Harvey on Industrial Relations and Employment Law

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DIVISION DI UNFAIR DISMISSAL

Compensation; no or limited loss; dismissal would have happened anyway

DI [1686.03], DI [2544]

***Teixeira v Zaika Restaurant Ltd [2022] EAT 171* (*2 December 20–22, unreported*)**

In the law relating to unfair redundancy dismissals, the concept of a 'pool of one' has naturally always been difficult because it cuts across normal ideas of warnings, consultation and a search for other employment; instead it smacks of inevitability and a fait accompli, with a limited role for legal intervention. However, as was reported in **Bulletin 532**, the EAT in *Mogane v Bradford Teaching Hospital NHS Foundation Trust* [2023] IRLR 44 revisited the question and reaffirmed the continuing importance of the *Williams v Compair Maxam* rules on fair redundancies, stressing the importance in particular of consultation in 'pool of one' cases. The instant case before Judge Tayler in the EAT considers the overlap between this and compensation in such cases, particularly the application of the '*Polkey* reduction' where it is held that dismissal would have happened anyway.

The claimant was a general chef in a restaurant that was going through difficulties in the pandemic. The owner decided that he had to make one member of staff redundant and that it had to be him. He dismissed him without any procedure. On his claim for unfair dismissal, it was accepted that this was procedurally unfair, but the EJ then held that, because on the facts it was open to the owner to go for a pool of one, therefore it was certain that the claimant would have been dismissed on the same date anyway even if a fair procedure had been adopted. The award was therefore reduced by 100%

under *Polkey*. Allowing the claimant's appeal, the EAT held that this apparently straightforward logic was an error of law. After considering *Mogane*, the judgment states at [25]:

> 'Regrettably, I consider that reasoning did not properly apply the relevant legal principles. The reasoning involved a non-sequitur because the possibility of a pool of one being fairly chosen does not mean that the dismissal was bound to have taken place when it did. On a proper application of the law the employment judge needed to consider what this particular employer would have done had it acted fairly. The employment judge's reasoning fails to take into account the general requirement for some warning and consultation, even in the case of a small employer, and even where a pool of selection of one might be determined upon. If the employment judge considered that dismissal would have been fair absent any consultation some further explanation was necessary to demonstrate a proper application of the relevant law. Some warning and consultation could have resulted in the selection of a pool of more than one, and might have affected the choice of any selection criteria. Even if dismissal would have been inevitable, it might well have been delayed to some extent, which would result in some additional compensation for the claimant, unless there was some compelling reason why the dismissal would have been fair absent any consultation.'

DIVISION L EQUAL OPPORTUNITIES

Religion and belief; freedom to manifest a belief; ban on physical manifestation

L [212.02]

LF v SCRL C-344/20, [2023] IRLR 70, ECJ

The claimant applied for a non-remunerated post with a Belgian social housing firm. The company had a strict policy of neutrality in relation to religious, philosophical or political views, which included a ban on manifestation by wording or clothing. When the claimant intimated that she would normally not be prepared to give up wearing a headscarf for religious reasons, she was rejected for the post. She brought proceedings for religious discrimination under the Belgian law implementing Directive 2000/78/EC. The Belgian court referred the matter to the ECJ. Following very much its previous decision in *IX v WABE bV* C-804/18, [2021] IRLR 832, considered at **L [212.02]**, it was held that such a policy of neutrality prohibiting manifestation through words, clothing or otherwise does not constitute direct discrimination on the grounds of religion or belief under the directive, provided that it is applied in a general and undifferentiated way. Here, there was no evidence that this company had failed that part of the test.

Two other points are worth note in this latest judgment on the point. The first is that the court accepted that such a policy might also be challenged as indirect discrimination. In such a case, an employer might readily establish

that the policy had a legitimate aim (especially where it was motivated by relations with the firm's customers), but must go on to show that its application was proportionate. This may involve similar factors to direct discrimination, but a court must be astute to ensure that it was not being used in an abusive way to disadvantage certain groups. The second is that the court held (contrary to the arguments of the Advocate General) that 'religion or belief' is *one* head of protected characteristics, not two distinct ones.

