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Harvey on Industrial Relations and Employment Law

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LEGISLATION

New protection from sexual harassment

The Worker Protection (Amendment of the Equality Act 2010) Act 2023 received Royal Assent on 26 October. It places a duty on employers to take reasonable steps to protect employees from sexual harassment. It provides for two forms of enforcement: (1) direct, by the EHRC; and (2) indirect by a new power for an ET to increase compensation by up to 25% where such harassment has been established. It operates by way of amendments to the EqA 2010 and is to come into force on 26 October 2024. In the meantime, it will be put into Div Q in its existing form in Issue 313.

Changes to the Rehabilitation of Offenders Act

The Police, Crime, Sentencing and Courts Act 2022 s 193 came into effect on 28 October. It significantly reduces the periods after which custodial sentences do not have to be disclosed to potential employers. Sentences of more than four years (currently never spent) go to seven years (subject to exceptions relating to serious violent, sexual and terrorism offences); sentences between one and four years are now subject to a four-year period and sentences up to one year to a one-year period. This applies to offenders over 18 and is subject to no reoffending in the relevant period.

Trade Union Act 2016 commencement

By virtue of SI 2023/1193, s 15 of the Trade Union Act 2016 ('Restrictions on deductions of union subscriptions from wages in public sector') is to come into force 9 May 2024. It operates by inserting a new s 116B into TULR(C)A 1992.

Changes to the ETA 1996

By virtue of SI 2023/1194, ss 35, 36 and 38 of the Judicial Review and Courts Act 2022 were brought into force on 7 November 2023. These substitute new ss 4 and 28 of the ETA 1996 on the composition of ETs and the EAT. These new provisions replace detailed rules with regulation-making powers. There are also consequential amendments to the ETA 1996 in Sch 5 paras 3, 18 and 25 of the 2022 Act, again coming into force on 7 November. These changes will be made in Div Q in Issue 313.

Carer's Leave Act 2023 brought into force

The Carer's Leave Act 2023 (Commencement) Order 2023 SI 2023/1283 brought into force the substantive provisions of the Act (ss 1 and 2 and the Schedule) on 4 December. This operates by adding a new Part 8B (ss 80J–80N) to the ERA 1996 which largely provides regulation-making powers to establish the new right. It then making consequential amendments. These changes will be made in Div Q in Issue 313.

DIVISION AI CATEGORIES OF WORKER

Workers; casual relationship; relevance of art 11

AI [81.09]; M [48.04]; NI [902.01], NI [902.09], NI [1003.03]

Independent Workers Union of Great Britain v CAC [2023] UKSC 43

In this case the union was seeking to use the statutory recognition system to obtain recognition in respect of its Deliveroo rider members. The CAC rejected the claim because the riders were not 'workers' within TULR(C)A 1992 s 296. The union brought a judicial review, which did not challenge this finding but instead relied on the separate argument that their exclusion was contrary to art 11 of the European Convention. It lost in the Divisional Court and in the Court of Appeal. It has now also lost before the Supreme Court.

The judgment isolated four points needing decision: (1) were the riders within the coverage of art 11; (2) if so, did art 11 require the UK to provide rights for them under the procedure; (3) if so, did the justification element in art 11(2) apply; (4) if not, could the procedure be read down to achieve that result? In fact, the case was decided on point (1), *but* because point (2) had caused so much dispute in the past with difficult case law, the court went on to consider it. It is possible that this part of the judgment may have the most effect in the longer term on trade union law generally.

On point (1) the judgment considered the case law of the ECtHR on worker status under art 11, in particular the 'Good Shepherd' case (*Sindicatul 'Pastorul cel Bun v Romania* [2014] IRLR 49, see **NI [902]**) with the emphasis on the need for an 'employment relationship' in order to attract the TU-specific part of the article. That requires an element of personal service which was missing here because of the level of substitution possible for the riders. That has been a dominant aspect of this case throughout, but it is interesting that at [71] the judgment isolates a dozen further factors about the

Deliveroo model that also point against an employment relationship. Thus, art 11 was not engaged here, which determined the case against the union. Points (2) to (4) therefore did not have to be decided, and (3) and (4) were not.

