Bulletin No 556 **November 2024**

Harvey on Industrial Relations and Employment Law

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

Bulletin Editor
Ian Smith MA, LLB; Barrister
Emeritus Professor of Employment Law at the Norwich Law School, University of East Anglia.

LEGISLATION

Amendments to the EAT Rules

The Employment Appeal Tribunal (Amendment) Rules 2024 SI 2024/1044 amend the 1993 Rules by amending certain definitions and then adding to rule 35 (service of documents) **R [748]** new paras (1A) to (1D) which: (1) require legal representatives to use the EAT online secure portal (failure to do so not invalidating the process but giving the EAT a discretion to impose a sanction, provide a waiver or require a party to rectify the failure); (2) state that the portal may not be used to serve documents on another party; and (3) set out permitted methods of service or delivery of notices or documents on any other person. The legislative change is accompanied by a new Practice Direction by the EAT which reflects the changes. These all come into force on 1 February 2025. The legislative changes will be incorporated into Div R in Issue 321.

DIVISION AI CATEGORIES OF WORKER

Employee; mutuality; control; relevance of tax cases

AI [14], AI [24], AI [25]

Commissioners for HMRC v Professional Game Match Officials Ltd [2024] UKSC 29, [2024] STC 1682

This is a curious case, concerning the employment status of part-time football referees. Its headline description as a Supreme Court decision on employment status initially seems very important, but it is actually a rather restricted decision in several ways: (1) it is a tax case (as to whether the referees' body was liable to deduct PAYE on the basis of their being its employees), not an employment law case; (2) by the time it got to the Supreme Court it concerned only possible individual contracts for individual

LexisNexis®

games (not any overarching contract); (3) by that time, it only concerned the factors of mutuality of obligations and control (the first-tier tribunal having ruled out employment status for lack of those two elements alone, without going any further); (4) the end result was that it was declared that there was sufficient mutuality and control but the case was remitted to the first-tier tribunal to consider whether there were other factors bearing on the status issue, but without spelling out what they might be. However, perhaps most importantly, it expressly did not raise the question posed in the leading case of *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501, [2022] IRLR 698 (see **AI [14]**) as to whether there may be some element of divergence between tax law and employment law because of policy factors applying in the latter case (concerning employee protection under the employment statutes) which do not apply in the tax context (see [27] of the judgment); that case must therefore retain its importance on the point.

The judgment starts with a consideration of the basis of employee status and affirms old law that mutuality and control are necessary but not sufficient indicators. The emphasis on other possible factors is important in showing that tax law does not take a restrictive approach to the determination of the issue. However, as seen above, the judgment concentrates on the two factors in question and in a wider context than tax it is primarily of interest for what it says about them. The principal points made are:

(1) *Mutuality.* This does not impose in all cases a legal requirement that the employer provides and pays for work and the individual undertakes to do it all. The position is more fluid and especially for separate engagements because the case law establishes that there is here *no* requirement for there to be mutuality *between* engagements. However, given the ultimately factual nature of this, there may be cases where the engagements are so sporadic as to be more suggestive of independent trading.

(2) *Control.* This section starts by saying that in many cases of traditional employment this is unlikely to be a problem, but that in modern employment there is more scope for such problems, especially where the individual has considerable latitude on doing the work, and/or is doing work of a professional or specialised nature. Interestingly, reference is made to the old Australian case of *Zuijs v Wirth Bros Ltd* (1953) 93 CLR 561 which posed the question of what control can be exercised by a circus owner over the work of a trapeze artist. More relevantly, an example is given of how a hospital administrator can control the work of a specialist surgeon and there is reference to the case of *White v Troutbeck SA* [2013] EWCA Civ 1171, [2013] IRLR 949 (see **AI [26]**) where there was a contract of employment between a farm manager and its largely absentee owner who exercised no day-to-day control at all. Again, the approach of the judgment in the instant case was that these remain questions of fact in the circumstances of the particular engagement. Cases talk of there being 'sufficient' control to justify a contract of employment and it may be enough for the employer only to have 'indirect' or 'ultimate' control, rather than anything more direct

and regular. Further than that, however, it is said that it is not possible to devise a precise test for this factor.