DIVISION NI LABOUR RELATIONS

Health and safety representatives; unfair dismissal; COVID-19 fears

NI [3589]

Rodgers v Leeds Laser Cutting Ltd [2022] EWCA Civ 1659

This well-known case involved an issue arising from the COVID-19 pandemic, namely whether an employee dismissed for leaving work or (as here) refusing to return to it because of fears of infection could claim automatically unfair dismissal under the ERA 1996 s 100(1)(d) **Q [724]** on the basis that they behaved as they did in circumstances of danger which they reasonably believed to be serious and imminent. This is clearly supposed to apply primarily to dangerous processes or machinery in factories, but how does it apply to infectious diseases?

The claimant had one medically vulnerable child and a new baby. He was dismissed when he refused to return to work during the pandemic. He lacked two years' continuity of employment for an ordinary unfair dismissal action, and so invoked s 100. The ET found against him, saying that his version of events was 'confusing and contradictory'. By contrast, the employer had shown that the workplace was large with a small staff so that social distancing was possible, there had been risk assessments leading to other measures being put in place and the staff had been consulted. The ET accepted that the claimant had had genuine fears about the virus, but these had been *general* ones, insufficiently connected with his work. Thus, within s 100(1)(d) it had not been shown that there had been circumstances of danger which the employee *reasonably* believed to be serious and imminent, justifying his staying away. Dismissing his appeal, the EAT held that this was a conclusion on the facts that was open to the ET. That decision has now been upheld by the Court of Appeal.

Viewed narrowly, this is a decision on the facts, and the point has been made before here that it is perhaps unfortunate that this first appellate-level case on this important point was on such weak and in places contradictory evidence by the claimant. However, on a slightly wider view, the EAT decision was arguably important in showing that there was nothing in law to *prevent* s 100 from applying in these particular circumstances. Moreover, the judgment of the Court of Appeal, given by Underhill LJ, contains some useful points of clarification:

(1) the most important for the application of sub-s (1)(d) *generally* is that, although on a literal interpretation the question of whether there were circumstances of danger would be objective, with the employee's subjective reasonable belief only applying to whether that objective danger was serious and imminent, that would unduly restrict the intended protection of the subsection (the judgment cites Judge Tayler in the EAT who had given the example of employees leaving a workplace because of green smoke suddenly appearing, which later proved to have in fact been inert). Thus, on a purposive approach, the question of reasonable belief apples to *both* the existence of the danger *and* its seriousness and imminence.

(2) It is not enough (as the claimant had argued) that the danger arose on the way to work; it must be present in the workplace itself. However, on the other hand, if that is the case it is irrelevant if it *also* exists outside the workplace.

(3) The protection of the subsection is not restricted to physical dangers; the judgment cites with approval *Harvest Press Ltd v McCaffrey* [1999] IRLR 778, EAT which concerned danger from a fellow employee.

(4) At [21], the judgment gives this guidance as to the approach to be adopted:

> '… the questions which the ET has to decide in a case under section 100(1)(d) can be analysed as follows:
>
> (1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:
>
> (2) Was that belief reasonable? If so:
>
> (3) Could they reasonably have averted that danger? If not:
>
> (4) Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so:
>
> (5) Was that the reason (or principal reason) for the dismissal?
>
> Questions (1) and (2) could in theory be broken down into two questions, addressing separately whether there was a reasonable belief in the existence of the danger and in its seriousness and imminence; but in most cases that is likely to be an unnecessary refinement.'

The point is made at the end that, apart from the above, it would be unsafe to attempt further guidance because ultimately these are questions of fact for the ET. Also, one question that was at least mentioned in the EAT did not arise here, namely whether on one set of facts there can be reliance by a claimant on both sub-s (1)(d) and sub-s (1)(e) ('taking appropriate steps to protect himself or other persons from the danger'); that one will have to await another case, but that apart, the present judgment does add considerably to the precedents on s 100.

