Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

Neonatal care leave and pay

The Neonatal Care (Leave and Pay) Act 2023 **Q [1758]** was brought into force on 17 January 2025. It inserts new ss 80EF to 80EI into the ERA 1996 and ss 171ZZ16 to 171ZZ24 into the SSCBA 1992, and operates largely by way of enacting regulation-making powers, so the secondary legislation setting out the details of the leave and pay entitlements is now awaited. These changes will be made in Div Q in Issue 332.

DIVISION AII CONTRACTS OF EMPLOYMENT

Restraint on competition; non-competition covenants; legality of preparatory steps

AII [220]

Cheshire Estate and Legal Ltd v Blanchfield [2024] EWCA Civ 1317, [2025] IRLR 135

In this case of a failed attempt by a legal firm to enforce a non-compete obligation against two departing directors who were discovered to have been taking certain steps towards setting up their own firm while still employed, the actual ratio of the Court of Appeal's decision to reject the employer's appeal was that these cases are very much ones of fact for the trial judge who here had applied the right law and come to a permissible decision. The rest of Phillips LJ's judgment is therefore obiter, but does give some useful pointers on the question, not of what an employee may not do, but what they *can* do lawfully before departing.

The judgment takes the usual line that these are heavily questions of fact in each case, but then looks at how to go about drawing the necessary lines in

the sand. It focuses on a synthesis of the law given by Etherton J (as he then was) in *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch), [2007] 2 BCLC 202, which looks at the sort of spectrum that can arise in these cases, along which a line must be drawn. The importance of this is that *not* everything done to plan for a future business will be unlawful. It is said that 'even an irrevocable intention to compete does not necessarily mean that merely preparatory steps are unlawful'. This is approved by the court here, in contrast to another first instance decision in *Berryland Books Ltd v B K Books Ltd* [2009] EWHC 1877 (Ch) where a stronger line was taken, that it is unlawful to take any steps to ensure that the new business is 'up and running' immediately on the individual's leaving the employer. This is summed up at [25] of the judgment:

> '[Counsel] referred to a dictum of HH Judge Hodge QC in *Berryland Books Ltd v BK Books Ltd* … at [25], to the effect that, whilst still employed, it is unlawful for an employee to take steps necessary to establish a competing business so that it is "up and running" or ready to go as soon as the employee leaves his employment. However, in my judgment that is too dogmatic a statement given the wide range of circumstances in which that situation might occur, whether in the context of a director or an employee. The preferable approach is that identified by Etherton J in *Shepherds Investments*, namely that whether preparatory actions, short of active competition, are consistent with a director's fiduciary duty to the company is highly fact sensitive in every case, and that even an irrevocable intention to compete does not necessarily mean that merely preparatory steps are unlawful.'

The eagle-eyed reader will have noticed that the instant case was primarily about the duties owed by *directors* who in some ways owe higher duties than ordinary employees (eg on disclosure), but on this issue of future competition the judgment treats the two areas as analogous, and in fact *Shepherds Investments* is an employment case, so that the pointers given here should arguably be equally applicable to departing employees.

DIVISION CI WORKING TIME

Holiday pay; use of the statutory calculation

CI [191]

***East Lancashire NHS Trust v Aleram [2025] EAT 2* (*7 January 2025, unreported*)**

The actual decision of Judge Beard in the EAT in this case was that the ET had not made all the calculations necessary in the holiday pay claim and so the appeal was premature and was dismissed. However, the judgment makes the important point that ultimately the job of the ET is to apply the statutory calculation in the Regulations, not to engage in some other calculation method. The problem seems to be that in this (typically complex) case of a claimant working varying shifts, the parties had become enmeshed in an apparent question of principle as to whether one should use calendar days or worked days. The judge states that he is 'constantly surprised' how the

calculation of holiday pay proves such a difficult topic. He says that the principle is simple, namely that a claimant should receive no less when on holiday than they would receive when working. Thus, the test ultimately is simply that if the figure arrived at (for the week, day or hour) is multiplied correctly, it should be equivalent to the amount earned in the relevant reference period. It is accepted that there must be a multiplier and a multiplicand and they may be flexible, but they must produce this essential result.

DIVISION DI UNFAIR DISMISSAL

Remedies; the impact of contributory action by the employee on the question of re-employment

DI [2400]

***British Council v Sellers [2025] EAT 1* (*3 January 20925, unreported*)**

Cases on re-engagement are relatively rare, and this one before the EAT under Eady P was complicated by two unusual factors: (1) after a finding of unfair dismissal against it and before the remedy hearing, the employer had commissioned a report by an independent barrister into whether the claimant was guilty of the offence for which he had been dismissed; and (2) at both the liability and the remedy hearings the employer had deliberately not relied on contributory conduct, relying at the latter solely on the defence that it would not be practicable to take the claimant back. The case shows how carefully an ET must construe exactly what is expected of it when considering re-engagement under the ERA 1996 s 116(3) **Q [740]**.

