Harvey on Industrial Relations and Employment Law

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

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

DIVISION AII CONTRACTS OF EMPLOYMENT

Duties of the employee; obedience; effect of human rights law

AII [155]

Grimmant v Sweden [2020] IRLR 554, ECtHR

The text at **AII [155]** considers the longstanding domestic law on obedience to lawful orders and the exceptional cases where an employee may be able lawfully to refuse an order. This case in the ECtHR from Sweden explored the possible effect of human rights law in this area, the judgment suggesting however that that effect may be limited, to say the least.

The claimant was a nurse who undertook further training to qualify as a midwife. She was then refused a position as such when she told her potential employer that because of her religion she would not be prepared to assist in an abortion. Her claim in relation to this was dismissed by the Swedish courts and remitted to the ECtHR. She argued that the employer had been in breach of art 9 (freedom of thought, conscience and religion). The court held that she satisfied art 9(1) because her objection to assisting an abortion was a manifestation of her religion and so art 9(1) was engaged. However, the court went on to hold that she failed under art 9(2) which permits limitations 'prescribed by law and necessary in a democratic society'. The employer's action here was 'prescribed by law' because Swedish law gives an employer wide discretion as to the organisation of work and (more particularly) puts an obligation on an employee to perform all the work duties given to him or her. The judgment puts it thus:

> 'The requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified. Employers have, under Swedish law, great flexibility in deciding how

work is to be organised and the right to request that employees perform all duties inherent to the post. When concluding an employment contract, employees inherently accept these duties. In the present case, the applicant had voluntarily chosen to become a midwife and apply for vacant posts while knowing that this would mean assisting also in abortion cases.'

It was further held that the action of the employer was also justified under art 9(2) by the aim of protecting the health of women seeking an abortion.

The remarks about Swedish employment law can be seen as also applying here, and so a human rights challenge to our basic concept of 'lawful orders' and refusal thereof seems unlikely.

DIVISION CI WORKING TIME

Holiday pay; position of a performance bonus

CI [191]; H [872]

***Econ Engineering Ltd v Dixon UKEAT/0285/19* (*10 March 2020, unreported*)**

The question of the inclusion of various forms of bonus or commission in the 'week's pay' when calculating statutory holiday pay has largely been settled in the employee's favour, primarily by way of EU law qualifying the previously harsh approach under the domestic statute. However, this case before Linden J in the EAT showed the opposite conclusion where (atypically now) the matter came purely under domestic law. There, it was held, a profitability bonus did *not* come within a week's pay when calculating holiday pay.

The employees were remunerated weekly by a basic hourly rate plus shift allowances and voluntary overtime. In addition, however, monthly in arrears they were paid a 'profitability bonus' based on the firm's performance but paid as an addition to hourly pay rates. This was a contractual entitlement with a calculation formula. It had nothing to do with an individual having worked particular hours; if the performance was below a threshold, nothing would be payable.

The employees brought ET proceedings challenging the calculation of their holiday pay, under both reg 13 (standard annual leave) and reg 13A (additional annual leave) of the Working Time Regulations 1998 SI 1998/1833. The difference of course is that the former is governed by EU law but the latter was added purely as a matter of domestic law. The ET held that the shift premia and the voluntary overtime were to be included under both regulations, by a combination of EU law and the ERA 1996 s 221(2). It then held that the performance bonus was also to be included under both. The employer accepted all of this except including the performance bonus under reg 13A. This was the sole issue in its appeal to the EAT.

The EAT allowed the employer's appeal on this point. The Regulations use the ERA's general provisions on 'week's pay' and it was agreed that this case

came within s 221(2). This applies to remuneration 'payable … if the employee works throughout his normal working hours in a week'. The Court of Appeal in *Evans v Malley Organisation* [2002 EWCA Civ 1834, [2003] IRLR 156, [2003] ICR 432 held that this did not include a performance-based commission (see **H [882]**). The EAT here took that as guidance and backing for its view that, as a matter of domestic interpretation, if an amount is to be included, the completion of the normal hours must be the necessary *and sufficient* condition giving rise to its payment. Here, the bonus in question was conditional only on the *firm's* performance; completion of the hours was a necessary condition for it, but *not* a sufficient one. At [33]–[35] this is explained thus:

> '… that is true of basic pay, where it is both necessary and sufficient, for the entitlement to arise, that the employee has worked their 39 or their 40 hours in a given week. 34. This is not the case in relation to the profitability bonus. … the payment is contingent on hitting specified profitability targets and will vary according to how successful the business has been in the month in question. The profitability bonus is therefore a payment by way of a bonus based on profit made rather than the fact that normal working hours have been worked. Putting the matter another way, it is necessary but not sufficient that the employee has worked a given hour in order for him to be entitled to the supplement for that hour: the mere fact that the employee has worked a given hour, or even throughout his normal working hours in a week, will not mean that he is necessarily entitled to be paid any profitability supplement. It follows that the profitability bonus is not a sum which falls to be included in the calculation under Section 221(2) ERA.'

