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Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Employee or worker? Position of athlete with training contract

AI [81.07]

***Varnish v British Cycling Federation UKEAT/0022/20* (*14 July 2020, unreported*)**

As we await the result of the appeal heard in July to the Supreme Court in the *Uber* litigation (see **AI [81.05]**) for further guidance on the boundaries in the employee/worker/self-employed divides, this case before the EAT under Choudhury P concerned an elite cyclist under a contract with British Cycling which provided for a training programme under its rules and control. This was discontinued in 2016, according to the Federation on performance issues, but according to her constituting discrimination and unfair dismissal. At a preliminary hearing the ET addressed the question whether she was an 'employee' and/or a 'worker' for the purposes of these claims. It was one of those cases of factors pointing both ways, but ultimately the ET 'stood back' from the details and held overall that she was neither. Her appeal was then dismissed by the EAT. One key point was that the financial arrangement was for the Federation to pay her 'benefits' during her training which were from public funding, and she supplemented these with private sponsorships. There was considerable 'control' over her training, but ultimately what was involved was the Federation providing services to *her* in advancing her professional development.

Agency workers; meaning of agency worker; exclusion of permanent workers

AI [196.01]; PI [1030], PI [1606.01]

***Angard Staffing Solutions Ltd v Kocur UKEAT/0050/20* (*10 July 2020, unreported*)**

This case, concerning a large number of casual workers at Royal Mail engaged through agency A, has been to the EAT previously on the question of which equal terms can be claimed by agency workers under the Agency Worker Regulations 2010 SI 2010/93, see **AI [210]** ff. This time, the issue was whether these claimants were agency workers at all. This depended on whether they were 'supplied' to 'work temporarily' at Royal Mail.

The basic point here is that, although the regulations do not define 'temporary', it has been construed as meaning 'not permanent' and the text sets out the two leading cases on how to draw the line here, namely *Moran v Ideal Cleaning Services Ltd* [2014] IRLR 172, EAT and *Brooknight Guarding Ltd v Matei* UKEAT/0309/17 (26 April 2018, unreported). In the instant case, the ET found that every assignment undertaken by these claimants was for a definite period, with defined shifts.

On the agency's appeal, Judge Auerbach in the EAT held that the ET had properly applied the law as set out in the above two cases and that its finding of temporary working was open to it in spite of the facts that:

(i) the contracts with the agency were open-ended;

(ii) the claimants were supplied exclusively to Royal Mail; and

(iii) these arrangements had lasted for four years.

The claimants thus won on the facts. They had raised an interesting secondary argument on procedure, namely that it was an abuse of process for the employers to have queried their status as agency workers at this late stage, citing *Henderson v Henderson* (1843) 3 Hare 100 (see **PI [1030]**). The problem was that they had not raised this point before the ET. To counter this, they argued that this is such a fundamental jurisdictional rule that the ET *itself* should have raised the issue, on analogy with *Langston v Cranfield University* [1998] IRLR 172, EAT (see **PI [1606.01]**). Although the point did not have to be decided in the light of the substantive decision, the judgment makes clear that this argument would not have succeeded – the exception in *Langston* (which applied to the well-known rules on selection in a redundancy unfair dismissal case) is not to be extended to cover a *Henderson* case. Indeed, at [96] the judgment states that the EAT should be very wary of imposing positive obligations on ETs to raise points generally.

DIVISION AII CONTRACTS OF EMPLOYMENT

Dismissal by notice; withdrawal of notice; implied agreement

AII [412]

Butcher v Surrey County Council [2020] IRLR 601, EAT

As the text at **AII [412]** states, the general rule is that notice, once given on either side, cannot be unilaterally withdrawn *but* it can be so withdrawn by agreement. This decision of Judge Tucker in the EAT emphasises two aspects of the law on withdrawal of notice:

(1) although the clearest form of it is an express/written agreement, there can also be *implied* agreement by conduct;

(2) an agreed withdrawal can be initiated by *either* party, not just the party who has given it.

The claimant resigned on three months' notice because of difficulties with a subordinate and the effects it was having on her. Senior managers asked her to reconsider and she said she would if the difficulties were resolved. She continued to work not just during her notice period but beyond the putative terminal date, being paid in the normal way. One complication here was that the council's HR manager who had dealt with the case had left swiftly and after a while the new one reviewed the claimant's position on the existing records. As a result, several weeks later the management decided that she had in fact resigned by her original notice. She left and claimed constructive unfair dismissal.

The ET held that she had simply resigned, partly on the basis of there being no written evidence of any withdrawal of her notice. The EAT allowed her appeal. It held that the ET had not taken into consideration sufficiently the council's request for her to continue, leading to her working on for a significant period beyond what would have been the end of her notice. It should have looked at this in the context of the possibility of an implied agreement to withdraw the notice, initiated by the employer. The whole matter was remitted for reconsideration.

