Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to **1 August**.

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LEGISLATION

New redundancy protection comes into force

The passage of the Protection from Redundancy (Pregnancy and Family Leave) Act 2023 was reported in **Bulletin 539**. Its provisions came into force on 26 July. It operates entirely by way of amendments to the ERA 1996. These changes will be made in Div Q in Issue 310.

First commencement for the Employment (Allocation of Tips) Act 2023

The Commencement (No 1) Order 2023 SI 2023/876 brings into force on 31 July 2023 s 9 of the Act which enacts new ss 27P–27T of the ERA 1996 providing for the Secretary of State to issue a Code of Practice. These are the first provisions into force of a new Part 2B of the 1996 Act, 'Tips, Gratuities and Service Charges'. Sections 1–8 and 10–12 are also brought into force on 31 July, but only for the purposes of making such a Code of Practice. The amendments in s 9 will be incorporated into Div Q in Issue 310.

Statutory amendment of flexible working law

The Employment Relations (Flexible Working) Act 2023 has received Royal Assent. Its changes to existing law are that the employer will have to deal with a request within two months (unless an extension is agreed), an employee will be able to make two requests within a 12-month period, the employer will not be able to refuse a request until it has consulted the employee and the employee will no longer have to explain what effects they think the change would have and how they might be dealt with. As Daniel Barnett points out, what the Act does not do is (1) make it a day one right, (2) give a legal right to appeal a refusal or (3) give a definition or any minimum standard required for the consultation.

The Act operates wholly by way of amendments to the existing scheme which is contained in Part 8A of the ERA 1996. It will be put into Div Q in its existing form in Issue 310, pending its commencement which is to be by order.

New Presidential guidance

The President of Employment Tribunals (England and Wales) has issued Presidential Guidance on Alternative Dispute Resolution. This explains four versions of ADR – the involvement of ACAS, judicial mediation, judicial assessment and a dispute resolution appointment. There are protocols about the last three at the end of the document. The last one is new and follows a pilot scheme. It goes beyond a mere invitation for drinks, and actually requires the parties to attend (at a late stage in the process), though of course there is no obligation actually to agree to settle. This guidance will be incorporated into Div PI in Issue 310.

Taking the long view (as in a rather good Radio 4 programme), it is interesting to see this renewed emphasis on ADR for ETs, when originally ETs were themselves supposed to be a form of ADR for the courts. On a personal note, when I chaired Social Security Appeal Tribunals I had a very longstanding side member who, as a TU representative, had also been on Industrial Tribunals in their early days. She intrigued me one time by talking about those days, when an Industrial Tribunal would list and get through four cases a day. O tempora, o mores, or perhaps here O tempora, o more litigation.

DIVISION AI CATEGORIES OF WORKER

Agency workers; government amendment struck down

AI [183.04]

***R* (*ASLEF*) *v Secretary of State for Business and Trade [2023] EWHC 1781* (*Admin*)**

There has for many years been a ban in the legislation relating to employment agencies on providing labour for, in effect, strike breaking (most recently in the Conduct of Employment Agencies and Employment Businesses Regulations 2003 SI 2003/3319 reg 7). However, in 2022 the government by amending regulations (SI 2022/852) revoked that regulation, rather suddenly. Now, however, a legal challenge to those amending regulations has succeeded. Linden J upheld the principal argument by the 13 unions involved that the government had acted illegally by failing to consult on their proposals. There had been a consultation of sorts in 2015 when these proposals first emerged, but the judge found that there was no evidence that this had been considered by the then-Business Secretary in 2022. This failure to consult was held to have been so unfair as to be irrational, meaning that the regulations had to be struck down. In these circumstances, it was unnecessary for the judgment to go on to consider the unions' alternative argument that the regulations breached art 11 of the European Convention. It remains to be seen if the government will now appeal and/or seek to

reintroduce the amendment in the same or more limited form, presumably after a fresh consultation exercise. Perhaps the lesson to be learned by the government is that they should have consulted that leading work, *Smith on Administrative Law*, a slim tome of one chapter, based on the simple principle 'Listen, and *then* say "No" '.