The claimant was a senior employee of the Council in Italy. He was accused of sexually inappropriate conduct towards a guest at a reception and summarily dismissed. In the circumstances, the ET upheld his claim for unfair dismissal, largely on procedural grounds. The employer considered that he had in fact committed the offence in question and, as stated, commissioned the independent report which confirmed this. When it came to the remedy hearing, the employer relied on this to oppose the claimant's request for re-engagement, *but* not as going to the question of contributory conduct in s 116(3)(b), but rather going to the third question in s 116(3)(c) of whether it was practicable to re-employ when they remained convinced of his guilt and had no further confidence in him. However, the ET took it upon itself to consider the sub-s (3)(b) question anyway, starting with the report, with which it was less than impressed, not because it was not independent, but because the ET thought its remit was restricted. In effect, the ET re-tried the claimant and found guilt not proved. From that, it went on to hold that it had been irrational for the employer to have accepted the report and so its defence to re-engagement failed and an order was made.

The EAT allowed the employer's appeal. It held that the ET had erred in testing the reasonableness of the investigation, rather than the more straightforward question as to whether the employer held a genuine and reasonably

held belief in guilt, which would make re-engagement impossible in practice. In doing so, it had fallen into the error of substituting its own view. This is summed up at [52] and [53]:

> '52. We do not, however, agree that is what sub-paragraph (c) requires. In our judgement, while it is plainly correct that, in considering whether to make a reinstatement or re-engagement order, the ET is bound to take into account any finding of contributory fault, this provision does not require it to make such a finding. That, we consider, is clear from the wording of sub-section (c): the mandatory requirement comes after the comma; it is only where the complainant has caused or contributed to the dismissal (so: if, but only if, that fact has been established) that the ET is required to take that into account in determining whether it would be just to order re-engagement.
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> 53. In many cases, a finding of contributory fault will already have been made by the ET at the liability stage … If so, sub-paragraph (c) requires that the ET should then have regard to that finding when deciding whether to make an order for re-engagement (and on what terms). In other instances, this will be a matter that has been put in issue on remedy, such that it is a dispute the ET must determine prior to deciding whether it should order re-engagement; if the ET then determines that the claimant engaged in blameworthy conduct causing or contributing to his dismissal, this will (by virtue of sub-paragraph (c)) be a mandatory consideration in deciding whether to order re-engagement. Where, however, no such finding was made at the liability stage, and it is not a point taken by either party, we cannot see that sub-paragraph (c) requires the ET to take on an inquisitorial role to determine whether there has been contributory conduct which it would be required to take into account in deciding whether to make a re-employment order.'

DIVISION L EQUALITY

Compensation; non-pecuniary loss; injury to feelings

L [887]

***Eddie Stobart Ltd v Graham [2025] EAT 14* (*29 January 2025, unreported*)**

This is a relatively unusual case of the EAT overturning an ET decision to award £10,000 damages for injury to feelings on the facts, holding that it was manifestly excessive, and itself substituting an award of £2,000. The main point was that the claimant had in fact lost her principal claim for maternity discrimination and had only won on a subsidiary claim for detriment based on a poorly conducted grievance procedure; it was held that the injury to feelings from *this* was much less. However, the case is of more note for the lengthy consideration in Judge Clarke's judgment of how to approach an award under the *Vento* principles. It starts with a review of the case law (to be found at **L [887]–L [899]**) and then, having stated that this was a case of relatively sparse evidence of actual injury, makes the following points:

(1) There can be no award if there is no evidence of injury.

(2) While ETs should avoid making assumptions, it can properly be borne in mind that in every case of discrimination a claimant will usually suffer some injury to feelings.

(3) While it is central that the compensation is for the injury suffered, *not* to reflect the manner of the discrimination itself (ie it is compensatory, not punitive), that manner can be a useful guide to inferring injury where evidence is otherwise scant.

(4) Factors here may include the frequency of the discrimination, whether it was overt, any elements of ridicule (especially exposure to it in front of other staff), exercise of asymmetrical power by the perpetrator and particular susceptibility to it in cases of pregnancy discrimination.

(5) It is important for the claimant to lead evidence for the ET's consideration, in particular about their description of their injury, the duration of its consequences, the effect on past, current and future employment and the effect on personal life or quality of life.

The judgment expands on each of these and is worth reading in full.