DIVISION BI PAY

National minimum wage; treatment of accommodation

BI [193]

Commissioners for HMRC v Ant Marketing Ltd UKEAT/0051/19 (24 October 2019, unreported)

The employer made deductions from the wages of certain workers, but with the complication that the accommodation in question was provided by a separate company which was wholly owned by the employer's chief officer. When NMW enforcement notices were issued by HMRC, involving considerable amounts, one question arose as to whether these accommodation

deductions were 'reductions' in calculating the employees' remuneration for NMW purposes. This depended on the NMW Regulations 2015 SI 2015/621 reg 14 **R [3195]** which covers deductions 'as respects the provision of living accommodation by the employer' (to the extent they exceed the maximum allowed by reg 16). The company argued that here the owner of the accommodation was not 'the employer'. The ET accepted that this was so and allowed the company's appeal in respect of this element.

The HMRC Commissioners appealed against this decision but Choudhury P in the EAT upheld the ET's interpretation and dismissed the appeal. It was held that, while NMW legislation in general is to be interpreted literally, HMRC's argument that 'employer' should include anyone connected with the employer went too far. The company's interpretation was thus right.

This flew in the face of official guidance on this very point (eg whether an employer could deliberately set up an arm's length property owner for workers' accommodation) which had tended to say that there was no need for specific anti-avoidance rules because the case was already covered implicitly. Was this all wrong?

Possibly not, because there is a big 'But …' in the judgment. The judgment points out that HMRC's appeal had been restricted to challenging the ET's interpretation of 'employer'. What it had not done (and it was by then too late to do so) was to consider and interpret the whole phrase '*the provision of accommodation by* the employer'. Had that been done, the judgment suggests that the outcome may well have been different and the official guidance shown to be correct. Thus, it should not be assumed that the actual result of this appeal sets a precedent for the application of reg 14 to cases of arm's length provision of accommodation.

DIVISION DI UNFAIR DISMISSAL

Constructive dismissal; successful internal appeal; affirmation and the subsequent conduct

DI [377], DI [541]

***Phoenix Academy Trust v Kilroy UKEAT/0264/19* (*8 February 2020, unreported*)**

The facts of this dismissal case were rather complex (Surely not – Ed) and are of interest in showing the possible interaction of two recent Court of Appeal cases (which were not before the ET), namely *Patel v Folkestone Nursing Home Ltd* [2018] EWCA Civ 1689, [2018] IRLR 924, [2019] ICR 273 (employee can affirm previous employer breaches by appealing) and *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978, [2018] IRLR 833, [2019] ICR 1 (there can be further repudiatory conduct after the employee has affirmed the contract).

On 23 July 2018 the claimant was summarily dismissed, just before his letter of resignation was received by the employer. On 6 August the claimant entered an appeal, but subsequently said that he would not return even if his

appeal was successful. On 16 October his appeal was indeed successful and he was reinstated as from 29 October (subject to a final warning). On 22 October he sent a second letter of resignation, alleging constructive dismissal. On his claim of constructive unfair dismissal, the employer argued that he had affirmed the contract by appealing, but the ET held that he had not (especially because of his refusal to return) and upheld his claim.

Soole J in the EAT upheld the employer's appeal in relation to affirmation – in the light of *Patel*, this had happened when he appealed – but this was not the complete answer. He had also claimed that the employer's conduct between his raising the appeal and his resignation on 22 October itself breached the T & C term. Applying *Kaur,* this had to be considered separately and in particular it was necessary for the ET to consider the five questions set out by Underhill LJ at [55] of that case, set out at **DI [541.02]**. This was remitted to the ET for determination.

Compensation; finding of unfair dismissal where no compensation likely

DI [2502.02]

***Evans v London Borough of Brent UKEAT/0290/19* (*6 March 2020, unreported*)**

The text at **DI [2502.02]** points out that there has hitherto been a conflict of opinion at EAT level as to whether a claimant has a right to proceed with an unfair dismissal claim even if it is clear that he or she will not actually receive any monetary compensation at the end of it. On the one hand, it is argued that a *finding* of unfairness *can* have value to the claimant (*Telephone Information Services v Wilkinson* [2010] IRLR 148, EAT, where a claim was not to be struck out just because the employer had offered the maximum compensation, but without accepting liability). On the other hand, it is argued that, unlike in discrimination claims, unfair dismissal law does not contain an express power for an ET to grant a declaration (*Nicolson Highland Wear Ltd v Nicolson* [2010] IRLR 859, EAT).

