Harvey on Industrial Relations and Employment Law

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LEGISLATION

The Worker Protection (Amendment of the Equality Act 2010) Act 2023 **Q [1776]** comes into force on 26 October. It inserts a new s 40A into the EqA 2010 to enact an employer duty to prevent sexual harassment of employees. The amendment will be made in Div Q in Issue 320.

Conversely, the incoming government have announced that the Workers (Predictable Terms and Conditions) Act 2023 **Q [1771]** is now not going to be brought into force. Instead, the matters covered by it will be subsumed into the government's own wider review of worker rights.

DIVISION AII CONTRACTS OF EMPLOYMENT

Fire and rehire; meaning of a 'permanent' change; restrictions on termination by notice

AII [93], AII [420], AII [501.01]; DI [2371]

Tesco Stores Ltd v USDAW [2024] UKSC 28

This is the final stage of the controversy over whether 'permanent' means permanent or something less. The win at the highest level for USDAW shows that employers may have to be particularly careful what they offer and how long it is likely to last. As the text points out (see particularly **DI [417.02]**), when in 2009 the employer offered extra 'retained pay' to employees willing to move location saying that it would be 'permanent' for them, only to attempt to remove it in 2020 by the device of fire and rehire (on all the existing terms except the retained pay), the High Court granted an injunction to prevent them from doing so, on the basis of an implied term that they would not exercise their otherwise unrestricted contractual right to terminate by notice in order to bring the entitlement to an end. The Court of Appeal then allowed the employer's appeal, holding that no such term was to be

implied. The Supreme Court have now allowed the union's further appeal and reinstated the injunction. The principal judgment given by Lord Burrows and Lady Simler (with the agreement of Lord Lloyd-Jones) largely accepts Ellenbogen J's reasoning at first instance, that the term is necessary to imply for business efficacy, since not to do so would have allowed the employer to negate the 'permanence' at any time and so deprive the agreement of any realistic meaning.

Four further specific points arise from this judgment:

(1) Like the judge, the court drew backing from 'the PHI cases' from *Aspden v Webbs Poultry and Meat Group Ltd* [1996] IRLR 521 onwards, disagreeing strongly with the Court of Appeal on this point. Importantly, however, the court approved the 'spread' of this idea (that an apparently unrestricted right to terminate on notice can be subject to an implied restriction that it will not be used to frustrate another valuable right) beyond actual PHIs. In particular, it approves *Jenvey v Australian Broadcasting Corpn* [2002] IRLR 520, [2003] ICR 79 where it was applied to an enhanced redundancy package.

(2) Equally importantly, the judgment addresses the rogue case here of *Reda v Flag Ltd* [2002] UKPC 38, [2002] IRLR 747, which at first sight seemed to cast doubt on the PHI cases but which was dismissed here (as it has been elsewhere) as an 'unusual case on its own particular facts', a fine exercise in 'restrictive distinguishing' (!).

(3) The implied term here met the business efficacy test and (contrary to the employer's case) was not too wide – it was not a term that guaranteed lifetime employment and would not prevent a bona fide dismissal on some other ground. It only enforced the employer's original promise for as long as the individual remained in that job. Crucially from the point of view of contract law, it qualified the right to give notice, it did not contradict it. Putting this altogether, the situation is summed up at [56] as follows:

> 'The promise that retained pay would remain a permanent contractual entitlement for as long as employment in the same role continued and would have continued absent that right means that there is an analogy with *Jenvey, Ali* and the PHI cases, although the three situations are not identical. Retained pay represents an important part of the total consideration for which the claimants worked and continue to work. It is a valuable benefit and was offered as a significant inducement for them to move to the new sites against the background of Tesco's need to retain an experienced workforce. Just as in *Jenvey, Ali* and the PHI cases, where it would have been contrary to the functioning of the particular scheme to permit the employer to exercise contractual powers to deny the employee the very benefits which the scheme envisaged would be paid, so too here. There is no magic in the nature of the particular scheme involved. These cases exemplify the principle that a term implied by fact may be required to qualify an

employer's otherwise unqualified contractual right to dismiss in circumstances where to do so would defeat or undermine the purpose of the contract by denying the very benefit that was promised.'

(4) Finally, the court accepted that there are longstanding common law rules against granting specific performance of a contract of employment, including as an indirect effect of an injunction, but agreed with the judge at first instance that this case fell within the exceptions to those rules, on the bases that: (1) there remained mutual confidence between the parties (the employer wished to retain the staff, but without the retained pay); and (2) damages would not be an adequate remedy (being difficult to calculate and not permitting recovery for non-pecuniary loss).

