Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Employees; effect of tax status; categorisation by the parties

AI [36], AI [46]

Richards v Waterfield Homes Ltd [2023] IRLR 145, EAT

The point is made in the text at **AI [14]** that for some time now tax law and employment law have been growing apart, including in the key area of the definition of 'employee'. However, long pre-dating that development has been the basic principle in employment law that a person's tax status may be an *indicator* of their employment status, but it is not determinative of it, so that the two may diverge. This can be seen in combination with the other principle that how the parties themselves see and describe their relationship is again only one factor, which tends to grow progressively weaker the more that contrary factors stack up on the other side. A key, venerable case here is *Young & Woods Ltd v West* [1980] IRLR 201, CA, set out at **AI [36]** (in Perry Mason style, the Case of the Sheet Metal Worker and the Large Tax Bill). The instant case before Judge Barklem in the EAT is a good example, concerning not just general tax categorisation, but use of a particular tax scheme.

The claimant was a qualified carpenter who began to work for the respondent company in 2010. He was registered with the Construction Industry Scheme (CIS) whereby a contractor such as the respondent deducts 20% tax from the sub-contractor's payments and forwards it on account to HMRC, thus keeping the latter off the former's back until the end of the tax year when the sub-contractor pays the extra owed for that year; see **BII [379]**. In this case the parties agreed with this arrangement, the key point about it being that it is *not* available to 'employees'. In 2018 the respondent brought in

consultants to change the status of their sub-contractors to employees with suitable contracts. The claimant was in fact off sick at the time and remained so until he resigned and brought ET proceedings. A preliminary point arose as to his employment status. The respondent argued that he had only been an employee since 2018, but he claimed that in fact he had been so from 2010. Although all the other factors usually considered in these cases pointed in the claimant's favour, the ET held that his membership of the CIS scheme in effect trumped that and so he had not been an employee for these employment law purposes until 2018.

The claimant appealed against this and won in the EAT. In a relatively short judgment, relying on *Young & Woods*, it was held that the CIS scheme was only one factor and that, as the Court of Appeal in that case had said, the ET's function was to discern the true nature of the engagement. Here, everything apart from the scheme and the agreement to operate it pointed to employment. Presumably, the upshot could be that having won at ET level, the claimant may have to make his peace with HMRC, as in *Young & Woods* itself, where Ackner LJ commented that Mr West may have won a 'hollow, indeed an expensive, victory'. Looking on the bright side, however, if this is to be the case, one possible point of mitigation would be that at least the claimant had not been Chancellor of the Exchequer at the time.

DIVISION DI UNFAIR DISMISSAL

Conduct; adhering to agreed procedures; re-opening concluded disciplinary procedures

DI [1546]

***Lyfar-Cissé v Western Sussex Universities NHS Foundation Trust [2022] EAT 193* (*20 December 2022, unreported*)**

This appeal, before Bourne J in the EAT, concerned the 'very difficult' question of when it can be fair for an employer to re-open disciplinary proceedings that had appeared to be concluded. The end result appears to be as argued in the text, namely that the better view is that there is no hard-and-fast rule either way, and that ultimately it is to be left to the ET to apply the 'equity and substantial merits' test in the ERA 1996 s 98(4). One point to note at the outset is that this was not a case of new *facts* coming to light, but of a significant change in the background to the alleged offences.

The claimant was an associate director for transformation and social equality in Trust A, and also chair of its BME committee. A number of allegations were brought against her by other members of staff, including harassment and bullying behaviour, racial abuse of a white employee and refusal to engage with an external inquiry set up by the Trust. These were investigated, resulting in her receiving a final written warning. The twist in the case is that shortly afterwards the Trust was inspected by the CQC and found inadequate in relation to leadership (including on racial equality grounds) and a culture of harassment and bullying. As a result, Trust B was brought in to take over Trust A's executive roles on a long-term basis. Complaints were then made to

the new management by one of the original complainants about the claimant still being in post, questioning whether she was a 'fit and proper person' under applicable regulations. This led to her position being reconsidered (in the light of the CQC findings). After a fair procedure (including TU representation), she was dismissed; her appeal was turned down and she brought proceedings for unfair dismissal, whistleblowing dismissal and victimisation.

