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Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

The meaning of 'worker'; implied terms

AI [81], AII [194]

Manning v Walker Crips Investment Management Ltd [2023] EAT 79 (14 June 2023, unreported)

Applying the 'worker' definition to higher grade and more unusual forms of engagement can be difficult, as this case before Ford DHCJ in the EAT shows. One fundamental point in the extensive judgment is that 'worker' is not just 'employee' with knobs on, but must be interpreted with respect to the statutory definition in question, in the light of the protective intent of the legislation.

The claimant was an investment manager with the respondent; some managers were direct employees, but the claimant was one of the 'associates', doing the same work but under a contract which stated that he was an independent contractor, that there was no intent to create an employer/employee relationship and that he could use employees/agents to provide services on his behalf, subject to approval by the respondent at its complete discretion. This last element was in fact never used by him, but he did make his own investments during normal working hours, as all managers were allowed to do. The question arose whether he was a worker under the ERA 1996 s 230 (for the purposes of a whistleblowing claim) and the Working Time Regulations 1998 SI 1998/1833.

The ET held that he was not, on two grounds. First, the employer's discretion to approve a substitute was subject to an implied term that it would not be withheld unreasonably. This, according to the ET, strengthened the substitution effect, pointing against worker status. Moreover, it showed it was genuine and not a sham, negating the necessary element of personal service, even

though on the facts it had not actually been used by him. Secondly, the respondent was in fact a client or customer of the claimant's own business, which he could conduct during working hours.

The EAT upheld the most important parts of the claimant's appeal and remitted the case for reconsideration. This was on four main grounds:

(1) The ET was wrong to imply a term cutting down the substitution clause. It was not necessary or obvious. Moreover, the respondent had relied on the important decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] IRLR 487 that a discretion may impliedly have to be exercised lawfully and rationally (see **AII [194.01]**) but that case was distinguishable because the purpose of such an implication there was to *extend* legal protection for the individual, whereas here its effect would be to counteract the protection intended to be given by classification as a worker (see particularly at [52]).

(2) The ET had erred in ignoring the fact that the substitution clause had never been used in practice (citing *Uber BV v Aslam* [2021] UKSC 5, [2021] IRLR 407).

(3) The ET had erred in placing emphasis on the statements of independent status and denying an employment relationship.

(4) Performing personal trading during normal hours (in common with other traders in both categories) should not have been interpreted as indicating the he was conducting business with persons other than the respondent. The latter had relied on *Wolstenholm v Post Office* [2003] IRLR 199, [2003] ICR 546 where it was held that a postmaster was not a worker, but the EAT here held that that was factually distinct, due to the rest of the commercial business carried out in post offices and their work as the Post Office's agents.

The EAT judgment acknowledges at the beginning its generally restricted role of reviewing an ET's decision on questions of fact, but these were legal errors, requiring the remission. The case is an interesting example generally, but legally it is perhaps the interpretation of *Braganza* that is most important and novel.

The meaning of worker; the basic requirement of a contract; use of service company

AI [83.02]

***Plastic Omnium Automotive Ltd v Horton [2023] EAT 85* (*28 June 2023, unreported*)**

In her judgment in this case, Judge Tucker stresses the importance of taking a structured approach to the actual wording of the legislation when applying the definition of 'worker' in the ERA 1996 s 230(3)(b) **Q [854]**. This is important in itself, but it is the result of the case that is likely to matter in any future cases concerning the use of a service company by a claimant later claiming that they were in fact a worker – provided the relevant contractual

nexus was genuinely between the employer and their service company, it is unlikely that they will qualify, no matter how many other factors would otherwise have pointed in that direction. On a wider canvas, it is an interesting (if rare) example of the application of corporate personality in employment law.

The claimant operated as a project manager through his service company, of which he and his then-wife were employed directors. It contracted with POA Ltd to provide his services (and those of another individual) over several years. In many ways, he operated in much the same way as directly employed managers. When this was terminated, he brought ET proceedings, arguing that he was both an employee and a worker. The ET ruled out employee status, but held that he was a worker, for the purposes of a claim for unlawful deductions. POA Ltd appealed.