The bonus was thus not to be included in holiday pay in relation to additional annual leave, even though it was included in relation to standard annual leave – yet another example of how complicated the law has become on something as ostensibly simple as 'holiday pay'.

DIVISION DI UNFAIR DISMISSAL

Redundancy and reasonableness; dismiss all and reappoint? appeals

DI [1724], DI [1666.02]

***Gwynedd Council v Barrett UKEAT/0206/18* (*3 June 2020, unreported*)**

This decision of the EAT under Choudhury P explores a difficult distinction in redundancy unfair dismissal law between classic cases of selection from a pool on the one hand and the modern tactic of dismissing all and inviting them to apply for the jobs available. This is discussed at **DI [1724]** ff and ultimately raises the basic question – if it is the latter, do any or all of the normal fairness requirements in *Williams v Compair Maxam Ltd* [1982] IRLR 83, EAT (see **DI [1666.04]**) apply to that 're-selection' procedure? This has been a contentious area since *Morgan v Welsh Rugby Union* [2011] IRLR

376, EAT, seemed to drive a wedge between the two procedures, arguably suggesting that the *Williams* guidelines should not apply at all in the latter case. The instant case takes a more nuanced approach, possibly giving a shot across the bows to any employer wanting to use fire-and-rehire as a way of minimising legal challenge. It was slightly complicated by specific regulations applying to schooling in Wales, but it is clear that the views on matters of redundancy are applicable generally.

The claimants were PE teachers in one of several schools in the relevant area being reorganised by the council into one large school. This was to be on their original site and there was a need for much the same staffing, but numbers were to decrease. To achieve this, the council announced that: (1) all staff would be dismissed on a certain date; (2) the staffing of the new school was to be determined by an application process; and (3) any unsuccessful applicants from existing schools would be made redundant. That is what happened to these claimants, who claimed unfair redundancy dismissal. The ET found for them, largely because of a lack of consultation.

The council appealed to the EAT. Part of this was on the basis that the ET had applied *Williams*-type criteria too automatically and strictly, ie as rules, but the EAT absolved it of this charge. More fundamentally, the employer argued that this was a *Morgan* case of reorganisation, not redundancy, and therefore *Williams* should not apply at all, in particular in relation to consultation. Again, the EAT rejected this argument. Their approach is well summed up in these potentially important passages at [71] and [72]:

> 'The claimant in [*Morgan*] had contended that there was a failure to apply the third and fourth factors in *Williams*, namely, the establishment of objective criteria for selection and the application of those criteria. The EAT held that the *Williams* factors did not address the situation in *Morgan*, where there was a reorganisation of two roles down to one new role and an interview process to determine the successful candidate. The "*forward-looking*" nature of the recruitment exercise led the EAT to conclude that, "*whereas Williams-type selection will involve consultation and a meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process*" (*emphasis added*)*:* per HHJ Richardson at [30]. The EAT did not thereby suggest that consultation can never be relevant in such an exercise. In our judgment, consultation may remain relevant. Whether or not that is so in any particular case is a matter for the Tribunal, as the arbiter of compliance with s.98(4) of the 1996 Act, to determine. In the present case, there was, as the Tribunal found, no consultation at all, merely the communication of decisions made. Clearly, the Tribunal considered that there were matters about which the Claimants could have been consulted, including the adoption of a procedure involving the dismissal of staff at affected schools and the process of recruitment to the new schools.
>
> Furthermore, it was not even clear that the appointments were to be made to "*new roles*" (as was the case in *Morgan*). Indeed, the Tribunal

found that the Claimants were required to apply for "*either an identical job or a substantially similar job*" (at paragraph 40). Where recruitment is to the same or substantially the same role as one which the employee was doing, then the exercise may not involve "*forward-looking*" criteria at all, but something closer to selection from within a pool.'

