Harvey on Industrial Relations and Employment Law

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

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

DIVISION CIII WHISTLEBLOWING

Discrimination against applicants – the NHS special case; time limit

CIII [139]

Leeks v Royal Marsden NHS Foundation Trust [2024] EAT 178 **(*7 November 2024, unreported*)**

In general, the law on whistleblowing protects from detriment during employment and dismissal from employment, but it does not protect job applicants. However, as Part 10 of Division CIII shows, an exception is made in the NHS, historically because of particular concerns arising there. The law is contained in the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018 SI 2018/579 **R [3356]** which set out a special regime covering NHS applicants. This decision of Judge Shanks in the EAT appears to be the first appellate decision on the regulations, in particular reg 5(3) which sets out detailed rules on how to apply the normal three-month limit to the more difficult circumstances of a refusal of employment, where problems can arise as to the *date* of a refusal (or just omission to offer). It is set out in full in the text at **R [139]**.

The basic problem in the case was that the ET, in holding the whistleblowing claim to have been brought out of time, seems to have not considered the Regulations at all until a late stage. It had applied the law properly in deciding not to extend time, but the EAT on the claimant's appeal held that it had failed to apply the specific reg 5(3) rules on dating the refusal in the first place. The appeal was allowed on that ground and the case remitted.

The facts show just how different these cases can be. The claimant applied for a catering job with the Trust in March 2020. An application for a full-time post was rejected, but she was interviewed for part-time posts in June. This

was followed by a 'taster session' in July. There was an acute conflict of fact about this. She maintained that in June she had been verbally offered a part-time post and in July was given to believe that she would soon receive a start date. The Trust, however, denied all of this (thus possibly giving credence to that well-known Sam Goldwynism 'An oral contract isn't worth the paper it's written on'). Moreover, it said that at the end of July there was a freeze on all catering posts. The claimant said that she then heard nothing, in spite of calling the hospital regularly (again disputed by the Trust). Eventually, she commenced proceedings to ACAS in December and made her ET claim in February. Her argument was that she had only found facts at the end of September suggesting that a decision may actually have been made to reject her but not communicated to her. The ET applied ordinary rules on determining the start date for the three months in relation to two additional discrimination claims she had brought (giving July), but then seemed to assume that that also applied to her whistleblowing claim, which was also held to be out of time. This was held by the EAT to be fatal to that part of the decision. There is an interesting discussion at para [17] of the judgment as to which, if any, of the multiple heads of reg 5(3) would apply here; most of them concern actual refusals of employment, deliberate omissions or withdrawals of offers, so that a simple lack of communication (provided the claimant's version of the facts is accepted) could be problematic. However, it was not necessary to rule on that, as it was not considered at all in the ET's judgment and was subject to the remission.

DIVISION L EQUALITY

Disability; recurring effects; arising in consequence of the disability

L [172], L [374]

***Connnor v Chief Constable of South Yorkshire Police [2024] EAT 175* (*12 November 2024, unreported*)**

This decision of Judge Beard in the EAT, rejecting an appeal against the dismissal of a claim for disability discrimination on the facts, makes three significant points of law:

(1) With regard to the definition of recurrent disability in the EqA 2010 Sch 1 para 1(3) **Q [1594]**, the element of recurrency relates to not just to the impairment itself, but also to its effect on day-to-day activities.

(2) With regard to discrimination arising from disability under s 15 **Q [1468]**, this requires an objective factual finding, on a balance of probabilities, of a connection between the disability and the 'something' that arises from the disability, which may be established directly, indirectly or through a series of links.

(3) With regard to the status of medical evidence: (i) where a medical practitioner states in a report that something 'appears' to be connected to a disability, that is likely (in the absence of contrary evidence) to meet the balance of probabilities test; (ii) given the informal nature of

> ET proceedings, where formal expert evidence can be prohibitively expensive, a medical practitioner's report *not* constituting an expert report as such is still to be considered as evidence backed by expertise, such that any rejection of it needs to be substantively reasoned.

It may be that in practice it is this third point that may be most important in disability cases.

Harassment; related to the prohibited grounds

L [426]

***Carozzi v University of Hertfordshire [2024] EAT 169* (*9 October 2024, unreported*)**

This decision of Judge Tayler in the EAT is a useful reminder of the width of the phrase 'related to' in the definition of harassment in the Equality Act 2010 s 26 **Q [1479]**. The case had several aspects to it, but in relation to harassment the decision on appeal by the claimant was that the ET had erred by ruling against it on the ground that there was a lack of motivation for the conduct in question. While in many cases there will indeed be conscious malice behind the impugned conduct, the definition is wider than that because it refers to 'purpose or effect'; it is thus wider than 'because of' in direct discrimination.