DIVISION NIII EMPLOYEE INVOLVEMENT

Meaning of 'transnational matters'; imposition of penalties

NIII [652], NIII [877]

Olsten (UK) Holdings Ltd v Adecco Group European Works Council [2022] EAT 183 (13 December 2022, unreported)

Unusually, there have now been two EAT decisions on European Works Councils (EWCs) in the last two months. There was reported in last month's Bulletin the case of *EasyJet plc v EasyJet EWC* [2022] EAT 162 (4 November 2022, unreported) which concerned the 'macro' level question of how such councils continue to operate post-Brexit. By contrast, the instant case before Kerr J concerned a 'micro' level question of interpretation. It is also of interest in relation to the penalties awarded by the EAT in operating its (rare) original jurisdiction here.

The question of interpretation concerned the meaning of 'transnational matters' which are the key to the invocation of the consultation obligations on the employer who is a party to an EWC. This arose as follows. Adecco, based in Switzerland, operates widely throughout the EU/EEA; its UK arm is Olsten. As a result primarily of the COVID-19 pandemic, in 2019/2020 redundancies were contemplated and then carried out in Sweden, the Netherlands, Hungary and Germany; the numbers varied. The employers dealt with the collective aspects of these primarily under the national laws of these individual countries. However, the EWC claimed that this all gave rise to transnational matters and demanded consultation at its level too. The employer resisted this on the basis that, although COVID-19 was the background, in fact there was no commonality between them; they had each been carried out by local management reacting to the local situations and there had been no co-ordination from Adecco centrally.

When the EWC brought proceedings for breach of the EWC Regulations 1999, this formed the basis of the employer's defence, but it was rejected by the CAC who held the employer in breach. The employer appealed to the EAT arguing that commonality was a legal requirement, both as a matter of statutory interpretation of the definition in reg 2(4A) **R [1225]** and as a matter of practicality, in order to keep the consultation requirements within reasonable bounds. However, dismissing the appeal, the EAT held that there is no legal requirement of commonality; it is only necessary that the events in question occur at the same or a similar time. Further, there is no requirement of central determination; to do so would make it too easy to avoid the consultation obligations by farming out the decisions to local managements. It was accepted that a case could arise of purely fortuitous coincidence in timing of completely unrelated events in two or more states, but the answer to this was that any resulting EWC meeting would be of short duration if the coincidence was genuine. In fact, the EAT upheld a subsidiary decision of the

CAC that the complaints in relation to Hungary and the Netherlands were technically out of time, but the complaints in relation to Sweden and Germany were upheld.

That led to the question of penalty. In relation to this principal breach in not convening an extraordinary EWC meeting, the EAT set the fine at £20,000. In relation to a secondary complaint of failure to provide business information in relation to these matters at an Annual Plenary Meeting, the fine was £5,000.

DIVISION PI PRACTICE AND PROCEDURE

Just and equitable extension of time; length of and reasons for delay; prejudice to other party

PI [281.02], PI [284]

Concentrix CVG Intelligent Contact Ltd v Obi [2023] IRLR 35, EAT

Extensions of time on the just and equitable basis for discrimination cases under the EqA 2010 s 123 **Q [1535]** are ultimately questions of fact for the ET. However, this case before Judge Auerbach in the EAT addresses two potentially important issues of law in applying this discretion, particularly in cases where the ET has found that a series of alleged incidents of discrimination constitute 'conduct extending over a period' under s 123(3)(a), possibly extending backwards over a significant period.

The facts were relatively simple. The claimant complained of three incidents of sexual harassment by her line manager going back over a year. The ET found that these were well founded and came within sub-s (3)(a) *but* the problem arose that in spite of taking ACAS advice, the claimant had brought her claims one day late, counting from the date of the last incident. She sought an extension of time, which the ET granted, in spite of two complicating factors: (a) the ET had heard no evidence from the claimant or otherwise as to *why* she was that one day out of time and why she had not claimed earlier; and (b) the employer had argued that it was impeded in making its defence by the passage of time generally and in particular the fact that the line manager was no longer in its employ and could not be called as a witness. The employer appealed against the granting of the extension, on two principal grounds, which gave rise to the above questions of law:

