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Harvey on Industrial Relations and Employment Law

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LEGISLATION

Extension of the rules on exclusivity clauses

Exclusivity clauses in zero hours contracts were made unenforceable in 2015 by the addition of the ERA 1996 s 27A, with remedies for breach added by regulations (the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 SI 2015/2021), see **AI [57.04]**. That regime has now been extended beyond such contracts, to apply to low paid employees/workers generally, by the Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022 SI 2022/1145 (as amended by SI 2022/1181). The title may seem odd, given that these rules apply to low paid work *other than* for zero hours, but it may be because contracts 'specified' in the regulations are equated with zero hours contracts for the purposes of the regulation-making power in the ERA 1996 s 27B(2).

Regulation 3(1) makes an exclusivity term in a specified contract unenforceable against a worker. Such a contract is defined in reg 3(2) as a contract of employment or other worker's contract which is not a zero hours contract, and entitles a worker to be paid 'net average wages' that do not exceed the lower earnings limit for NI contributions (currently £123 pw). Regulations 4–6 define 'average wages' in the cases of both permanent and non-permanent working and provide that 'net' wages are after deductions. Reg 7(1) then declares that dismissal of an employee for breaching an exclusivity term is automatically unfair, with no qualifying period (thus activating the usual remedies for unfair dismissal). The rest of reg 7 enacts a right for a worker not to suffer detriment for that reason, attaching specific remedies, with compensation equivalent to that for unfair dismissal.

The regulations come into force on 5 December 2022. They will be included in Div AI and Div R in Issue 303.

Amendments to the Prescribed Persons Order

The Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014 **R [2927]** is subject to several amendments in SI 2022/1064 and SI 2022/1249. These come into force on 15 December 2022 and 4 January 2023 respectively and the Schedule will be reprinted with these amendments in Issue 304.

DIVISION DI UNFAIR DISMISSAL

Termination by the employer; effect of a successful appeal; withdrawal of appeal by employee

DI [375]

***Marangakis v Iceland Foods Ltd [2022] EAT 161* (*2 November 2022, unreported*)**

The position of an employee faced with dismissal who uses an internal appeal system raises two important points of law: (1) on the one hand it is important in constructive dismissal law that merely to use that system does not amount to affirmation of the contract, so that they can still leave and claim (see **DI [523.01]**); (2) on the other hand, in the case of an ordinary employer dismissal if the appeal goes ahead and is successful, the result is that the employee is reinstated into the employment (with a right to back pay) irrespective of their actual wishes: the appeal decision does not simply give the employee the option whether to return or not, and if they do not they cannot carry on with their unfair dismissal claim because the dismissal itself (in the usual jargon) has 'disappeared' (see **DI [375]** ff). The instant decision of Judge Tayler in the EAT concerns this second point but raises an important sub-point.

The key cases are *Roberts v West Coast Trains Ltd* [2004] EWCA Civ 900, [2004] IRLR 788, [2005] ICR 254 (**DI [376]**) and more recently *Patel v Folkestone Nursing Home Ltd* [2018] EWCA Civ 1689, [2018] IRLR 924, [2019] ICR 273 (**DI [377]**), which are considered in detail in the judgment here, which reaffirms the above legal effect of a successful appeal (see [17]). However, in *Patel* Sales LJ said that this applies to a claimant who exercises their right to appeal '*and does not withdraw the appeal*'. That was the issue here. The ET rejected the claimant's unfair dismissal claim because of her successful appeal, but she claimed that this was wrong because, she argued, she had indeed withdrawn the appeal in good time. This was based on a statement by her that she did not want to go back to work at the employer's store. This raised the question as to how *clearly* an employee must withdraw. On the facts here, the EAT dismissed her appeal. The question of withdrawal is one of objective fact for the ET which had found on these facts that she had not done sufficient to withdraw. The EAT held that this finding was justified by the following factors:

(1) although she said she did not want to return, she had not at any point stated specifically that she was withdrawing;

(2) she had continued to follow ACAS advice not to withdraw;

(3) there may be reasons for continuing with an appeal other than a desire to return (especially to clear one's name);

(4) on the facts she had continued to participate in the appeal process in spite of her stated preference.

This may all seem to be a case of a claimant in these circumstances having to be careful what they wish for in raising an appeal and there could be important questions of tactics here. However, the judgment does point out that all might not be lost. In *Patel* the claimant was in law reinstated though that was not his ultimate wish, *but* the court pointed out that, as he remained dissatisfied with the whole way the affair had been handled, he could still then resign and claim constructive dismissal.