In the EAT it was held that the ET had erred, primarily by going straight to 'indicia' such as integration into the firm's business and wider concepts such as subordination. In doing so it had failed to take the necessary structured approach. It is true that in most contested 'worker' cases the emphasis tends to be on the questions of personal service and the profession/business caveat (where these wider concepts may be helpful) *but* when applying the definition the *primary* requirement that 'A must have entered into or worked under a contract … with B' (see *Catt v English Table Tennis Association* [2022] IRLR 1022, EAT). Here, B (POA) had entered a contract with the service company, not the claimant himself. It is sometimes the case that a sham contract can be ignored, but here the ET had contradicted itself, in a way that was fatal to the claimant's case. When considering employee status it had held as a matter of fact that the original contract between POA and the service company was genuine and reflected the intent of the parties, especially as it was advantageous to the claimant who had in fact turned down an offer of direct employee status. The ET on considering worker status had held that that was not 'the real issue' and had ignored it in the light of all the other pro-worker factors (and an *Autoclenz* search for the real relationship). However, that was an error of law of such a nature that it was not necessary for the case to be remitted and the EAT itself declared that he was not a worker.

DIVISION CI WORKING TIME

Daily rest; weekly rest periods; relationship between them

CI [112], CI [118]

I H v MAV-START Vasuti Szemelyszallito Zrt C-477/21, [2023] IRLR 591, ECJ

In the Working Time Directive 2003/88/EC, art 3 provides for daily rest of eleven consecutive hours and art 5 provides for weekly rest of a minimum uninterrupted period of 24 hours, in addition. The question in this case from Hungary was the relationship between them. The claimant was a train driver working various shifts. He was given the appropriate weekly rest period, but

when he took it his working arrangements did not allow him to take the daily rest on each side of it. He claimed that this breached his directive rights. The employer in effect argued that as long as the total rest was sufficient there was no breach. On a reference by the Hungarian court, the ECJ held for the clamant, on the basis that arts 3 and 5 are separate and independent rights, both as a matter of interpretation of the directive and as a matter of legislative policy, given that they in fact govern different types of rest. In relation to the employer's argument, the judgment states that 'an interpretation according to which the daily rest period formed part of the weekly rest period would render meaningless the right to daily rest referred to in Article 3 of that Directive, by depriving the worker of the actual enjoyment of the daily rest period provided for in that provision, where he or she is entitled to a weekly rest period.'

These articles are enacted here in the Working Time Regulations 1998 SI 1998/1833 regs 10 and 11 **R [1081]**, **R [1082].** Although this decision obviously post-dates UK withdrawal from the EU, it may still be persuasive, and considers such a fundamental point of interpretation that it is likely to be so.

DIVISION DI UNFAIR DISMISSAL

Misconduct; disciplinary hearing; who should conduct the hearing?

DI [1505]

Charalambous v National Bank of Greece [2023] EAT 75 **(*19 April 2023, unreported*)**

The ACAS Code of Practice states that different people should carry out the investigation and disciplinary hearing, but this case concerned a slightly different point, namely whether the disciplinary hearing must be conducted by the dismissing officer themselves (so that the claimant can address them directly). The text at **DI [1506]** doubts whether there is any such mandatory rule, suggesting for example that a dismissal may be fair if an investigating officer provides a full report (including any mitigation) to the dismissing officer. That passage was cited to the EAT and approved by it in this case before Gullick DHCJ.

Those were indeed the facts. The claimant was accused of serious procedural flaws in handling sensitive information, potentially constituting gross misconduct. This was investigated by Mr H in two face-to-face meetings with the claimant and her union representative at which she could make her case and raise mitigation points; H then drew up a full report of this which went to Mr V who took the decision to dismiss. When the claimant brought proceedings the ET took the view that although it may be the norm for the dismissing officer to hear the employee directly, in the circumstances of this case the procedure adopted was fair.

The claimant appealed, founding heavily on *Budgen & Co v Thomas* [1976] IRLR 174, [1974] ICR 344, EAT where a dismissal solely on the basis of a

report from a security officer was held to be unfair. The claimant argued that this either established a rule requiring a direct hearing or at the least a strong presumption in favour of that. The problem was that *Budgen* is an old case (only four years after the inception of unfair dismissal) at a time when the tribunals were feeling their way, especially in relation to procedural requirements; at least one later case suggested that it may have overstated the position (see **DI [1506]**), hence the reservation expressed in the text, especially as the modern tendency generally is to leave so much of the ultimate adjudication on fairness to the ET and the statutory test (rather than the now-familiar 'barnacles of case law'). The EAT dismissed the appeal. At [40], [41] the judge states:

