Harvey on Industrial Relations and Employment Law

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

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DIVISION BI PAY

Deductions from pay; time limit for presentation of a claim

BI [376]

Wharton v Sheehan Haulage and Plant Hire Ltd [2024] EAT 127 (27 June 2024, unreported)

This decision of Williams J in the EAT reaffirms an important practical point about the three-month time limit in the ERA 1996 s 23(2) **Q [647]** in a claim for unlawful deductions from pay, in a case where a final payment of wages is due after the termination date for the employment. In short, the limitation period flows from the date of the due payment, not the termination.

The claimant's (short) employment terminated on 9 September 2020. He brought a claim on 5 February 2021 that he had not been paid one week's notice pay and part of his accrued holiday pay. The employer argued that this was out of time, given the date of termination; the ET agreed and dismissed the claim. However, the EAT upheld his appeal and permitted the claim to proceed. What had not been picked up at ET stage was that he had been paid wages *in arrears*, which meant that the due date for the *payment* was 18 September. That was the date envisaged by s 23(2). The relevant dates therefore were that the final payment was due on 18 September; he had contacted ACAS (using the government online guidance) on 16 December; when early consultation led nowhere, he had received the EC certificate on 6 January 2021 and then submitted his claim on 5 February. Thus, (1) he had contacted ACAS within three months of the payment date (not the termination date), (2) he could then use the EC extension period under the ERA 1996 s 207B **Q [831.02]** and (3) he had then brought his claim within one month of receiving his EC certificate. All of this was in time.

DIVISION CIII WHISTLEBLOWING

Whistlebowing detriment; vicarious liability

CIII [98.01]

***Treadwell v Barton Turns Development Ltd [2024] EAT 137* (*7 August 2024, unreported*)**

There was reported in **Bulletin 549** the EAT decision in *Wicked Vision Ltd v Rice* [2024] EAT 29, [2024] IRLR 692 which concerned possible vicarious liability on an employer for a dismissal under the ERA 1996 s 47B **Q [671.03]** in spite of sub-s (2) which seems to rule out an action for detriment where the harm suffered was dismissal. As pointed out there, the outstanding aspect of the judgment was a disagreement with part of the judgment in the earlier Court of Appeal case of *Timis v Osipov* [2018] EWCA Civ 2321, [2019] IRLR 52 (considered in detail at **CIII [98.01]**) leading to an attempt either to 'explain' it or to hold it to have been obiter. The commentary suggested that much will depend on how this is treated either by a subsequent EAT or in a future Court of Appeal case. Both of these are now happening.

In the instant case before Judge Barklem, the EAT held that it was bound by *Timis* (which it applied to permit the amendment sought), especially as it had been informed that *Wicked Vision* is currently being appealed. Watch this space.

DIVISION L EQUALITY

Indirect discrimination; whether associative discrimination applies; pre-January 2024 law

L [291.01]

***British Airways plc v Rollett [2024] EAT 131* (*15 August 2024, unreported*)**

The EqA 2010 was amended as from 1 January 2024 by the insertion of s 19A **Q [1472.01]** to make it clear that the concept of associative discrimination can apply in a case of indirect discrimination. This was in order to come into compliance with the ECJ decision in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* C-83/14, [2015] IRLR 746. The previous problem domestically was that the general provisions on indirect discrimination in s 19 seemed to rule it out through their emphasis on the claimant's own protected characteristic (or lack thereof).

It had however been argued for some time in the text (**L [291.01]** ff) that it would be possible to give the existing s 19 a purposive interpretation to reach this result anyway. That has now been accepted by Eady P in the EAT in the instant case. It is of interest factually in showing how this problem can arise. It concerned changes to shift patterns to which staff objected. A joint claim was brought on two grounds: (1) indirect race discrimination, the point being that the changes discriminated against non-British staff who were more likely to commute from abroad; and (2) indirect sex discrimination, the point being

that they discriminated against carers who were more likely to be female. The associative discrimination point arose in two individual cases: (1) a female employee who was British but lived abroad; and (2) a male employee who was a carer. In each case they shared the disadvantage but *not* the protected characteristic relied upon. The ET held that s 19 could be extended to cover these cases in the light of *CHEZ*. On appeal, the employer argued that this interpretation had gone too far, but the EAT disagreed and upheld the ET's decision.

