Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to **29 October**.

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TIM BRENNAN KC

It was with great sadness that we learned of the untimely death of Tim Brennan KC who for many years was a contributing editor to this work. He had a high-profile career at the Bar, from Atkin Scholar of Gray's Inn through to head of chambers and Deputy High Court Judge. In addition to wide coverage of employment law, he specialised in Tax Law and it was Division BII 'Taxation of Employment Income' that he edited. He did so with great authority and wrote it in such a way as to combine coverage of the basics by way of introduction with detailed and incisive coverage of the particular aspects of the subjects of most concern to employment law practitioners – no mean feat. He will be greatly missed by those of us who were his fellow editors.

LEGISLATION

As a result of the changes made as from 30 September by the Employment Appeal Tribunal (Amendment) Rules 2023 SI 2023/967 (see **Bulletin 543**), HMCTS have issued new and/or amended EAT forms to take these into account. These will be incorporated into the relevant places in this work in Issue 311.

DIVISION AII CONTRACTS OF EMPLOYMENT

Restraint of trade; bonus claw back clause not a restraint

AII [195.02]

Steel v Spencer Road LLP [2023] EWHC 2492 (Ch)

Restraint of trade cases normally concern the legality/enforceability of a particular clause directly affecting the ex-employee's freedom to take new

employment/compete/induce others to do so. The law here is voluminous and ancient. However, as the text points out at **AII [195.02]** there may be other cases where the argument is that some other aspect of employment (short of a formal restraint clause) *acts* as an unlawful restraint. This is sometimes referred to as an *indirect* restraint, on which there is some, but not much, authority. The instant case before Bacon J is an instructive example of this issue.

The claimant was subject to a contract of employment which provided for discretionary bonuses on top of basic pay. It stated, however, that a bonus was conditional on the employee remaining in employment (and not giving notice) for three months after the date of payment (a 'bonus claw-back' in the jargon). Note however, that the clause did not place any restrictions on any post-employment activities. The claimant received a substantial bonus in January 2022 but in February gave notice to leave. The employer sought repayment of the bonus but the claimant refused and defended their refusal on the basis that the claw-back provision was an unlawful restraint of trade.

The claimant's principal problem was that in the only case directly in point (*Tullett Prebon plc v BGC Brokers LLP* [2010] EWHC 484 (QB), [2010] IRLR 648, upheld by the CA on other grounds) it was held that a claw-back provision not affecting post-termination activities is *not* an unlawful restraint. The claimant invited the court to hold that that case was wrongly decided and pointed to another first instance decision where a less clear approach had been taken (*20/20 London v Riley* [2012] EWHC 1912 (Ch)). Again, however, there was a problem because in two other cases on the analogous area of commission payments the judge had held consistently with *Tullett Prebon* (*Marshall v NM Financial Management Ltd* [1996] IRLR 20, QB, as explained in *Peninsula Business Services v Sweeney* [2004] IRLR 49, QB). In the instant case, the judge held that *20/20* was not authoritative here and that the latter two cases were authority for the proposition that a contractual condition that is subject to continuing employment, or to employment for a specific period of time, but which does not otherwise restrict the employee's freedom to take up other employment, is not a restraint of trade. It was accepted that such a provision might act as a *deterrent* to leaving, but that was not enough. At [53] the judgment states:

> 'I do not consider the reasoning in *Tullett Prebon* to be wrong. There is no doubt that an employee bonus or commission scheme which is conditional on the employee remaining in employment for a specified period of time operates as a disincentive to that employee resigning. That does not, however, turn such a provision into a restraint of trade. As Rimer J said in *Sweeney*, the disputed employment contract did not impose any restrictions on where Mr Sweeney might work after he left the defendant. The same was true of the disputed clauses in *Tullett Prebon*, and the same is also true of the bonus clawback provisions in the present case.'