The ET rejected her complaints. Her dismissal was for either misconduct or SOSR, there had been a fair procedure and substantively the dismissal was fair as being within the range of reasonable responses, in the light of the CQC report and the fact that she continued to deny any fault on her part. Moreover, there was no evidence of whistleblowing and victimisation was not made out. Her appeal to the EAT centred on the unfair dismissal aspect, arguing that it was unfair and contrary to natural justice to have reopened the disciplinary proceedings against her. The EAT disagreed and rejected the appeal. As stated above, it was said that this is a difficult area, but essentially the facts here were sufficiently unusual to justify the reopening of the disciplinary charges. The judgment cites *Christou v London Borough of Haringey* [2013] EWCA Civ 178, [2013] IRLR 379 (the notorious 'Baby P' case, considered at **DI [1547]**) but, although in that case too reopening was fair, it was stated that it did not lay down any definitive rules and the matter remains one of overall fairness. The position was summed up at [52] and [53]:

> 'We perceive no error. The ET directed itself correctly in law, applying the right test of fairness and having regard to the relevant authorities. Its reasons for upholding the employer's decision were stated concisely but were entirely clear, identifying the combination of circumstances which made this an unusual case. We agree that the situation of an NHS Trust in special measures, where the CQC had found "… acceptance of poor behaviour …", and where an individual who was race equality lead had been found to have engaged in racist abuse, and where management believed that regulation 5 imposed a "fit and proper" test on that individual (an issue which had not been before [the original manager]) was very unusual. The employer had also explored the Appellant's attitude to the case and discovered that, far from being open to changing her behaviour, she continued to deny that the misconduct had occurred. In those circumstances, we consider that it was reasonable for the ET to conclude that it was open to the employer to take the view that it did, and to proceed as it did, following a careful and appropriate procedure, even if other employers might have concluded that it would not be reasonable to re-open a concluded disciplinary process.'

DIVISION L EQUAL OPPORTUNITIES

Protected characteristics; marriage and civil partnerships

L [185.02]

***Ellis v Bacon [2022] EAT 188* (*22 November 2022, unreported*)**

The text points out that, although a wider approach was initially taken to the reach of the prohibition on marital discrimination, in the case of *Hawkins v Atex Group Ltd* [2012] IRLR 807, [2012] EqLR 397, EAT Underhill J took a narrower approach, more based on the wording of the general provisions of the EqA 2010 s 13 on direct discrimination ('because of' the protected characteristic), so that the test is whether the less favourable treatment was because of the fact of being married, not the identity of the person to whom the claimant was married. The text's argument that this is now the preferable view is affirmed by the instant decision of Judge Shanks in the EAT, which bears a factual similarity to *Hawkins*.

The claimant was employed by, and initially a director of, a company of which the respondent was managing director and the claimant's husband the major shareholder. When the claimant and her husband separated and divorced, she was subject to seriously prejudicial financial treatment and eventually dismissal by the managing director. She claimed that this was marital discrimination and the ET agreed, possibly swayed by the treatment she had received. However, it had not had *Hawkins* cited to it. On the respondent's appeal, this proved fatal and the appeal was allowed. It was held that: (1) the ET had not properly considered the *Hawkins* distinction (marriage itself or the person married to); and (2) the ET had not applied the proper comparator test of comparing her treatment to that which would have been meted out to a person also in a close relationship with the husband but not married to him. This is summed up at [8]:

> 'The issue in this case was therefore whether Mr Ellis treated Mrs Bacon in the unfavourable ways that have been identified because she was married. That is where the sentence ends: the question is not whether she was badly treated because she was married to a particular person. Another way of looking at the issue was to ask oneself whether an unmarried woman whose circumstances were otherwise the same as hers, including being in a close relationship with Mr Bacon, would have been treated differently. It seems to me, on the face of it, plain from the judgment that the ET, no doubt because the merits were so clearly in Mrs Bacon's favour and because they did not have the relevant case law I have referred to drawn to their attention, failed to address their minds to the real issue or, which is really the same thing, to construct the appropriate hypothetical comparator.'

