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Harvey on Industrial Relations and Employment Law

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DIVISION AII CONTRACTS OF EMPLOYMENT

Breach of confidentiality; remedies; springboard injunction; effect of delay

AII [171]

AMOB Machinery Ltd v Smith-Hughes [2022] EWHC 1410 (QB), [2022] IRLR 975

Many first instance decisions on restraint of trade are ultimately only factual examples of well-established rules of law. However, this decision of HHJ Coe (sitting as a High Court Judge) adds an interesting point to the rules on springboard injunctions (set out at **AII [266]** ff), relating to the possible dangers of delay on the part of the injured party.

The first defendant had been a key accounts manager at the claimant's firm, which manufactured specialist equipment. He left in April 2021, joining in May the third defendant company, a direct competitor. He subsequently became one of its directors. In July 2021 the claimant became aware that the first defendant had taken with him confidential information and had been using it to approach the claimant's customers. So far, so normal in these cases. However, the claimant did not take any steps about this until 10 December when a letter before action was sent, with actual proceedings not being commenced until 12 April 2022. The claim was for an interim springboard injunction lasting a year. This was refused. The judgment points out that the aims of such an injunction are limited to preventing a 'head-start effect', and so are restricted to a limited timeframe. Delay, as here, is a relevant factor in two ways: (1) in relation to whether any unlawful advantage is still in effect; and (2) in applying the normal rules on the balance of convenience and preservation of the status quo. Here, the delay was inordinate and had not been adequately explained by the claimant. The claim

should have been brought in July 2021 but further to that, on the facts, even such a timeous claim would not have resulted in a year-long injunction because most of the illegal activity had occurred at the beginning of the period. In considering the law here, the judgment sets out the leading authority of *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 116 (QB), [2012] IRLR 458 (considered at **AII [171.02]**) but adds that the year period granted in that case is *not* to be considered a benchmark for other cases on different facts.

DIVISION DI UNFAIR DISMISSAL

Redundancy; pool of one; importance of consultation

DI [1688.03], DI [1704]

***Mogane v Bradford Teaching Hospitals NHS Foundation Trust [2022] EAT 139* (*10 June 2022, unreported*)**

When a department needed to make financial savings and needed to lose one post, it determined to make the claimant redundant, primarily because her fixed-term contract was conveniently coming to a close. This in effect produced a 'pool of one' as it is known. There was no consultation with her when that decision was taken. On her complaint of unfair dismissal, the ET held that the dismissal was fair. On appeal, the EAT under Judge Beard reversed that decision and remitted the case for reconsideration.

The judgment reaffirms the primacy of the *Williams v Compair Maxam* rules, as upheld in *Polkey*. There is an interesting discussion of the relevant case law here, in particular *Wrexham Golf Club v Ingham* UKEAT/0190/12 (20 July 2012, unreported) **DI [1686.03]** which is factually similar to the instant case, accepting that it can be reasonable for an employer to decide on a pool of one (more precisely, a case where the setting of the pool makes the choice itself). The judgment then goes on to consider the basic requirements of consultation as one of the *Williams* criteria, citing the well-known guidance on consultation generally in *R v British Coal Corpn, ex p Price* [1994] IRLR 72, which is set out at **DI [1708]**. However, what is particularly significant in the judgment is when it puts these two elements together. It holds that where the pool is restricted to one, individual consultation will in practice be essential *and* the general requirement of timely consultation means here that it must take place at 'a formative stage' before the employer takes the decision *on that pool*. If (as here) that does not happen the results are likely to be that: (1) the dismissal will not be within the range of reasonable responses and so unfair; and (2) the employer may well be in breach of the term of trust and confidence by acting arbitrarily.

DIVISION L EQUAL OPPORTUNITIES

Burden of proof

L [796]

Field v Steve Pye & Co (KL) Ltd [2022] IRLR 948, EAT

Judge Tayler starts his judgment in this case on applying the statutory reversal of proof in the EqA 2010 s 136 **Q [1548]** by saying that it will involve no new law (a judicial version of 'Move along please, there's nothing to see here') but that perhaps underplays the judgment which emphasises that the question of how to apply that reversal is more 'nuanced' than it might sometimes seem. In particular, it contains a full consideration of one of the leading authorities, *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] IRLR 870 (see **L [805]**, **L [806]**) stating that it is sometimes cited as authority that an ET can often skip the burden of proof stage and go straight on to the second point relating to 'the question why'. This in particular may need that more nuanced approach.