The judgment makes the points at [17] that a wide interpretation is part of the protective aim, and that any balance between the interests of employee and employer is contained in the other elements of the definition, in particular the perception of the claimant, other circumstances and whether it was reasonable for the conduct to have that effect. It is further stated that, while the law does not expect people at work to be constantly walking on eggshells, in relation to objectionable language, employers and employees can be expected to take greater care in how they speak and behave at work than they might in their social life. There is a particularly good summary of this at [24] and [25]:

> 'There is no requirement for a mental element equivalent to that in a claim of direct discrimination for conduct to be related to a protected characteristic. Treatment may be related to a protected characteristic where it is "because of" the protected characteristic, but that is not the only way conduct can be related to a protected characteristic, and there may be circumstances in which harassment occurs where the protected characteristic did not motivate the harasser.
>
> Take, for example, a person who unknowingly uses a word that is offensive to people who have a relevant protected characteristic because it is historically linked to oppression of people who have the protected characteristic. The fact that the person, when using the word, did not know that it had such a meaning or connotation, would not prevent the word used being related to the protected characteristic. That does not necessarily mean the person who used the word would be liable for harassment, because it would still be necessary to consider whether the

conduct violated the complainant's dignity. If the use of the word had that effect but not that purpose, the Employment Tribunal would go on to consider the factors in sub-paragraph (4) of section 26 EQA. That said, there could be circumstances in which, even though a word was used without knowledge of the offensive connotations, having considered the factors in sub-paragraph (4), the perception of the recipient, other circumstances and whether it is reasonable for the conduct to have that effect, the use of the word would nonetheless amount to harassment under section 26 EQA.'

DIVISION M TRADE UNIONS

Check off; discontinuance by employer

M [3641]

Secretary of State for DEFRA v Public and Commercial Services Union [2024] UKSC 41

This is the final stage of the appeals relating to the attempts by the previous government to halt the use of the check-off system for union dues in the public sector. The challenge had been on the basis that the obligation to use that system, although originating in a venerable collective agreement, was part of the individual departmental employees' contracts. There had been a series of first instance decisions upholding that analysis (see **M [3641]**) and when they reached the Court of Appeal (*sub nom Cox v Secretary of State for the Home Department* [2023] EWCA Civ 551, [2023] IRLR 679, [2023] ICR 914) it was again upheld, giving individual rights to named claimants. That element was not subject to this further appeal, which concerned the second main issue. This was whether the union itself could sue. An individual action is fine, but of limited value, especially as it could be difficult to show what actual damage was caused to them. The union here wanted a legal ruling on its behalf to stop the practice altogether.

The question here was whether the union could rely on the Contracts (Rights of Third Parties) Act 1999. The problem was that, although there were indeed contracts with their individual members, the origin of the check-off agreement was the collective bargain which in UK law is not legally binding. The government argued that to allow use of the Act would in effect permit legal enforcement of that non-legal bargain. This point had split the Court of Appeal 2 to 1, with the majority agreeing with this argument. However, the Supreme Court have now unanimously allowed the union's appeal and held that the Act does apply. The issue legally was that, while s 1(1)(b) of the Act does allow enforcement of a third party right if the term purports to confer a benefit on it (ie without an express provision to that effect), s 1(2) then disapplies that 'if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party'. This was the basis of the government's argument and the decision of the majority in the Court of Appeal, ie that the non-enforceability of the collective bargain showed that lack of intent. After a considerable analysis of the aims and drafting of the Act, the court held that (1) it enacts a presumption in favour

of granting the third party right and (2) the government had not rebutted it; the bargain itself could not be enforced, but there was no reason why its existence could not be part of the factual matrix used to construe the agreement.

This was the decision of the court in a judgment given or assented to by four of its members. It is of interest that the fifth Justice, Lord Burrows, gave a judgment agreeing with it because, as Professor Burrows, he was the lead Law Commissioner responsible for the report which led to the Act. Two points on that:

(1) At [148] he gives a short and concise summary of the result:

> 'Just as it would be wrong to ignore the collective bargaining background, it would also be wrong to regard that background as here being decisive against the union having a right to enforce the check-off term under the 1999 Act. It follows that there is ultimately no inconsistency between recognising, on the one hand, that a collective agreement is unenforceable as between employer and trade union and, on the other hand, allowing a trade union a right of enforceability against the employer under an employment contract by reason of the 1999 Act. Put another way, the fact that a collective agreement is legally unenforceable does not entail that the parties to the employment contract could not, and did not, objectively intend that the union should have a right of enforceability against the employer under the 1999 Act.'