DIVISION CIII WHISTLEBLOWING

Whistleblowing detriment; meaning of detriment; timing

CIII [96], CIII [97]

MacLennan v The British Psychological Society [2024] EAT 166 (21 October 2024, unreported)

Most of this appeal concerned the worker status of a charity trustee and president-elect of the respondent society who had brought proceedings for whistleblowing detriment. However, one side point gave rise to a potentially important legal ruling on the *reach* of the whistleblowing protection. The point was that there had been a delay in the claimant taking up his post and some of the alleged protected disclosures had taken place *before* he had entered office. Could there be a detriment claim for disclosures made prior to the employment?

Judge Tayler in the EAT held that there can be. The relevant passage is at paras [29]–[33]. It starts by saying that, while the ERA 1996 s 47B does not specifically require the disclosure to have occurred during employment, s 43C(1)(a) refers to 'his employer'; this could literally be taken to mean that there is such a requirement, but the judgment goes on to say that such a literal interpretation is trumped by the purposive interpretation already taken to the reach of the protection in three analogous areas:

(1) The protection applies where the detriment occurs after the employment ended (*Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] IRLR 677, [2006] ICR 1436).

(2) The protection applies to a detriment done by the current employer because of a protected disclosure made to a former employer (*BP plc v Elstone* [2010] IRLR 558, [2010] ICR 879, EAT).

(3) The protection applies to a detriment by a former employer where both the disclosure and the detriment occur after the employment ended (*Onyango v Berkeley* [2013] IRLR 338, EAT).

At [33] the judgment concludes:

> 'Adopting the purposive approach supported by these authorities, I consider that a worker is protected from being subjected to a detriment by his current employer for making a protected disclosure to that employer prior to the commencement of the employment. I can see no reason to interpret the provisions to create a lacuna that would exclude such a worker. The position is different to that of a job applicant who never becomes an employee.'

DIVISION DI UNFAIR DISMISSAL

Redundancy; consultation; collective and individual

DI [1668], DI [1704], DI [1705]

Haycocks v ADR PRO UK Ltd [2024] EWCA Civ 1291

There was reported in **Bulletin 545** the decision of the EAT in this case, reversing the decision of the ET that the redundancy of the claimant was not unfair. That EAT decision has now in turn been reversed by the Court of Appeal, holding that the ET was entitled to hold that, in all the circumstances, there had been no unfairness in the procedure used by the employer. This decision is of importance in two ways: (a) its emphasis on consideration of all the facts, with no particular emphasis on any one factor (that factor here being timing of consultation); and (b) its resolution of an apparent conflict in authorities about the role of consultation in a case where no trade union is involved and the collective redundancy procedures for large-scale redundancies do not apply.

(1) *Timing.* The basic problem here was that, although a prima facie fair points-based system had been used (and the claimant failed to establish any ulterior bias against him), it came to light during the course of the procedure and ET hearing that the employer had operated that system to produce at least a working result *before* commencing its consultation with the claimant (including giving him his score). The manager in charge gave a mea culpa, accepting that this had been a mistake. The ET, however, found as fact that by the time that the claimant had his meeting with the employer at the end of the consultation period he had become aware of the timing and his score; he had also then had an appeal which was fair and at which he was able to make his case. On that basis, the ET held his dismissal to be fair in spite of the timing issue. The EAT took a stronger line, on the basis that a timing glitch such as this was so fundamental that it should normally lead to a finding of unfairness, unless the ET specifically explains why it was not following this normal approach. The Court of Appeal, in a judgment given by Underhill LJ, disagreed with this approach. It held that there are no rules here requiring an ET to abide by them unless explaining why not. It remains a wide question of fact and the ET here had taken that approach, including that (a) it had still been possible for the claimant to have changed the employer's mind on its initial decision and (b) the appeal had 'cured' any irregularity in the original handling. It was accepted that the employer's mistake over timing was 'bad practice' but that was outweighed by other factors here.