This case applies to any cases still under the pre-January law, but since then presumably claimants can rely directly on s 19A.

Burden of proof and drawing of inferences

L [796]

Leicester City Council v Parmar [2024] EAT 85, [2024] IRLR 721

Unsurprisingly, the application of the EqA 2010 s 136 **Q [1548]** on the statutory reversal of proof has given rise to extensive case law. This decision of Judge Tayler in the EAT arguably shows a fresh take on some of this case law and is well worth reading in full. It is significant in warning against too simplistic an application of two particular aspects of the case law which could well be raised by a respondent employer in order to avoid the statutory reversal, namely:

(1) the mere fact of a difference in status and a difference in treatment by the employer only shows the *possibility* of discrimination and is not in itself enough to pass the statutory test of whether an ET 'could conclude' that the employer had behaved in a discriminatory manner;

(2) evidence of bad/unfair/unreasonable treatment is not per se evidence of discrimination, which requires *worse* treatment.

The claimant worked in a local council; due to bad blood between two departments a manager instituted an inquiry into this. The result was that a formal disciplinary procedure was invoked in her case, but not in the cases of other (white) employees, who were dealt with, if at all, by informal means. Although the inquiry exonerated her, the claimant brought proceedings for race discrimination. In these, the ET held that this evidence was sufficient to reverse the burden and, on the facts, the respondent had not discharged this, so that the claimant succeeded. The respondent appealed on several grounds, but on the principal ground of the burden of proof argued that the ET had erred in law by not applying the two well-known aspects of the case law. The EAT disagreed and held that on the *totality* of the evidence the ET had been entitled to hold that the claimant's case went well beyond these limitations. Three passages from the judgment show this well:

(i) Point (1) (mere differences): at [66] the judgment states:

> 'I have quoted these extensive passages to emphasise that comparing the treatment of a claimant with that of another person is a subtle business. The analysis is highly context specific. Where such

a comparison is made, as part of an analysis of a range of relevant factors, it is not valid to pick apart small components of the comparative analysis, and to trot out the well-worn phrase that there is nothing more than a mere difference of status and treatment, while ignoring all of the other relevant findings of the tribunal that contributed to the overall analysis.'

(ii) Point (2) (mere bad treatment); at [71] it states:

'The extracts from the authorities relied upon by the respondent must be seen in their proper context. It is also important not to salami slice a judgment into multiple components, each of which is individually assessed, out of context, against the criteria of whether there is no more than a difference in status and difference of treatment and/or no more than an allegation of unreasonable conduct. If there are multiple examples of different treatment between those of different status, and of unfair treatment, it is unlikely to be a case where it can be said that there is mere difference of status and treatment and/or mere unfair treatment.'

(iii) Summing this up, it states at [73]:

'The core reasoning of the Employment Tribunal is the opposite of a mere difference in status and difference of treatment. A number of employees of different race to the claimant have not been subject of formal disciplinary proceedings in circumstances similar to those in which the claimant was. The similarity of the circumstances, and the fact that a number of employees of different race have been treated more favourably, obviously establishes more than a mere difference of treatment and status. If what the Employment Tribunal found is not evidence that could support a claim of race discrimination it is hard to imagine what is. It was the totality of the evidence that resulted in the shift in the burden of proof.'

DIVISION PI PRACTICE AND PROCEDURE

Case management; determining the sequence of issues; importance in equal pay cases

PI [375], PI [377]; L [501]

Tesco Stores Ltd v Element [2024] EAT 83, [2024] IRLR 736

This is a further procedural stage in the long-running multiple equal value claims against the supermarket. The EAT under Kerr J dismissed an appeal against a case management order to try the issue of a possible material factor defence (see **K [501]**) before a final determination of the equal value issue. It could be argued that logically this is out of order, but the EAT held that it was a proper exercise of the ET's powers at the preliminary stage. The judgment states that in complex cases such as equal value ones, 'patience is not a virtue' and that these cases merit 'urgency and momentum' in their

prosecution. This means that it may be necessary to take issues out of a strictly logical order. In the context of equal value claims, it may be necessary to consider the material factor defence (where it is particularly relevant) on the *assumption* that equal value can be shown; not only is this permissible, but it may be desirable. Ultimately it is for the ET to set the order for determination of the issues, in order to save cost and delay.