Termination by notice; statutory minimum restraint of trade clause; balance of convenience

AII [247], AII [408], AII [430]; BI [10.13]

Hine Solicitors Ltd v Jones [2023] EWHC 1708 (KB), [2023] IRLR 928

This is a first instance case on restraining an employee from breaching the term of fidelity post-employment when proposing to join a competitor. So far, so ordinary, and indeed the actual decision in the case was that the application for an interim injunction was refused, principally because there was little compelling evidence that the ex-employee was in fact going to act in contravention of fidelity, especially as the other solicitors' firm she was joining was not a competitor. As this was an interim application, the questions before the judge were in the nature of whether there were arguable cases on each side and ultimately the balance of convenience came down on the ex-employee's side.

The reason the case is unusual, however, is because of the odd form that the contractual restraints on the employee took. By a contract entered into in 2022, although the notice she was required to give was three months, she could not *give notice at all* until she had worked there for three years. Moreover, that was then followed by a restraint clause for a further period. On her giving notice a year later, the basis of the employer's argument to restrain her was that her notice was contractually invalid, so that she remained employed by them, even though not actually there. At first sight, this may seem a strange proposition, but (1) it has some contractual backing generally in the light of the elective theory of termination and (2) a not-dissimilar argument was used successfully in *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373, [2015] IRLR 57 (see **AII [247]**, **AII [463.09]** and **BI [10.13]**), though that case concerned enforcing a contractual notice provision during what should have been the notice period, not this apparent extension to a bar on giving notice at all for a long period.

The employee argued that such a clause was void under the ERA 1996 s 86 (minimum notice) in combination with s 203 (restrictions on contracting out), but the judge held against this because s 86 only sets out the minimum notice the employee is required to give; it does not render void anything longer. Moreover, nothing in *Sunrise Brokers* backs such a defence. A second argument was that the bar on giving notice and the successor restraint clause should all be viewed as in effect one super-restraint, all subject to the normal rules on restraint clauses (under which three years plus would hardly if ever be enforced). Given the actual decision (above) based on the facts and the balance of convenience, the judge did not have to decide this point. At [37] the judgment sums this up as follows:

> 'This is an unusual case where HSL is arguing that Ms Jones remains employed by it, yet is no longer seeking to prevent Ms Jones from undertaking other employment at all, or from other employment at the Second Defendant. It is nevertheless relying upon the alleged continuing employment status to impose a broader restriction on her activities

than would have been the case if the termination was lawful. In these circumstances, it is incumbent on a Court to consider the purpose of the broader restriction, and in particular whether it is, for some reason, required by HSL as being reasonably necessary to protect its legitimate business interests.'

Arguably, this points in the direction of future use of this super-restraint argument to get over what could be some complex issues. Otherwise, reliance may have to be placed on the discretionary nature of an interim injunction and wider arguments on the balance of convenience. It would be better altogether for the sanity of employment lawyers if this case proved to be a one-off and not an invitation to employers to try this tactic in the future.

DIVISION CI WORKING TIME

Holiday pay; recovery of unpaid amounts; meaning of a 'series' of deductions

CI [146.07], CI [193.14], CI [193.32], CI [238.02]

Chief Constable of the Police Service of Northern Ireland v Agnew [2023] UKSC 33

This is the awaited decision of the Supreme Court (given jointly by Lord Kitchin and Lady Rose) on appeal from the NICA which had disapproved the limitation in *Bear Scotland v Fulton* [2015] IRLR 15, [2015] ICR 221, EAT that a 'series' of unlawful deductions from wages for the purposes of recovering underpaid statutory holiday pay is broken by any gap of greater than three months (see **CI [238.07]**). The court has upheld that NICA decision, meaning that the relevant underpayments here, caused by not including overtime in holiday pay over many years, could be claimed in full, which is likely to cost the PSNI £3m, rather than £300,000 as it would have been under *Bear Scotland*.