(2) *Content*. In the EAT, there was also discussion of the wider question of what the *content* of the consultation should be where there is no union involvement and where collective consultation law does not apply. Its judgment cites the judgment of Underhill J (as he then was) in *Mental Health Care (UK) Ltd v Biluan* UKEAT/0248/12 (23 February 2013, unreported) where he seemed to suggest that in such a case there is no need to consult individuals on the overall 'collective' issues such as

numbers involved and selection methods (which would normally have been discussed with a union), so that individual consultation could be restricted to personal matters such as alternative employment. The EAT said that this went too far and conflicted with the later case of *Mogane v Bradford Teaching Hospitals NHS Foundation Trust* [2022] EAT 139, [2023] IRLR 44. In the Court of Appeal, however, the judgment denies any such rigid division and Underhill LJ says at [43] that he is happy to agree that this passage was poorly phrased; what he was intending to do was make a commonsense point that in such a case there will often not be much left to discuss of the collective aspects and consultation will in practice tend to concentrate on matters personal to the individual. There is, however, no rule of law to that effect and at [52] he usefully sums up the correct position:

> 'I agree with the EAT that there are dangers in the unthinking application of labels "individual" and "collective" consultation. Collective consultation in ordinary usage refers to consultation between the employer and representatives of the affected workforce (that is, those who are at risk of dismissal) as a whole. Typically it is the appropriate forum to discuss issues that are common to the group. The most obvious such issue is whether there are ways in which redundancies can be avoided, or at least the numbers reduced, but there will also be procedural issues relevant to the group as a whole, such as the choice of selection criteria. Where collective consultation occurs, it may be sufficient for individuals to be consulted about issues peculiar to them. The most obvious such issue is alternative employment, to which the EAT specifically refers; but it may not be the only issue on which fairness requires that there be individual consultation (not least because the distinction between "common" and "individual" issues may not always be clear-cut). But where there is no collective consultation the situation is different. In such a case it is good practice for employees to be given, in the course of individual consultation, the opportunity to express their views on any issue that may affect the risk of their dismissal or its consequences, whether it is peculiar to them as an individual or common to the affected workforce as a whole. It should certainly not be assumed that they will have nothing useful to contribute on common issues: it depends on the particular case. For the avoidance of doubt, I am not to be taken as saying that a failure to afford that opportunity will necessarily render any subsequent dismissal unfair: again, that will depend on the circumstances … But if there is a widespread view among employers that individual consultation need only ever address individual matters the sooner they are disabused of it the better.'

DIVISION J FAMILY MATTERS

Maternity leave; return to work; meaning of suitable alternative vacancy

J [178]

Carnival plc v Hunter [2024] EAT 167 **(*15 August 2024, unreported*)**

Under the MAPLE Regulations 1999 SI 1999/3312 reg 10(2) **R [1209]** if an employee on maternity leave is made redundant, she is entitled to be offered a suitable alternative vacancy where such exists (ie in preference to others). This sounds simple, but this decision of Judge Barklem in the EAT shows that that may not always be so. In particular, it addresses the meaning of 'vacancy'.

The claimant was one of 21 team leaders working for the respondent cruise ship company. She took maternity leave, but this then coincided with the COVID pandemic, as a result of which the cruising industry encountered difficulties. The company announced a major redundancy exercise, as a result of which five of the team leaders were selected for redundancy, including the claimant. On termination, she claimed unfair dismissal, but also (relevant for present purposes) breach of reg 10. The ET held in her favour, but the EAT allowed the company's appeal.