Lords Leggatt and Reed gave judgments concurring in the result, for essentially the same reasons. Lord Leggatt's judgment is of interest in concentrating more on the contractual mechanics of the implication of terms generally and in this particular employment context where there are two sources of evidence (the negotiation of the backing collective agreement and the incorporation into individual contracts). Lord Reed at one point disagreed with the width of an expression by Lord Leggatt of the circumstances where an express term can be subject to qualification on grounds such as good faith, but accepted that it was not necessary to determine the point in this case.

DIVISION DI UNFAIR DISMISSAL

Dismissal for incapability; incapability or misconduct; consultation/warning

DI [1193], DI [1223]

Kikwera-Akaka v Salvation Army Trading Co Ltd [2024] EAT 49 (25 January 2024, unreported)

The facts of this case before Judge Tucker in the EAT show the complications that can arise in an incapability case where: (1) there is an overlap with misconduct; and (2) the employee refuses to acknowledge that they need to improve. The judgment includes some general guidance on the borderline between the two types of dismissal, starting by contrasting their fundamental natures, but then considering the common requirement to consult/warn and the need to consider the case as a whole.

The claimant was employed in the respondent charity's shop. It was also staffed by volunteers, some of whom were personally vulnerable. There had been concerns about the claimant's work (leading to a warning), but things came to a head when he objected to the actions of one such volunteer and he threatened to punch her in the head. Other volunteers complained and did not wish to work with him. Disciplinary proceedings were instigated. There would have been a case for dismissal, but the respondent decided instead to issue a formal written warning and require him to undergo a personal improvement procedure (PIP) to address the issues. He appealed but this was

dismissed. One key point to note at this point was that throughout all of this he denied that there was any need for him to improve, everything having been the fault of others. In the event, although the PIP was initially for four weeks, it was terminated after three and a half and, in the light of the final warning, the decision was taken to dismiss him. A further appeal failed and he brought unfair dismissal proceedings.

The ET rejected his claim.

In the EAT he argued that the final warning had been for his conduct, not incapability, and so should not have formed the basis for fairness. However, the EAT held that the ET had made clear findings of fact and had applied the law correctly. With regard to that law generally, the judgment considered the now rather venerable case law here, from *Winterhalter Gastonom Ltd v Webb* [1973] IRLR 120, [1973] ICR 245, NIRC onwards, and made the following points:

(1) There is an initial difference between conduct and capability cases. In practice, the former are likely to be more adversarial, with each side making its case and 'pure' warnings of considerable importance. The latter are less adversarial and may hinge more on the extent to which the employee was made aware of perceived deficiencies, given time to improve and reasonable support to do so.

(2) However, there is common ground between them in relation to how the employee is to be made aware of exactly what it is that is putting the employment at risk and what the consequences may be of not rectifying it.

(3) On the facts here, the ET had identified 'performance' (a form of incapability) as the principal reason, but in reality his conduct was an integral part of it. In that context, what swung the case against him was the provision of the PIP to allow him to improve and his steadfast refusal to accept any need to improve at all (which also validated the decision to cut the PIP short).

There is a warning to employers that ideally they need to be clear which head they are relying on, but the result of the case shows that this is not a hard and fast distinction and that ultimately (as is so often the case in unfair dismissal) cases will depend on their facts and the extent to which the employer acted reasonably overall in giving the employee the necessary information (whether or not you call it a 'warning') and, where performance (perhaps a better word here than conduct) is at issue, a chance to improve. Conversely, an employee who refuses to accept any need to improve is likely to be on thin ice, especially as the EAT also accepted the ET's alternative ground that, even if they had held the dismissal fair, they would have imposed a 100% *Polkey* reduction.

Some other substantial reason; changing terms; test for reasonableness

DI [1930]

Masiero v Barchester Healthcare Ltd [2024] EAT 112, [2024] IRLR 774

The 'SOSR' category can be a controversial one, especially when applying in the context of a business change being imposed by the employer. This was considered here in the unusual context of the COVID-19 pandemic. The claimants were employees of a healthcare provider; during the pandemic (but before it became a legal requirement) the employer varied contracts to require its staff to be vaccinated, unless medically exempt, in order to protect home residents and others. The claimants refused, had no such exemption and were dismissed.