The judgment concludes with a strong expression of regret at having to come to this conclusion, given the way that the claimant had been treated, but there was no alternative as *Hawkins* clearly represents the law here.

Duty to make reasonable adjustments; provision, criterion or practice

L [389]

***Davies v E E Ltd [2022] EAT 191* (*23 December 2022, unreported*)**

In a case concerning an alleged failure to make reasonable adjustments (EqA 2010 s 20 **Q [1473]**) the first question is whether the employer has imposed a provision, criterion or practice (PCP) and the instant case before Judge Tayler in the EAT shows yet again how important it is to identify that PCP before going further into the section.

The claimant worked in a call centre under a contract requiring 40 hours per week. The employer did also employ some people on part-time contracts. The claimant developed a throat condition which qualified as a disability. She took some time off and when she returned she was put on reduced hours for about a month as a phased return, at the end of which she was put back on to her normal hours. She requested to go part time because of the lingering effects, but her manager said that there were no current vacancies in the part-time category; her request was noted. When she was then refused time off to attend a medical appointment, she resigned and claimed constructive dismissal and failure to make reasonable adjustments.

The ET rejected her disability discrimination claim on the basis that the PCP on which she relied, that she work 40 hours per week (there was another that was not pursued), had not been made out on the facts because: (a) there were employees on part-time contracts so the 40 hours were not a universal requirement; and (b) in any event she had not been required to work these hours during her phased return. Allowing the appeal, the EAT held that this was wrong in law. The 40-hour requirement had been applied to her (and all the others on full-time contracts) and it was *not* necessary that it applied to the whole workforce. Moreover, the reduced hours during the phased return were not relevant because the 40-hour requirement had been re-applied to her when it expired. It was held that her PCP had been made out and the case was remitted for consideration of the remaining steps of substantial disadvantage and any steps that should reasonably have been taken. There was thus much still to consider if she was to succeed, but at least her claim did not fail at the initial PCP stage.

Victimisation; doing a protected act; relevance of bad faith

L [467]

Kalu v University Hospitals Sussex NHS Foundation Trust [2022] EAT 168, [2023] IRLR 129, EAT

The significance of this decision of Judge Auerbach in the EAT is that it stresses the importance of good faith in an action for victimisation under the EqA 2010 s 27 **Q [1480]**. The section has two parts – did the claimant do a

protected act and, if so, were they subject to a detriment because of it? At the first stage, by virtue of s 27(3), the claimant will fail if it is shown that they acted in bad faith.

The two claimants in were employed as hospital consultants until they were dismissed for misconduct. They are both black and were members of a BME network. A fellow employee, Ms X, brought a grievance alleging that the chair of a BME network event which she attended had outed her as gay at the meeting in a manner that she believed was homophobic. This grievance was not upheld. In return, eight BME network members including the claimants then brought a collective internal grievance against Ms X. This accused her of stereotypically insinuating that members of the BME network were homophobic. In the event, an independent legal investigator was appointed. She found that there was a case to answer as to whether the collective grievance was an act of *victimisation* against Ms X. The Trust then took disciplinary proceedings against the claimants. It was found that the claimants were guilty of victimisation in bad faith. This led to their dismissal. They brought proceedings, inter alia for victimisation. The ET found that the claimants' participation in the collective grievance was not a protected act for the purposes of s 27 because the allegations made were untrue and were made in bad faith.

She appealed against this, but the EAT turned it down. It was held that bad faith can indeed negate the doing of a protected act for these statutory purposes. It can be expressed as being 'dishonest', which in this context means being false. The position is well explained at [39]:

> '… in order for a claimant to succeed in a complaint of victimisation the tribunal must find both that they did a protected act and that they were subjected to a detriment because they did that act. The bad faith point goes to the first question, as an allegation which would otherwise amount to a protected act will not do so if it is false and made in bad faith. The bad faith question concerns the state of mind of the *claimant*, and in particular whether they were dishonest in the sense that they did not believe in the truth of the allegation they were making.'