Compensation; duty to mitigate; whistleblowing case

DI [2666]

***Hilco Capital Ltd v Harrington [2022] EAT 156* (*1 September 2022, unreported*)**

The rules on mitigation of loss in an unfair dismissal case are well established and in general rely on a fairly straightforward reasonableness test. However, this case before Judge Auerbach in the EAT concerned a specific point where the particular subject of the case was a whistleblowing dismissal. The claimant won such a case but when it came to the remedies hearing it was accepted that she had applied for no other jobs that would have been suitable for her. The employer argued that this was an unreasonable failure to mitigate, but her explanation was that she had taken the view that it was not worth even trying to find other work in the industry.

Normally, a complete failure to seek other employment will seriously prejudice the successful employee at remedy stage, but in the context of whistleblowing there was some backing indirectly for her stance from the case law on career loss damages where the stigma is so great that damages can be awarded on the basis that the individual will never work in that context again. The key case here is *Chagger v Abbey National* [2009] EWCA Civ 1202, [2010] IRLR 47, [2010] ICR 397, which, although concerning stigma from a discrimination claim, has often been thought particularly relevant in whistleblowing law. In the instant case, the ET accepted the analogy and held that she had not failed to mitigate but the EAT allowed the employer's appeal and remitted the case. It was held that, although there could be a case of no search being reasonable, even in *Chagger* it was said that, normally, for stigma/loss of career damages to be awarded the claimant must adduce evidence of that problem, not just assert it (in *Chagger* there was evidence of multiple applications, all unsuccessful). Here, the claimant fell within the 'just assertion' category, hence the remission. At [52] the judgment states:

> '… in a case where the employee has simply made no job applications at all, for reasons I have explained, the employer is entitled to assert, at least as a starting point, that, by failing to do so, she has acted

unreasonably, subject to the tribunal being satisfied as to the explanation. Where the employee, as here, relies on stigma, she needs to put forward some evidential basis in support of that case. I do not say that the fact that she has not made any job applications, and therefore cannot put forward the sort of evidence that Mr Chagger did, will necessarily be fatal to her case. There might, conceivably, be other evidence that is found to have supported her suspicions or concerns, that is sufficiently compelling to justify her not having tested the water with even a single application. But there does have to be some evidence of that sort, which is put before the tribunal, and which the tribunal evaluates and makes findings of fact about and concludes affects the question of whether the failure to look for any jobs or make any applications at all was reasonable.'

DIVISION F TRANSFER OF UNDERTAKINGS

Service provision changes; activities must remain fundamentally the same

F [72.24]

Tuitt v London Borough of Richmond [2022] EAT 124, [2022] IRLR 1035

The definition of a service provision change in TUPE reg 3(1) **R [2292]** is subject to reg 3(2) which states that the activities carried on before and after the transfer must remain fundamentally the same. Often this can involve arguments that the activities have changed in nature, but it can also raise cases where the change is essentially one of degree. This decision of Heather Williams J in the EAT is an example of the latter.

The council had contracted out security services including CCTV monitoring to Co A which had employed the claimant as a dedicated CCTV operative. When the contract came to an end, the council decided to take this work back in-house. However, instead of continuing to use a dedicated operative the council shared that work out among existing staff (for financial reasons); as these staff were already fully committed to other work, the amount and nature of the CCTV monitoring declined considerably. The council declined to take on the claimant, who brought ET proceedings for unfair dismissal under the Regulations.

The decision to take the work back in-house came within reg 3(1)(b)(iii) which covers a 'contracting back in', giving rise prima facie to a service provision change, but the ET rejected the claim under reg 3(2) because the CCTV activities had not remained fundamentally the same through the transfer. On appeal the claimant argued that this looked too narrowly at the question, but the EAT dismissed the appeal. It was held that this is primarily a matter of fact for the ET, which here had applied the correct test of looking at the situation before and after the transfer in all the circumstances and was entitled to come to the conclusion that the changes were of such an extent as

to fall foul of reg 3(2). As there was no compelling evidence that the council had acted deliberately to avoid TUPE, the result was that there was no service provision change.