Point (2), however, has been such a controversial one for so long that the court decided to consider it. It is effectively the '*Demir* problem'. Did that well-known decision of the ECtHR go further than imposing a negative duty on states not to attack union collective rights (as in the case) and recognise a positive duty to promote such rights, in particular to provide a right for workers to require their employer to bargain collectively with their union? The problem for unions here has been that *Demir* itself (and the UK case of *Wilson, Palmer and Doolan v UK* [2002] IRLR 568) can be construed as going in that direction but did not clearly decide the point. In the instant case, the union's argument was that, irrespective of that, the later case of *UNITE the Union v UK* [2017] IRLR 438 *had* taken that step. Moreover, later domestic cases should be interpreted as approving that view, in particular *Pharmacists' Defence Union v Boots Management Services Ltd* [2017] EWCA Civ 66, [2017] IRLR 355, *Wandsworth LBC v Vining* [2017] EWCA Civ 1092, [2017] IRLR 1140, *R (Independent Workers Union of Great Britain) v CAC* [2021] EWCA Civ 260, [2021] IRLR 363 and *National Union of Professional Foster Carers v Certification Officer* [2021] EWCA Civ 548, [2021] IRLR 588 (see **NI [902.09]–NI [902.16]**). The court considered these in detail and held that they should not be interpreted as supporting such an expansive view. One important element here was the wide margin of appreciation given by the Strasbourg court to nations to mould their various (and varying) laws. The judgment also cites with approval Bean LJ's dictum that overall *Demir* represents the high point and that a union expecting more was likely to be disappointed. At [134] and [139] the court's decision on this second point is expressed as follows:

> 'In our judgement, therefore, the Court in *Unite the Union* did not develop the law beyond what had been decided in *Demir* and *Wilson* and did not decide that article 11 now includes a right to compulsory collective bargaining. In so far as the domestic case law has interpreted the Strasbourg authorities to the contrary, those decisions should not be followed.'

> 'In our judgment there is, on the current state of the Strasbourg Court's jurisprudence, no right conferred by article 11 to compulsory collective bargaining. Even if the Riders were article 11 workers, it would not be a breach of their article 11 trade union rights to define those who benefit from Schedule A1 in a way which excludes them.'

Partners; not employees of a business engaging the partnership

AI [127]

***Anglian Windows Ltd v Webb [2023] EAT 138* (*3 November 2023, unreported*)**

It is trite law that a partnership is fundamentally different from an employment relationship. This primarily means that an individual partner within it is not 'employed' by it and so, for example, cannot claim unfair dismissal if terminated. However, this traditional rule also applies to relations with a third party contracting *with* the partnership. In this case before Eady P in the EAT AW Ltd contracted with a two-person partnership for it to provide services (in reality by one of the partners). In later litigation that partner claimed to have in fact been an employee of AW Ltd. The claimant's problem was that in *Firthglow Ltd v Decsombes* UKEAT/0916/03, [2004] All ER (D) 415 (Mar) on very similar facts (again concerning a contract with a two-person partnership) it was held that there was no contract of employment. However, the claimant mounted a direct attack on the application of the traditional rule in this sort of case. He argued, firstly, that what *Firthglow* really meant was that there could not be such a contract with the partnership *itself*, which did not preclude an employment relationship with an individual partner. Secondly, and in the alternative, he argued that if the first argument failed the EAT here should hold that *Firthglow* was wrongly decided and should be departed from. However, the EAT disapproved both of these arguments and held that the claimant was not AW's employee. At [59] the judgment states that:

> 'the existence of a genuine pre-existing partnership, in which the claimant was a partner and through which his activities were provided to the respondent pursuant to contract (between the respondent and the partnership) by which the claimant's services were engaged, and were similarly paid for through the partnership, with no suggestion that this was a sham arrangement, precluded the possibility of the existence of a contract of employment between the claimant and respondent.'

The reference to a sham points to a possible exception, where the agreement with the partnership is not genuine; in *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 9, [2009] IRLR 365 Sedley LJ suggested that this aspect may need further consideration. Another possible exception, in ordinary contract law, is that on particular facts there might have been a collateral contract with an individual partner. Subject to these, however, the decision upholds orthodoxy.

Agency workers; exclusion of permanent workers; meaning of 'temporary'

AI [196.01]

***Ryanair DAC v Lutz [2023] EAT 146* (*30 November 2023, unreported*)**

The claimant in this case was a pilot provided by an agency to fly for Ryanair. His arrangement was for a period of five years; pilots were often re-supplied after this, but that was not certain. He brought ET proceedings for: (1) unpaid holiday pay under the Civil Aviation (Working Time) Regulations 2004 SI 2004/756; and (2) equal treatment with permanent staff under the Agency Workers Regulations 2010 SI 2010/93. Much of the extensive judgment is concerned with the former, specific issue (revolving round whether he was a 'crew member' who was 'employed'). The ET held that he was and this was upheld by the EAT.