The judgment accepts that in many, more straightforward cases, the burden of proof will add little and be of little importance (the starting point in *Hewage*) but then goes on to consider the position where the evidence shows that there *may* have been discrimination. Here, the emphasis is on going through the primary s 136 procedure first, rather than ignoring it. In such circumstances, the ET should not just carry forward that evidence into a general consideration as to whether discrimination has been proved, especially if the ET then finds that another factor was the operative one, dismissing the claim. That had happened here and the EAT allowed the claimant's appeal, remitting the case for reconsideration. It held that the ET had not engaged properly with s 136 and, moreover, if it was going to take that simplified route, had not explained why it was doing so. One particular approach in the judgment is that in cases of doubt, while under *Hewage* it might be defensible to go straight to the second stage, an ET might ask itself what, overall, the *advantage* might be of doing so. The judgment is fairly comprehensive. The following extracts give a good flavour:

> '41 It is important that employment tribunals do not only focus on the proposition that the burden of proof provisions have nothing to offer if the employment tribunal is in a position to make positive findings on the evidence one way or the other. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores the prior sentence in *Hewage* that the burden of proof requires careful consideration if there is room for doubt.
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> 42 Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that

was suggestive of discrimination was not considered at the first stage in an *Igen* analysis. Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one *Igen* threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence. In such a case the employment tribunal would, in effect, be moving directly to paras [10]–[13] of the *Igen* guidelines.'

DIVISION M TRADE UNIONS

Disciplining; natural justice; absence of bias

M [3383]

***Simpson v UNITE the Union [2022] EAT 154* (*12 October 2022, unreported*)**

The question as to how to apply the rules of natural justice to an internal union disciplinary procedure has a long history. As the text states at **M [3384.01]** which is cited in Judge Tayler's judgment in this case, the problem is that 'the union is both the offended party and the judge of the offence'. The trick lies in holding a balance between the principled requirements of natural justice and the realities of applying them in the context of a private body.

The claimant union officer had made complaints of sexual harassment which other union officers considered, on investigation, to have been false and vexatious. The claimant was subjected to disciplinary proceedings. The problem in the case was that one particular officer (the chair of the F & G P Committee and chair of the union's Scottish Executive Committee) was involved in bringing the charges *and* chaired the disciplinary committee. When the decision went against him, the claimant applied to the Certification Officer (CO) for a declaration under TULR(C)A 1992 s 108(2) **Q [342.01]** that he had been disciplined contrary to the union's rules. Sometimes there are questions about the place of natural justice in union rules, but here that did not arise because the relevant rules specifically included them. The claimant's case was that the rule against pre-judgment had been breached. It was rejected by the CO and the claimant appealed to the EAT. Considering the case law on pre-judgment generally, the EAT held that the correct test for *apparent* pre-judgment is whether a fair minded and informed observer, knowing the facts, would think that there was a real possibility that the decision-maker had pre-determined the matter to be decided. It held that the CO had improperly truncated parts of this definition and so had erred in law in making her decision (a requirement at the time, before the April 2022 reforms which substituted 'any question' for 'any question of law').

In coming to that decision, the EAT considered the overall question of (in effect) how strictly a union should be held to natural justice generally. Following on from the above passage from the text, the judgment cites the well-known passage from Viscount Simon in *White v Kuzych* [1951] AC 585

M [3383] that in a union context those taking part in an internal tribunal cannot be expected to have 'the icy impartiality of a Rhadamanthus'. The highest expectations are of a professional judge; next category is a non-legal professional body exercising disciplinary functions. A union comes one step down, being a private body where some overlap of functions may be unavoidable. However, there are limits (citing the notorious case of *Roebuck v NUM* [1977] ICR 573 where, on a charge of insulting the union president, the president acted as both complainant and chair of the disciplinary committee) and the judgment makes the point that wherever possible the union should opt for an available procedure which minimises duplication of functions. *Roebuck* was said to be an extreme case, but the judgment states that the rule against pre-judgment is *not* confined to extreme facts.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time for bringing proceedings; ill health or disability

PI [229]

Cygnet Behavioural Health Ltd v Britton [2022] EAT 108, [2022] IRLR 906

Applying the escape clause in the ERA 1996 s 111(2) **Q [735]** ('not reasonably practicable') is usually very much a matter of fact and discretion for the ET hearing the case. The interest in this decision of Cavanagh J in the EAT is that it is a fairly rare example of an ET's decision being reversed on the grounds of perversity.