DIVISION AII CONTRACTS OF EMPLOYMENT

Disciplinary and grievance procedures; voluntary procedures

AII [307]

Colbert v Royal United Hospitals Bath NHS Foundation Trust [2023] EWHC 1672

In this High Court action before Squires DHCJ the claimant, a consultant accused of misconduct and bullying, sought an interim injunction to stop disciplinary proceedings. His principal complaint was that, contrary to the hospital's disciplinary code which was part of his contract, the employer was not ensuring that witnesses against him were to attend in order to be cross-examined. He also claimed to be entitled to see certain documents in an unredacted form. He lost his claim. On the principal ground, it was held that his argument that the procedure required attendance of witnesses and their cross-examination was unsustainable. In addition, on the procedural point of the appropriateness of an interim injunction, it was held that his proceedings were premature, because a court will normally wait until the outcome of an internal procedure, on the basis that, in a well-known phrase, a court will not 'micro-manage' an employer's internal procedure. The judgment at [32]–[38] contains a useful and lucid summary of the law here.

Two comments are offered:

(1) Although this case was a common law one about the meaning and interpretation of an internal procedure, its result is much in line with the case law on internal procedures in the context of the statutory law on unfair dismissal, in particular that there is no absolute rule that an employee can require the physical presence of witnesses, nor is there such a rule that the claimant must always have an opportunity to cross-examine them – see *Khanum v Mid-Glamorgan Area Health Authority* [1978] IRLR 215, [1979] ICR 40, EAT (considered at **DI [1513]**) and *Santamera v Express Cargo Forwarding* [2003] IRLR 273, EAT (considered at **DI [1515.01]**).

(2) There might be a loose analogy here with *Charalambous v National Bank of Greece* [2023] EAT 75 (19 April 2023, unreported) considered in last month's **Bulletin 540** where it was affirmed that there is no absolute rule that the accused employee must have a face-to-face meeting with the dismissing officer. The test remains a wider one of overall fairness in the particular circumstances.

DIVISION CIII WHISTLEBLOWING

Importance of structured approach; manner of disclosure

CIII [5], CIII [67]

Kealy v Westfield Community Development Association [2023] EAT 96 (11 July 2023, unreported).

In this whistleblowing case before Judge Tayler in the EAT the decision of the ET was overturned and the matter remitted to a new ET to reconsider. The judgment is of note for two aspects of more general interest:

(1) It is another case stressing the need for structured decision-taking in this area (see **CIII [5]**). The first matter to be considered is whether there was a 'qualifying disclosure' at all. In this context, the ERA 1996 s 43B **Q [68.02]** sets out a number of steps that must be taken in deciding whether such a disclosure has been made. The judgment quotes these as set out by Judge Auerbach in *Williams v Michelle Brown AM* UKEAT/0044/19 (29 October 2019, unreported):

> 'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'

Once a qualifying disclosure is established, the next stage is to consider whether it is a protected disclosure which involves the remaining sections of Part IVA of the Act. In the case itself, the EAT held that the ET had not only not followed this guidance on a qualifying disclosure but had also gone on wrongly to conflate this with the separate tests for whether a disclosure was 'protected'. One other problem here was that the ET in places had used paraphrases of the statutory language rather than that language itself.

(2) The particular head of protected disclosure here was 'Disclosure in other cases' under ERA 1996 s 43G **Q [668.07]**. On this aspect, the point is made that Parliament deliberately made the conditions harder – in relation to disclosure to the employer (the normal case) under s 43B the worker must show that they reasonably believed that the information disclosed tended to show one or more of the enumerated factors, whereas under s 43G the worker must show that they reasonably believed that the information disclosed (or any allegation in it) was substantially true. However, it is also pointed out that this remains subjective and stops short of a requirement to show that objectively it actually *was* true.

DIVISION DI UNFAIR DISMISSAL

Termination by the employer; continuation of the employment relationship; applying Hogg

DI [222]

***Jackson v University Hospitals of North Midlands NHS Trust [2023] EAT 102* (*19 July 2023, unreported*)**

As Judge Clarke in the EAT said in this case, the rule in *Hogg v Dover College* [1990] ICR 39, EAT is now well established in dismissal law. Along with its companion case, *Alcan Extrusions Ltd v Yates* [1996] IRLR 327, EAT, it establishes that an employee faced with major changes in terms being imposed on them, such that the new terms are radically different, can continue in the *employment* but claim unfair dismissal on the basis that the original *contract* has been terminated by the employer's actions. As the judge further states, this gives protection to the employee in this difficult situation and is a factor for an employer to consider when deciding whether to go down the route of imposing a change. It also means that, unlike constructive dismissal, the employee does not have to resign (either at all, or at least not immediately). The instant case is a good example of the rule in application, in an unusual context of a common law breach of contract claim concerning a contractual redundancy payment by an employee placed in a difficult bind by the employer's actions.