With regard to his second claim, more generally as an agency worker, again the ET held in his favour. On the airline and agency's appeals, two main issues arose. The first was whether a substitution provision in his contract meant that he was not a worker under the regulations. This in turn queried if any power of substitution (if not a sham) was 'unfettered' (so as to deny the status). Here, it was held that it was too fettered to count, those fetters arising under the relevant air safety legislation; applying *Sejpal v Rodericks Dental Ltd* [2022] EAT 91, [2022] IRLR 752, it was held that such restrictions can be taken into account just as much as less formal ones.

It is, however, in relation to the second issue that the judgment is of most interest. It was whether the arrangement for five years could be called 'temporary', an essential element in the definition of an agency worker in reg 3(1)(a) **R [2416]**. The text at **AI [196.01]** makes the point that, essentially, the proper interpretation is that 'temporary' means 'not permanent' (or open-ended); it does not mean of short duration (even though that would be a possible linguistic option). It cites the three main EAT cases on this point, namely *Moran v Ideal Cleaning Services* [2024] IRLR 172, EAT, *Brooknight Guarding Ltd v Matei* UKEAT/0309/17 (26 April 2018, unreported) and *Angard Staffing Solutions Ltd v Kocur* [2020] IRLR 732, EAT. The judgment of Heather Williams J in the instant case, after considering them in depth, goes on to give the following guidance as to how an ET should approach deciding the point in their light:

> '(i) The question is whether the individual was supplied by the agency to work "temporarily" under the supervision and direction of the hirer: regulation 3(1)(a); *Angard* paragraph 46;
>
> (ii) A temporary supply is one that is terminable upon some other condition being satisfied, for example, the expiry of a fixed period or the completion of a particular event. It does not mean short term. The contrast is with an indefinite supply, which is to say one that is open-ended in duration: *Moran* paragraph 41; *Brooknight* paragraphs 25 and 28;

(iii) Accordingly, the distinction between a temporary supply and an indefinite one is binary; there is no intermediate form of supply for these purposes;

(iv) The focus is on the purpose and nature of the work for which the worker was supplied; to determine whether it is temporary or permanent: *Brooknight* paragraph 25;

(v) In this regard, the focus is upon the basis on which the individual was supplied to the hirer, rather than on the overarching arrangement between the agency and the hirer: *Angard* paragraphs 46, 50 and 51;

(vi) A finding of fact will need to be made about the basis on which the worker is supplied to work for the hirer and then a decision made as to whether that basis amounts to a supply to work temporarily: *Angard* paragraphs 44–45;

(vii) The terms of the contract between the individual and the agency will not necessarily be determinative of this question, but may provide evidence as to what the parties intended: *Brooknight* paragraph 25, *Angard* paragraphs 48 and 50;

(viii) In some cases the documentation created when the relationship between the individual and the agency was formed will contain all the particulars of the supply which are contemplated, including sufficient terms to enable the tribunal to identify the basis of the supply from the documentation alone. Whereas in other cases, the documents may simply provide the framework for the supply or may not reflect what was done in practice. The question is what was in fact the basis in practice on which the supply was made: *Brooknight*, paragraphs 25–26 and *Angard* 52–54; and

(ix) If the individual is supplied to the hirer on successive occasions, then the question is the basis upon which s/he was supplied on each such occasion. There can be a number of temporary supplies of a worker to the same hirer: *Angard* paragraphs 46, 64 and 66.'

This is a very useful summary for future use on this fundamental point under the Regulations.

DIVISION DI UNFAIR DISMISSAL

Was there in fact a dismissal; the problem of unambiguous language

DI [319]

Omar v Epping Forest District Citizens Advice [2023] EAT 132 (2 November 2023, unreported)

This decision of Judge Stout in the EAT raises again the difficult question of how to deal with cases of apparently unambiguous words of resignation/dismissal but where the speaker then argues that they were not meant. There

is a fundamental divide between 'I did not really mean it' and 'I have reconsidered', though as the judgment says, this can be a thin distinction on the facts. Those facts here were quite classic – the claimant resigned from his employment with the respondent 'in the heat of the moment' during an altercation with his line manager. In a subsequent conversation, it had apparently been recognised by his employer that he wished to continue in employment, but his line manager decided she no longer wanted to work with him and he was asked to confirm his resignation in writing, which he said he would do, but did not and instead sought formally to retract his resignation. The employer refused. In his claims for unfair and wrongful dismissal, the claimant argued that in law he had not resigned as the situation fell within what has sometimes been referred to as a 'special circumstances exception' to the normal principle that notice once given cannot be withdrawn. The respondent argued that he had resigned and the ET agreed. On appeal, the EAT allowed the claimant's appeal and sent the case back for rehearing, on the bases that the ET had too readily relied on a simple 'special circumstances' approach and in any event had not made sufficient findings of fact on which to apply the correct law.