(2) There is an unusual confluence here of legislature and judiciary. When your humble editor was a baby law student, he was told that this did not happen now (even in those days of a proper Lord Chancellor!) and one of the legal system books gave, as an example that it was not always so, the case of a late medieval judge who stopped a barrister's argument about the meaning of a piece of legislation with the words 'Do not gloss the statute, we made it'.

DIVISION NI LABOUR RELATIONS

Collective agreements; general principles; rectification

NI [3211]; AII [43], AII [67]

NURMTW v Tyne & Wear Passenger Transport Executive, tla Nexus [2024] UKSC 37

The basic principle relating to collective agreements in this jurisdiction is that they are not legally enforceable. This lay behind the twists and turns in this case as to whether the general contract law/equity concept of rectification of an instrument because of mistake can apply to such an agreement.

To start off with, a dispute about a term of a letter agreement on a pay adjustment between union and employer (subsequently incorporated into individual contracts of employment) contained a procedural complication. Unsurprisingly, it started with an individual ET action by a named employee

for unpaid wages. The employee won before the ET and EAT. However, having lost at this level, Nexus then brought High Court proceedings for rectification of the letter agreement, to make it reflect what they had argued in the ET was its proper meaning; any further proceedings in the ET case were stayed pending this new claim. It was this can of worms that has now gone to the Supreme Court. The High court rejected Nexus's claim and the Court of Appeal upheld that decision, dismissing the claim. The Supreme Court have now held that the Court of Appeal were right to do so, *but*, to add further complication, on different grounds. Essentially, the result was that it was held for the first time that a collective bargain can be rectified in an appropriate case, but that this was not one.

There were four main issues:

(1) Can a collective bargain be rectified, in spite of it being legally unenforceable? The Court of Appeal held that this was an insuperable objection, but the Supreme Court disagreed. Unenforceability is not per se a barrier, but in general a court would not rectify an unenforceable agreement because to do so would be futile, leading nowhere. Where, however, an unenforceable collective bargain has been incorporated into individual contracts, an order for rectification would have an effect, albeit indirectly, because the contracts would change to reflect it, affecting the rights of employees.

(2) Can a contract of employment be rectified? According to the Court of Appeal, that was the right approach, but again the Supreme Court disagreed because the contracts only reflected the agreement which, as the source, was the correct target.

(3) Who are the correct parties? Here, the Supreme Court agreed with the Court of Appeal that the correct action was not against the union, but the employees (which was not what Nexus had done). There were two reasons for this: (i) there was no dispute directly concerning the interests of the union as such, and (ii) to sue the union would mean that the employees who were directly affected by any outcome would have no say in the matter, which was a basic breach of civil procedure.

(4) Can an ET make an order for rectification? Here, the supreme Court's answer was 'no, but …'. As a creature of statute an ET cannot make such an equitable order, *but* if in competent proceedings (such as a statutory action for wages) it appears to it that the conditions for rectification are met, the ET can *treat* the agreement as rectified, as can be done by a civil court (without a formal order).

Thus, Nexus's claim for rectification of a collective agreement was legally possible, but it had brought it against the wrong party. The judgment seems not to rule out a further action against the right parties, but the immediate question was rather what effect this could have on the stayed ET action. On these particular facts, it was held that to use this judgment to reopen the decisions of the ET and EAT would be an abuse of process.

DIVISION PI PRACTICE AND PROCEDURE

Early conciliation; effect of a second EC certificate

PI [288.02], PI [289.07]

***Smith v The Restaurant Group Ltd [2024] EAT 168* (*1 November 2024, unreported*)**

The text at **PI [288.02]** states that only one EC certificate is required, with the result that if a second certificate is obtained, for whatever reason, it cannot be used instead of the first one; this is said to be so that a claimant cannot keep obtaining them, in particular to keep advancing the start date for the limitation period. The authority given for this is *Commrs for HMRC v Garau* UKEAT/0348/16, [2017] ICR 1121. In the instant case before Lord Colbeck in the EAT there was a challenge to this case and the rule in it.

The claimant was dismissed in November 2022 because she did not pass the probation period. She raised a grievance about this, the unfavourable result of which was given to her on 23 January 2023, upon which she initiated early conciliation. The certificate for this was issued on 3 February. She lodged an ET1 on 29 April. This was out of time *but* she relied on the fact that her solicitor had started a second EC procedure on 1 February, the certificate for which was issued on 29 March. If this could be used, her claim was in time. The ET held that only the first certificate could be used, applying *Garau*, and rejected her claim.

In her appeal, she argued that the ET was wrong to have applied *Garau* because it had been impliedly overruled in *Sainsbury's Supermarkets Ltd v Clark* [2023] EWCA 386, [2023] IRLR 562. However, the EAT disagreed and upheld the ET's decision, for two main reasons:

(1) *Sainsbury* did not consider *Garau* and indeed was concerned with a wholly different point about the EC system, namely the use of EC numbers in multiple cases (see **PI [289.07]**). It could not be said that it had affected the present point.