The claimant was a nurse employed under the Agenda for Change (AFC) terms. This has nine bands; she was on band 6. In order to save money, her department was reorganised, to limit the number of band 6 posts. Those on this band could apply for the posts left; if they did not get one they were to go on to a new post on band 5. That is what happened to the claimant. She was told this by letter in November 2018, saying she would transfer in December. She refused to agree to this and raised grievances. This was initially rejected but eventually upheld on appeal. However, in the meantime there was a complex series of events leading up to her leaving in late January 2019, involving a resignation, withdrawal of it and possible notices flying both ways. All this was even further complicated by the employer not realising that in law it had created a redundancy situation.

The key point in the case concerned a provision in the AFC terms for enhanced redundancy pay (worth in her case £36,644, reduced to the statutory maximum of £25,000). However, it also said that an employee would lose this right if they left before the expiry of notice. The employer refused to pay the statutory redundancy pay and relied on this exception to refuse to make the AFC redundancy payment. She brought ET proceedings in which the ET upheld her claim for unfair dismissal and awarded the statutory redundancy payment. However, it dismissed her breach of contract claim for the AFC payment, holding that she had left while eventually under notice.

Her appeal to the EAT concentrated on this one (valuable) element and whether, in relation to it, she could succeed under *Hogg,* the point being that

if she had been dismissed *from her band 6 contract* in December, then that was a fait accompli, there was no dismissal by notice at the point she was made redundant and the AFC exception did not apply. The fact that she had worked on for a short period in confused circumstances became irrelevant. The EAT upheld her appeal, holding that the ET had not properly applied *Hogg*, which requires a 'before and after' exercise to determine as a matter of fact just how fundamental the changes imposed by the employer were. The case was remitted to a new ET to make further findings of fact on the effect of the imposed changes and then to apply *Hogg*. Reading this case in detail shows how complex life can get for an employee not wanting to lose a job but unwilling to accept a major demotion/loss of income, and how *Hogg* can be used to cut this particular Gordian knot.

DIVISION L EQUAL OPPORTUNITIES

Disability discrimination and incapability dismissals

L [246.01], L [374]

Boesi v Asda Stores Ltd [2023] IRLR 625, EAT

***Pilkington UK Ltd v Jones [2023] EAT 90* (*6 July 2023, unreported*)**

When disability discrimination was first introduced there were fears among employers that dismissals for long-term medical incapacity (lawful under unfair dismissal law) might become impossible. That has not proved to be so, provided handled properly. These two EAT cases show that there can be discrimination-based challenges, but the employee must also exercise care in this area. They also illustrate the differences between an action for straightforward direct discrimination under the EqA 2010 s 13 **Q [1466]** and the more specific head of discrimination arising from disability under ERA 1996 s 15 **Q [1468]**.

In *Boesi* the claimant was a warehouse assistant disabled by degenerative back problems, with a poor prognosis for recovery. She was off work for 15 months, after which her case was reviewed under the employer's absence policy and she was dismissed. She brought ET proceedings for direct disability discrimination, complaining that enough had not been done to find her other work. As the claim was under s 13 there had to be a (hypothetical) comparator. This was fixed as a person who was not disabled but had been absent from work for that period and with that prognosis. On the evidence, the ET concluded that that comparator also would not have been considered for other work and would have been dismissed. There had therefore not been less favourable treatment because of the disability. The claimant appealed, arguing that the comparator should have been simply someone not disabled. However, Eady P in the EAT rejected the appeal. A hypothetical comparator must be comparable in *all* the circumstances. All that the claimant had shown here was that the lack of other work and the eventual dismissal may have been in a general sense *consequences* of her disability, but under s 13 they had not been *because of* it. At the end of her judgment the President commented that the case showed why s 15 is there to deal with certain cases of disability

discrimination. However, as the claimant had restricted her claim to s 13 that was all that the ET was required to adjudicate on and it had done so properly.

