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Harvey on Industrial Relations and Employment Law

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LEGISLATION

Amendments to the rehabilitation of offenders scheme

When the Supreme Court held in *Re Gallagher (NI)* [2019] UKSC 3, [2019] 3 All ER 823 that the rehabilitation of offenders provisions were incompatible with art 8 of the Convention in two respects (the extension of disclosability to youth cautions and the 'multiple convictions' rule) the government announced that both of these would be removed. That has now been done by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2020 SI 2020/1373 which took effect on 28 November. The explanatory notes state:

> 'Article 2(2) to (4) of this Order amends the 1975 Order by changing the definition of a protected caution to include all those given where a person was aged under 18 years at the time. A protected caution does not have to be disclosed by a person if they are asked about it. These changes also apply to youth warnings and reprimands, which are treated the same as cautions. Article 2(5) and (6) changes the definition of a protected conviction by removing the "multiple conviction rule" exemption from the scope of the definition. Read alongside the changes made by the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2020, youth cautions and multiple convictions no longer have to be disclosed when a person is asked about them, and will no longer be subject to mandatory disclosure in criminal records certificates.'

DIVISION CIII WHISTLEBLOWING

Disclosure; the reaction against Cavendish; the fundamental requirement for genuine belief

CIII [20]

Simpson v Cantor Fitzgerald [2020] EWCA Civ 1601

This decision of the Court of Appeal dismissed a further appeal by the claimant who had failed to establish whistleblower status before the ET. The EAT decision is cited in the text for the proposition that an ET has a discretion whether to aggregate a series of alleged disclosures (see **CIII [26]**).That, along with the ET's decision here not to aggregate, was upheld by the court.

The appeal was largely on factual grounds, and ranged across several areas of whistleblowing law, but two aspects of law stand out:

(1) The first is the fundamental nature of the genuine belief that the claimant must have had, because once the ET's decision on the facts that that was missing was upheld by the court the appeal was essentially lost.

(2) The second is the approval and application of the retreat from the original view in *Cavendish Munro Ltd v Geduld* [2010] IRLR 38, EAT, that a claimed disclosure was *either* information *or* mere allegation. The court applied *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436, [2018] IRLR 846 (see **CIII [21]**) as having disapproved of such a simplistic approach.

The end result, along with other elements of the ET's findings being held to have been open to it, was as comprehensive a dismissal of a claim as *not* establishing whistleblower protection as one is likely to see, being summed up by Bean LJ at the end of the judgment in these terms:

> 'I have left to the end the question … of whether the ET's failure to set out the relevant law means that its judgment was not *Meek*-compliant. Although I admire [counsel's] ability to make bricks without straw, it is really not difficult to understand why Mr Simpson lost. He lost because the ET found that (a) the decision to dismiss him was taken by Mr Neilly; (b) it was "utterly fanciful" to state that the reason was that the claimant had made protected disclosures; (c) it had become "utterly impossible" for his colleagues on his team to work with him; the lack of trust between them was "corrosive" and "ultimately insuperable"; (d) he had a poor attendance record, by which Mr Neilly was "appalled"; (e) Mr Neilly's reasons were genuine and not the result of manipulation by others; and (f) none of the communications relied on was a protected disclosure, either because they were insufficiently specific or because Mr Simpson did not genuinely believe that the information contained in them tended to show malpractice at Cantor Fitzgerald.'

DIVISION DII DETRIMENT

Health and safety; who has the right; employee or worker

DII [73]

***International Workers Union of Great Britain v Secretary of State for Work and Pensions [2020] EWHC 3039* (*Admin*)**

Unless it is subject to a successful appeal by the government, this decision of Chamberlain J in the Administrative Court will require an amendment to the ERA 1996 s 44 **Q [668.14]** (health and safety detriment) even though the main thrust of the challenge under EU law was towards health and safety law.