(2) Moreover, *Garau* has been followed on the present point in *Romero v Nottingham City Council* UKEAT/0303/17 (26 April 2018, unreported) where it was held that it had not been decided *per incuriam* and was not manifestly wrong; indeed, it was described by Simler P as 'plainly correct' in permitting only the first certificate to have effect (which was echoed by Lord Colbeck here). It has also been followed in *Treska v Masters and Fellows of University College Oxford* UKEAT/0298/16 (21 April 2017, unreported).

Admissibility of evidence; pre-termination negotiations; meaning of improper behaviour

PI [929]

Gallagher v McKinnon's Aito and Tyres Ltd [2024] EAT 174 (25 September 2024, unreported)

In 2013 there was introduced into the ERA 1996 a new a s 111A **Q [735.01]** to provide for the non-admissibility of evidence of pre-termination negotiations in (ordinary) unfair dismissal claims, to encourage such negotiations as a way of compromising settlements more readily. There already existed the common law doctrine of 'without prejudice', but that only applies to actual or contemplated disputes; s 111A is meant to apply at an earlier stage. As the text points out at **PI [929]**, there is some case law on the section generally, but the instant case before Judge Barry Clarke in the EAT is the first to give consideration to an important exception in s 111A(4), namely where the ET takes the view that a party was guilty of improper behaviour in the negotiations, in which case the ET can admit the evidence to the extent it thinks just. There is guidance on this in the ACAS Code of Practice on Settlement Agreements at paras 17–19. It is an interesting decision because its ultimate lesson is just how much this is a matter of fact and discretion for the ET; moreover, it upholds an ET decision not to apply sub-s (4) on facts which might, at first sight, appear more likely to succeed.

On her dismissal for redundancy, the claimant brought proceedings for unfair dismissal and wished to adduce evidence of dealings she had had with the management prior to leaving, which she obviously considered to have been unfair and, in one way, underhand. The ET took this as a preliminary matter and held that this remained inadmissible.

On appeal, the claimant raised three specific arguments on impropriety:

(1) She was told at the relevant meeting that she had been selected for redundancy. Para 18(e)(ii) of the Code suggests that it may be improper for the employer to put pressure on the employee by telling them that if they do not agree to a settlement they will be dismissed. The EAT held however that that did not apply here, for two reasons: (i) para (e)(ii) is cast in terms of applying to a disciplinary dismissal, not a redundancy one (which poses different considerations); and (ii) in any case, the facts were more nuanced as the ET had found that she was not told she *would* be dismissed, there remaining at least the possibility of alternative employment.

(2) The relevant meeting had been set up on false pretences, in the guise of a return to work meeting after illness, but it had then been used to consider her leaving. The EAT accepted that this may have been unfair in a general sense, but the Code stresses flexibility and that in practice meetings can take different forms and may progress. Here, the ET had considered this fully, in the light of the Code, and its decision that it was not enough to constitute impropriety could not be said to be perverse.

(3) The claimant had only been given 48 hours to respond, which was again argued to constitute unfair pressure, especially as there is mention in the Code of ten days. However, the EAT judgment points out that that figure is suggested as a reasonable time after the employee receives a *written* proposal for a settlement agreement. Elsewhere (as with this oral proposal) the Code only says that a reasonable time should be given. Again, the ET had given full consideration to this on the facts found and its decision that this was not improper behaviour could not be faulted.

The decision of the EAT was that, taken as a whole and on the facts as found, there was no error of law. The emphasis on the ET's primacy on facts is very clear. In relation to (3), the judgment uses the appropriate mantra that another EJ might have come to the opposite conclusion, but that does not invalidate the actual decision.

REFERENCE UPDATE

Bulletin	Case	Reference
549	*Donkor-Baah v University Hospitals Birmingham NHS Trust*	[2024] IRLR 965, EAT
552	*Clifford v IBM UK Ltd*	[2024] IRLR 1232, EAT
552	*Taylors Service Ltd v HMRC Commrs*	[2024] ICR 1171, EAT
553	*Augustine v Data Cars Ltd*	[2024] IRLR 953, EAT
553	*HSBC EWC v HSBC Continental Europe*	[2024] ICR 1284, EAT
553	*Chumbu v The Disabilities Trust*	[2024] ICR 1310, EAT
555	*Sutcliffe v Secretary of State for Education*	[2024] ICR 1332, EAT
555	*Thomas v Surrey and Borders Partnership*	[2024] IRLR 938, EAT
555	*Tesco Stores Ltd v USDAW*	[2024] IRLR 998, SC

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).

Published by LexisNexis