This decision of Judge Eady in the EAT resolves the issue in favour of allowing such a claim to continue. Following criminal and High Court proceedings it became clear that the claimant's unfair dismissal claim could not succeed on substantive grounds and, if it did, there would be nil compensation. However, he did have an arguable claim that his dismissal had been procedurally unfair. The ET struck out his *whole* claim, as having no reasonable chance of success and there being no interest of justice in proceeding with it given the lack of likely remedy, applying *Nicolson*.

However, the EAT allowed his appeal, to the extent of allowing his procedural unfairness element to proceed. It was held that *Nicolson* is not to be followed, especially as *Telephone Information Services* was not cited in its judgment. Moreover, just at the time that *Nicolson* was decided the Court of Appeal handed down its judgment in *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] IRLR 786 which, though largely on a different point, did

at one point consider *Telephone Information Services,* on an incidental issue, and did so with approval. At [19] Laws LJ said:

> 'There is a further point. An unfair dismissal claim is not in all respects to be equated with a common law action which a defendant can simply choose to settle by a monetary offer. Here the decision of the Employment Appeal Tribunal (presided over by Tucker J) in *Telephone Information Services Ltd v Wilkinson* [1991] IRLR 148 is instructive. It is enough to cite this passage from the headnote:
>
> > "An employee has a right … to have a claim of unfair dismissal decided by an [employment] tribunal. Such a claim is not simply for a monetary award; it is a claim that the dismissal was unfair. The employee is entitled to a finding on that matter and to maintain his claim to the tribunal for that purpose. He cannot be prevented from exercising that right by an offer to meet only the monetary part of the claim. If that were so, any employer would be able to evade the provisions of the Act by offering to pay the maximum compensation. If employers wish to compromise a claim, they can do so by admitting it in full but they cannot do so by conceding only part of it." '

It is clear now that this principle is not confined only to cases of employers offering the maximum to try to get rid of a claim.

DIVISION F TRANSFER OF UNDERTAKINGS

Relevant transfer; fragmentation; position under EU law

F [72.21]

ISS Facility Services v Govaerts C-244/18, [2020] IRLR 639, ECJ

A problem that has been emerging in TUPE law for some time now is how to deal with a transfer where the work in question is transferred not to one new transferee employer, but to several ('fragmentation'). The ECJ have now considered this as a question of EU law under the Acquired Rights Directive 2001/23/EC and have decided that there can be a transfer under the directive in such circumstances, subject to certain employee protections if there is so *much* fragmentation that no sense can be made of how the transferred work is to be divvied up. The ruling of the court was as follows:

> 'Where there is a transfer of undertaking involving a number of transferees, Article 3(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers

guaranteed by that directive, which it is for the referring court to determine. If such a division were to be impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under Article 4 of that directive, even if that termination were to be initiated by the worker.'

Of course, this is of limited application in the UK because the EU-style transfer comes under TUPE SI 2006/246 reg 3(1)(a) **R [2293]** as a straightforward 'transfer of business', whereas the facts of this case if arising here would come within reg 3(1)(b) as a 'service provision change' (as nearly all do) which is domestic in nature only. As such, it would be construed as a fragmentation case in domestic law, the result of which would depend on the application of the leading cases of *Kimberley Group Housing Ltd v Hambley* [2008] IRLR 682, [2008] ICR 1030, EAT and *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust* [2016] IRLR 406, EAT which are discussed at **F [72.21]** ff.

DIVISION L EQUAL OPPORTUNITIES

Disability; mental impairment; substantial adverse effect

L [137], L [146]

***Khorochilova v Euro Rep Ltd UKEAT/0266/19* (*18 February 2020, unreported*)**

At a preliminary hearing the question arose as to whether the claimant was 'disabled' within the EqA 2010 s 6 **Q [1459]**. She claimed to have 'mixed personality disorder' but this was only evidenced by a seven-year-old medical report (prepared for another purpose) which fell short of a diagnosis and her statement that she suffered from being 'somewhat obsessive' and 'perfectionist behaviour'. The ET held that she was not disabled because (1) she had not established a mental impairment and (2) in any event there was scant evidence of the necessary adverse effect on normal living.

On appeal, her argument that the finding in (2) was perverse was dismissed simply on the facts. However, her appeal against ground (1) (also dismissed) was more interesting legally. She argued that the ET had erred in considering impairment *first* before going on to adverse effect. She relied on *J v DLA Piper UK plc* [2010] IRLR 936, [2010] ICR 1052, EAT, where it was said that the structure of s 6 does not have to be followed slavishly; there may be cases where it is more instructive to go straight to the claimed adverse effect and then construe the rest of the section in the light of findings on that. However, the EAT here held that that *option* does not mean that it is wrong in any particular case to follow the sequence in the section itself.