In *Pilkington* the claimant was disabled by a shoulder problem with no prospect of recovery. He was put on to lighter work but then went on sickness absence for four months. During this, he was seen wearing work boots and apparently helping a farmer friend (though, it would appear, in very minor ways). The employer investigated this and formed the possibly erroneous view that he had been working during sickness absence. It dismissed him summarily. In this case the claimant's disability discrimination claim was brought under s 15 and succeeded before the ET which held that the 'something' arising was that employer belief in fraudulent working, which had led to the dismissal, which was 'in consequence' of that something. The employer appealed but Judge Beard in the EAT dismissed the appeal. The judgment cites the fundamental view in *City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492, that there are two questions to ask: (1) did A treat B unfavourably because of 'something', and (2) did that 'something' arise in consequence of B's disability? These are subjective and objective elements and the test overall of 'in consequence' is looser than the s 13 test of 'because of'. What this case adds to that is that, whereas normally the something will be some physical factor, in an appropriate case an employer's *belief* can also qualify as that something. The ET had been correct in that holding. The judgment does add that this approach may have complicated matters and that the ET could have simply used the sickness absence itself (either alone or along with the belief), but the approach itself was not wrong.

Thus, in the second case the claimant proceeded under the more appropriate section and succeeded. However, although not featuring in *Pilkington*, the President in *Boesi* ended her comment about s 15 by adding that, if that section is used it is still open to the employer with a good reason to end sickness absence to plead justification.

DIVISION NIII EMPLOYEE INVOLVEMENT

Transnational consultation; continuation of EWCs

NIII [605.11], NIII [652.02]

EasyJet plc v EasyJet European Works Council [2023] EWCA Civ 756

Olsten (UK) Holdings Ltd v Adecco Group European Works Council [2023] EWCA Civ 883

These two decisions of the Court of Appeal came closely together, as had the EAT decisions in the cases, which has been rather unusual, given the relative paucity of higher court decisions on European Works Councils.

In *EasyJet* the question was the very existence of such councils since Brexit. Problems arose with the drafting of TICER 2 regs 4 and (particularly) 5. These are set out in **Bulletin 533** covering the decision of the EAT to uphold

the decision of the CAC that the overall effect is to retain existing councils, albeit that no new ones can now be created. That decision has now been upheld by the Court of Appeal, turning down EasyJet plc's further appeal. The reasoning is slightly different. The EAT had relied primarily on statutory interpretation to reach its result but the Court of Appeal doubted that this was possible; indeed it acknowledged that the company had a good argument textually. However, this was outweighed by reliance instead on the other provisions of TICER 1999, the amending regulations and the Explanatory Memorandum, which made it clear that existing councils were indeed to continue to operate. The judgment accepts the argument for the company that it could end up with two councils (one EU and one domestic) but did not consider the problems caused to be insurmountable.

The question of continuing applicability did not arise in *Olsten* because the case has been going on for so long that the facts occurred prior to Brexit. Instead, the question at issue was one of interpretation, as to what constitutes a 'transnational matter'. 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 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 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.

The Court of Appeal have now reversed the decisions of the CAC and EAT. The principal judgment given by Simler LJ starts by saying that the arguments had developed a little since the EAT stage, with more emphasis on the

wording of the actual Adecco I & C agreement and whether the particular clause governing emergency meetings had its own definition of 'transnational'. It was held that it did not; instead, it relied on the general definitional clause at the beginning, which adopted the statutory definition. On that point, the court held that the CAC and EAT had erred in not requiring the sort of commonality that the employer had argued for. This is summed up at [66]:

> 'It follows that a mere coincidence of timing of proposals for collective redundancies or business restructuring happening in undertakings in two countries is not enough to trigger an Extraordinary Meeting and it is not irrelevant that such "exceptional circumstances" are unrelated or have no common rationale or nexus at all. Collective redundancies of this kind would not be transnational in character. They would lack the necessary link or nexus affecting (or potentially affecting) two undertakings in each of two or more countries. This does not require a central management decision, but to qualify as transnational there must be some objective factual nexus between the proposal or proposals to make collective redundancies in two different countries. Thus if the proposal to make redundancies in Sweden *concerns* the undertaking in Germany (because, for example, it has potential effects on employees in the German undertaking) and/or vice versa, the matter will be transnational and an Extraordinary Meeting must be convened if the redundancies also significantly affect existing employees in those two countries. If on the other hand there are two separate, unrelated proposals, each of which only concerns the undertaking in one country and neither has any potential effects on or relates to the undertaking in the other country, no transnational issue arises. It will be for the national employee representative body to be involved in information and consultation in the latter case.'