The union, representing many workers in the gig economy particularly affected because of the coronavirus emergency, argued that the UK had not properly transposed relevant parts of the Framework Directive 89/391/EC and the PPE Directive 89/656/EC because the domestic protection is given to 'employees', not 'workers'. One of the problems in gig economy cases is, of course, that these individuals may qualify as the latter, but in general not as the former, thus falling into a gap in health and safety protection. The union argued that the directives, referring to 'workers', required wider coverage in domestic law, whereas the government argued in the alternative that: (1) there was no stand-alone EU definition here of its use of the term 'worker' and so domestic law could use the term 'employee'; or (2) in any event 'workers (but not 'employees') had sufficient alternative protection elsewhere in domestic law (eg as whistleblowers) to satisfy the directives.

The judgment contains lengthy consideration of the point of EU law, accepting that not all directives use a stand-alone definition of 'worker' *but* comes to the conclusion that these particular directives do require a wider EU law interpretation than that given by the domestic term 'employee' for two principal reasons: (i) the aim of the directives is to enforce common standards of health and safety across the EU; and (ii) unlike certain other directives, these ones do not contain a reference to 'national law and practice' in their drafting.

The principal effects of this judgment relate to the Management of Health and Safety at Work Regulations 1992 SI 1992/2051 and the Personal Protective Equipment at Work Regulations 1992 SI 1992/2966 (which are outside the scope of this work) *but* in relation to individuals whose health and safety is being compromised the directives were also transposed by what is now the ERA 1996 s 44 which gives rights to 'employees' (not just health and safety representatives), for example to take direct action (including walking out) in the face of immediate threats and not suffer detriment for doing so. If the judgment stands, this section will have to be amended to cover all limb (b) 'workers'.

One final point is that the directives were also transposed by the ERA 1996 s 100 **Q [724]** by protecting individuals in similar circumstances from

dismissal, enacting one of the principal grounds of automatically unfair dismissal. This is of course also only open in domestic law to employees (as only an employee can be dismissed). Any change here would be *very* fundamental and the judgment specifically rules this out by holding that the directives cannot be construed as requiring such a major change in 'a structural feature of UK employment law' (see [128] of the judgment).

DIVISION L EQUAL OPPORTUNITIES

Indirect discrimination; justification; relevance of cost

L [347.03]

Heskett v Secretary of State for Justice [2020] EWCA Civ 1487

It sometimes happens that a shorthand version of an area of law becomes widely used, only for the courts later to query its use (and indeed usefulness). That has been happening for a while now in relation to the concept of 'cost-plus' in the law on justification of indirect discrimination. The basic idea is that cost per se should not be justification ('it was too expensive to rectify it') *but* where cost is part of some larger concern ('cost plus'), then an ET can take that into account. It has been particularly important where an employer argues that its actions, albeit indirectly discriminatory, were in effect forced on it by external factors with which it was having to cope. As the text points out at **L [347.03]** in its discussion of the decision of the EAT in this age discrimination case, that arose here because the probation service's action in altering promotion scales which disadvantaged younger employees was in response to economies required by government policy. The ET and EAT accepted that this was justified, Judge Barklem commenting that it was necessary to 'square the circle brought about by government policy'. It was a case of 'cost plus', not just 'cost'. The Court of Appeal have rejected the claimant's further appeal, in a way that basically accepts this distinction, but warns against over-use of the terminology.

The judgment is given by Underhill LJ who for a while now has been giving such a warning. The actual phrase 'cost plus' does not appear in the hitherto leading cases set out in the text and at [88] and [89] the judgment sets out the position as follows:

> 'The upshot of all this is that there is certainly an established principle that, to take Rimer LJ's formulation in *Woodcock*, "the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim" for the purpose of the defence of justification in a discrimination claim; but that that principle needs to be understood in the way that I have sought to explain it in the preceding paragraphs. It only bites where the aim is, as the CJEU put it in *Hill and Stapleton*, "solely" to avoid costs.
>
> That being so, the "cost plus" label (and its cognates such as "cost alone" and "the plus factor") cannot be said to be incorrect, and it is sometimes too convenient a shorthand to eschew. However, that language is not in fact used either by Burton P in *Cross* or by Rimer LJ

in *Woodcock*, and I would prefer to avoid it so far as possible. In my experience it can lead parties, and sometimes tribunals, to adopt an inappropriately mechanistic approach (see my observations in *Woodcock* quoted above). It is better, in any case where the issue arises, to consider how the employer's aim can most fairly be characterised, looking at the total picture. It is only if the fair characterisation is indeed that the aim was *solely* to avoid increased costs that it has to be treated as illegitimate.'