> 'I do not regard *Budgen* as establishing that, in order for a dismissal to be fair, there must necessarily be a meeting between the employee and the dismissing officer. All the references by this Appeal Tribunal in its judgment to the employee having the opportunity to "say whatever he or she wishes to say" do not mean that such communication cannot, in principle, either be in writing or by way of a report to the dismissing officer.
>
> I agree that it is desirable that such a meeting between the employee and the dismissing officer should take place. It is good practice and something which many employers' disciplinary procedures will expressly require. No doubt many dismissals will be found to be unfair if no such direct meeting takes place. *Budgen*, where the entire process was conducted by the security officer relaying events to the personnel manager over the telephone, was one of those cases. But I do not regard *Budgen* as establishing that a dismissal must be unfair if such a meeting does not take place. As the editors of *Harvey on Industrial Relations and Employment Law* point out in the passage to which I have already made reference, it may be reasonable for an employer to dismiss where a full report, including potentially mitigating features, is provided to the dismissing officer.'

For good measure, the EAT also held that the ET had been justified in finding that the claimant had had an appeal heard by a more senior manager at which she was present and able to make her case; contrary to the claimant's argument, this had not been a sham and would have been capable of making the dismissal fair anyway.

DIVISION L EQUAL OPPORTUNITIES

Religion or belief; causal relationship

L [207], L [270]

***Higgs v Farmor's School [2023] EAT 89* (*16 June 2023, unreported*)**

This case concerning a dismissal of a school assistant who had given online tweets about her views on the vexed question of gender identity has been to the EAT twice already on the question of recusal of EAT side members because of their (or their home organisation's) published views on the topic

(see **Bulletin 531** and **Bulletin 538**). The result was that the President decided to hear the case herself and this is the outcome.

The ET had rejected the claimant's claim for direct discrimination and harassment on the ground of her religion and beliefs. It decided that her suspension then dismissal were not because of these beliefs but because of the school's fears that people reading her tweets would think that she held homophobic/transphobic views (even though she denied this). The EAT allowed her appeal, holding that the ET had failed to consider whether there was a close and direct nexus between her beliefs and the respondent's treatment of her (applying *Eweida v UK* [2023] IRLR 231, ECtHR), particularly in the light of her Convention rights under arts 9 and 10 and their supporting case law. Moreover, in stressing the respondent's objections to her posts it had also failed to apply properly a proportionality approach to the well-known (but inherently difficult) distinction between objecting to the manifestation of protected beliefs (protected) and reasonably objecting to the *way* in which that manifestation was done (potentially not protected – see particularly *Page v NHS Trust Development Agency* [2021] EWCA Civ 255, [2021] IRLR 391). The case was referred for reconsideration of these points.

One final point to note comes at the end of the President's judgment. She was invited to give further guidance on this area, not just for the reconsidering ET but more widely for those having to contend with it. In the context of unfair dismissal laws having to apply in novel contexts, she has recently counselled against doing so, given that cases are so fact-specific and that one-size-fits-all approaches have their dangers (see *Lovingangels Care Home Ltd v Mhindurwa* [2023] EAT 65 (12 May 2023, unreported), considered in **Bulletin 539**. However, in this context she did so, at [94] as follows:

> 'All that said, I can see that, within the employment context, it may be helpful for there to at least be some mutual understanding of the basic principles that will underpin the approach adopted when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression.
>
> (1) First, the foundational nature of the rights must be recognised: the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.
>
> (2) Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others. Where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not, properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.

(3) Whether a limitation or restriction is objectively justified will always be context specific. The fact that the issue arises within a relationship of employment will be relevant, but different considerations will inevitably arise, depending on the nature of that employment.

(4) It will always be necessary to ask …: (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective; (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

(5) In answering those questions, within the context of a relationship of employment, the considerations identified by the intervenor are likely to be relevant, such that regard should be had to: (i) the content of the manifestation; (ii) the tone used; (iii) the extent of the manifestation; (iv) the worker's understanding of the likely audience; (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business; (vi) whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer.'

Harassment; general guidance; knowledge of claimant

L [413]

Greasley-Adams v Royal Mail Group Ltd [2023] EAT 86 **(*7 June 2023, unreported*)**

This case before Lady Haldane in the EAT addresses a point of interpretation in the EqA 2010 s 26 **Q [1479]** on harassment, on which there appears to have been no previous direct authority – can there be conduct having the purpose or effect of violating the claimant's dignity (within the s 26(1)(b)) if they were actually not aware of that conduct at the relevant time? The answer is 'No', which with hindsight may seem to have been obvious, but the opposite argument was in fact given a good run here by a litigant in person represented by his wife.

