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Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

Amendments to ET procedures

The Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020 SI 2020/1004 make a series of changes to the head regulations (SI 2013/12137 **R [2743]** and SI 2014/254 **R [2906]**). In particular, they extend the categories of persons able to sit as Employment Judges, provide more flexibility for remote hearings, provide for (at last) 'legal officers' and set out the duties they can perform instead of an EJ, allow multiple claims and responses to be set out in one form, make it easier to correct errors and make the period for early conciliation a straight six weeks (rather than four with a possible extension of two).

The amendments to the Rules of Procedure come into force on 8 October and those to early conciliation on 1 December. They will be incorporated into Div R in Issue 285.

DIVISION AII CONTRACTS OF EMPLOYMENT

Restraint on competition; the doctrine; need to justify in employment contracts

AII [196]

Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd [2020] UKSC 36, [2020] 3 WLR 521

This is an important decision on the law of restraint generally. As pointed out in the text at **AII [196]**, the leading case of *Esso Petroleum Ltd v Harper's Garage Ltd* [1968] AC 269, [1967] 1 All ER 699 established that not all forms of contractual restraint fall within the doctrine, requiring justification. The

problem over the subsequent years is that it has been arguable as to what *test* is to be applied to separate these legal sheep and goats. That was the point at issue before the Supreme Court in the instant decision. Departing from previous authority, they upheld Lord Wilberforce's dissenting test in *Esso* (the 'trading society' test, ie where the restraint was of a sort generally accepted as appropriate for the sort of transaction in question, here a covenant against further retail outlets in a commercial development agreement) and disapproved the majority's test in *Esso* (the 'pre-existing freedom' test).

While this is a major clarification in commercial cases, the key point from the point of view of this work is that in *Esso* it was made clear that restraints in *employment* contracts do *not* come within the exemption (and so need justification) and there is nothing in *Peninsula Services* to cast doubt on this.

DIVISION DI UNFAIR DISMISSAL

Misconduct; dismissal on suspicion; need for clarity at disciplinary stage

DI [1481.01]

***K v L UKEATS/0014/18* (*24 April 2020, unreported*)**

This decision of Lord Summers in the EAT is yet another example of how sensitive and difficult a case can be where dismissal is on less than the usual reasonable belief in guilt on the employer's part, but can still potentially be fair because of danger to vulnerable people and/or reputational damage to the employer if it does not act quickly to protect them. It follows the existing law as set out at **DI [1481.01]** ff, but adds one important procedural rider, namely that if the employer is to rely on reputational damage as its ground for dismissal, that must be made clear to the employee at the disciplinary hearing stage, so that he or she has a reasonable opportunity to counter it.

The claimant was a teacher. In a police raid, indecent images of children were found on a computer in his house, but it was not clear who had put them there (others having had access). A decision was taken not to prosecute at that stage. Information as to the evidence found was divulged to his school, though to go no further. An investigation was held which queried his guilt and did mention possible reputational damage to the school. However, when he was invited to a disciplinary hearing the latter was not mentioned; also, the police information was not before the decision-taker. The decision was to dismiss him. The decision-taker said that it was due to his being involved in the police investigation and that she could not 'exclude the possibility of [his] having been responsible' for the existence of the photographs. He brought proceedings for dismissal which were dismissed by the ET.

On his appeal to the EAT, two grounds of appeal were upheld. The first was that, although there had been *some* reference to reputational damage at the investigatory stage, this had not been the case at the disciplinary hearing at which dismissal had been decided upon. This breached the normal rules of natural justice that the employee must have proper notice of any ground that

may lead to dismissal. This meant that reputational damage was not properly in play, which in turn meant that the case had to be considered as a more traditional misconduct one. On that basis, the second ground was that in that context there must be a genuine belief in guilt on reasonable grounds; it is not enough that the decision-taken 'cannot exclude the possibility' of guilt. Moreover, on the question of the necessary level of proof, the judgment at [51] states:

> 'I consider that the obligation to act reasonably (s. 98(4)(a)) and in accordance with equity (s. 98(4)(b)) required the Respondents to apply the balance of probability. Plainly she was not permitted to guess. Some objective standard had to be applied. As Harvey indicates it will only be in exceptional circumstances that a doubt is a sufficient ground for dismissal (Harvey on Industrial Relations and Employment Law para. 1466). If it was in order to take account of doubts about his "innocence" the alternative test formulated by the Head of Service and endorsed by the Employment Judge was not an appropriate one. It was unreasonable to apply a test that in effect entitled the employer [sic] dismiss unless all doubt as to the Claimant's guilt had been excluded.'

For good measure, the judgment adds that if it had properly been pursued as a reputation damage dismissal, it would still have been held unfair because the facts were not strong enough to come within the leading case of *Leach v OFCOM* [2012] EWCA Civ 959, [2012] IRLR 839. The overall result was a substitution of a finding of unfair dismissal and remission to the ET on remedy.