Turning to the origin of the 'no cost alone' rule in EU law and the significance of external factors, at [99] the judgment states:

'There is nothing to suggest that the CJEU in *Hill and Stapleton*, *Kutz-Bauer* or *Steinicke* had in mind a case of the present kind, where an employer is having to make choices about how best to allocate a limited budget: the justification advanced in those cases was purely that avoiding discrimination would cost more. I can see no principled basis for ignoring the constraints under which an employer is in fact having to operate. It is never a good thing when tribunals or courts are required to make judgements on an artificial basis. As Burton P in *Cross*, Elias J in *Bainbridge*, and myself and Rimer LJ in *Woodcock* have all observed, almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent; and it is unreal to leave that factor out of account. That is particularly so where the action complained of is taken in response to real financial pressures, as was very clearly the case in all three of the authorities relied on by [counsel] and as is the case, on the Tribunal's findings, in the present case. It is also necessary to bear in mind that because age, unlike other protected factors, is not binary it is difficult, to put it no higher, for an employer to make decisions affecting employees that will have a precisely equal impact on every age group, however defined. This makes it particularly important for them to be able to justify such disparate impacts as may occur by reference to the real world financial pressures which they face.'

Although the burden on justification remains on the employer (and the judgment goes on to remind us that all of this concerns whether there was a legitimate aim, with the second question of proportionality still to come), it can be argued that the decision may put a chilling effect on a claimant's case in these circumstances, partly because of the last two sentences above, but also because of a subtle change in emphasis – under the 'cost plus' approach the emphasis was on whether the actions could be *legitimised* by showing more than just cost, whereas the approach in this case puts the emphasis on whether they can be shown to be *illegitimate* because 'solely to avoid increased cost'. It would be going too far to say that this casts a formal burden back onto the claimant, but arguably there is a difference in emphasis that may have this chilling effect.

Scope of the legislation; what is a qualification body?

L [746]

Nwabueze v University of Law Ltd [2020] EWCA Civ 1526

The claimant alleged that he had suffered discrimination by the respondent while studying for the professional legal practice course in 2017. He brought his claim before an ET but the respondent sought to have it struck out because the proper forum for such a claim was the county court. The ET agreed, as did the EAT and the Court of Appeal have dismissed his further appeal.

In the employment sphere, discrimination by a qualifications body is covered by the EqA 2010 s 53, with definitions in s 54 **Q [1496]**. Under s 54(4)(c) an authority or body is excluded from the definition if it is 'the governing body of an institution to which s 91 applies'. The latter covers discrimination by 'a university', which is to be dealt with under the Act's education section, with recourse to the county court. When the respondent was the College of Law, it did not constitute a university, but in 2012 it changed into the University of Law with powers to award degrees. The Court of Appeal held that this meant that the exclusion in s 54(4)(c) applied and the claimant had chosen the wrong forum.

Two subsidiary points arose in the judgment. The first was that a secondary argument for the claimant would have meant that both fora could have had jurisdiction, but the scheme of the Act is to divide rights and remedies into watertight compartments. Secondly, this was not a case where a claimant might end up with *no* remedy (where a previous case had said that a court should take a proactive approach to avoid such a result). Overall, the decision was, in Bean LJ's words, that '… if a body is the governing body of a university, that displaces its status as a qualifications body'.