That is the key holding in the case, which is particularly important in Northern Ireland because, although its working time and general employment protection laws mirror the GB Working Time Regulations 1998 SI 1998/1833 and the Employment Right Act 1996, they do *not* include the statutory two-year overall limit on back claims introduced in GB as the ERA 1996 s 23(4A) in 2015 (as the belt to *Bear Scotland's* braces in an attempt to limit the potentially open-ended retrospective liability on employers once it was accepted that overtime is to be counted in holiday pay, not just basic). This holding had been predicted by obiter remarks by Simler LJ (as she then was) in *Smith v Pimlico Plumbers Ltd (No 2)* [2022] EWCA Civ 70, [2022] IRLR 347 and so should perhaps not come as too much of a shock. It is summed up at [123]:

'We are satisfied that Langstaff J fell into error in this second part of his reasoning. Of course, there will be cases where a failure by a worker to bring a claim within three months of a particular act or failure to act will extinguish the jurisdiction to consider that claim. The limitation

> period is short and deliberately so. The purpose of protecting potentially vulnerable workers is not uncontrolled. In general, the claim must indeed be made within three months of any act or failure to act of which complaint is made. But to assume that a gap of more than three months between an act of which complaint is made and any acts which preceded it will necessarily extinguish the claimant's ability to recover in respect of the earlier acts would be largely to ignore the exception to the general rule which the "series" extension provides and the protection it is intended to confer.'

One point about the 'series' exception to the normal three-month limit is that it appears in (to use the GB terminology, to which this case now applies) the ERA 1996 s 23(3)(a) **Q [647]** but not in the WTR reg 30(2) **R [1101]**; the tactic adopted hitherto has therefore been to sue for unpaid holiday pay under the general provisions of s 23, not under the specific enforcement provisions in reg 30, in order to access it. This is accepted in the judgment. This all leads to the question – what is a 'series'? This is answered at [127]. It is a question of fact, applying its normal linguistic meaning. It need be neither contiguous, nor of course with no gaps greater than three months. In construing it, the passage suggests the following factors: (1) the similarities and differences of the failures by the employer; (2) their frequency, size and impact; (3) how they came to be made or applied; (4) what links them together; and (5) all other relevant circumstances. Here, they all concerned one common fault (not including overtime) stretching over many years, and so the Industrial Tribunal and the NICA had been right to construe them as indeed a series.

The Supreme Court also had to consider four subsidiary points, on which the judgment is also authoritative:

(1) As well as arguing for a wide interpretation of 'series' generally in s 23, the claimants had also argued that, in any event, a similar provision should be read into the WTR SI 1998/1833 reg 30(2)(a) because its absence infringed the EU law concept of equivalence. The NICA accepted this argument and held that the following italicised wording should be read into reg 30(2)(a):

> 'An [employment] tribunal shall not consider a complaint under this regulation unless it is presented– (a) before the end of the period of three months … beginning with the date on which it is alleged that … the payment should have been made *or if presented in respect of a series of payments of wages from which deductions were made, before the end of the period of three months beginning with the date on which it is alleged that the last in the series of such payments was made*…'.

In the Supreme Court the employer argued that this stretched the *Marleasing* principle too far, but the court disagreed and upheld this element of the NICA's decision too, holding that the reading-in was 'entirely appropriate and in accordance with the *Marleasing* test' (see [73]).

(2) The police officers were specifically covered by the NI equivalent of the WTR (see reg 41 GB), but, unlike their civilian colleagues, were not covered by the NI equivalent of s 23 because they were not 'workers'. Applying again the principle of equivalence, it was held that they are to be covered by the latter.

(3) A question had arisen as to the *order* in which a worker is to take the ordinary (EU) holiday entitlement of four weeks and the additional (domestic) 1.5 days. If *Bear Scotland* had stood, it was thought that this could make a difference. As it was, the judgment says that it now makes little difference, but in any event it was held that there is *no* rule of law on this.

(4) A further question arose as to the method of calculation of 'normal pay', particularly for calculating a day's overtime pay. On this, the court expressed two opinions: (i) it is 'inappropriate' when doing so to divide by all calendar days; and (ii) the appropriate reference period for calculation is a question of fact, but the court noted the 'pragmatic' view of the NICA that 12 months is not a bad starting point.