The claimant was a physiotherapist who was dismissed during his probationary period, following the instigation of fitness to practice enquiries by his professional body. Lacking the qualifying period for ordinary unfair dismissal, he brought a claim for whistleblowing dismissal. His problem was that he did not bring it until 62 days after expiry of the primary three-month time limit, after receiving an ACAS EC certificate. The ET allowed an extension of time, on the basis that he suffered from dyslexia, had been concentrating on the fitness to practice investigation and had become depressed, making his lack of knowledge of the time limit reasonable. The employer appealed and the EAT upheld that appeal, holding the claim out of time. Moreover, it did so in no uncertain terms. As a matter of law, the ET had erred in considering that they should take a liberal approach to s 111(2); that was not in line with the more recent authorities which take a stricter line (even if a liberal approach can be justified under the alternative 'just and equitable' test in discrimination law). However, the gist of the decision was that it was simply perverse for the ET to have come to their conclusion on these facts. The evidence of dyslexia and other problems was simply insufficient, especially as: (1) during this (considerable) period of time he had been able to deal with several other matters, including appealing against the dismissal, contacting ACAS and going through the EC procedure, working as a locum, moving house and dealing with the fitness to practice issue; (2) the ACAS officer had told him he needed to bring proceedings as soon as possible; (3) in any case,

the onus was on him to find out about time limits when bringing the claim, which could have been done easily (including online) either by himself or someone helping him. Adopting the language of perversity, the result was that it 'flew in the face of reason' to hold that he had a reasonable lack of knowledge.

Breach of an unless order; relief from sanctions; effect of party's disability

PI [405], PI [412]

***Bryce v Trident Group Security Ltd [2022] EAT 137* (*February 2022, unreported*)**

In *Rackham v NHS Professionals Ltd* UKEAT/0110/15 (16 December 2015, unreported) (applied in *Heal v University of Oxford* UKEAT/0070/19, [2020] ICR 1294) it was accepted that, although strictly speaking the obligation to make reasonable adjustments for disability in the EqA 2010 does not apply to judicial proceedings, the general requirements of ensuring a fair hearing incorporate it indirectly; see **PI [874]**. The instant decision of Gavin Mansfield KC in the EAT shows this in action in the context of an application for relief from sanctions (for failure to comply with an unless order) under r 38(2) **R [2795]**.

The claimant brought claims for, inter alia, disability discrimination. He failed to comply with an unless order under r 38(1) until eight days after the due date and his claims were struck out. He applied for relief under r 38(2) but this was rejected.

On his appeal against this refusal, the EAT noted that this four-year-old case had had a 'tortuous' history on both sides; the preliminary hearing at which the unless order was made was the fourth, and the orders made there were to try to get the case back on track. However, the judgment states that, although the making of unless orders is very much in the discretion of the ET, in this case the claimant's argument was that his disability affected him in ways (relating to communication, memory, reading and understanding dates) that could be directly relevant to r 38(2). Under *Rackham* and *Heal* that meant that the normal rules on relief from sanctions (set out in the text) have to have overlaid on to them the requirement to make reasonable adjustments. Here, the EJ dealing with the request had applied the correct approach to s 38(2) itself (citing *Thind v Salvesen Logistics Ltd* UKEAT/0487/09 (13 January 2010, unreported), see **PI [412]**), but had failed to go on to consider the claimant's disability and what effect it may or may not have had on the lateness of his response to the unless order. The appeal was allowed and the r 38(2) point remitted for reconsideration.

Settlement agreements; relating to the particular proceedings

PI [729]

***Bathgate v Technip UK Ltd [2022] EAT 155* (*7 October 2022, unreported*)**

The question as to how widely or otherwise a settlement agreement can exclude *possible* claims has not been easy. The text at **PI [729]** contains the principal case law, in particular the decision of the Court of Appeal in *Hinton v University of University of East London* [2005] EWCA Civ 352, [2005] IRLR 552, which was much in issue in the instant decision of Lord Summers in the EAT. The issue primarily was whether the agreement purported to apply to 'the particular complaint', under the EqA 2010 s 147(3)(c); in the case of any future complaints, this essentially looks at how close the connection was and to what extent the claim was anticipated. It is the drawing of that line that can be difficult in an individual case, and this one is an example of falling on the wrong side of the line, from the employer's point of view.

The claimant was made redundant with a redundancy package, and an extra payment in anticipation of access to a pension-related payment not usually applicable to people of his age. He signed a settlement agreement which included a long list of possible claims, including age discrimination. The problem that arose was that after termination of his employment that ex-employer reconsidered the pension element and decided that he was not entitled to it after all. He brought proceedings for age discrimination in relation to this later decision, but the ET dismissed them on the basis of the settlement agreement, which had validly excluded such a claim on ordinary contract principles.