Scope of the legislation; exclusion of alternative appeal procedures

L [753]

***Ali v Office of Immigration Services Commissioner UKEAT/0271/19* (*6 November 2020, unreported*)**

The claimant's two companies' registrations to provide immigration services were not renewed in 2014 and the Commissioner commenced an investigation into them in 2017. He challenged the non-renewals before the First Tier Tribunal in an appeal under the Asylum and Immigration Act 1999 s 87 but failed. He subsequently brought proceedings before an ET alleging that the Commissioner's actions constituted race discrimination, harassment and victimisation. The ET rejected the claims under the EqA 2010 s 120(7) which removes an ET's jurisdiction where the act complained of 'may, by virtue of any enactment, be subject to an appeal or proceedings in the nature of an appeal'. This last phrase has been subject to dispute and case law (set out at **L [754]** ff), including in the leading case of *Michalak v General Medical Council* [2017] UKSC 71, [2018] IRLR 60, [2018] ICR 49.

Judge Auerbach in the EAT upheld the ET's decision and rejected the claimant's appeal. He had argued that the 1999 Act appeal was not sufficient to qualify as 'proceedings in the nature of an appeal' because it did not specifically cover allegations of discrimination and did not provide the same provisions on burden of proof or similar remedies to those available in discrimination law. However, considering Lord Kerr's judgment in *Michalak*, it was held that these were not requirements and that the nature of an appeal coming within the s 120(7) exclusion was that the appeal body must have an unconstrained ability to look at the matter again, come to a different conclusion and reverse the original decision. On these grounds, in *Michalak* itself judicial review was not sufficient (because it only considers the lawfulness of the procedure adopted) but on the facts here this statutory appeal did qualify and so the ET proceedings were unavailable.

DIVISION PI PRACTICE AND PROCEDURE

Amending a claim; balancing injustices before applying the Selkent factors

PI [311]

***Vaughan v Modality Partnership UKEAT/0147/20* (*9 November 2020, unreported*)**

It has been said that the works of Shakespeare are less a collection of plays than a long series of quotations. The same might be said of this first reported decision of the new EAT judge (and, we are delighted to say, our new Harvey editor), HHJ James Tayler, which subjects the law on amending ET claims to fresh scrutiny and contains several highly quotable passages for any lawyers or representatives having to deal with this matter.

The judgment starts with this salutary reminder about using well-established principles of law:

> 'This appeal concerns the correct approach to adopt when considering an application to amend. It might be said that everything that needs to be said about amendment has already been said. That is probably true, but some statements of law are so often repeated that it is easy to stop thinking about what the words mean and to assume that repeating them is the same thing as applying them.'

This is applied here to the very well-established '*Selkent* principles' (see **PI [311.02]**) and is particularly apposite because the burden of the judgment is that the basic *test* for whether to allow an application to amend is the balance of injustice and hardship to each party in either allowing or disallowing it. What *Selkent* does is to set out *factors* which may well influence the application of that test. The danger is that they might be thought so fundamental that they are applied mechanistically as a checklist, losing sight of the overall test in exercising the ET's discretion.

The judgment merits reading in full, but the principal points are:

(1) The parties should make submissions as to the practical consequences of granting or refusing the application; if one party does not do so, they will find it particularly difficult to challenge an adverse decision.

(2) They must not lose sight of the necessary balancing exercise. Quoting Charles Darwin who, when pondering matrimony, wrote out the pros and cons, the suggestion is made that representatives might well do the same with advantages and disadvantages, though with the caveat that it is not just the longer list that wins, because it must all ultimately be viewed in the round.

(3) Once this is done, one can then go on to the *Selkent* factors, but familiarity with them must not lead to an unthinking application. The judgment sets them out with the introduction 'As any employment lawyer knows …,' but your humble editor speculates that the learned judge might here have gone full Molesworth and used instead 'As any fule kno …'

(4) Although *Selkent* is the fons et origo here, the judgment points out that equally important are the cases considering it, in particular *TGWU v Safeway Stores Ltd* UKEAT/0092/07 (6 June 2007) and *Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148, [2013] IRLR 953 in both of which Underhill LJ emphasised the above relationship between the factors and the ultimate test. The suggestion is made that representatives and EJs should keep copies of *Safeway Stores* and *Abercrombie* in their file of key authorities, along with the ubiquitous copy of *Selkent*.