One final thought. Previously, a claimant wishing to claim for a series of past failures to pay holiday pay had to sue under s 23 in order to come within the 'series' provision, *but* that also meant (since the 2014 amendment) that they also came within the two-year limitation in s 23(4). However, in the light of point (1) above, they can now access the 'series' provision in reg 30; the point here is that the 2014 imposition of the two-year limitation *only* applies to s 23 and does *not* appear in reg 30. It is therefore arguable that an unintended consequence of *Agnew* is that a claimant wanting to claim in relation to a series of failures going back beyond two years can now evade that two-year limitation by bringing their action solely under reg 30. If this is correct, it will be interesting to see whether, once this is appreciated in governmental circles, there will be a legislative amendment to add the limitation to reg 30 too.

DIVISION M TRADE UNIONS

Certification Officer; appeal to the EAT

M [4014]

Embery v Fire Brigades Union [2023] EAT 134

This latest episode in the long-running litigation concerned an appeal by the claimant against a decision by the Certification Officer (CO) that the union had not been in breach of its own procedural rules in not letting him appeal against an interpretation of a disciplinary rule by the Executive Committee; the relevant rule provided for a contested interpretation to be referred to a higher committee, but it was held by the CO that this permitted the union to do so, but was not a form of individual appeal. That was upheld by the EAT. To that extent, the case is one on its own facts, but the interest in it lies in the fact that at [19] Eady P sets out guidance on *how* an appeal to the EAT from the CO is to be conducted. Arguably, this is even more pertinent since the

change last year to TULR(C)A 1992 s 108C **Q [342.03]** widening the appeal from one only on law to one on any issue arising (ie including appeals on fact). The guidance is as follows:

> 'Having regard to the relevant case-law (set out more fully by the Court of Appeal in *Kelly v The Musicians' Union* [2020] EWCA Civ 736), we approach our task on this appeal with the following principles in mind:
>
> (1) A trade union's rulebook is in law a contract between all of its members from time to time (*Heatons Transport (St Helens) Ltd v Transport General Workers Union* [1972] IRLR 25, [1972] ICR 308; *Evangelou and ors v McNicol* [2016] EWCA Civ 817, paragraph 19; *Kelly*, paragraph 36(1))
>
> (2) As such, it must be interpreted in accordance with the principles which apply generally to the interpretation of contracts (*Evangelou*, paragraph 20; *Kelly* paragraph 36(2)).
>
> (3) Nevertheless, context is important. Trade union rule books are not drafted by parliamentary draftsmen and should not be read as if they were. Further, unlike commercial contracts, it is not to be assumed that all the terms of the contract will be found in the rule book alone (particularly as regards the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf) and may be informed by custom and practice developed over the years (*Heatons Transport* per Lord Wilberforce at pp 393G–394C; *Kelly*, paragraph 36(3)).
>
> (4) It is also important to recall that what falls to be construed in this context is in substance the constitution of a trade union. Although in law its status is that of a multilateral contract, it is the document which sets out the powers and duties of a trade union (*Evangelou*, paragraph 19; *Kelly*, paragraph 36(4)).
>
> (5) The rules of a trade union should thus be given an interpretation which accords with what the reasonable trade union member would understand the words to mean; a court should be slow to adopt a construction which, on the face of it, is contrary to what both the members and common sense would have expected. (*Jacques v AUEW* [1986] ICR 683 per Warner J, at p 692A-B; *Coyne v Unite the Union* (D/2/18–19) per HHJ Jeffrey Burke QC (acting as a CO), paragraph 30*; McVitae and ors v Unison* [1996] IRLR 33 per Harrison J, paragraph 57; *Kelly*, paragraph 39).'