DIVISION K EQUAL PAY

Work rated as equivalent; requirements of a valid job evaluation scheme; burden of proof

K [253.01], K [258]

***Element v Tesco Stores Ltd [2022] EAT 165* (*31 October 2022, unreported*)**

In this group litigation, female store workers are claiming equality of pay with male distribution/warehouse employees on the grounds of equal value and work rated equivalent in a job evaluation scheme (JES). This decision of Stacey J in the EAT concerns the latter. The claimants sought to rely on what they claimed was a JES carried out by the company in 2014. The ET decided that it was not in fact a valid JES because: (1) it did not cover the matters required by the statutory definition in the EqA 2010 s 80(5) **Q [1522]**; and (2) in any event a JES must have been completed and here the employer showed that the 2014 exercise was just an exercise and a 'work in progress'. The EAT rejected the claimants' appeal, holding that the ET had applied the right general approach (Was the study thorough and analytical? Did it have the necessary degree of detail, rigour and evaluation? Was it complete?) and these were findings open to the ET and were not perverse. The work rated equivalent challenge has thus failed and the case will continue on the equal value basis.

That is the actual decision in the case, but the lengthy judgment is notable for an element of reconsideration of the longstanding case law on this area, arguably on something of a 'back to basics' basis and a renewed emphasis on applying the statutory language, minimising the proverbial barnacles of some of the case law. The three main points made were:

(1) The old case of *Eaton Ltd v Nuttall* [1977] IRLR 71, [1977] ICR 272, EAT remains the starting point but it has tended to be forgotten that in the subsequent leading case of *Bromley v H & J Quick Ltd* [1988] IRLR 249, [1988] ICR 623, CA, one element of *Eaton* was further explained – the *Eaton* formulation of a valid JES has been expressed as requiring 'an analytical approach, capable of impartial application' *but* this is in fact two tests, with the second one ('impartial application') only becoming relevant later if a prima facie valid JES is attacked as being discriminatory, under s 131(6) **Q [1543]**.

(2) The task of ETs in applying the statutory definition of a JES has become over-complicated by the accretion of case law, adding what appears to be extra requirements. As the text points out at **K [253.01]**, in *Armstrong v Glasgow City Council* [2017] IRLR 993, [2017] CSIH 56, the court laid down seven factors to consider ((a) to (f)), but in the instant case the judgment starts that this is inconsistent with the

decision of the Court of Appeal in *Bromley*. The result is that the EAT is bound to follow *Bromley,* not *Armstrong.* One phrase used at [120] was that there has been too much complication and 'micro-management' culminating in *Armstrong*. Instead, after 40 years of this legislation ETs should be trusted to apply the basic ideas on what is a valid JES as a matter of fact, in the light of their judgment and common sense. A combination of these first two points can be seen in this passage at [119]:

> 'When a tribunal is considering whether "a study evaluates jobs in terms of the demand made on a worker under various headings, for instance, effort, skill and decision-making", it will focus on the need for the exercise to be a study, which denotes a degree of detail and rigour and evaluation, which is also self-explanatory. The tribunal's consideration of the scheme being put forward as a JES will no doubt assess how well such a study is capable of being applied impartially: if the study is not capable of evaluating the jobs by reference to the demands on the workers, it will not be capable of being applied impartially. But it does not require extra words or an additional limb of the statutory test to do so. So, whilst *Bromley v Quick* must be followed and the second limb of the *Eaton* test should not have remained such common currency, it is unlikely to affect the way that tribunals undertake their fact-finding task when considering whether a study is a JES. So, whilst tribunals no doubt routinely consider studies relied on as a JES with care and scrutiny in their fact-finding exercise, it is unhelpful to add words to the statute. The absurd results feared by [counsel] are avoided by a common-sense approach and natural reading of the statute as by simply applying the words of the statute and assessing if a scheme is thorough in analysis, tribunals are well able to decide if a scheme relied on is a JES as defined by s.80(5), as this tribunal did. Only where a JES is relied on by a respondent to strike out an equal value claim under s.131(6) must the tribunal consider if the study is tainted by sex discrimination or is otherwise unsuitable to be relied on. If a study is tainted by sex discrimination it may well be that it also means that it has not given the job in question a value by reference to the demand made on a worker under various headings, but that is as a consequence of applying s.80(5).'

(3) The third point is a much more precise one. The ET had approached the validity question by invoking the general statutory reversal of the burden of proof in s 136. However, the judgment holds that this was wrong – that reversal depends on the establishment of facts from which an inference could be drawn, but in an equal pay claim questioning whether there has been a valid JES as a preliminary matter, that stage will not have been reached and so reliance on the reversal will be premature. However, in this case that mistake was not determinative

because, even on a wrongly reversed burden, the ET had been correct to go on to hold that the employer had shown that the 2014 exercise was not a valid JES.