The already factually complex case then also became legally complex because the judgment went on to make a procedural point which at first seemed to go in the claimants' favour, namely that if a respondent is to raise the defence of bad faith to a victimisation claim then that must be put fairly and directly to the claimant(s) in cross-examination, which had not been the case on the facts here. However, the claim still failed on other grounds relating to causation (the 'because of' point).

DIVISION PI PRACTICE AND PROCEDURE

Conciliation; interpretation of a COT3; effect of a general release

PI [693.09]

Arvunescu v Quick Release (Automotive) Ltd [2022] EWCA Civ 1600

The text at **PI [693.09]** considers the decision of the EAT in this case, upholding the decision of the ET that the claimant's claim of victimisation by the ex-employer (allegedly interfering in his application post-termination to work for another entity in the group) was covered by a COT3 that he had entered into, covering existing and future claims relating directly or indirectly to the terminated employment. The Court of Appeal have now upheld that decision in turn, very much along the lines of the EAT judgment. Its judgment shows again that COT3s are contracts which are to be interpreted as such, and also explains the distinction between this case and *Royal Orthopaedic Hospital v Howard* [2002] IRLR 849, EAT mentioned in the EAT's judgment and relied upon unsuccessfully by the claimant here.

Privacy and restrictions on disclosure; anonymity orders

PI [952.01]

Clifford v Millicom Services UK Ltd [2023] EWCA Civ 50

The facts of this rather unusual case are set out fully at **PI [952.01]** along with the EAT decision reversing the ET which had declined a respondent's request for an anonymity order. The case concerned a claimant pleading whistleblowing protection, but in relation to events in a foreign country which was considered dangerous (or, putting it more diplomatically, which did not observe the rule of law). The respondent argued that a public hearing could imperil not just senior managers but also other employees in that country, to the extent that it was said that if anonymity was not granted the company would rather take no part in the proceedings and not defend them. Eady P's judgment has now been upheld by the Court of Appeal in a judgment given by Warby LJ (subject to one qualification concerning interpretation of the facts).

The judgment follows very much that of the EAT, considering the three grounds for an anonymity order in ET Rules SI 2013/1237 Sch 1 r 50 **R [2807]**:

(1) In the interests of justice – as in the EAT, it was accepted that r 50 sets out the statutory tests in the ET but that the common law on fair hearings also applies and can be wider. It can take into account real and immediate fears of personal safety (which had been made out here) and the danger of a decision to withdraw from proceedings based on such fears.

(2) Protection of Convention rights – these apply generally in these cases, but here the foreign country was not covered by the European Convention. However, that could be made up for by reliance on the common law.

(3) Breach of contractual obligations of confidentiality – this was accepted as being a factor here, though not to the extent of meaning that whistleblowing cases should normally attract anonymity; the question is not whether a confidentiality clause should be enforced as such, but whether a court or tribunal should accept a breach of confidentiality on the facts of the case. It is a factor to be put into the balance.

Overall, the court agreed with the EAT that the issue should be remitted for reconsideration at ET level.

Costs orders; procedure to be adopted

PI [1047]

***Kite Et Al v Clark [2022] EAT 194* (*29 January 2023, unreported*)**

The moral of the story in this case before Judge Tayler in the EAT is that a party making an application for costs in writing should set out not just the legal grounds relied upon but at least a summary of the salient facts and arguments (or at the very least an indication that such further material is to be forwarded later).

In a complex case involving multiple possible employers and issues of time limits and territorial jurisdiction, the claimant's case was rejected and the respondents applied for costs by letter. However, although this set out the two heads of ET Rules SI 2013/1237 Sch 1 r 76 relied on (no reasonable prospects of success and vexatious etc behaviour), it did not set out the arguments on prospects or what behaviour was said to be vexatious. All the respondents said was that the details were inherent in the application itself. The ET refused the costs order.

