allowable to tell one's partner or close family members (this reasonable, practical approach makes clear that breaching confidence to anyone outside the stated group will, by contrast, rightfully be regarded as a breach)
> - consider the staging of payments, rather than paying any sum due in full at the outset, to provide a continuing incentive to maintain confidentiality'.

## Costs; unreasonable conduct; relevant factors

**PI [1066], PI [1083], PI [1101]**

***Radia v Jefferies International Ltd [2020] IRLR 431, EAT***

The claimant brought proceedings for disability discrimination, all of which failed. The ET proceeded to make a full costs order for £550,000 on the bases that: (1) the claimant had given untrue and misleading evidence; (2) there had been no reasonable prospect of success; (3) he had known this from the outset; and (4) it had been unreasonable to bring the proceedings from the outset.

Dismissing the claimant's appeal against the order, Judge Auerbach in the EAT laid out the general principles that:

(i) there can be an overlap between ET Rules r 76(1)(a) (unreasonable conduct) and (b) (no reasonable prospect of success) where the unreasonable conduct is the bringing of the proceedings; in the case of both it is necessary to consider the party's knowledge;

(ii) they require a two-stage approach: (1) has the threshold of either (a) or (b) been passed on the facts, then (2) if so the ET *may* make an order, considering the matter judicially;

(iii) in considering this, it must not use hindsight: '*had* no reasonable prospects of success'.

These principles are particularly important when the ET is proposing to make a full costs order. In that context, the judgment states at [65]:

> 'I should say something further about how the Employment Tribunal should approach an application seeking the whole costs of the litigation, on the basis that the claim "had no reasonable prospects of success" from the outset. It should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.'

In the present case the ET had taken this approach and so its decision on the facts stood.

## REFERENCE UPDATE

| Bulletin | Case | Reference |
|---|---|---|
| 501 | *Human Kind Charity v Gittens* | [2020] IRLR 412, EAT |
| 501 | *Castano v London General Transport Services Ltd* | [2020] IRLR 417, EAT |
| 501 | *Home Secretary v Parr* | [2020] IRLR 422, EAT |
| 501 | *Mervyn v B W Controls Ltd* | [2020] IRLR 464, CA |
| 502 | *Barclays Bank plc v Various Claimants; W M Morrison Supermarkets Ltd v Various Claimants* | [2020] IRLR 472, [2020] IRLR 481, SC |

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**Correspondence** about the **content** of this Bulletin should be sent to Nigel Voak, Analytical Content, LexisNexis, FREEPOST 6983, Lexis House, 30 Farringdon Street, London, EC4A 4HH (tel: +44 (0)20 7400 2500).



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