(1) It was argued that if there is no evidence at all as to why a claim is late, then in law an ET *must* refuse a just and equitable extension. The judgment points out that, as counsel had agreed, over the years there have been unreported EAT decisions going both ways on this point. That alone would have allowed this EAT to choose between them, preferring the claimant's argument that, while lack of explanation may be a factor, there are no hard and fast legal rules here. However, it was held that the matter was in fact covered by the Court of Appeal decision in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] IRLR 1050, [2018] ICR 1194 where it was held that there can still be an extension if *the claimant* had

led no evidence as to the reason. The employer here sought to distinguish that case but it was held that that approach is to be applied also to a case of no evidence from any source. Clearly, it might be an important matter of fact (potentially weakening a claimant's application), but not as a matter of law.

(2) The employer also argued that the ET had erred on the question of prejudice to the other party (an essential factor in applying the test, see **PI [284]**) because it had just looked at any prejudice arising from the complaint being the one day late, whereas the real problem in a 'conduct extending over a period' case may well be (as here) that the events go back over a significant period of time, with memories fading and witnesses not being available. Here, the employer was on stronger ground, but again depending on the interpretation of a Court of Appeal case. In *Adejedi v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, [2021] ICR D3 it was held that in considering an extension of time in a discriminatory constructive dismissal case the ET can look at possible prejudice to the employer if the facts behind the alleged conduct went back over time, considering that whole period. Here, the EAT agreed with the employer's submission that that approach may have arisen in the context of constructive dismissal, but it is equally applicable to a 'conduct extending over a period' case. At [70] the judgment states:

> 'In *Adedeji*, the complaint in question was of constructive discriminatory dismissal. In the present case the tribunal was concerned with a number of real time discrete incidents, which it found together amounted to conduct extending over a period, in respect of which time therefore ran from the date of the most recent episode. It seems to me that in principle the reasoning in *Adedeji* must carry across from the constructive dismissal scenario, to the conduct extending over a period scenario, insofar as both give rise to issues about what did or did not factually happen going back potentially very much earlier than the date on which limitation begins to run. When such features are obviously present in a given case, it would be an error of principle for the tribunal not to consider them at all.'

On the facts here the ET had not done this, which was an error of law.

Note, however, one possible caveat to this. It was suggested obiter that in a case such as this it *might* be possible for the ET to extend time but *only* in relation to the last incident, from which the primary time limit flowed, if prejudice in relation to that one would be minimal.

The upshot in the case was that the employer's appeal failed on ground 1 but succeeded on ground 2.

Admissibility of evidence; power to exclude; whether to do so at a preliminary hearing

PI [926.01]

***Health and Safety Executive v Jowett [2022] EAT 151* (*18 February 2022, unreported*)**

This decision of Heather Williams J in the EAT emphasises the importance of the guidance given by Underhill J in *HSBC Asia Holdings BV v Gillespie* [2011] IRLR 209, EAT; this covers the question of admissibility of evidence before ETs and is set out at **PI [926.01]**. The particular issue at stake in the instant case was whether it was appropriate to have ruled out evidence as inadmissible at the interlocutory stage of a preliminary hearing. On the numbering used in the text, this invoked points (vi) and (viii) of the guidance, with their emphasis on *not* normally doing so at this early stage, but leaving it to the full hearing before the tribunal of fact, which is likely to have a fuller picture of the matter.

The claimant succeeded in a claim for disability discrimination when the Executive withdrew an offer of a post as a trainee inspector. Prior to the remedies hearing, at which the claimant was claiming five years' loss of earnings (on a 'loss of career' basis, as in *Chagger v Abbey National plc* [2009] EWCA Civ 1202, [2010] IRLR 47, [2010] ICR 397) a question arose at a preliminary hearing as to the Executive's wish to adduce evidence of the claimant having in fact held such a post with them from 2008 to 2011, when he had resigned from it. It was argued that this could be relevant to whether he would have stayed for the five years in question, but the EJ excluded this evidence as not sufficiently relevant.