Finally, one point of terminology is suggested. These exceptional less-than-normal-proof cases are referred to as 'reputational damage' cases. However, in one sense that may be misleading, in that it suggests that the employer is only worried cynically about its own wellbeing and indulging in an exercise in posterior protection, whereas in at least some of these cases the dominant motive is the rather more positive (and defensible) one of protection of vulnerable clients, charges, etc, as in *Lafferty v Nuffield Health* UKEATS/0006/19 (5 August 2019, unreported) which is discussed at **DI [1481.03]**.

Redundancy; efforts to find alternative employment; chance of a job insufficient

DI [1721]

***Aramark UK Ltd v Fernandes UKEATS/0028/19* (*13 March 2020, unreported*)**

The case law on whether a redundancy dismissal is unfair because of insufficient efforts to find alternative employment, considered at **DI [1721]** ff, has varied over time as to the *extent* of the duty to seek such employment, for example in relation to whether there is ever an obligation to create a new job or to indulge in 'bumping' of other employees. Although the lawyer's usual cop-out of 'it's all a question of fact' can loom large here, it is useful to have

at least an element of certainty as to the legal position. The short but emphatic judgment of Lord Summers in the Scottish EAT in this case may not help here because it adds a further potential complication, namely that the search must be for an actual job, not just the *chance* of it, no matter how likely that may be.

The claimant was dismissed for redundancy and brought proceedings for unfair dismissal on the basis of failure to make reasonable efforts to find him alternative work. The facts were, however, atypical, in the sense that what he objected to was that the employer maintained a list (in the nature of a 'bank' or 'pool') of people it could call on to undertake temporary off-the-books work on an ad hoc basis, but had not put the claimant on it when he was being made redundant. The ET agreed and found for the claimant but the EAT allowed the employer's appeal.

The gist of this decision is clear in para [4]:

> '[The law here] focusses on the availability of other reasonable alternatives to dismissal. In this case, placing the Claimant on the List would not have obviated dismissal. Being placed on the List opened the prospect of work but did not secure work. In my opinion, therefore, the Employer's decision not to place the Claimant on the List is not a decision that falls within the scope of the section. This is because the mischief s.98(4) seeks to address is the mischief of dismissal. It does not provide a statutory right to an alternative that might have had the potential to mitigate the adverse effects of dismissal.'

Counsel for the claimant had argued that the normal concept of actual alternative employment should be wide enough to include a prospect of such work, especially as the ET had found as a fact that the list was used regularly and the chances of at least ad hoc work for those on it were good. However, that was rejected in the judgment as a matter of law. There is, however, one peculiarity of the reasoning for this. At [8] the judge states that 'Section 98(4), however, is constrained by its wording. If placing him on the List did not entail the provision of alternative employment then failing to place him on the List did not involve a breach of s. 98(4).' The point is that that 'wording' is in the widest of terms ('employer acted reasonably or unreasonably'; 'equity and substantial merits of the case') and does *not* directly address its application to redundancy dismissal, that application being a matter of case law interpretation. What this decision does is to add to that body of interpretation, in possibly a restrictive way. While it is true that it could be used in a redundant employee's favour if the employer *did* offer only a vague prospect of some future work (which the employee could argue was not enough), in the instant case it rebounded to the employee's disfavour.

DIVISION PI PRACTICE AND PROCEDURE

The claim; parties not to use a 'narrative style'

PI [295.05]

***C v D UKEAT/0132/19* (*19 September 2020, unreported*)**

In this case Judge Tucker strongly advises legal advisers preparing documentation for an ET (especially the ET1 and ET3) *not* to continue with what she says has become frequent practice, namely to use a 'narrative style' (more akin to a witness statement), possibly for fear of missing some relevant material. This, she says, can lead to a position where:

> 'a claim is not set out with sufficient legal precision. Valuable time can be lost. Costs can increase. There may be a delay in the case being heard, because the parties are not clear precisely what issues are in dispute or consider that they have inadequate time to meet the case that is advanced against them, once they have understood it.'

She then at [11] and [12] gives the following advice:

> 'I do not encourage parties, particularly lawyers, to engage in that type of "narrative" pleading. I would encourage legal representatives, in particular, to adopt a more succinct and clear drafting style. Whilst I do not suggest that the employment tribunal is a forum in which meticulous or unnecessarily pedantic pleading points should be raised, I do consider that, increasingly, there is a need to refocus on the purpose of a claim form, a formal document which initiates legal proceedings.
>
> A claim form sets out a legal claim. It is not a witness statement (although in this case both the Claim Form and Response in this case bear many similarities to a witness statement). Ideally, in a Claim Form, the author should seek to set out a *brief* statement of relevant facts, and the cause of action relied upon by the Claimant. The purpose of doing so is to allow the other side to understand what it is that they have done or not done which is said to be unlawful. It should be clear from the document (Claim Form) itself, within the brief summary of the relevant factual events, which facts are relevant to which claim, if more than one is advanced. The Respondent can then properly respond to that claim or claims. The Respondent can admit, not admit, or deny the facts and claims asserted by the Claimant and, where appropriate, set out a brief summary of the relevant facts the Respondent asserts occurred. Lawyers will, or should, understand, that each of the phrases "admit, not admit, or "deny" have a particular meaning in this context. The task in hand, when setting out a Claim or Response (certainly for an instructed lawyer) is to distil the relevant factual matters to their essential or key component parts. Doing that effectively will often be more difficult, and take more time, than simply reciting lengthy facts and then listing a series of claims. It is often, however, time well spent. Different considerations obviously apply where parties represent themselves and the documents are prepared by people who are not lawyers. However, the

basic principle remains good: the Claim form should set out what the claim is and a brief summary of the facts relevant to each particular claim.'