Although these facts are commonplace, the judgment is anything but because it contains a comprehensive review of the often contradictory case law here, as set out at **DI [231]–DI [247]**, and contains the death knell for any widespread special circumstances exception. This review takes up much of the judgment and is intended to be a template for ETs here. It merits reading in full because it slots the case law into the propositions it ends up putting forward in para [97]. Helpfully, it gives a précis of these propositions in the headnote, which is as follows:

'(a) There is no such thing as the "special circumstances exception"; the same rules apply in all cases where notice of dismissal or resignation is given in the employment context.

(b) A notice of resignation or dismissal once given cannot unilaterally be retracted. The giver of the notice cannot change their mind unless the other party agrees.

(c) Words of dismissal or resignation, or words that potentially constitute words of dismissal or resignation, must be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation. The subjective uncommunicated intention of the speaking party are not relevant; the subjective understanding of the recipient is relevant but not determinative.

(d) What must be apparent to the reasonable bystander in the position of the recipient of the words is that: (i) the speaker used words that constitute words of immediate dismissal or resignation (if the dismissal or resignation is "summary") or immediate notice of dismissal or resignation (if the dismissal or resignation is "on notice") – it is not sufficient if the party merely expresses an intention to dismiss or resign in future; and (ii) the dismissal or resignation was "seriously meant", or "really intended" or "conscious and rational".

The alternative formulations are equally valid. What they are all getting at is whether the speaker of the words appeared genuinely to intend to resign/dismiss and also to be 'in their right mind' when doing so.

(e) In the vast majority of cases where words are used that objectively constitute words of dismissal or resignation there will be no doubt that they were "really intended" and the analysis will stop there. A Tribunal will not err if it only considers the objective meaning of the words and does not go on to consider whether they were "really intended" unless one of the parties has expressly raised a case to that effect to the Tribunal or the circumstances of the case are such that fairness requires the Tribunal to raise the issue of its own motion.

(f) The point in time at which the objective assessment must be carried out is the time at which the words are uttered. The question is whether the words reasonably appear to have been "really intended" at the time they are said.

(g) However, evidence as to what happened afterwards is admissible insofar as it is relevant and casts light, objectively, on whether the resignation/dismissal was "really intended" at the time.

(h) The difference between a case where resignation/dismissal was not "really intended" at the time and one where there has been an impermissible change of mind is likely to be a fine one. It is a question of fact for the Tribunal in each case which side of the line the case falls.

(i) The same rules apply to written words of resignation / dismissal as to spoken words.'

Constructive dismissal; use of employer's internal procedures; whether affirmation of contract

DI [522.01], DI [523.01]

Brooks v Leisure Employment Services Ltd [2023] EAT 137 (8 November 2023, unreported)

The question whether an employee faced with a breach of contract by the employer affirms the contract (and so loses the right to claim constructive dismissal) by using the employer's internal procedures to at least try to rectify the issue before deciding to leave is not just a contractual nicety, but could be very relevant to a potentially departing employee in difficult circumstances. The text points out that there has been case law on this that has not always been consistent, but expresses the hope that the matter should have been settled (in favour of there normally being *no* affirmation in such a case) by the recent decision in *Gordon v J & D Pierce (Contracts) Ltd* [2022] IRLR 266, EAT. The decision of Judge Tayler in the instant case is to like effect, not just generally but by citing the whole of the text on this point with approval and upholding its bottom line.

The claimant was a call centre worker on a low basic but then qualifying for commission. During the COVID-19 lockdown she was retained on full pay. After a while the employer put together a team to resume work from home and intimated that she would be on it. She raised concerns about how this would affect her pay, but these were not addressed at all and she was not put on to the team, without consultation or information. She raised a grievance about this but this was only resolved (being rejected) after she had resigned and claimed constructive unfair dismissal based on breach of the term of trust and confidence. The ET held that there had been such a breach but that she had affirmed her contract by continuing to accept payment for three months. The EAT allowed her appeal from the latter holding; it was too narrow an approach because it did not take into account her attempt to rectify the position. The matter was remitted for rehearing.