Their claims for unfair dismissal raised questions of their Convention rights, though the case law was unhelpful because it has tended to uphold measures to secure vaccination on health grounds, provided they fall short of compulsory vaccination. However, for present purposes, the claims raised questions about SOSR dismissals where employees object to contractual changes. The ET found that the employer had acted reasonably for a genuine and substantial reason and dismissed the claims.

On their appeals to the EAT they relied on two principal arguments:

(1) The ET here should have followed the approach of the ET in *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386, EAT, in considering not just the reasonableness of the employer's decision to dismiss, but also and equally the reasonableness of the employees' refusal. However, the EAT here held that this was a misreading of the case because that element was not in issue in the appeal there. The correct position is that the emphasis remains on the employer's reasons and that there may well be cases (as several previous authorities have said) where *both* sides were behaving reasonably in their own terms. Employee objections may be a factor in some cases, but no more than that. Here, the ET had made full findings of fact and concentrated properly on the employer's reasons (see especially [56] of the judgment).

(2) In applying the overall test in the ERA 1996 s 98(4), the ET should have specifically and expressly gone through the five factors set out in Burton P's judgment in *Scott & Co v Richardson* UKEATS/0074/04 (26 April 2005, unreported) (taken from *Catamaran*) in order to carry out the balancing exercise necessary. Again, the EAT disagreed. These factors are referred to in that judgment as 'certain non-exclusive matters' that 'might' fall to be considered. It is not an exclusive list and it is not an error of law for an ET not to go through them directly in every case. The question remains the overall one of reasonableness in s 98(4). On the facts here, the ET had addressed the relevant factors in the course of its judgment and its decision was upheld.

DIVISION L EQUALITY

Religion or belief; freedom to hold and manifest; restrictions

L [212]

Sutcliffe v Secretary of State for Education [2024] EWHC 1878 (Admin), [2024] IRLR 798

This was a case against the Secretary of State in the Administrative Court, but has implications in discrimination law too, in relation to the restrictions that might apply to certain Convention rights if abused.

The appellant was a teacher in a school which had a policy that transgender pupils were to be referred to by their preferred pronouns. He is an evangelical Christian who believes that sex is immutable. He was found to have referred to a male transgender pupil by a female pronoun, and had done so deliberately both in school and on national television, to the distress of the pupil. This was viewed as misgendering and pursuant to complaints he was dismissed. The reason for this appeal was that he was also referred to the Teaching Regulation Agency which, having heard his case, found him guilty of unprofessional conduct, leading to him being disqualified from teaching for two years by the Secretary of State. He appealed against this to the Administrative Court but this was rejected. It was held that his religious beliefs were covered by art 9 of the Convention on freedom of religion and that he came within art 10 on freedom of speech *but* both of these are qualified rights, so that their protection may be lost in the circumstances of their exercise. Here, the restrictions imposed by national teaching standards were held to be proportionate and the Agency's and Secretary's decisions lawful. The judgment comments that misgendering is not in itself unlawful but in an appropriate case (for example of deliberate and persistent misuse) it can constitute professional misconduct.

Religion or belief; Grainger (v): belief worthy of respect

L [211.08]

Thomas v Surrey and Borders Partnership NHS Foundation Trust [2024] EAT 141 (5 September 2024, unreported)

This case before Sheldon J in the EAT concerned the fifth element of the *Grainger* definition of the 'belief' element of the protected characteristic of religion and belief.

The claimant worked through an agency for the respondent trust until his engagement was terminated, he alleged, because of his belief in English nationalism. This included his belief that there is no place for Muslims or Islam in British society and that Muslims should be deported. In his action for religion/belief discrimination under the EqA 2010 s 10 **Q [1463]**, a preliminary issue arose as to whether this belief was protected. The ET held that it was not because it failed the fifth element of *Grainger* that it must be

worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.

The claimant appealed against this, arguing that this decision ignored the low bar generally applied to the validity of beliefs, and more specifically that the EJ erred in applying *Grainger* rather than the ECtHR decision in *Redfearn v UK* (2013) 57 EHRR 2 which concerned similar views. Dismissing the appeal, the EAT held that *Grainger* is not affected by that ECtHR decision and that the ET had properly applied its fifth element here; this follows the more recent approval and application of the guidelines in *Forstater v CGD Europe* [2022] IRLR 706, [2022] ICR 1, EAT, which is considered at length in the judgment. Of note is that the judgment also prays in aid art 17 of the Convention **Q [1088.31]** which provides that nothing in the Convention gives a right to engage in anything aimed at the destruction of any of the rights and freedoms set out in it or at their limitation to a greater extent than is provided for in the Convention. That too applied here, particularly in relation to the deportation aspect. At the end of the judgment the point is made that 'the claimant is not prevented from holding his views, but he is outside the right to complain that he has been discriminated against in relation to those beliefs in the circumstances covered by the EqA.'