This is a long and closely argued judgment which contains much food for thought on some basic issues in equal pay law.

DIVISION NI LABOUR RELATIONS

Collective agreement; whether can be rectified

NI [3211]

Tyne & Wear Passenger Transport Executive* (*tla Nexus*) *v NURMT [2022] EWCA Civ 1408

The text at **NI [3211]** points out that, although a fundamental principle of collective labour law is that a collective agreement is not legally enforceable (TULR(C)A 1992 s 179 **Q [413]**), the court at first instance in this case held that such an agreement could be subject to the equitable remedy of rectification. The matter arose because the employer had sent a letter of agreement to the union stating that an existing discretionary payment would be incorporated into basic pay. However, the employer later disputed this and it was not done. Several affected members brought ET proceedings for unlawful deductions and won at liability stage. Before the remedy hearing, however, the employer brought civil proceedings for rectification of the letter of agreement, on the basis that it did not reflect what had actually been agreed. The Chancery judge granted this and the union appealed.

The Court of Appeal unanimously allowed the appeal, holding that the non-enforceability point, meaning that collective bargains are not contracts, was an insuperable barrier to a remedy of rectification. In effect, the employer had sued the wrong party – the union was not the proper defendant in proceedings that would have to have been brought against individual employees whose contracts allegedly included the term in question. This disposed of the appeal, but several questions then arose as to whether the appeal would have also succeeded on grounds of estoppel, ie that the employer should have raised rectification as a defence in the original ET proceedings; this in turn would have raised the question whether an ET had the power to deal with an equitable remedy. On this, there was some divergence between the three judges, but as the appeal had already been determined on the unenforceability point this did not actually have to be decided. As Daniel Barnett's alerter states, this would make it a prime case to go to the Supreme Court.

DIVISION NIII EMPLOYEE INVOLVEMENT

Transnational consultation; effect of Brexit

NIII [605.09]

EasyJet PLC v EasyJet European Works Council [2022] EAT 162 (4 November 2022, unreported)

The text at **NIII [605.09]** covers this case at CAC level when the question was whether the CAC had jurisdiction to hear a complaint by the EWC brought since the implementation of Brexit. It was held that it did, and the employer appealed to the EAT.

The problem, as the text points out, is that when the Transnational Information and Consultation of Employees Regulations 1999 (TICER) were amended in 2019 they seemed to create a nonsensical situation when taken literally – reg 4 of what is called TICER2 continued the EU regime only where the central management is situated in the UK. However, the amended regulation is stated to be 'subject to reg 5' and, while that regulation seems to have the effect of *deeming* certain cases to have such a central management, if taken very literally its wording seemed to say that the EU regime does *not* apply where the central management *is* situated in the UK. The CAC adopted a construction to avoid such a contradictory interpretation. Dismissing the appeal, Judge Tayler in the EAT upheld that construction and agreed that the CAC could hear the case. The judgment contains discussion of certain canons of statutory interpretation generally, and upholds the CAC's view on four grounds:

(1) even on a literal interpretation, the modern approach is to give the words their natural meaning in context and to reach a sensible result;

(2) alternatively, it is possible to interpret in the light of Parliament's intent, which was shown here by official guidance on the 2019 changes to have been to continue in force EWCs with central management in the UK;

(3) more particularly, there is a general principle that an amendment is not to be construed as negating unamended parts of the instrument in question, such as the enforcement provisions here;

(4) finally, there is ultimately a power in certain circumstances to interpret so as to correct an obvious drafting error.

With this belt and three sets of braces, the purposive interpretation of the CAC was upheld.

REFERENCE UPDATE

Bulletin	Case	Reference
526	*Kumar v MES Environmental Ltd*	[2022] IRLR 1044, EAT

Bulletin	Case	Reference
529	*Kong v Gulf International Bank (UK) Ltd*	[2022] ICR 1513, CA
529	*USDAW v Tesco Stores Ltd*	[2022] ICR 1573, CA
530	*Catt v English Table Tennis Association*	[2022] IRLR 1022, EAT
531	*Clark v Sainsburys Supermarkets Ltd*	[2022] IRLR 966, EAT
531	*University of Dundee v Chakraborty*	[2022] IRLR 1003, EAT
531	*Ponticelli UK Ltd v Gallagher*	[2022] IRLR 1035, EAT

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