DIVISION NI LABOUR RELATIONS

Blacklists; activities of a trade union; industrial action

NI [856.04], NI [861.02]; NII [699]

Morais v Ryanair DC [2025] EWCA Civ 19

The decision of the EAT in this case is considered at **NI [861.02]**. It concerned action by the respondent airline to create a list of pilots who had taken part in industrial action in order to withdraw discretionary travel benefits from them. Did this contravene the Employment Relations Act 1999 (Blacklisting) Regulations 2010 SI 2010/493? This raised the questions: (1) does industrial action constitute the activities of a trade union, which are protected by the Regulations; and (2) if so, is that protection confined to action which is official and/or official and legally protected (eg by having had a lawful ballot)?

The ET and EAT held that their actions did come under the Regulations. The respondent appealed to the Court of Appeal who have now upheld the tribunals' decisions. In a judgment given by Bean LJ, the starting point was that a commonsense approach would be that of course industrial action was covered (in one of the most controversial areas, ie blacklisting strikers) and that the opposite approach would deprive the Regulations of their Parliamentary intent (as shown by official guidance given at the time of their passage). However, the position was complicated by an (indirect) argument put at **PI [861.03]**, namely that this question now has to be looked at in the light of the decision of the Supreme Court in *Secretary of State for Business and Trade v Mercer* [2024] IRLR 599, [2024] ICR 814, where it was held that industrial action did *not* count as trade union activity for the purposes of detriment imposed for such activity under the TULR(C)A 1992 s 146. The

respondent argued that a consistent approach should be taken under the Regulations, but the Court of Appeal took the view that *Mercer* is distinguishable because it arose in the separate context of unfair dismissal law and addressed a particular problem of an apparent conflict between two legislative provisions. Having so decided, it followed that the commonsense approach was correct and that the pilots' claims could proceed. On the second question, it was held that there is *no* requirement that the industrial action be legally immune. At [50] the judgment states:

> 'I would also reject Ground 2 of Ryanair's appeal. There is no indication either in the text of the Blacklisting Regulations or in the Departmental documents that an employer is free to blacklist an employee taking part in industrial action organised or endorsed by a trade union unless it can be shown that the union had conformed with all the requirements of Part V of the 1992 Act so as to achieve immunity from being sued in tort. To be one of the "activities of an independent trade union", industrial action must be official, in the sense of being organised or endorsed by the union under its rules, but, like Judge Auerbach, I see no basis for importing into the Blacklisting Regulations a requirement of conformity with the balloting requirements of Part V of the 1992 Act.'

This judgment is clear on the point, but it may not be the last word. As the text points out, even with the *Mercer* point out of the way, there are still some loose ends here, and the LexisPSL Employment commentary states that the respondent may seek to appeal to the Supreme Court.

DIVISION PI PRACTICE AND PROCEDURE

Early conciliation; requirement for an EC certificate; rejection of claim

PI [288.10], PI [289]

***Abel Estate Agent Ltd v Reynolds [2025] EAT 6* (*20 January 2025, unreported*)**

Although the EC system is meant to operate flexibly, the legal requirement to accompany a claim with an EC certificate has caused some problems of a stricter nature. This decision of Swift J on the EAT considered the position where, unusually, there was not the necessary certificate *but* the tribunal office did not notice and registered the claim, this only coming to light later at a preliminary hearing, when the respondent argued that that claim should be rejected at that stage because the ET lacked jurisdiction. This happened because the claimant's claim for unfair dismissal included a claim for interim relief (needing no certificate) but she also claimed for detriment, which did require one, and it was this that the office failed to notice. The ET agreed and rejected that claim, but allowed an amendment to cover the detriment claim. The respondent appealed.

The EAT noted that the ET had not had cited to it *Sainsbury's Supermarkets Ltd v Clark* [2023] EWCA Civ 386, [2023] IRLR 563 (see **PI [289]** ff)

which considered the general nature of the certificate requirement and held that if an ET fails to reject at an early stage, the proper procedure is to consider a strike out under r 37 (now r 38). The ET had erred here by a simple rejection. In coming to that conclusion, however, the judgment considered the basis for all of this and the deeper question of whether the certificate requirement in the ETA 1996 s 18A **Q [890.01]** goes to the ET's *jurisdiction*. The decision was that it does not, but that involved departing from the earlier EAT decision in *Pryce v Baxterstorey Ltd* [2022] EAT 61 (9 December 2021, unreported) (see **PI [288.10]**) and also holding that certain remarks of Bean LJ in *Clark* (at [44]) apparently going the other way were obiter and not to be followed. It may therefore be that this is not the last that we have heard of this issue. Hopefully, this particular problem of the ET office not noticing the lack of a certificate will be rare, but it does show how quickly an overall aim of flexibility of application of the whole EC system can be overtaken by a descent into legal detail, especially here where the dominant concept is the inherently slippery one of 'jurisdiction' which has tasked many eminent legal brains in many contexts.