In the course of the judgment the EAT considered the whole question of affirmation and internal procedures. First, it approves **DI [522.01]** on terminology, including the conclusion there that although 'affirmation' and 'waiver' are different things in a common law, it makes little difference under statutory unfair dismissal; the word used in the judgment is affirmation. It then goes on to consider the substance of the matter. It quotes with approval **DI [523.01]–DI [523.04]** in their entirety. The conclusion in **DI [523.04]** on the main cases causing some difference in the past is that *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, [2018] IRLR 833 is right on the point, *Phoenix Academy Trust v Kilroy* UKEAT/0264/19 (8 February 2020, unreported) is wrong and that *Patel v Folkestone Nursing Home Ltd* [2018] EWCA Civ 1689, [2018] IRLR 924 (which contained some dicta used in *Phoenix Academy*) was in fact on a different question. This is accepted in para [29]:

> 'We agree that *Kaur* is authority for the proposition that the exercise of a contractual grievance or appeal procedure in an attempt to give an employer an opportunity to resolve the issues that give rise to the breach of contract is not likely to be treated as an unequivocal affirmation of the contract. Use of a contractual grievance procedure will generally be no more than "continuing to work and draw pay for a limited period of time" as referred to in *W E Cox Toner* while giving the employer an opportunity to put matters right, so generally will not amount to affirmation. We also agree with the Editors of Harvey that *Patel* is not a case about affirmation of contract but about the consequences of succeeding in an appeal, and so is not in conflict with *Kaur*.'

Note the use of the phrase 'is not likely'; clearly, there might be cases on special facts where there will be affirmation, but in the generality of cases it will not be so, which gives the employee considerable protection here.

Redundancy dismissals; individual consultation or warning

DI [1704]

***Haycocks v ADP RPO UK Ltd [2023] EAT 129* (*28 November 2023, unreported*)**

Some areas of unfair dismissal law were largely settled in earlier years of the jurisdiction, so that much of the case law is quite old, albeit still authoritative. This decision of the EAT under Judge Beard is therefore an interesting and useful recent case on unfair redundancy, a classic area of older case law.

The claimant was employed by an American concern in this country. Due to loss of trade during COVID-19, it was decided to make redundancies. The management were told to use a matrix used by the company in America to decide on who was to go; this relied on entirely subjective criteria. This was done at the beginning of June. On 18 June it was decided that two had to go. On 19 June a timetable for this was decided, providing for two weeks of consultation. The first consultation meeting was on 30 June. On 14 July the claimant was told that he had been selected and he was dismissed. He was not given his or others' scores. He appealed, but this was rejected. On his complaint of unfair dismissal, the ET found against him, holding that he had not made out his objections on criteria and pool selection, but not specifically addressing the question of consultation. His appeal to the EAT was allowed on the issue of consultation and the case was remitted to the ET for reconsideration.

The judgment is notable for the following five points:

(1) While the case guidance (from *Williams v Compair Maxam* onwards) is only guidance, not rules set in stone, it is still of such importance that if an ET is not going to apply one or more of these cases to the particular facts of the case, it will be expected that the ET will address that point directly and explain why.

(2) Although in practice it may be the case that, where a trade union is involved, consultation about numbers and selection criteria will be primarily for union consultation, with individual consultation being primarily about the application of those criteria and alternative work, there is *no* rule of law to that effect and it may be that timely individual consultation across these issues may be reasonably expected (following the later case of *Mogane v Bradford Teaching Hospitals NHS Foundation Trust* [2022] EAT 139, [2023] IRLR 44 in preference to the earlier case of *Mental Health Care (UK) Ltd v Bilau* UKEAT/0248/12 (28 February 2013) which, the judgment states, had 'overstated' the distinction).

(3) At [22] the judgment sets out the basic law established in the case law (on consultation generally and the specific point about providing individual scores, on which see **DI [1702.03]** and **PI [492]**) as follows:

(a) The employer will normally warn and consult either the employees affected or their representative.

(b) A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious consideration being given to the response.

(c) Whether in collective or individual consultation, the purpose is to avoid dismissal or ameliorate the impact.

(d) A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable.

(e) The ET's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss.

(f) It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect.