The ET had found as fact that what had happened here was that there had simply been a reduction in numbers of team leaders from 21 to 16. There had not been the creation of any new or alternative posts. In these circumstances, the EAT held that there were *no* vacancies and so nothing to activate reg 10(2). Reinforcing that, the judgment states that where there is a conventional redundancy, in which there is a reduction in existing roles, reg 10 does not override a valid selection process requiring, in effect, a woman eligible for reg 10 protection but who scored lower than the others to bump someone who would otherwise have retained his or her job following the reduction in roles by having scored higher. There had been consideration in argument of the case of *Sefton BC v Wainwright* [2015] IRLR 90, EAT (considered at **J [179.04]**) but that case, where reg 10 was applied, was distinguished because there had been a reorganisation meaning that two existing roles had ceased to exist and a new role had been created, which did constitute a 'vacancy'. The moral of the story seems to be that 'vacancy' has a specific meaning and, as the judgment says, care must be taken if using a generic term such as 'vacant posts'.

DIVISION L EQUALITY

Harassment; related to the prohibited ground

L [426]

British Bung Manufacturing Co Ltd v King [2024] EAT 165 **(*28 November 2023, unreported*)**

This case before Ellenbogen J in the EAT makes an important point about the meaning of 'related to' the protected characteristic in question in the

definition of harassment in the EqA 2010 s 26 **Q [1479]**, and does so in a rather unusual context – can it be harassment by one man to insult another man about his appearance in the course of a nasty altercation? This seems far removed from the usual case of sexual harassment, and the decision of the ET (upheld by the EAT) that it was may at first seem counter-intuitive, but the answer lies in the interpretation and application of the wording of the section.

In the course of that altercation, a fellow employee (the second respondent) referred to the claimant as a 'bald c …'. When, after a second incident some time later, matters came to a head and the claimant was dismissed, he claimed unfair and wrongful dismissal, and in addition harassment related to sex. The dismissal cases were also rather unusual, based on employer objections to the claimant's son, a police officer, having wrongfully used police witness statement forms in the course of the claimant's complaints; however, on balance the ET found for him on these grounds and the EAT agreed. Legally, the ET finding in favour of harassment was more complex. The ET considered that, although it is true that women can also be bald, it was a condition primarily suffered by men and so the connection with the claimant's sex was established. Reliance was placed on the notorious 'hiya big tits' case of *Insitu Cleaning Co Ltd v Heads* [1995] IRLR 4, EAT **L [420]**, **L [435]** which shows that some slurs/insults can be inherently related to a characteristic even though the matter aimed at is not exclusive to one sex.

In the EAT the respondent argued that the ET had erred in law because s 26 requires harassment directed at matters necessarily and inherently connected to the characteristic, relating to one sex to the exclusion of the other. Here, the fact that women can also be bald meant that the remark could not be harassment. *Insitu Cleaning* was argued to be distinguishable. The EAT rejected this argument, stating that it was 'not rooted in authority' and contrary to the purposes of s 26. *Insitu Cleaning* was held to apply. At [26] the judgment states:

> 'In my judgement, in a case such as this, the context of a remark said to constitute harassment within the meaning of section 26(1) of the EqA encompasses the prevalence amongst persons having the relevant protected characteristic of the feature to which that remark alludes and the absence of any other factor or circumstances said to explain the remark. From paragraph 234 of its reasons, it is clear that that is the analysis in which the Tribunal engaged, following which it concluded that [238], "It is much more likely that a person on the receiving end of a comment such as that which was made in the *In Situ* case would be female, so too it is much more likely that a person on the receiving end of a remark such as that made by Mr King would be male. Mr King made the remark with a view to hurting the Claimant by commenting on his appearance, which is often found amongst men". Those were findings which it was open to the Tribunal to make, the appeal from which is dismissed.'

Exceptions and special cases; armed forces; service complaints

L [738]

Ministry of Defence v Rubery [2024] EAT 165 **(*14 October 2024, unreported*)**

By virtue of the EqA 2010 s 121 **Q [1533]** a member of the armed forces may only bring ET proceedings for discrimination if they have first brought a 'service complaint' about the matter and have not withdrawn it. This case before Stacey J in the EAT concerned an unusual aspect of this procedure. The claimant made allegations of sex discrimination, in relation to which she made the necessary service complaint. These substantive complaints proceeded normally, but the issue in this appeal was that she then also made allegations that the handling of then service complaint *itself* was discriminatory.