Costs; relevance of judicial mediation and assessment

PI [740.06], PI [1060]

***Leeks v University College London Hospitals NHS Foundation Trust [2024] EAT 134* (*16 August 2024, unreported*)**

The primary question in this case was whether it was no longer possible to have a fair hearing where there was a 'disappearing' witness (exacerbated here by the length of the litigation). However, the case also raised a potentially important point about the relationship between the power to award costs under ET Rules SI 2013/1237 Sch 1 r 76 **R [2833]** and the existence of the option of judicial mediation/assessment under r 3 **R [2760]** (see **PI [740.06]**). The question was whether there can ever be an award of costs for unreasonable conduct based on a refusal to use this form of ADR. The answer was that there is no rule of law preventing it.

The claimant applied for costs at a preliminary hearing on the basis that the respondent had declined to use the ADR. The ET refused this, but not just as a matter of general discretion, but holding that, as that procedure is voluntary, a refusal *cannot* amount to unreasonable conduct. Judge Tayler in the EAT allowed the appeal on this point. Accepting that the regimes of costs in the civil courts and the ETs are different, the judgment does look at the former, noting that the 'direction of travel' is towards more ADR and (in the light of the leading civil cases cited) that a more robust approach is taken, including a possible effect on costs. Applying that here, the judgment concludes at [61]:

> 'Rule 76 ETR does not place a limit on what types of conduct might be unreasonable and I do not consider that there is an absolute prohibition on refusal to engage in judicial mediation being unreasonable conduct that could found an award of costs on a proper exercise of the discretion of the Employment Tribunal'

In the following paragraph there are the following subsidiary points:

> 'I am not persuaded that a distinction can be made, as suggested by the respondent, between mere refusal to engage in judicial mediation and the reasonableness of the decision to do so. The test will always be that of whether there has been unreasonable conduct in refusing to engage in judicial mediation which will depend on all the circumstances of the case. It is incumbent on the party seeking an award of costs to establish what it was about the circumstances and actions of the party that refused to enter into judicial mediation or assessment that made it unreasonable. That analysis will always have to take account of the fact

that the process is voluntary, and that particular care must be taken to protect the sanctity of without prejudice discussions in the lead up to judicial mediation or assessment and anything said in a judicial mediation or assessment'.

On the facts here, not much of a case had been made out on unreasonableness, but it was not possible to hold that only one answer was possible, and so the issue was remitted.

Admissibility of evidence; the general approach

PI [925]

***Matondo v Kingsland Nursery Ltd [2024] EAT 123* (*27 June 2024, unreported*)**

The general rule in the ET Rules SI 2013/1237 Sch 1 r 41 **R [2798]** is that an ET is 'not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts'. The usual contexts in which this has featured have been similar fact evidence, confessions and hearsay (see **PI [926.03]** ff). However, this case before Judge Auerbach in the EAT extends this general approach to the question of corroboration.

It arose in the context of a complaint of unlawful deduction from wages on termination of employment. The difficulty was that in her claim that she had not been paid for all the hours of overtime that she had worked there was a factual dispute as to how many hours of overtime the claimant had in fact worked. Although she gave evidence about this from her own recollection, the ET held that, to be accepted, this had to be corroborated by other evidence, such as independent documentary records. Allowing her appeal, the EAT held that there is *no* such rule of evidence in the ETs. Instead, it should have appraised *all* of the different sources of evidence, as to their reliability and credibility, including the claimant's oral testimony, contemporary (though not independent) communications reflecting what she had said when she had raised her grievance during employment, work records relied upon by the respondent, and the respondent's evidence about how pay was calculated and those records compiled. It should then have made findings of fact about what hours the claimant had or had not worked, based upon its assessment of the overall picture.