Privacy, anonymisation orders and redaction

PI [950]

X v Y [2020] IRLR 762, EAT

This decision of Cavanagh J in the EAT gives a strong steer that, wide though the powers in ET Rules r 50 **R [2807]** are to secure privacy in certain ET cases, the answer will *not* normally be to redact the ET judgment itself, given the dangers that this could lead to an eventual judgment that is somewhere along a spectrum from misleading to incomprehensible. Instead, the answer will be some form of anonymisation.

The claimant had a problem with time limits. At the ET (where he was represented in absentia by his father) it appeared that relevant factors here in not having met them were his transgender nature and mental problems. The ET judgment in his favour referred to these but when he saw it he objected to the publicity and applied not just for some form of anonymity but for the whole information relating to transgender status and most of the mental problems to be redacted from the judgment. The ET refused this and the EAT rejected the appeal on this point. The judgment gives clear guidance on this point at [32], [34] and [35], which are worth setting out here in full:

'32 Given that the findings for the Judge were relevant to an issue in the case and were in fact taken into account by the Judge in coming to his decision, it seems to me clear that the paramount importance of open justice outweighs any privacy concerns that the Appellant has about their inclusion in the Judgment. If the Judge had refrained from referring to these matters, and had referred only to PTSD and complex trauma, this would have been to mislead the reader of the Judgment by giving a false and censored impression of the reasons why the Judge decided that the claim was in time. Moreover, the redaction of this information would not have been proportionate because there was a less drastic way in which the Appellant's art 8 rights could have been protected, namely by anonymisation. In my view, this is of fundamental importance.…

34 The dangers of editing a Judgment, to delete reference to facts and matters which were in reality taken into account and relied upon by the Judge, are highlighted by consideration of the nature of the relief that the Appeal Tribunal would be required to grant if this part of the appeal had succeeded. Is the EAT required to blue pencil parts of the Judgment or to re-write parts of the Employment Judge's Judgment for him? Either way, the end result that would be reached would be that the written Judgment does not truly reflect the reasoning of the Employment Judge in coming to his conclusion. It would not be the Judge's own Judgment but one that had been doctored after the event. What would happen if the individual

appealed against the Decision on the merits? How could the appellate court fairly deal with the appeal if the full scope of the Tribunal's findings of facts and reasoning had been concealed?

35 I accept that the terms of r 50 go beyond anonymisation and permit, in an appropriate case, an order which has the effect of preventing the public disclosure of any aspect of the proceedings. However, I think it would only be in a wholly exceptional case that this would be a proportionate response to a litigant's right to privacy, especially when the alternative and much less drastic expedient of anonymisation is available to the Tribunal.'

The EAT further held that there can be rare cases where an ET should consider anonymisation off its own bat, even if not requested by a party. As this was such a case and on the facts the only likely result was such a finding, the EAT itself substituted an anonymity order, but added however that there is no rule that if evidence raises questions of transgender status or mental problems there must be such an order.

REFERENCE UPDATE

Bulletin	Case	Reference
498	*Barnard v Hampshire Fire and Rescue Authority*	[2020] ICR 1077, EAT
498	*Miller v Ministry of Justice*	[2020] ICR 1143, SC
499	*Walker v Wallen Shipmanagement Ltd*	[2020] ICR 1033, EAT
499	*Basfar v Wong*	[2020] ICR 1185, EAT
500	*Morgan v Abertawe Bro University Local Health Board*	[2020] ICR 1043, EAT
500	*Ishola v Transport for London*	[2020] ICR 1204, CA
500	*Jesudason v Alder Hay Children's NHS Foundation Trust*	[2020] ICR 1226, CA
504	*Kelly v Musicians Union*	[2020] IRLR 736, CA
504	*Stott v Leadec Ltd*	[2020] IRLR 770, [2020] ICR 1217, EAT
505	*ISS Facility Services v Govaerts* C-244/18	[2020] ICR 1115, ECJ
505	*Kocur v Angard Staffing Solutions Ltd*	[2020] IRLR 732, EAT

Reference Update

Bulletin	Case	Reference
505	*Commissioners of HMRC v Ant Marketing Ltd*	[2020] IRLR 744, EAT
505	*Evans v London Borough of Brent*	[2020] IRLR 755, EAT

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