(g) Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process.

(h) The use of a scoring system does not make a process fair automatically.

(i) The relevance or otherwise of individual scores will relate to the specific complaints raised in the case.

(4) One major change since some of the older case law has been the decrease in union presence. However, in line with point (1), the statutory provisions on collective redundancies allowing direct employee representation show the continuing importance of consultation in one form or another and indeed there may be problems with overuse of the terminology of either collective or individual.

(5) The other major change isolated in the judgment is the increase in cases with an international dimension. Here, a warning is given that ideas of 'good practice' may vary from nation to nation. However, the simple importation of a foreign system or practice (as here) may *not* satisfy the requirements of UK employment law. That in turn emphasises once again the importance of *timely* consultation which may show up any potential conflict at an early stage.

DIVISION E REDUNDANCY

Collective redundancies; notification to BIS; offences; position of administrator

E [2937]

R* (*Palmer*) *v North Derbyshire Magistrates' Court [2023] UKSC 38

This is potentially an important case for administrators faced with an accusation of failure to notify the Department for Business, Innovation &

Skills of impending collective redundancies under TULR(C)A 1992 s 193. Normally it is the organisation that bears this responsibility and is liable criminally for failure to comply (s 194 **Q [428]**). However, by virtue of s 194(3) there can also be individual liability for consent, connivance or neglect by any director, manager, secretary *or other similar officer*. Does this apparent catch-all apply to an administrator appointed under the Insolvency Act 1986?

In a prosecution of such an administrator, the magistrates' court held that it did and, as the text states at **E [2937]**, the Divisional Court upheld that view, taking essentially a 'functional' approach based on the de facto control that such an official has. However, the Supreme Court has now allowed the administrator's appeal and reversed the lower courts' decisions. It held that the functional test is not the correct one. Instead, it is necessary to consider the language of s 194(3) and its context. The linguistic approach faced an immediate problem because s 194 is *not* clear as to a definition of similar officer. That meant that it was necessary to look instead at the Insolvency Act 1986. Here, the decision was that both the (relatively sparse) case law and the intent of the legislation was to the effect that an administrator is *not* meant to be put in the position of an officer within the company, which refers instead to someone within the ordinary constitution of the company.

DIVISION L EQUAL OPPORTUNITIES

Disability; normal day-to-day activities; effect on professional life

L [146]

***Williams v Newport City Council [2023] EAT 136* (*27 September 2023, unreported*)**

As the text points out at **L [146.01]–L [146.07]**, it is now established by domestic case law following *Chacon Navas v Eurest Collectividades SA* C-13/05, [2006] IRLR 706, ECJ, that the key phrase in the definition of disability 'normal day-to-day activities' can include participation in professional activities (or, as Underhill LJ has put it, 'working life'). It can, however, still be a tricky concept to apply, as is shown by the instant case before Judge Auerbach in the EAT, in which an ET erred by, in effect, producing a self-fulfilling prophesy.

The claimant was a senior lawyer whose normal duties included appearing in court. The claimant had suffered a traumatic event in doing so. Several months later, the employer confirmed that she would still be required as part of her duties, as and when necessary, to attend court. This caused a severe anxiety reaction. This caused a period of sickness absence, during which the employer did not remove the requirement to attend court, and an internal grievance by the claimant, and appeal, against the decision were unsuccessful, the employer maintaining that this was an essential element of her duties. She was ultimately dismissed under the employer's managing attendance procedure. On her claim for disability dismissal, the ET found that the she had a

mental impairment at all relevant times, from when her absence began, until her dismissal. However, it found that, from a couple of months beforehand her mental health had improved to the point where she would have been able to carry out all of her duties *apart from attending at court*. It found that attending at court was not, itself, a normal day-to-day activity and, on that basis, she was not a disabled person.

The EAT allowed her appeal. Apart from a dubious reading of the law on professional activities, the ET had impermissibly stripped out the court attendance which was actually the proximate cause of the impairment. The decision was that:

> 'had the tribunal analysed the implications of its own findings correctly, it would therefore have concluded, in light of them, that, throughout the period of the claimant's absence, and in circumstances in which the respondent maintained and indicated that it would not remove from her duties the requirement to attend court, the effect of her impairment was that this caused her such a degree of anxiety that she was unable to return to her job at all. The tribunal would then have been bound to conclude, in light of the fact that it correctly found, taking the *Chacón Navas* approach, that her work tasks generally involved normal day-to-day activities, that the impairment had, throughout the relevant period, a substantial adverse effect on her ability to carry out normal day-today activities.'