This can be read, firstly, as suggesting that *Morgan* should only be applied to a 'forward-looking' case with significant changes in job content (see also *Green v London Borough of Barking and Dagenham* UKEAT/0157/16 (10 March 2017, unreported), discussed at **DI [1725.01]**) but also, secondly (and more significantly?) that even where *Morgan* can be relied on by an employer that does not rule out at least *some* of the *Williams* guidelines, in particular consultation. Given the emphasis in the judgment on this being ultimately a question for the ET in applying the ultimate test of fairness in the ERA 1996 s 98(4), it may be this very vagueness that most constitutes the aforementioned shot across the bows to employers – they can *try* a simplistic *Morgan* procedure, but if challenged cannot be confident of the view an ET might take.

Finally, there was one other ground for the ET's holding of unfairness, namely lack of an opportunity to appeal. As the text points out at **DI [1666.02]**, the general rule is that there is no absolute rule that there has to *be* an appeal procedure in redundancy cases. Here, however, there was a statutory appeal procedure in the regulations, which the ET had been right to take into account. This perhaps backs the view that, although an appeal does not always have to exist, if it does a failure to conduct it properly *can* be a factor in a finding of unfairness.

DIVISION L EQUAL OPPORTUNITIES

Marriage and civil partnership discrimination; extent; reason for the less favourable treatment

L [185.06]

***Gould v St John's Downshire Hill UKEAT/0002/20* (*5 June 2020, unreported*)**

The text at **L [185.06]** gives this case at its previous hearing in the EAT as an example of the 'very narrow ambit for … EqA 2010 s 8' on marriage discrimination established by the earlier case law, but commenting that this ambit 'keeps the focus on the protected status, marital status'. The simple point is that the claimant, a minister in a church with generally conservative views on marriage, was dismissed after going through marital difficulties leading to separation. He claimed marital discrimination (and unfair dismissal based on that discrimination) but the church countered that the real reason for their treatment of him was the way he had dealt with his difficulties (including public condemnation of his wife), difficulties with others in the church and his treatment of a subordinated employee. In other words, the church claimed that his marital status and problems may have been the *context* in which his dismissal occurred, but it was not the *reason*.

The first ET struck out his claims as having no reasonable chance of success and in *Gould* (*No 1*) in 2017 the EAT allowed his appeal on the basis that there was a triable issue here. The matter was remitted. The second ET in fact held for the church and the EAT under Linden J have now rejected the claimant's second appeal. It held that there was no unlawful discrimination and that the dismissal (for SOSR) was fair. The key finding of fact was that 'none of these events concerned the marriage per se; rather they were manifestations of the problems of the marriage'. It was true that one trustee had stated that 'a broken marriage equals a broken ministry' but he was only one of five and overall the *causa causans* was not the marriage or its difficulties, but *entirely* the irretrievable breakdown of the relationship between the claimant and the trustees, the leadership team, certain colleagues and other members of the congregation.

The EAT under Linden J have now rejected the claimant's second appeal. It held that there was no unlawful discrimination and that the dismissal (for SOSR) was fair. Two main and connected issues arose in the appeal, both of which are given detailed consideration in the judgment, in particular setting out the relevant case law:

(1) 'Because of' – applying the normal approach to the requirement in direct discrimination that the less favourable treatment be 'because of' the protected characteristic, it was held that the church's objection here was to the way that the claimant had acted during his marital problems, not those problems themselves. The case thus came within the scope of the well-known case exemplifying this sort of distinction between the protected characteristic itself and entirely 'separable' matters motivating the respondent, namely *Martin v Devonshire Solicitors* [2011] ICR 352, [2011] EqLR 108, EAT, which is considered at **L [487.01]**. It was accepted that this is dangerous territory and that an ET must be careful that the respondent is not using the distinction as a smoke screen, but here the ET had made clear and defensible findings of fact to justify its conclusion that the church fell on the right side of the line.

(2) Protection of marriage – the judgment cites the case law considered at **L [185]** ff to the effect that it is the status itself that is protected, not just anything connected with it. Particular reliance was placed on the guidance from Underhill P in *Hawkins v Atex Group Ltd* [2012] IRLR 807, [2012] EqLR 397, EAT, which is set out at **L [185.02]** and which holds that this restricted approach is what Parliament must be taken to have intended.