The EAT allowed his appeal and held that the agreement did not have that effect. The initial point made was that a case such as this is not governed by common law, but by s 147, with its precise wording. The judgment cites not just *Hinton*, but also Hansard on the occasion of the passing of the ERA 1996 s 203 with its equivalent provisions, which were said only to apply to 'a particular complaint that has already arisen between the parties'. Here, the judgment states that the claimant had signed away his right to sue for age discrimination before he knew whether he had a claim or not. While that may be possible at common law, the EqA 2010 restricts parties' ability to do so. In particular, the inclusion of a claim in an agreement defined merely by reference to its legal character or its section number does not satisfy the statutory language – the words 'the particular complaint' suggest that Parliament anticipated the existence of an actual complaint or circumstances where the grounds for a complaint existed. They are not apt to describe a potential future complaint such as this. The judgment accepts that this may be inconvenient for employers seeking a full settlement, but it resulted from applying the wording, not wider contractual concepts.

Privacy and restrictions on disclosure; orders concerning third parties

PI [946.03]

Piepenbrock v London School of Economics [2022] EAT 119, [2022] IRLR 957

The text at **PI [946.04]** shows that, after some initial uncertainty, it was held in *TYU v ILA Spa Ltd* [2022] IRLR 126, [2022] ICR 287, EAT that an anonymity order can be issued in relation to a person who is neither a party nor a witness. This decision of Judge Shanks in the EAT provides a good example, albeit on fairly extreme facts.

The claimant sued his ex-employer for unfair dismissal and discrimination, in the course of which he made 'lurid' allegations of sexual harassment against a young female student (Ms D) whom he had been supervising. In dismissing all his claims, the ET found as a fact that these allegations were untrue and malicious. He appealed but the EAT rejected this. Up to this point Ms D had been given anonymity, but the question then arose (on the university's application) whether the EAT should make an indefinite order into the future to protect her, even though she was neither a party nor a witness. The EAT held that:

(1) Although the EAT rules do not specifically cover this, the general provisions on anonymity in ET proceedings (ET Rules r 50 **R [2807]**) apply and there is also a general power in the interests of justice.

(2) Applying *TYU*, there can be an order in favour of a third party.

(3) Article 8 of the Convention can apply to protection of reputation, but it has to be balanced against art 10 on freedom of expression and the general public interest in open justice.

Applying this here, the judgment states that the claimant continued to show a strong animus against Ms D, such that if no order was made he would use the case documentation, including the judgment, to 'name and shame' her (including on his website). He had shown no intention to stop this campaign voluntarily; using the court documents in it would be an abuse of the legal system by him. All of this meant that her art 8 rights outweighed his art 10 rights and open justice. An order was made anonymising the judgment, restricting access to supporting documentation and ordering the claimant not to disclose her identity.

POSTSCRIPT

On 20 October *The Times* reported what hopefully should be the denouement of the seven-year legal battle in *Royal Mail Group Ltd v Jhuti*, the leading case on determining the motivation of a dismissal in a complex organisation, particularly in 'Iago cases'. The decision of the Supreme Court ([2019] UKSC 55, [2020] IRLR 129) is of importance across several areas of employment and discrimination law, but may be seen as especially important in whistleblowing cases, of which it was one (see **CIII [126]**). The claimant's

unfair dismissal claim having been upheld at the highest level, an ET in a remedies hearing has now awarded her damages of £109,065, including £12,500 aggravated damages for the employer's treatment of her in a 'high handed, malicious insulting and oppressive' manner. The judgment is self-avowedly direct and contains the statement that 'if the employer has a shred of decency in the light of the catastrophic impact on the claimant of its treatment of her, it will ensure that the process is swiftly completed'.

REFERENCE UPDATE

Bulletin	Case	Reference
528	*Rentplus UK Ltd v Coulson*	[2022] ICR 1313, EAT
528	*Sejpal v General Medical Council*	[2022] ICR 1361, EAT
529	*Citibank Ltd v Kirk*	[2022] IRLR 925, EAT
529	*Mackenzie v AA Ltd*	[2022] IRLR 985, [2022] ICR 1362, CA
529	*Brazel v Harpur Trust*	[2022] ICR 1380, SC
530	*Cowie v Scottish Fire and Rescue Service*	[2022] IRLR 913, EAT
530	*Dafiaghor-Olomu v Community Integrated Care*	[2022] ICR 1329, EAT

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