DIVISION PI PRACTICE AND PROCEDURE

Vulnerable witnesses or parties; fair hearing; use of judicial guidance

PI [381], PI [874], PI [879]

Habib v Dave Whelan Sports Ltd [2023] EAT 113, [2023] IRLR 893

This decision of Judge Beard in the EAT emphasises the point made in the text that when dealing with vulnerable parties or witnesses an ET should

consider and apply the available official guidance. This is contained in the Presidential Guidance on the matter (see **PI [2561]**), but also more generally the Equal Treatment Bench Book applicable to tribunals as well as courts. The purpose of both documents is to provide judges with the tools which assist in ensuring a fair hearing when dealing with, amongst others, vulnerable witnesses. This case concerned a party with dyslexia. The relevant part of the Bench Book provides the assurance to claimants that 'misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness.' Here, however, the ET had made explicit and detailed findings impugning the claimant's credibility based upon her behaviour during the hearing, with no reference to the Bench Book. The problem was that the ET was relying on the very matters that might arise from the condition as reasons to doubt the claimant's evidence. The EAT held that this made the hearing unfair and allowed the appeal. The judgment in fact went beyond the question of using the guidance and warns that, in general, there is always a danger in relying, simply, on demeanour as a guide to the truthfulness or not of evidence; cultural and other differences can make the reliance on such factors unreliable and this is all the more important in circumstances where the tribunal is aware of a condition that might affect demeanour or the manner in which evidence is given.

DIVISION PIII JURISDICTION

The appropriate forum; employee habitually working in the UK; claim by employer against employee; anti-suit injunction

PIII [271], PIII [291], PIII [324]

Gagliardi v Evolution Capital Management LLC [2023] EWHC 1608 (Comm), [2023] IRLR 920

The text points out that the rules on jurisdiction in employment cases set out in the Civil Jurisdiction and Judgments Act 1982 s 15C (as inserted in 2019) are meant to re-enact the existing pre-Brexit situation under the Brussels I Recast Regulations art 22. That is affirmed in this judgment of Foxton J, but in the relatively unusual context of a foreign claim by the employer *against* the employee.

The claimant was an American working for an American firm in England. He brought ET proceedings here for allegedly due bonus payments. However, the complication arose that the employer not only disputed this entitlement but brought proceedings in a New York court to declare that no bonus was payable. The claimant brought High Court proceedings to seek an anti-suit injunction (on an interim basis) to stop the New York claim. The basis for this was that: (1) under s 15C(2)(b) he had a right to sue here because England was where he habitually carried out his employer's work; and (2) more particularly (by way of protection intended to be given to an employee here), under s 15C(3) the employer could only sue *him* here because he was

domiciled here (the domicile of the employer being declared to be irrelevant). With regard to (2), the learned editor of the IRLR points out that this is the first case on sub-s (3).

The court had to determine (i) if he was domiciled in England, (ii) if he was an employee of the employer and (iii) if so, if the employer's claim arose in relation to his employment. Point (iii) was not contested by the employer (if (i) and (ii) went against it), and so much of the judgment concerned interpretation of the facts on domicile and employee status. One point of law here was that, although this was an interim application, the normal *American Cyanamid* rules requiring only an arguable case do not apply in the more controversial context of an anti-suit injunction, where the person applying for it has to show 'high probability' for the elements to be established. On the facts, the claimant had done so.

That led to the question of remedy. The key authority here was *Samengo-Turner v JH Marsh & McLennon (Services) Ltd* [2007] EWCA Civ 723, [2008] IRLR 237 which established the availability of an anti-suit injunction and accepted the mandatory nature of the Brussels Regulation on this point (which is to be followed under the new statutory regime). A mandatory injunction was held to be inappropriate and so the injunction was limited to require the employer to comply with certain undertakings it had given to the court in relation to the New York proceedings pending trial. One interesting straw in the wind is that one reason for not making a mandatory order was that the employer had indicated that it intended to challenge the correctness of *Samengo-Turner* in higher proceedings. In this context, the judgment in considering anti-suit injunctions had pointed out that that case had not met with unalloyed joy either judicially or in academic writing and so it is possible that we will hear more of the instant case in the future.

REFERENCE UPDATE

Bulletin	Case	Reference
541	*Cannon v Bar Standards Board*	[2023] IRLR 939, CA
542	*Hewston v OFSTED*	[2023] IRLR 878, EAT
542	*Ponticelli UK Ltd v Gallagher*	[2023] IRLR 934, CSIH

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