Putting these points together, the result is summed up at [137] as follows:

> 'As we read [the relevant part of the judgment], therefore, the Tribunal understood and applied the distinction, discussed above, between a protected characteristic being an important part of the context, or a "but for" cause of the treatment complained of, and it being a subjective reason for that treatment. This was the distinction relied on by the Respondent and it is the distinction flagged up by the Tribunal by its reference to *Ahmed* in its self-directions of law, and then explored in

> detail in the evidence and the Tribunal's Reasons. In the Tribunal's view there clearly was a breakdown in relationships and that clearly was the Trustees' entire reason for their decision. The fact that the issues to some extent arose in the context of the breakdown of his marriage did not mean that in law the decision to dismiss was "*because of marriage*".'

Finally, it was held that, even with the wisdom of hindsight, *Gould (No 1)* was correctly decided because it only held that the claimant here had had an arguable case, not that he should succeed at a full hearing.

Discrimination arising from disability; justification; relationship with unfair dismissal

L [377.03]

***Department of Work and Pensions v Boyers UKEAT/0282/19* (*24 June 2020, unreported*)**

Where in an ill-health dismissal case there are parallel claims of unfair dismissal and discrimination arising from disability (EqA 2010 s 15 **Q [1468]**), a question may arise as to the relationship between the test of reasonableness for the former (ERA 1996 s 98(4) **Q [722]**) and the test for justification (legitimate aim plus proportionality) for the latter. They certainly *look* alike and indeed in *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, [2017] IRLR 547, Underhill LJ said that 'in this context I doubt whether the two tests should lead to different results'. However, the instant decision of Deputy High Court Judge Gullick in the EAT shows that this will not always be so. It does so, however, without citation of a later Court of Appeal case making that point in wider terms.

The disabled claimant was dismissed during sickness absence. He claimed unfair dismissal and s 15 disability discrimination. The ET held his dismissal procedurally unfair and upheld his discrimination claim on the basis that the employer was pursuing legitimate aims, but not by proportionate means. The employer accepted the finding of unfairness, but appealed against the finding of s 15 discrimination. It argued that instead of applying the correct balancing act under s 15 (setting the legitimate aim of the employer against the discriminatory effect on the employee), the ET had concentrated on the *process* adopted by the employer in reaching its decision, ie in effect reading over the procedural unfairness into the s 15 justification. The EAT agreed. The judgment cited *Chief Constable of West Midlands Police v Harrod* [2015] IRLR 790, [2015] ICR 1311, EAT, for the proposition that it is wrong to concentrate on process, and then addressed Underhill LJ's approach in *O'Brien*. It held that that did not apply here because this case was the 'mirror image' of *O'Brien* – there the ET had used a finding of s 15 discrimination to establish parallel unfair dismissal, whereas here the ET had used its finding of unfairness to reject justification under s 15, which has greater logical problems. At [37], [38] it states:

> 'That it may be both undesirable and unlikely for the two statutory tests to yield a different result in a case of dismissal consequent on long-term

> sickness absence does not mean that it is not possible for them to do so; I do not consider that anything in *O'Brien* results in there being no error of law in the ET's approach to the proportionality assessment in this case, or in any such error being an immaterial error.
>
> In my judgment, the ET fell into error in basing its analysis of proportionality on the actions and thought-processes of the Respondent's managers, rather than on a balancing of the needs of the Respondent, in the context of the legitimate aims it had found were pursued by the dismissal, and the discriminatory impact on the Claimant.'

On a narrow basis, the decision rests on this distinction with *O'Brien*, but more widely can be seen as suggesting that ultimately it is a question of fact in each case and that Underhill LJ was not laying down any clear rule. If the latter, it is perhaps unfortunate that no reference was made to *City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] IRLR 746 where Sales LJ had made much that point, as is set out at **L [377.03]**.

As it happens, the same issue also arose in *Iceland Foods Ltd v Stevenson* UKEAT/0309/19 (13 February 2020, unreported) before Judge Barklem in the EAT. The disabled employee was dismissed and brought ET proceedings. He won on s 15 but lost on unfair dismissal. Here, both parties appealed, with both arguing (to opposite effect) that there should have been the same result under both claims. The result on the facts was that both appeals were allowed and the whole matter remitted to a new ET. However, the legal interest here is that the EAT *did* consider *York Council v Grosset*, with its insistence that there can be differential results in a given case. However, the judgment also 'notes' Underhill LJ's opinion in *O'Brien* and may perhaps introduce a further complication in drawing a distinction between *Grosset* which concerned disability and a *misconduct* dismissal and *O'Brien* which concerned disability and an *incapability* dismissal. A passage at the end suggests that Underhill LJ's opinion may be stronger where the dismissal is on incapability grounds. Clearly, there is more to come on this point.