Unless orders; application to costs; relief from sanction

PI [390], PI [405], PI [412]

Sivanandan v Independent Office for Police Conduct [2025] EAT 7 (20 January 2025, unreported)

This decision of Judge Auerbach in the EAT holds (apparently for the first time) that an unless order under r 38 of the old ET Rules (now r 39 of SI 2024/1155 **R [3636]**) can be made in relation to a costs application, ie not just in relation to the main proceedings. The claimant in lengthy litigation had lost comprehensively on liability and the respondent made a costs application. The EJ made an unless order under r 38(1) requiring a schedule of costs by a certain time. This was missed by four and a half hours. However, the respondent was given relief from sanction under r 38(2). The claimant opposed this, raising the whole question of the appropriateness of an unless order in a costs application (an indirect way of opposing the relief decision). The EAT held that the order, and therefore the relief, were lawful (see [36] of the judgment).

In addition, the judgment makes the following subsidiary points, well summarised in the headnote:

(1) An ET can properly consider failure to comply and relief from sanction sequentially on the same occasion.

(2) The provision in r 38(2) that a tribunal may determine relief by written representations means that the parties must have a fair opportunity to make such representations, but what that means will depend on the circumstances of the particular case,

(3) The test to be applied for relief under r 38(2) is the interests of justice, guidance on which is provided in *Thind v Salveson Logistics*

UKEAT/487/09, [2010] All ER (D) 05 (Sept) (see **PI [412]**). There is no further rule of law that it should only be granted in exceptional cases.

(4) The decision on relief lies very much with the ET. Unless there is a substantive error of law, its decision can only be interfered with by the EAT if the ET has not considered relevant considerations, taken into account irrelevant considerations or reached a perverse decision.

Costs orders; relationship with preparation time orders

PI [1045]

Pilgrim v Jasmine Care (Holdings) Ltd [2024] EAT 179, [2025] IRLR 118

The claimant won at the liability hearing. Prior to the remedies hearing the ET made certain case management orders which were not initially observed by the respondent by the set time. The claimant made an application for a preparation time order in respect of this, which was made. Subsequently, he made an application for a general costs order. The ET refused this on the facts, given that the delay in replying had not been long and the remedies hearing had not been prejudiced, so that the respondent's conduct fell short of the relatively high bar for a costs order. The claimant appealed, but Glynn DHCJ rejected the appeal. On the facts, the ET had considered the matter properly and come to a defensible conclusion. However, it was also held that there was a more fundamental reason, namely that the ET would have had no power to make a costs order here anyway. Rule 75(3) (now r 73(3) of SI 2024/1155 **R [3670]**) states that 'A costs order … and a preparation time order may not both be made in favour of the same party in the same proceedings'. As a matter of law, it was held that 'in the same proceedings' refers to the *whole* proceedings from ET1 to final disposal; it is not possible to split proceedings up for this purpose.

DIVISION PIII JURISDICTION

State immunity; nature of claimant's work

PIII [191.06]

Kingdom of Spain v Lorenzo [2025] EWCA Civ 59

There was reported in last month's **Bulletin 558** the Court of Appeal's substantive decision in this significant case on state immunity in the employment context. It was pointed out there that one loose end left in the judgment was whether to make a declaration of incompatibility with the European Convention art 6 in relation to s 4(2)(a) of the State Immunity Act 1978. Having heard further submissions, the court have now issued this short supplementary judgment agreeing with the claimant and making that declaration. One interesting point made in relation to declarations of incompatibility generally (argued by the Secretary of State) is that the court reminded itself that, according to *R (Wright) v Secretary of State for Health* [2009] UKSC 3, [2009] AC 739, when making the declaration a court should *not* go

further and advise what it thinks should be done to bring the legislation into line with the requirements of the Convention.

REFERENCE UPDATE

Bulletin	Case	Reference
553	*Prospect v Evans*	[2025] ICR 1, KB
553	*Augustine v Data Cars Ltd*	[2025] ICR 19, EAT
553	*Bailey v Stonewall Equality Ltd*	[2025] ICR 46, EAT
553	*Notaro Homes Ltd v Keirly*	[2025] ICR 72, EAT
554	*Leeks v University College London Hospitals NHS Foundation Trust*	[2025] ICR 87, EAT
556	*Carnival plc v Hunter*	[2025] IRLR 94, EAT
556	*Haycocks v ADP PRO (UK) Ltd*	[2025] IRLR 123, CA
557	*Connor v Chief Constable of South Yorkshire Police*	[2025] IRLR 104, EAT
557	*Gallagher v McKinnon's Auto & Tyres Ltd*	[2025] IRLR 112, EAT
557	*NURMTW v Tyne & Wear Passenger Transport Executive*	[2025] IRLR 140, [2025] ICR 153, SC

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