DIVISION PI PRACTICE AND PROCEDURE

EAT; institution of appeal; extension of time; missing documents

PI [1444]

***AB v University of East London [2024] EAT 157* (*27 September 2024, unreported*)**

The question of when an extension can be granted to the 42-day time limit for appeals in r 37 of the EAT Rules 1993 **R [750]** was subject to amendment a year ago, partly to remove one of the required categories of accompanying documents in r 3, but also to add to the general power of extension in r 37(1) a new provision in r 37(5) to allow the forgiveness of 'minor errors' in the lodging of documents, where it is just to do so in all the circumstances. This is meant to liberalise the position, but as the case law so far has shown it has thrown up considerable issues of interpretation in relation to two questions: (1) how do r 37(1) and (5) fit together? and (2) under r 37(5), when is an error 'minor'? This has been complicated by the fact that the amendment to r 3 only applies to post-September 2023 cases *but* the new r 37(5) (being procedural not substantive) applies to cases coming before the EAT now, including pre-September 2023 ones (such as those in issue in the instant case). The case law so far on r 37(5) has appeared to be inconsistent, with the original decision in *Melki v Bouygues E and S Contracting UK Ltd* [2024] EAT 36, [2024] ICR 803 taking a relatively strict approach (especially where whole documents are missing, as opposed to pages), *Jasim v LHR Airports Ltd* [2024] EAT 59 (28 March 2024, unreported) then seeming to take a wider approach, but then *Hewer v HCT Group* [2024] EAT 133 (14 August 2024, unreported) taking more of the *Melki* approach (see **Bulletin 554**). In

Ridley v Kirtley [2024] EWCA Civ 875 the Court of Appeal considered r 37, but primarily on the longstanding provision of r 37(1).

In the instant case before Eady P in the EAT there were five conjoined appeals, all raising similar issues. Applying this case law, the result on their individual facts was that extensions were granted in three cases but refused in two. Its overall importance is that para [27] the judgment gives a synthesis of the case law for ETs, in seven propositions:

(1) Where an explanation is given by the appellant for the omission of the document, it must be an honest account that does not seek to mislead.

(2) If it is contended that the omission of the document was a 'minor error', the ET may wish to start with r 37(5); it must consider both 'error' and 'minor', bearing in mind that it is less likely to be minor if a whole document is missing.

(3) If it was indeed a minor error, the ET should go on to exercise its judicial discretion to rule on whether it would be 'just' to extend; r 37(5) stipulates certain relevant considerations, but these are not exclusive.

(4) If there is not a minor error, the ET should go on to consider the case under the general power in r 37(1), again making a case-specific assessment.

(5) The starting point here will be why the error was made (though that does not rule out a case of no reason if the appellant was simply unaware of the requirement.

(6) Where the error was unrealised until pointed out (usually by the EAT office), the relevant question is how long it *then* took to rectify it).

(7) The strong public interest in finality of litigation means that an extension under r 37(1) will be rare and exceptional, though there is not a formal burden on the appellant to show that their individual case is such; all the relevant factors must be considered, though normally the substantive merits of the case will not be relevant.

Note that this is a short precis of a long passage in the judgment which should, if necessary, be read in full.

Perhaps the real answer to these issues lies in a remark at the beginning of the judgment that an appeal is now to be taken to the Court of Appeal in the original case of *Melki*, when hopefully the two fundamental questions set out above will be fully addressed.

REFERENCE UPDATE

Bulletin	Case	Reference
549	*Hilton Food Solutions Ltd v Wright*	[2024] ICR 862, EAT

Bulletin	Case	Reference
549	*Rentokill Initial UK Ltd v Miller*	[2024] ICR 873, EAT
549	*Nicol v World Travel and Tourism Council*	[2024] ICR 893, EAT
550	*BA plc v De Mello*	[2024] ICR 967, EAT
551	*Baldwin v Cleves School*	[2024] ICR 1001, EAT
551	*Boohene v The London Parks Ltd*	[2024] ICR 1036, CA
552	*Bhogal v NEU*	[2024] IRLR 809, Ch
553	*Bailey v Stonewall Equality*	[2024] IRLR 786, EAT
553	*Prospect v Evans*	[2024] IRLR 825, KB

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