The result of this in the case was that the EJ had sufficiently shown application of the correct test and the appeal against refusal to amend was dismissed. Finally, two tangential points made in the course of the judgment are of note:

(1) When discussing making a decision on an application at a pre-hearing it is said that an EJ may have to take a more inquisitorial approach with a litigant in person. This is a single line, but views have varied on this in recent years, with occasional support for a fundamentally adversarial approach, and it is interesting to see this (more traditional) view from a judge with such long experience as a full-time EJ.

(2) There is also an interesting application of the 'no checklist' approach in the specific context of a whistleblowing case at [41]:

> 'In all public interest disclosure cases the focus should not be on how many disclosures can be asserted and how many detriments can be alleged, but on which disclosure are likely to be shown to have given rise to a detriment. Litigants in public interest disclosure cases often feel with detriments and disclosures that the more the merrier, whereas focus on the principal disclosures that may have resulted in detriment or dismissal is more likely to bear fruit. The fact that all relevant detriments are pleaded does not assist a claimant if the disclosure that resulted in them is not pleaded.'

As in the old saying, a rifle, not a shotgun.

Disclosure and inspection; specific disclosure; correct approach

PI [455]

***Santander UK Ltd v Bharaj UKEAT/0075/20* (*15 October 2020, unreported*)**

It is now well established that discovery of documents in the ET setting (ET Rules r 31 **R [2788]**) is to be interpreted and applied in accordance with court rules. CPR Pt 31 is the appropriate one, with general discovery governed by CPR 31.10. However, there are also provisions in CPR 31.12 for *special* discovery if ordinary discovery appears to be inadequate. This decision of Linden J in the EAT considers this latter form, and the guidance given is now likely to be the starting point in any application of it by an ET. The principal points are as follows:

(1) CPR 31.12 and Practice Directions 31A and 31B are to be applied; the generally more flexible procedure in ETs is not to qualify the normal county court rules.

(2) Starting with normal disclosure under CPR 31.6, the test is set out in its own wording and, although 'relevance' is sometimes used as shorthand, that is not the test, even though it may be a factor. It is better to use the word 'disclosable' rather than 'relevant', and 'potentially relevant' is not enough.

(3) Turning to special disclosure, again the wording of CPR 31.12 and the Practice Directions are to be used. The test is whether it is necessary for fair disposal of the proceedings, not relevance or confidentiality. Fishing expeditions are impermissible. Authorities cited here are *Canadian Imperial Bank of Commerce v Beck* [2009] EWCA Civ 619, [2009] IRLR 740 (see **PI [491.01]**) and *Flood v Times Newspapers Ltd* [2009] EMLR 18 (applied by the EAT in *Birmingham City Council v Bagshaw* UKEAT/0107/16, [2017] ICR 263).

(4) Expanding this at [26] the judgment states:

> 'a. There can be no order for specific disclosure unless the documents to which the application relates are found to be likely to be disclosable in the sense that, in a standard disclosure case, they are likely to support or adversely affect etc the case of one or other party and are not privileged. Similarly, if disclosure is sought in relation to a category of documents, it must be shown that the category is likely to include disclosable documents.
>
> b. Even if this question is answered in the applicant's favour, specific disclosure will only be ordered to the extent that it is in accordance with the overriding objective to do so. The "necessary for the fair disposal of the issues between the parties" formulation

in *Beck*, and the formulation in paragraphs 24 and 25 of *Flood* cited above, are shorthand for this second question.

c. *Beck* also effectively makes the point that the greater the importance of the disclosable documents to the issues in the case, the greater the likelihood that they will be ordered to be disclosed, but subject always to any other considerations which are relevant to the application of the overriding objective in the circumstances of the particular case and in particular the principle of proportionality.'

(5) An application must be supported by evidence; the applicant should show why the material is likely to be disclosable, with reference to the overriding objective, proportionality and cost. The respondent may have to prove that no such documents exist or that they are not disclosable.