The procedure on a costs order is covered by r 77 **R [2834]** in the case of the *paying* party, requiring a reasonable opportunity to make representations in writing or at a hearing. In *Onyx Financial Advisors Ltd v Shah* UKEAT/0109/14 (26 August 2014, unreported) (considered at **PI [1047]**) it was held that this basic requirement applies to the *applicant* for costs as well. In that case, a rejection of an order without this was an error of law. Did that apply here? The EAT held on the facts that it did not and that the ET had not erred in rejecting the application without a hearing or requiring further written submissions. In *Onyx* the application had specifically said that further evidence/arguments were to follow, but here the EAT held that the EJ had been entitled to take the respondents at their word, ie that the letter contained everything they were to put forward. At [29] the judgment states:

> 'I have concluded that in the particular circumstances of this case the determination of the employment tribunal did not involve an error of law, because:

(1) The employment judge was entitled to conclude that the application did not set out proper grounds. While it set out the specific provisions of the costs rules relied upon it did not properly set out the specific grounds

(2) It was not incumbent on the employment judge to guess what grounds the respondent wished to advance

(3) There was no good reason why the specific grounds could not have been set out concisely as they were in the skeleton argument for this hearing – and was the case in *Onyx* in which the "core reasons" had been set out in the written application

(4) There are a number of reasons why the grounds should be set out concisely in the application. The 28 day time limit for making an application for costs would be rendered meaningless if the application for costs was merely a starting point and there was no requirement to set out at least succinct grounds which could need only be provided [sic] after the time limit has expired. A respondent to an application for costs would not have a fair opportunity to respond if the succinct grounds are not set out. It is particularly important to set out the specific grounds on which an application is made for costs as costs are the exception rather than the rule.'

Appeal to the EAT; questions of law; limitations on the EAT's power to intervene

PI [1649]

***Preston v E.ON Energy Solutions Ltd [2022] EAT 192* (*6 January 2023, unreported*)**

This decision of the EAT under Eady P concerned primarily a question of the application of the laws on reasonable adjustments and is an interesting example. However, at one stage in the discussion of the relevant legal principles the judgment makes an important point on the ability of an appellate court such as the EAT to interfere with a first instance ET decision, in the light of a recent decision of the Court of Appeal.

The claimant suffered from a condition that constituted a disability. However, the ET found on the facts that the employer had neither actual nor constructive knowledge of this. He went off sick due to stress, but the ET found that this was caused by factors *other than* the disability. The employer subsequently acquired knowledge of the disability and proposed adjustments to allow the employee to return to work, but he refused to engage with these and was dismissed for that reason. The ET rejected his claims of disability discrimination, on the bases that the employer lacked knowledge before the sickness absence and had proposed reasonable adjustments after that; any detriment due to the dismissal was a justified means of pursuing the legitimate aim of managing sickness absence. The EAT, dismissing the appeal, held that the ET had applied the law correctly and come to defensible conclusions on the facts.

The procedural point related to whether the EAT could interfere in a case such as this. The point was that recently in *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 (an appeal from the Business and Property Court) Lewison LJ had given guidance to appeal courts generally as to their functions and powers when hearing appeals essentially challenging a trial judge's conclusions. What is important is that the EAT here held that this general guidance is *consistent* with the guidance already given in the specific employment context, principally in *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, [2021] IRLR 1016 per Popplewell LJ, which is considered at **PI [1649.01]**, and then subsequently in *Sullivan v Burt Street Capital Ltd* [2021] EWCA Civ 1649, [2022] IRLR 159 per Singh J, which is considered at **PI [1649.02]**. There is thus no need for any reconsideration here.

REFERENCE UPDATE

Bulletin	Case	Reference
531	*Clark v Sainsburys Supermarkets Ltd*	[2023] ICR 20, EAT
533	*Element v Tesco Stores Ltd*	[2023] IRLR 102, EAT
533	*Marangakis v Iceland Foods Ltd*	[2023] IRLR 140, EAT
533	*Easyjet plc v Easyjet European Works Council*	[2023] IRLR 147, EAT
533	*Tyne & Wear Passenger Transport Executive v NURMTW*	[2023] ICR 148, CA
534	*Concentrix CVG Intelligent Contact Ltd v Obi*	[2023] ICR 1, EAT
534	*LF v SCRL*	[2023] ICR 133, ECJ

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