The problem here is that the relevant armed forces regulations (discussed at length in the judgment) exclude altogether certain forms of complaint from the service complaint procedure, including a complaint about the decision or proceedings of the adjudicating service body in that procedure. That was the case here and it meant that she could not bring a service complaint about these aspects of the case; that in turn meant that on a literal interpretation of s 121 she could not bring ET proceedings. Unsurprisingly, the MOD applied to have this aspect of her claims struck out, but the ET refused to do so. It held that the literal interpretation could be attacked under arts 6 and 14 of the European Convention; there was a breach of them here in this absolute prohibition and, secondly, it was possible to 'read down' s 121 by adding a new sub-s (1A) to cover a case such as this.

This 'adventurous' decision was however overturned by the EAT. These articles are subject to a defence of justification and, even if there were breaches, the MOD had satisfied that objective justification test. In doing so, the judgment went back to the original reasons for the introduction of the exclusions, namely to prevent repeat complaints or challenges to decisions made in the internal system and to otherwise exclude complaints where adequate alternative remedies are available. This strong emphasis on finality was held to amount to justification. In addition, it was held that even if there had been a breach of the Convention, it would *not* have been possible to have read s 121 down as the ET had thought because to do so would have gone too far and (in the now familiar phrase) have gone against the grain of the legislation.

There was a secondary argument for the claimant that the s 121 exclusion was also in contravention of EU discrimination law and the principles of effectiveness and equivalence. However, the ET found that even if this was the case it could no longer do anything about it because of the Brexit legislation then in force to the effect that, while those principles were still retained, a UK court could no longer 'disapply or quash' any enactment on the basis of them. The claimant had cross-appealed this, but the EAT held that: (1) the

ET had applied that legislation properly; and (2) in any event it would not have been possible to have read down s 121 on this basis either, the test for such reading down being common to both arguments.

The end result was that s 121 and the subsidiary armed forces legislation means what it says and says what it means.

Burden of proof and drawing of inferences; use of statistical material; comparison of like with like

L [796]

Karim v General Medical Council [2024] EWCA Civ 770, [2024] IRLR 833, [2024] ICR 1194

The use of statistical evidence in discrimination cases, especially in relation to direct discrimination claims, has long been accepted, but as usual with such evidence it must be treated with care because it can easily give rise to 'false positives' (see Radio 4's More or Less, passim). In the area of the EqA 2010, this is emphasised by the overall requirement that, in any comparison, like must be contrasted with like. That basic point is neatly made by the facts of this case before the Court of Appeal.

The claimant was a consultant surgeon, who described himself as being mixed race. After an internal review of his department by the hospital, he and two colleagues (one of whom was white) were suspended. This was reported to the GMC which initiated a fitness to practise enquiry into the three of them. The claimant was exonerated, but only after a delay of three and a half years; his white colleague had been exonerated after one year. The claimant brought ET proceedings for race discrimination based on the length of the investigation. The ET upheld his complaint. In doing so, it took into account statistics about alleged disparate effects of medical complaints (BME doctors were 29% of all UK doctors but featured in 42% of complaints; UK-born BME doctors were 50% more likely to be sanctioned or warned than white doctors).

The EAT and Court of Appeal allowed the GMC's appeals, resulting in the case being remitted for rehearing. Partly this was due to inadequate findings by the ET on alleged disparities between the claimant and his white colleague, but of more interest legally was the finding as to the ET's misuse of statistics. The essence of the claimant's case was the long delay, but the statistics went to alleged disparity of treatment in relation to complaints and sanctions; however, nothing in them went to the separate question of whether complaints against BME doctors were typically more *prolonged* than those brought against white doctors. It was accepted in Bean LJ's judgment that if there had been such statistical evidence it could indeed have been used when deciding whether the statutory reversal of proof applied, but that was not the case here.