(6) Finally, there is no rule that the question of disclosability can only be decided if the court or ET is able to read the documents itself.

Conciliation; can a COT3 be voided at common law?

PI [704]

***Cole v Elders' Voice UKEAT/0251/19* (*26 November 2020, unreported*)**

The basic question in this case before Griffith J in the EAT was whether the claimant should have been allowed to challenge the validity of the COT3 settlement that she had signed on the common law grounds of misrepresentation, estoppels or interpretative construction. The ET had held that she could not, as a matter of law, but this was overturned on appeal and the case remitted. The power to do so is established by *Industrious Ltd v Horizon Recruitment Ltd* [2010] IRLR 204, EAT and *Greenfield v Robinson* UKEAT/0811/95, [1996] Lexis Citation 1590, which are considered at **PI [714]**. One problem here was that in the more recent case of *Patel v City of Wolverhampton College* UKEAT/0013/20 (19 June 2020, unreported) at [50] it is stated that there is no such power, relying on the decision in *Freeman v Sovereign Chicken* [1991] IRLR 408, [1991] ICR 853. However, not only was that case on a different point (see **PI [692]**), but more to the point the EAT in *Patel* had not referred to the later case law (above) and so it was declared *per incuriam* on this point.

Two further points may be noted:

(1) It was further held on general principles that, when reconsidering this issue, the ET could look if necessary at without prejudice material.

(2) As in *Vaughan v Modality Partnership* above, the judgment states that, in considering what the claimant may or may not have been agreeing to, regard should be had to her status as a litigant in person (citing *Muschett v HM Prison Service* [2010] EWCA Civ 25, [2010] IRLR 451 and *Drysdale v Department of Transport* [2014] EWCA Civ 1083, [2014] IRLR 892 (see **PI [860.01]**, **PI [860.02]**)):

> 'However, Mrs Cole was a litigant in person with no legal qualifications. This meant that particular care had to be taken to make sure that what she was saying was heard and understood, and acted upon.'

Employment Appeal Tribunal; complaint of bias by tribunal

PI [1462]

***Lyfar-Cissé v Brighton & Sussex Hospitals NHS Trust UKEAT/0100/19* (*28 October 2020, unreported*)**

The claimant brought two separate sets of ET proceedings for a variety of complaints. When these were unsuccessful, she appealed on the ground of bias but on a rather unusual basis. Her complaint was that, although the two proceedings were heard by ETs with different EJs, one side member had sat in both cases, and it was her argument that the involvement of one manager in effect muddied the waters improperly. Did this give rise to a valid appeal on the ground of bias?

The EAT under Lord Fairley held, applying the 'fair minded observer' test, that it did not. At [47] and [48] the judgment states:

> '… a fair minded and informed observer with knowledge of the issue which the [second] Tribunal had to determine and also of the evidence which [the side member] had heard about the [manager's] decision during the [first] Tribunal hearing would not have seen a real possibility of bias. Rather, the fair minded and informed observer would have concluded that all that the [second] Tribunal was doing was determining what issues were properly before it …
>
> Nothing that [the side member] had previously learned about the substance of the [manager's] decision could conceivably have affected her decision on that issue in her role as a member of the [second] Tribunal panel. There was likewise nothing in the limited discussion of the [manager's] decision during the [second] Tribunal that would cause the fair minded and informed observer to consider that there was any real possibility of bias in [the side member's] consideration of the evidence about the [manager's] decision that was led before the [first] Tribunal.'

An important part of this decision was a holding that the factual overlaps between the two sets of proceedings were not as extensive or potentially conflicting as the claimant had made out. The decision therefore does not rule as a matter of law that there cannot be an appeal on grounds such as this, if the facts were much stronger. However, what might be the moral of the story is that if similar circumstances arise it might be better generally if the same side member did not sit.

REFERENCE UPDATE

Bulletin	Case	Reference
506	*PGA European Tour v Kelly*	[2020] IRLR 927, EAT
509	*K v L*	[2020] IRLR 916, EAT

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