DIVISION M TRADE UNIONS

Interpreting the rules; reasonable interpretation; duties and powers

M [562]

Kelly v Musicians' Union [2020] EWCA Civ 736

The point of interpretation of the union's disciplinary rules in this case was a neat one and its results first before the Certification Officer (CO) and then the EAT and Court of Appeal show the possible approaches to 'reasonable interpretation' as set out in the text at **M [562]** – it is one thing to pose the test, but another to apply it to the facts.

The claimant was a longstanding union member who was accused of harassment, discrimination and bullying. The General Secretary investigated

these allegations, leading to disciplinary proceedings as a result of which he was expelled for ten years. The problem was with the relevant rule which said that where a complaint is made within 28 days of the alleged offence, the General Secretary was to investigate whether charges were justified. In this case, the allegations were of conduct outside that 28-day period. The claimant brought proceedings before the CO under TULR(C)A 1992 s 108A. The CO accepted his argument that on a literal interpretation the charges were out of time and she issued an enforcement order quashing the expulsion.

On appeal to the EAT, the union argued that the 28-day period was not mandatory/exclusive, either as a matter of construction or under an implied term allowing disciplinary proceedings outside that period, especially in the case of serious misconduct. Soole J in the EAT allowed the union's appeal on both grounds and discharged the enforcement order. It took the view that under the relevant rule *if* a complaint is brought within 28 days the General Secretary *must* investigate, but it does not go further and rule out any complaint not within that period. To do so would be inconsistent with the enforcement of other rules on misconduct and could lead to absurdities. Thus it was the *whole* of the rules that were to be considered. This view could only then be negated if there was an implied term restricting action to 28-day complaints. On these facts, not only was there no such implied term, but the proper implication was to the contrary.

On further appeal, the Court of Appeal upheld the decision of the EAT and rejected the claimant's appeal. It did so as a matter purely of construction, ie without the need for any argued implied terms. The point ultimately was that the existence of a *duty* on the General Secretary on a timeous claim did not rule out a parallel *power* to bring proceedings in other cases. One argument for the claimant had been that proceedings under that power would not be subject to the same limitations and safeguards applying to a 'duty' charge, but the court pointed out that the latter would be subject in any event to the normal legal rules on fairness and proportionality, and so this was not a fatal objection.

DIVISION PI PRACTICE AND PROCEDURE

The claim; altering the original claim or making a new claim

PI [311.04]

***GTR Ltd v Rodway UKEAT/0283/19* (*17 June 2020, unreported*)**

This decision of Kerr J in the EAT is an example of the application of the well-known '*Selkent*' principles on when to allow a change in the claim as originally brought, but it arose in an unusual context involving the Employment Relations Act 1999 (Blacklisting) Regulations 2010 SI 2010/493.

The claim as originally brought was for religious/belief discrimination and non-payment of holiday pay. The claimant subsequently applied to add a claim for breach of the Blacklisting Regulations. The employment judge

agreed to this, effectively holding that it was just a re-naming exercise. However, the EAT allowed the employer's appeal and remitted the matter for reconsideration. Applying *Selkent Bus Co Ltd v Moore* [1996] IRLR 661, EAT, it was held that the ET had correctly found that the factual basis for the new claim was largely (but not entirely) the same as that for the original claims, *but* it had not taken sufficiently into account that there are significant differences between those original claims and the blacklisting claim, both as to their substance and also their remedies. It was accepted that blacklisting is a *sort* of discrimination, but not sufficiently similar to ordinary discrimination (here, religion/belief) to be interchangeable. This lapse had also led the ET to fail to consider the further possible problem of differential time limits, which was also remitted.