Protected characteristics; sex; the protected grounds

L [220]

For Women Scotland Ltd v Scottish Ministers [2023] CSIH 37

This case concerned the legality of guidance given by the Scottish government in 2022 as to the meaning of 'sex' in the EqA 2010. Where a person has a gender recognition certificate (GRC), the Gender Recognition Act 2004 s 9 states that they are to have that acquired gender 'for all purposes'; the guidance says that that includes under the EqA 2010, so that a person transitioning to female and having a certificate can claim protection as a woman under the 2010 Act. The claimants said that this was a misreading of the Act which only refers to biological sex, and so the guidance was unlawful. As the text states, this argument was rejected by the Outer House of the Court of Session and that decision has now been upheld by the Inner House in a judgment given by the Lord Justice Clerk Lady Dorrian. It holds that on a proper interpretation there is no such limitation in the 2010 Act. It also rejects a secondary argument that the guidance conflates and confuses two separate forms of protected characteristic. This is summed up in [65]:

> 'The Guidance does not conflate two separate protected characteristics. A person with a GRC in their acquired gender possesses the protected characteristic of gender reassignment for the purposes of section 7 EA. Separately, for the purposes of section 11 they also possess the protected characteristic of sex according to the terms of their GRC. For the purposes of section 11, individuals without a GRC, whether they

have the protected characteristic of gender reassignment or not, retain the sex in which they were born. No conflation of the protected characteristics is involved. A person with a GRC in the female gender comes within the definition of "woman" for the purposes of section 11 of the EA, and the guidance issued in respect of the 2018 Act is lawful.'

DIVISION PI PRACTICE AND PROCEDURE

Representation before an employment tribunal

PI [772]

London United Busways Ltd v Dankali [2023] IRLR 978, EAT

The right for a party to nominate a representative is fundamental, but a question could arise, as in this case before Judge Auerbach in the EAT, as to whether a particular representative has sufficient *authority* to represent (or, as here, continue to represent) that party. The claimant had said that he was to be represented by his union, but later appeared to take little part in the claim. At a hearing, the employer took objection to this and asked for the ET to strike out the claim because it was not clear that the union representative had continuing authority. The latter gave the ET oral assurance that he did and the ET accepted this, refusing the strike out. The EAT allowed the employer's appeal, holding that this was too simple an approach. The judgment states that when a tribunal is presented with a situation in which there may be some concern as to whether a representative has sufficient current instructions or authority, it will be a matter for the judgement of the judge concerned as to how to manage that concern. There are a range of tools available to the judge confronted by such a situation, who considers that some further steps need to be taken to investigate it. These might include requiring written or other forms of evidence to support assertions that there is sufficient authority or instructions, or could include, in certain circumstances, the tribunal seeking to communicate directly with the party concerned as well as with the representative. This, although an 'unusual' case, was one where such further enquiries were required.

Procedure at the hearing; High Court proceedings pending; whether stay to be granted

PI [903]

Onea v Contingent and Future Technologies Ltd [2023] IRLR 986, EAT

This is another case on the issue of whether ET proceedings should be stayed pending resolution of parallel High Court proceedings (a specialised version of the general idea of *pendent lite,* once referred to by a law student in an exam as concerning a chandelier). The case was of some complexity. The claimant was a founding director, along with three others, of the respondent company. After a major falling out, the other two disciplined the claimant, who responded by arguing that they were trying to force him out. He sought to resign, saying he was responding to breaches of trust and confidence, but

the employers said that they did not accept this and were dismissing him for gross misconduct (which would render him a 'bad leaver', with financial consequences). He brought High Court proceedings challenging the company's actions, but so did the company, seeking an injunction to restrain any misuse of confidential information. The claimant also brought ET proceedings for whistleblowing, unfair dismissal and wrongful dismissal. In respect of these, he sought a stay pending resolution of the High Court proceedings. This was refused by the ET on the ground that he had not shown a very real risk of considerable embarrassment to the High Court if the ET case went ahead.

Heather Williams J in the EAT allowed his appeal. It was held that the EJ had applied the wrong test. It is not just a case of considering possible embarrassment; instead, the EJ must balance *all* relevant factors. Here, these included the degree of overlap, the level of complication of the issues and the amount of money at stake. In the light of these, the EAT itself substituted a decision to order a stay, saying that this was in line with the influential case of *Glover v Mindimaxnox LLP* UKEAT/0225/10, [2011] All ER (D) 146 (May), where it was suggested that in practice this will often be the correct course to take.