DIVISION PI PRACTICE AND PROCEDURE

Deposit orders; application of strike out guidance

PI [590], PI [632]

Amber v West Yorkshire Fire and Rescue Service [2024] EAT 146 (14 August 2024, unreported)

The powers of strike out and ordering a deposit are dealt with in separate rules, but it was held by Judge Beard in this case that they have one important matter in common. In *Cox v Adecco* UKEAT/0339/19, [2019] ICR 1307 Judge Tayler gave guidance on how an ET should approach determining a strike out application, in the form of nine propositions which are set out at **PI [632.01]**. They deal with the matter generally and also in relation to the potentially more difficult case of a litigant in person. In the instant case, there were applications for both orders, in a LIP case where the documentation was long and complex, ending up in the making of both, in relation to different claims. Much of the appeal was factually based, but issues also arose as to how the ET had reached its decision. Although expressing sympathy with the EJ at the preliminary hearing, the EAT held that: (1) as a matter of law, the guidance in *Cox* applies equally to deposit orders (or, to be more precise, points (3) to (9) do, the first two being specific to strike outs); and (2) on the facts the ET had not followed it.

At [28] the judgment states that: (1) an ET in such an application should not deal with disputed issues of fact and in the context of the limited use of ET time at this stage; (2) factual matters may be considered but only in exceptional cases; (3) this should normally be done without witnesses; and (4) the claimant's case should be considered at its highest, *but* this must also be done in a realistic way in order to deal with any purely fanciful claims.

The judgment concludes at [33] and [34] with the following general remarks:

> 'There does not appear, from anything I have seen, to be any guidance connected to the online or paper forms as to how claimants should complete the Part 8 section of the ET1 (or any document that they attach to complete the section). Individuals will take very different approaches to completing that part. It is unsurprising, in those circumstances, that first time litigants in person will produce a document that will vary from the voluminous and confusing to that which is short and lacking in essential detail. Indeed, in some cases it will be voluminous but still lack essential information. That creates problems for a tribunal service under pressure, as [counsel] argued. Previous attempts have been made to deal with this by the production of Scott type schedules, however, that has proved in practice to create more problems than it solves and has been the subject of judicial disapproval.
>
> It appears to me that there is no alternative at present to Employment Tribunal judges delving deeply in case management type hearings with parties. This would be to make sure that their cases are properly understood. In such hearings, the judge reducing that analysis to a list

of issues, could ask the parties to consider it, giving time to respond if they disagree with the list. That will be time consuming and it could also lead, I am sure, to complaints that judges are taking sides in some way or other. However, there does not appear to me to be any useful alternative to that approach at present given the absence of any external guidance.'

REFERENCE UPDATE

Bulletin	Case	Reference
550	*William v Lewisham and Greenwich NHS Trust*	[2024] ICR 1065, EAT
551	*Anderson v CAE Crewing Services Ltd*	[2024] ICR 1084, EAT
552	*Taylors Services Ltd v Revenue and Customs Commrs*	[2024] ICR 1171, EAT
553	*HSBC European Works Council v HSBC Continental Europe*	[2024] IRLR 916, EAT
553	*N Notaro Homes Ltd v Keirle*	[2024] IRLR 875, EAT
553	*Mansfield Care Ltd v Newman*	[2024] IRLR 902, EAT
554	*Tesco Stores Ltd v Element*	[2024] ICR 1098, EAT
554	*Leicester City Council v Parmar*	[2024] ICR 1115, EAT
554	*British Airways plc v Rollett*	[2024] IRLR 891, EAT
554	*Leeks v University College London Hospitals NHS Foundation Trust*	[2024] IRLR 866, EAT

Subscription and filing enquiries should be directed to LexisNexis Customer Services Department (tel: +44 (0)330 161 1234; fax: +44 (0)330 161 3000; email: customer.services@lexisnexis.co.uk).

Correspondence about the **content** of this Bulletin should be sent to Nigel Voak, Analytical Content, LexisNexis, FREEPOST 6983, Lexis House, 30 Farringdon Street, London, EC4A 4HH (tel: +44 (0)20 7400 2500).

© RELX (UK) Limited 2024
Published by LexisNexis