The EAT allowed the Executive's appeal. Applying the above paragraphs of the *Gillespie* guidance, it was held that the normal approach should apply, ie of not seeking to resolve the matter at this early stage, for the reasons given in the guidance, especially as on the facts here the exclusion would deprive the respondent of material for its defence on quantum, given the nature of the claimant's case.

Employment Appeal Tribunal; institution of appeal; service of documents

PI [1436]

***Anghel v Middlesex University [2022] EAT 176* (*5 December 2022, unreported*)**

***Elhalabi v Avis Budget UK Ltd [2022] EAT 185* (*19 December 2022, unreported*)**

These two decisions of Judge Auerbach in the EAT concerned non-provision of necessary documents for an appeal to the EAT until after expiry of the 42-day time limitation (in the first case by one day and in the second by two). The judgments make several general points of importance: (1) the normal

rules on extension of time generally in *United Arab Emirates v Abdelghafar* [1995] IRLR 243, [1995] ICR 65, EAT apply equally to a refusal by an EAT Registrar to accept an appeal as properly constituted; (2) a strict approach will usually be taken to time limits because of the importance of finality of judgments; (3) simple mistakes or inefficiency will not normally be accepted as good reason to extend time; (4) the 42-day limit is already 'generous'; (5) a litigant in person (as in both of these cases) is not automatically to be treated more generously.

Given the application of these points, the two cases do, however, come to different conclusions on the facts, with the second being resolved on the question whether the appeal was properly constituted in the first place, rather than by an extension of time as such.

In *Anghel* the unsuccessful claimant's notice of appeal was submitted in time, but it did not include in the relevant attachments the detailed grounds of claim, as required by the EAT Rules 1993 r 3 R [716] and para 3 of the EAT Practice Direction 2018. This was because the claimant wrongly assumed that these were attached to the ET1 which had been sent. When this came to light, they were sent but arrived one day late. The Registrar refused to accept this as a competent appeal. The EAT upheld this and declined the claimant's request to extend time. The basis of this was that good cause had not been shown. Ultimately, it is for the putative appellant to ensure that the rules are followed, including on the attachment of documents; it is not for the EAT administration to make sure that this is done. In spite of the claimant's strong views as to the way she had been treated by the employers and the tribunal system, her appeal was out of time and could not proceed.

In *Elhalabi* the claimant lodged an appeal against the ET decision within the 42-day period, but before receiving the ET's written reasons. He did, however, explain that he was still waiting for them. There was then some misunderstanding on his part because of a confusion of the written judgment and the written reasons and because he did not receive the posted hard copy of the latter, and a subsequent email version went into his junk/spam folder which he had not checked. The reasons were eventually supplied two days late and again the Registrar's decision was that the appeal was not properly constituted. Before the EAT, it was held that these facts would not normally give good cause to extend time, *but* the decision was that the appeal could proceed because his clear explanation that he was awaiting the reasons meant that the appeal was valid and there was in fact no need for an extension. At [81] this is explained as follows:

> 'It is my understanding, and experience, as a resident EAT judge, that, in cases where an appeal is otherwise properly instituted ahead of receipt of written reasons, and there is a clear explanation, supported by evidence, that a timely request for these has been made, the usual practice of the EAT approved by the court for handing down is indeed to treat the appeal as properly instituted at that point; but also to take the approach that a copy of the written reasons, once received, needs to be provided to the EAT, before consideration is given to the next

appropriate step. In light of the foregoing that appears to me to be, in principle, the right approach, in such clear cases, so as to further the expeditious and economical disposal of such appeals, and in accordance with the interests of justice to both parties and the overriding objective.'

REFERENCE UPDATE

Bulletin	Case	Reference
528	*Mackereth v Department for Work and Pensions*	[2022] ICR 1609, EAT
530	*Cowie v Scottish Fire and Rescue Service*	[2022] ICR 1693, EAT
532	*Bathgate v Technips UK Ltd*	[2023] IRLR 4, EAT
532	*Mogane v Bradford Teaching Hospitals NHS Foundation Trust*	[2023] IRLR 44, EAT
532	*Simpson v UNITE the Union*	[2023] IRLR 51, EAT

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