The judgment of Choudhury P accepts that 'personality disorders' can cause problems here because, on one view, everyone has personality traits and some can be 'problematic' without being an impairment for statutory purposes (readers can no doubt think of colleagues or ex-colleagues who could be case studies here!). However (as with other rather generalised conditions) there

will be cases where such traits do cross the difficult border into impairments; where it is difficult to apply this distinction, it might well be appropriate to adopt the suggested course in *J v DLA Piper* of considering the adverse effect first and then going back to the impairment issue in the light of the finding on effect. Here, however, the ET had held positively that on the evidence there was *no* impairment and, for good measure, had then gone on to rule out adverse effect. There could be no criticism of it for doing this and it had reached a conclusion open to it on the facts.

Remedies; recommendation

L [917]

***Hill v Lloyds Bank UKEAT/0173/19* (*6 March 2020, unreported*)**

The breadth of the power of an ET in a discrimination case to make a recommendation under the EqA 2010 s 124(2) **Q [1536]** can be seen in this case before Judge Shanks in the EAT, in the context of a successful disability claim of failure to make reasonable adjustments.

The claimant was off sick with a stress-related condition which she said was caused by working with two particular colleagues. She asked the employer for an undertaking that if she returned she would not be required to work with these two and, if at a later stage there was no alternative, the bank would offer her a severance package akin to redundancy. The bank refused. She brought proceedings for disability discrimination, the failure to give these undertakings being the alleged failure to make reasonable adjustments. The ET held for her in this claim and the EAT upheld that decision.

The question then arose as to a recommendation which she had sought in the same terms as the refused undertaking. At first, the ET had made a recommendation in slightly different terms, but had then withdrawn it on a reconsideration. On appeal, the bank argued that that was correct because the terms sought were too wide and indeterminate. However, the EAT remitted the question of the recommendation to the ET, pointing out that:

(1) a recommendation can, where appropriate, take the form of requiring an undertaking from the employer;

(2) that undertaking can be cast in alternative forms;

(3) there can be included a requirement that in certain circumstances the employee should be treated as redundant; and

(4) the undertaking can be open-ended in time.

DIVISION PIII JURISDICTION

Territorial jurisdiction; employees working in a British enclave abroad

PIII [81]

Hamam v British Embassy in Cairo [2020] IRLR 570, EAT

The claimant was employed as a vice consul in the British embassy in Cairo. She was an Egyptian national, resident in Egypt. Her contract was governed

by Egyptian law and she paid Egyptian taxes. When dismissed she sought to bring proceedings in a UK tribunal, on the basis that she was employed in a 'British enclave'. She also stressed that Egyptian law would not have given her a claim for unfair dismissal. The ET held that it did not have jurisdiction and Lavender J in the EAT upheld that decision and rejected her appeal.

The judgment echoes the point made in the text at **PIII [81]** that, although the 'British enclave' category was put forward by Lord Hoffmann in *Lawson v Serco Ltd* [2006] UKHL 3, [2006] IRLR 289 itself, the tendency now is to view it as one *factor* in the overall test of whether the claimant's employment had more connection with the English legal system than the foreign one in question. The ET here had applied that test properly. In so deciding, the EAT held that: (1) there is no definition of 'British enclave'; (2) not everyone who works in such an enclave can claim jurisdiction here; and (3) there is no previous case where a *locally engaged* employee in an enclave has been held capable to sue here. This last point proved the Achillles' heel for the claimant who was already facing a difficulty in trying to distinguish *Bryant v Foreign and Commonwealth Office* [2003] UKEAT/0174/02, [2003] All ER (D) 104 (May) (approved by Lord Hoffmann) where a British national, resident and based in Italy engaged locally to work in the British Embassy in Rome, could not sue here. If that claimant, a British national, fell on the wrong side of the line, the claimant here was even more likely to do so as she was locally engaged *and* a foreign national. As for her subsidiary argument about the lack of unfair dismissal law in Egypt, that fell foul of the rule in *Dhunna v Creditsights Ltd* [2014] EWCA Civ 1238, [2014] IRLR 953, [2014] ICR 105, that the relevant merits of UK law and the relevant foreign law have no part to play in the test for territorial jurisdiction.

REFERENCE UPDATE

Bulletin	Case	Reference
503	*Sarnoff v YZ*	[2020] IRLR 562, EAT
503	*Ferguson v Astrea Asset Management Ltd*	[2020] IRLR 577, EAT
503	*Williams v Governing Body of Alderman Davies Church in Wales Primary School*	[2020] IRLR 589, EAT
503	*Duchy Farm Kennels Ltd v Steels*	[2020] IRLR 632, QB

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