Bias and the appearance of bias; remarks by employment judge; chance to reply

PI [920]

Stuart Harris Associates Ltd v Gobudhun [2023] EAT 145 (17 November 2023, unreported)

This is an interesting challenge to the fairness of an ET decision because of objections to actions of the EJ during the hearing. It affirms that there are norms and borderlines here, but the end result shows, as the text points out at **PI [920]**, that such challenges are not easy.

The claimant, an accountant, was subject to disciplinary proceedings for insubordination for not obeying an instruction from the employer to include figures for expenses incurred described as 'estimates' in clients' tax returns. She objected that these estimates were not based on actual records of expenditure and were routinely much higher than actual records would suggest. She was given a final written warning after which she resigned claiming constructive dismissal. There was insufficient time to complete the hearing before the ET and the matter was adjourned. Prior to the resumed hearing, the ET prepared a lengthy case summary containing an account of legal research by the EJ as to the position relating to tax returns and what were described as 'preliminary views'. These included the view that the claimant had been constructively dismissed. After the resumed hearing, the ET gave judgment reaching the same conclusion. In doing so, the ET also found that one of the claimant's managers had been either dishonest or incompetent in engaging in the expenses practice that had led to her resignation.

The employer appealed on three grounds:

(1) Pre-judgment

The EAT under Chaudhury J relied on the case of *Jiminez v Southall London Borough Council* [2003] EWCA Civ 502, [2003] IRLR 477, [2003] ICR 1176 (see **PI [921]**) where it was stressed that if an ET decides to give a preliminary view in the course of a hearing it is well advised to stress that preliminary nature only. In the instant case, the EAT held that this was not a conclusive view, the ET had made that clear, it had been produced to assist the parties in preparing the rest of the hearing, and it was a considered opinion, not a knee-jerk reaction to the facts. The appeal on this point was dismissed.

(2) Descending into the arena

The employer objected on two bases: (1) the research done by the EJ; and (2) the level of questioning by the EJ. With regard to (1), the EAT recognised that caution is necessary here, but on the facts held that the EJ had stayed on the right side of the dividing line:

> 'As to the research itself, no issue appears to be taken to the research on the law. Whilst the better course, generally, particularly where parties are represented, will be to invite them to undertake research on any points which in the Judge's view need more explanation, it is open to a Judge to undertake some limited, relevant research of their own, provided that the parties have a fair opportunity to deal with the fruits of any such research. That is what the Judge did here, with the parties being given an express opportunity at the resumed hearing to address in detail the points set out in the Case Summary.'

With regard to (2), the EAT relied on *Serafin v Malkiewicz* [2019] UKSC 23, [2020] 4 All ER 711 for the principles to be applied. It held that, overall, the level of intervention was not unfair. It did consider that at one point the EJ had expressed himself in injudicious terms but commented that in any event 'by no means all departures from good practice render a trial unfair. Ultimately the question is one of degree'. The appeal on these grounds was also dismissed.

(3) Finding of dishonesty not put to the witness

This is the point which caused the EAT most trouble. It was accepted that such a serious finding can lead to unfairness of a hearing if the person involved is not given a chance to reply to the accusation, citing *City of London Corporation v McDonnell* UKEAT/196/17, [2019] ICR 1175 (a whistleblowing case involving a finding of bad faith; see **CIII [124.01]**) and *Kalu v University Hospitals Sussex NHS Foundation Trust* [2022] EAT 168, [2023] IRLR 129 (a victimisation case, again involving a finding of bad faith). On the facts here, the ET fell on the wrong side of the line and the appeal was allowed against the finding of dishonesty by the manager. *However,* this did not profit the employer because on the question of the validity of the ET's overall decision for the claimant there was still a question of causation, on which it was held that the ET had made it clear that it was the breach of trust and confidence in the employer trying to make her act

wrongfully that justified her in walking out, *irrespective of dishonesty on the part of the manager.* The finding of constructive unfair dismissal therefore stood.

REFERENCE UPDATE

Bulletin	Case	Reference
542	*Rajput v Commerzbank AG*	[2023] IRLR 957, EAT
543	*Riley v Direct Line Insurance Group plc*	[2023] IRLR 952, EAT
543	*Fernandez v Department of Work and Pensions*	[2023] IRLR 967, EAT

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