Case management; unless orders; application where several causes of action

PI [390]

***Ijomah v Nottinghamshire NHS Foundation Trust UKEAT/0289/19* (*12 June 2020, unreported*)**

Unless orders have given rise to significant case law (set out at **PI [390.01]** ff), given their potentially drastic effect on a party held to be in material breach of one. In this case before Judge Auerbach in the EAT, particular attention is paid to the particular problems capable of arising where such an order has been made in a case containing multiple allegations/causes of action. After two preliminary hearings in a case concerning several allegations of whistle-blowing and breach of contract, the claimant was made subject at a third to an unless order to produce further information. At a further hearing, the EJ considered that there had been material non-compliance with the order and held that the whole claim was automatically dismissed. On appeal, the EAT held that this blanket approach was wrong. Rule 38(1) **R [2795]** applies such dismissal to 'the claim, or response, *or part of it*' and on the facts here the proven failure to provide information applied to some, but not all, of the allegations. Applying in particular guidance in two of the cases set out in the text (*Wentworth-Wood v Maritime Transport Ltd* UKEAT/0316/15 (3 October 2016, unreported) and *Johnson v Oldham MBC* UKEAT/0095/13, [2013] EqLR 866), the judgment warns of the particular difficulties with these orders in complicated cases and the need to construe later what the original order really meant. At [74] it states:

> 'An Unless Order should not be a punitive instrument, and, in particular, should not have the effect of depriving a party of a claim (or defence) which is properly pleaded and perfectly capable of being fairly litigated. If, nevertheless, an Unless Order has been made which, unambiguously, does have that effect, tying the hands of the Judge who considers the compliance issue, it may be susceptible to an application for relief from sanctions. But an Order which is ambiguous should be construed so far as possible to eliminate or minimise any such effect.'

Conciliated agreements; whether agreement voidable at common law; ET/EAT jurisdiction

PI [704]

***Patel v City of Wolverhampton College UKEAT/0013/20* (*19 June 2020, unreported*)**

This appeal before Deputy High Court Judge Gullick concerned principally an ET's refusal to extend time limits, but it was complicated by the fact that the parties had entered a COT3 agreement to settle all ET claims. As well as appealing the ET's decision, the claimant sought to have the EAT declare the agreement void. It is in relation to this latter that the decision may cause further complications in an area already containing conflicting case law, namely whether an ET (or EAT) has jurisdiction to strike down a COT3 agreement on common law/equitable grounds such as duress or mistake, or whether any such argument must be taken to the High Court or County Court.

The EAT, as well as rejecting the substantive appeal, refused to invalidate the agreement. It has to be said that the primary reason for this was factual – it was not clear from the case put forward by the claimant (a litigant in person) on *which* common law/equitable grounds she was challenging the agreement. However, the judgment agrees with a wider submission by the employer that it would have had no jurisdiction to do so anyway. In doing so, it relies on the judgment of Wood J in *Freeman v Sovereign Chicken Ltd* [1991] IRLR 408, [1991] ICR 853, EAT, where (at 860E) it is stated that an agreement can only be set aside on common law or equitable grounds by a separate action in the High Court or a County Court; for authority, there are cited the cases of *Eden v Humphries & Glasgow Ltd* [1981] ICR 183, EAT and *Times Newspapers Ltd v Fitt* [1981] ICR 637, EAT.

The instant decision raises two particular problems:

(1) There is no mention of the prior decision of the Court of Appeal in *Hennessy v Craigmyle & Co Ltd* [1986] IRLR 300, [1986] ICR 461 which accepted the possibility of a common law/equitable challenge in substance, but did not specifically address jurisdiction; that case was addressed in *Freeman* and distinguished. However, as the text argues at **PI [713]**, the EAT in *Hennessy* did consider that there would be jurisdiction and nothing in the Court of Appeal's judgment doubts this.

(2) Moreover, there is no mention in the instant case of the three later EAT decisions considered at **PI [714]**, **PI [715]** where it was accepted that an ET *does* have jurisdiction to consider the validity of an agreement on common law/equitable grounds.

This point is in need of authoritative resolution, but for the moment the balance of more rccent authority is in favour of the argument made in the text, ie in favour of jurisdiction.

Employment Appeal Tribunal; appearance and representation; litigation friends

PI [1580]

***Stott v Leadec Ltd UKEAT/0263/19* (*20 February 2020, unreported*)**

Three years ago in *Jhuti v Royal Mail Group Ltd* UKEAT/0061/17, [2018] ICR 1077, Simler P held that there is a general power for an ET to appoint a litigation friend where a party lacks mental capacity to conduct litigation. This was a notable decision because there is *no* express provision for this power in the ET Rules and so it had to be constructed from general principles. This decision is considered in detail at **PI [826.03]** ff where it is pointed out that there had been a parallel development in relation to First-tier Tribunals elsewhere.