The problem arose in extended litigation by the claimant, a part-time lorry driver who was accepted as having a disability. Earlier litigation having been settled, he continued with claims of harassment, victimisation and whistle-blowing detriment. On the harassment point, his problem was that the ET, in dismissing his claim, found that he was unaware at the relevant time of the

employer's conduct he complained of; it had only come to light in later proceedings investigating counter-complaints against him by two colleagues who had accused him of bullying and harassment. The ET rejected the harassment claim on this ground. In his appeal on this point, his wife argued that 'dignity' is a wide concept and it should be possible to compromise it by actions/words not at the time known by the claimant. Her problem was that s 26(4) states that an ET must consider several factors including 'the perception of [the claimant]'. This is the subjective element of that sub-section, which points towards actual knowledge. Also, there are dicta in two of the leading cases in favour generally of that conclusion (see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, EAT and *Pemberton v Inwood* [2018] EWCA Civ 546, [2018] IRLR 542, considered at **L [413.01]–L [414]**). In spite of her strong *a priori* arguments, the EAT held against this interpretation and applied these cases. At [19] and [20] the conclusion is as follows:

> 'Dr Greasley-Adams presented a nuanced and considered analysis in support of her contention that a person's dignity could be violated even when they were not aware of the unwanted conduct on the basis that "dignity" means how an individual is held in esteem by those around them and thus can be violated without their direct knowledge. She properly conceded she could offer no authority directly in point, but I have nevertheless given the submission careful consideration.
>
> Ultimately I have concluded that this is a flawed proposition. Giving the language of s.26 its plain meaning makes it clear that the test is a cumulative one. By that I mean that it is stated that A harasses B if, firstly, they engage in unwanted conduct, secondly that the conduct has the effect of violating B's dignity (for present purposes) and that in deciding whether the conduct has that effect, "each of the following *must* (my emphasis) be taken into account …a. the perception of B, b. the other circumstances of the case, and c. whether it is reasonable for the conduct to have that effect." In other words, the perception of the person claiming harassment is a key and indeed mandatory component in determining whether or not harassment has occurred. If there is no awareness, there can be no perception.'

DIVISION PI PRACTICE AND PROCEDURE

Extension of time; ignorance or mistake resulting from faulty professional advice

PI [208]

BLISS Residential Care Ltd v Fellows [2023] IRLR 528, EAT

As the text points out at **PI [208]**, the '*Dedman* principle' that normally a claimant cannot rely on a mistake by a professional adviser to extend the primary time limit for a claim such as unfair dismissal may sometimes operate harshly, but is well entrenched in our law. This decision shows its continuing strength, even in circumstances which (in themselves, as opposed to in law) may evoke some sympathy, as the ET found in a decision then reversed by the EAT.

The claimant instructed solicitors to bring a claim for unfair dismissal. The case went to a newly qualified solicitor who had not handled such a case before; it was during the Coronavirus pandemic and she was working from home with reduced supervision. She firstly miscalculated the time limit and then, without consulting the Presidential Practice Direction on the presentation of claims (**PI [2506]**), sent the application off by post to the wrong office. She did not realise this until she received a letter pointing this out. By a quirk of the facts here, this was on the very day that the correct time limit expired, with the result that if she had immediately resent the application by email it would have been in time. However, she resent it by post, arriving too late. The ET cited the correct case law but went on to express sympathy with the solicitor's mistake ('not unreasonable') and held that it had not been reasonably practicable to present in time.

The employer appealed and Judge Tayler in the EAT upheld that appeal and dismissed the claim. While in principle there was nothing wrong with expressing sympathy, the fact remained that this case fell squarely within the *Dedman* rules. This is summed up at [30]:

> 'The fundamental errors were in failing to properly calculate the primary time limit in the first place and in not reading and complying with the Presidential direction. There was nothing in the circumstances of this case that meant that the failure to do so was reasonable even in the case of a recently qualified solicitor submitting a claim to the employment tribunal for the first time. All practitioners must submit their first claim form. They can be expected to take especial care in doing so. A client is entitled to expect that of a legal advisor. One necessarily has some sympathy for someone who makes a mistake at the start of their career. However, before accepting instructions to act in an employment tribunal claim, a solicitor should know how to calculate the time limit for the submission of a claim and how it is to be submitted. A new solicitor might not be expected to know the finer points of employment law, but any professional adviser should know those basic points.'