Thus, the employer's appeal was allowed and the EAT's penalty of £20,000 quashed. It might have been thought that this would have been the end of it, but actually the court could not just find for the employer for one particular reason – the CAC and EAT had approached this question as a matter of law and hence had not made findings of *fact* as to whether there was or was not an element of commonality. Regretfully, given the length of this litigation, the court had to remit the case to the CAC for rehearing.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time; just and equitable extension; burden of proof

PI [277], PI [280]

***Polystar Plastics Ltd v Liepa [2023] EAT 100* (*19 July 2023, unreported*)**

It is referred to in this case before Eady P in the EAT as 'trite law' that the burden of persuasion in a claim for a 'just and equitable' extension of time is

on the claimant . That basic point however went wrong in this case. The claimant had initially lodged a discrimination claim without including an ACAS early conciliation number. He subsequently obtained an EC certificate but, at an ET hearing it was held that this could not rectify the error made with his first ET claim and he undertook to lodge a new claim. The claimant's second ET claim, which included ACAS EC numbers, was received and accepted by the ET but it was out of time. The ET however found that the claimant had had a genuine belief that his first ET claim was validly presented in time (although the basis for that belief was unclear) and on that basis granted the extension. The employer appealed and the EAT allowed the appeal. The major mistake by the EJ here was encapsulated in their conclusion that 'I do not find that it has been proved on the balance of probabilities that the claimant has acted unreasonably in this matter'. Citing the case law set out at **PI [280]**, this was an error of law in that it had put the burden of dissuasion on to the employer. Although it was then said that that would not automatically have vitiated the decision, the mistake was compounded by confusion in the ET judgement as to what exactly it had found as facts, especially as to what the claimant believed and why. Taken together, this did vitiate the ET's decision.

Apparent bias; conduct of members

PI [919]

Aspect Windows (Western) Ltd v Retter [2023] EAT 95 (13 April 2023, unreported)

While there is considerable case law at **PI [919]** ff on when apparent bias can arise in relation to side members (as opposed to the EJ), normally this relates to acts or omissions at the actual hearing. However, this decision of Judge Auerbach in the EAT concerned the unusual position of a challenge based on the conduct of a side member *after* the hearing. After the ET found for the claimant, the member in question posted on her LinkedIn page a link to a report about the decision in the Mail Online. Followers of hers then responded on LinkedIn and she responded to them. The unsuccessful employer appealed on the basis that the LinkedIn posts gave rise to apparent bias against it. Dismissing the appeal, the EAT held that it is possible for post-hearing matters to give rise to a challenge, so that it was necessary to apply the well-known guidance in *Porter v Magill* [2002] AC 357, [2002] 1 All ER 465, HL which is set out at **PI [912.01]** ff. Applying the 'fair-minded and informed observer' test here, having considered the contents of the post, it was held that the conduct of the side members did not reach the seriousness for apparent bias. However, it is not difficult to understand the concerns of a losing party in such circumstances and it is arguable that it is at the very least *unwise* for a side member to engage in social media discussion of a decided case.

REFERENCE UPDATE

Bulletin	Case	Reference
537	*Minnoch v Interservefm Ltd*	[2023] ICR 861, EAT
538	*Miles v Driver and Vehicle Standards Agency*	[2023] IRLR 630, EAT
538	*Higgs v Farmor's School*	[2023] IRLR 667, [2023] ICR 875, EAT
538	*Williams v Bishop of London*	[2023] IRLR 697, CA
539	*Alcedo-Orange Ltd v Ferridge-Gunn*	[2023] IRLR 606, EAT
539	*Lycatel Services Ltd v Schneider*	[2023] IRLR 668, EAT
539	*Cox v Secretary of State for the Home Department*	[2023] IRLR 679, [2023] ICR 914, CA

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