A similar point arose at EAT level in the instant case before Deputy High Court Judge Ellenbogen. Combining the ETA 1996 ss 7 and 30 with the common law duty of fairness and the HRA 1998 s 7, she held that the same implicit power can be exercised by the EAT. The lawyer appointed for the party in question had had doubts as to their capacity to conduct the appeal. The EAT held that there was enough evidence that there might be a lack of litigation capacity, requiring medical assistance to decide that question and what appropriate orders may have to be made. The judge, echoing comments made in *Jhuti*, said that it was now *truly* urgent that the ET and EAT Rules should be amended to give an express procedure for such cases.

Employment Appeal Tribunal; further appeal to the Court of Appeal

PI [1759.01]

Tabidi v BBC [2020] EWCA Civ 733

Appeal in this case went to the Court of Appeal on a substantive point on sex discrimination where the claim had been dismissed by the ET and against a costs order that it had then imposed. The former element was dismissed and the latter allowed. The interest in the case, however, lies in two dicta concerning the *role* of the Court of Appeal in the specific employment law jurisdiction. As the text points out, the court 'has repeatedly stressed that, as it is a second tier appeal court, its concern is not whether the EAT's decision is correct, but whether the decision of the employment tribunal is correct'. Some dissatisfaction with this has been expressed (see **PI [1759.01]**) and that has been further expressed here, given that the essence of the decision on sex discrimination was heavily one of fact, contrasting it with practice in other jurisdictions. At [41] Underhill LJ said:

> 'Standing back from the particular issues considered above, this is a case where an experienced tribunal heard evidence from two of the individuals responsible for the decision of which the Appellant complained, who were professionally cross-examined by reference to the contemporaneous records, and reached the clear conclusion that the decision was reached without any account being taken (consciously or

unconsciously) of the gender of any of the candidates. That is the kind of factual assessment which it is the responsibility of the tribunal to make, and its conclusion cannot be interfered with on appeal unless it is shown to be vitiated by an error of law. I can see no such error in the Tribunal's reasoning; indeed its decision is entirely understandable on the basis of the evidence to which it refers. I would add, finally, that this is the precisely the kind of case in which permission to appeal would have been refused if a second appeals test of the kind which applies in most other fields were in place.'

In a concurring judgment on the substantive issue, McCombe LJ was even more direct (at [45]):

'I agree that if the customary "second appeals" criteria had applied to this jurisdiction, as they do to virtually all others, permission to appeal would have been refused. In my judgment, it is high time that that [sic] the legislation was amended to enable that test to be adopted for appeals from cases which have already had the attention, not only of the expert ET, but also of the expert EAT. I can see no rational reason for the continued exception from the "second appeals" test for cases of this character.'

REFERENCE UPDATE

Bulletin	Case	Reference
491	*Bamish v Foreign and Commonwealth Office*	[2020] ICR 465, CA
493	*E.ON Control Solutions Ltd v Caspall*	[2020] ICR 552, EAT
493	*National Union of Foster Carers v Certification Officer*	[2020] ICR 607, EAT
494	*Brazel v Harpur Trust*	[2020] ICR 584, CA
494	*Britliff v Birmingham City Council*	[2020] ICR 653, EAT
496	*Coletta v Bath Hill Court (Bournemouth) Management Co Ltd*	[2020] ICR 703, CA
496	*Gray v Mulberry Co (Design) Ltd*	[2020] ICR 715, CA
497	*Simply Manor House Ltd v Ter-Berg*	[2020] ICR 570, EAT

Reference Update

Bulletin	Case	Reference
497	*Royal Mail Group Ltd v Jhuti*	[2020] ICR 731, SC
502	*Davies v D L Insurance Services Ltd*	[2020] IRLR 490, EAT
502	*Rakova v London North West Healthcare NHS Trust*	[2020] IRLR 503, EAT
502	*Re Carluccio's Ltd*	[2020] IRLR 510, HC
503	*B v Yodel Delivery Network Ltd*	[2020] IRLR 550, ECJ

Subscription and filing enquiries should be directed to LexisNexis Customer Services Department (tel: +44 (0)330 161 1234; fax: +44 (0)330 161 3000; email: customer.services@lexisnexis.co.uk).

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).

Published by LexisNexis