There was then a denouement to the case which was doubly unfortunate for the claimant. Having won the appeal, the employer then applied for costs, see [2023] IRLR 531. The claimant was 62, with cancer, on benefits and 'impecunious'. However, once again sympathy could only go so far. Given that the substantive finding was that there was no good case for an extension, the legal question was whether the claimant's arguments were misconceived and with no reasonable prospect of success. On the facts that was so at both the ET stage and in resisting the appeal. The respondent employer had argued that her chances of compensation from the solicitors should be taken into account, but the EAT held that that remained speculative. The result was a 'modest' award of costs of £1,000.

Reconsideration of judgments; error by a representative

PI [1149]

Phipps v Priory Education Services Ltd [2023] EWCA Civ 652

In *Ironsides, Ray & Vials v Lindsay* [1994] IRLR 318, [1994] ICR 384, EAT, Mummery J stated that 'Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review'. It has long been considered that that is the basis of the law here. In the instant case, the Court of Appeal gave its first consideration to the issue. The result is that arguably the existing approach is approved *but* with more emphasis on the word 'generally', widening the scope for exceptional cases. It is made clear that there is no absolute rule that professional fault cannot found a request for a reconsideration. Moreover, the facts of the case show a good example of the sort of case that might be the exception. The judgment of Bean LJ ends with a suggested reform to avoid the problem under consideration in future.

The claimant brought ET proceedings through a legal adviser. The day before the start of a four-day hearing her representative applied to the ET for an adjournment because the representative had suffered a 'medical emergency'. The ET agreed to this but required him to provide medical evidence on this. It was not provided, then or later. The ET sent three strike-out warnings to the representative who still failed to respond. The claim was struck out. The first that the claimant knew of any of this was when she was informed of the strike-out. She applied for a reconsideration, but this was refused by the ET on the basis that the fault lay with her representative, and the EAT upheld that ruling.

On further appeal, however, the Court of Appeal allowed her appeal. The judgment considered three leading cases in the EAT which are analysed at **PI [1149]–PI [1149.02]**, namely *Linsay* (above), *Trimble v Supertravel Ltd* [1982] IRLR 451, [1992] ICR 440, EAT and *Newcastle upon Tyne City Council v Marsden* UKEAT/0393/09, [2010] ICR 743. From them, it isolated the following three principles:

(1) The interests of justice test is broad-textured and should not be so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires. The ET has a wide discretion in such cases. But dealing with cases justly requires that they be dealt with in accordance with recognised principles.

(2) Failings of a party's representative, professional or otherwise, will not generally constitute a ground for review where the disappointed party has had an opportunity to argue the case and wishes to reargue it. This is because considerable weight must be given to the public interest in the finality of judicial decisions, both to protect the opposing party and to avoid over-burdening the employment tribunal system. A typical example of this is a case where a full hearing has been conducted but an argument was not put, or a witness was not called. In most such cases

reconsideration will be refused on the grounds that the claimant has had a fair opportunity to put their case.

(3) However, the general rule that a party to tribunal proceedings cannot rely on the default of their representative as the basis for an application for reconsideration is not a blanket rule. In the exceptional circumstance where a party has not had a fair opportunity to present their case, that is a significant procedural shortcoming which may be appropriately dealt with by reconsideration.

In the circumstances in the instant case (most like *Marsden*) it was of course that third principle that was in issue. Applying it, the ET's decision was held (unusually in a procedure-based case) to have been perverse. The factors pointing to that were:

(1) the strike-out occurred entirely because of the improper conduct of the claimant's representative;

(2) as the ET found, the claimant was not implicated in this misconduct and had no knowledge of what was happening until she received the strike-out decision;

(3) the application for reconsideration was made within ten days of the strike-out decision;

(4) the claimant had not at any stage been given a fair opportunity to present her case;

(5) any supposed alternative remedy against her particular representative was fanciful.

The judgment ended with a suggestion to the Presidents of ETs to consider a change of practice so that notice of an intended strike-out should in future go to the claimant, as well as any representative, so that they are at least put on notice of any default by the latter.

REFERENCE UPDATE

Bulletin	**Case**	**Reference**
535	*Millicom Services UK Ltd v Clifford*	[2023] ICR 663, CA
536	*Lloyd v Elmhurst School*	[2023] ICR 644, EAT
537	*Ministry of Justice v Dodds*	[2023] ICR 715, EAT
538	*Thukalil v Puthenveetil*	[2023] IRLR 512, EAT
538	*Fire Brigades Union v Embury*	[2023] IRLR 520, EAT
538	*Sainsbury's Supermarkets Ltd v Clark*	[2023] IRLR 562, CA

Reference Update

Bulletin	Case	Reference
538	*Boydell v NZP Ltd*	[2023] IRLR 572, CA

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