EAT; institution of appeal; documentation; extension of time

PI [1436], PI [1444]

***Hewer v HCT Group [2024] EAT 133* (*14 August 2024, unreported*)**

Two unsuccessful claimants lodged their appeals through their solicitor. These were accompanied by the ET1 and ET3, the grounds of appeal and the written reasons for the decision; however, the actual written judgment was not included. The EAT office told the solicitors that the appeals had not been properly instituted, but originally on another ground. Eventually, however (once that had been cleared up), the office told them that it was still

incomplete without the written judgment. The solicitors provided this immediately, but by that time the appeal was 85 days out of time. An application was made for an extension of time under the EAT Rules SI 2013/1237 Sch 1 r 37 **R [750]**, mentioning among other things difficulties using the e-file portal, and also referring to the new power to extend for minor mistakes in r 37(5).

When this was refused, there was an appeal to the EAT under Judge Tayler, who (as an appeal from the Registrar) heard it de novo. This had two results:

(1) The appeal was allowed under the general discretion to extend in r 37(1). The basic rules on extension generally in *Abdelghafar* were cited, along with (in the context of a missing document) the judgment of Judge Hand in *Carroll v Mayor's Office for Police and Crime* UKEATPA/02003/14, [2015] ICR 835 and the recent decision in *Ridley v Kirtley* [2024] EWCA Civ 875 (see **Bulletin 553**) which draws a distinction between cases where the appeal itself has been lodged in time but with a missing document and cases where the whole appeal was late. In spite of dicta that in general simply relying on the fault of legal advisors will not be enough, the decision was that, 'just on balance', it was appropriate here to allow the extension under r 37(1).

(2) On the other hand, the appeal was *not* allowed under the new specific power in r 37(4) because, applying *Melki v Bouygues E & S Contracting UK Ltd* [2024] EAT 36, [2024] ICR 803 (see **Bulletin 549**), it could not be said that the omission of the written judgment was a 'minor' error.

DIVISION PIII JURISDICTION

Absolute immunity; judicial immunity; foreign arbitration

PIII [211]

***Erhard-Jensen OntologicallPhenomenological Initiative Ltd v Rogerson [2024] EAT 135* (*20 August 2024, unreported*)**

The case law cited in the text at **PIII [211]** illustrates how strong the concept of judicial immunity is. The instant case before Williams J in the EAT contained arguments for a more relaxed approach to be taken, but these were rejected. The case is also of interest because the judicial proceedings in question were to take place abroad.

The claimant worked for an organisation based in Singapore. He brought ET proceedings for whistleblowing detriments; the relevant one for present purposes was that the employer had invoked an arbitration provision to bring arbitral proceedings against him for breaches of confidentiality in Singapore. The employer sought to strike out this head on the basis of judicial immunity. The ET however ruled against this, holding that the immunity did not apply to the mere fact of seeking to bring proceedings, and in any case should not apply to foreign proceedings.

The EAT allowed the employer's appeal on both grounds. On the first, the reasoning was on two bases: (1) after a full consideration of the case law (set

out in the text at **PIII [211]** ff), it held against the argument for narrowing the immunity, for example to things said or done during the judicial proceedings; and (2) in any event, the ET had misunderstood the actual detriment complaint here – it was not just the fact of instituting the arbitration (where the immunity might have been more debatable), but more specifically it was an allegation that the employers had done so maliciously and on false and groundless facts; this impacted more closely on the *substance* of the arbitration and as such was held to invoke the immunity. With regard to the second ground, it was held that, although there is less authority here, common law principles of comity and the strong public interest in ensuring harmony between English law and foreign jurisdictions (including foreign-based arbitrations) meant that it made no difference that this arbitration was to take place in Singapore. Given a final determination in the judgment that none of this infringed the European Convention, the EAT struck out this particular detriment and permitted the case to proceed on the others.

REFERENCE UPDATE

Bulletin	Case	Reference
548	*Barnard v Hampshire and Isle of Wight Fire and Rescue Authority*	[2024] IRLR 744, EAT
549	*Wicked Vision Ltd v Rice*	[2024] IRLR 692, EAT
551	*First Great Western Ltd v Moussa*	[2024] IRLR 697, EAT
552	*Valimulla v Al-Khair Foundation*	[2024] IRLR 713, EAT
553	*Ajao v Commerzbank AG*	[2024] IRLR 756, EAT

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