Harvey on Industrial Relations and Employment Law

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

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DIVISION CI WORKING TIME

Holiday pay; what is included; series of deductions

CI [191], CI [193.14], CI [238.06]

***British Airways plc v de Mello [2024] EAT 53* (*19 April 2024, unreported*)**

The judgment of Judge Auerbach in the EAT in this case considers several points relating to the quantification of holiday pay under the Working Time Regulations 1998 SI 1998/1833 and time limits for claiming it. The case concerned primarily whether the claimants (cabin crew) could include in their claim for greater holiday pay a flat-rate meal allowance; this had been agreed on such a flat-rate basis to avoid the need for multiple individual claims; in the result, it tended to be more than the actual cost to the employer. Their claims were actually under the Civil Aviation (Working Time) Regulations 2004 SI 2004/756, but the points were in common with the head 1998 Regulations. The ET upheld their claims in principle on the basis that the allowance *or at least part of it* qualified as 'pay'; here, the employer had not shown that this was not so. However, it held against them on the question of time limits, holding that they could not sue on the basis of a series of deductions.

The EAT allowed the employer's appeal on the question of substance but also allowed the claimants' appeal on the question of time. The case was remitted for reconsideration. The principal points decided were:

(1) *Status of the allowance.* The key distinction here is between payments which are inextricably linked to performance-related matters (included in weekly pay) and payments reflecting occasional or ancillary costs (not included). The ET had recognised this but had erred in two important ways: (1) the correct approach under the Regulations is *not*

to seek to apportion a difficult payment, but rather for the ET to decide which side of the line the payment as a whole falls (and in so holding the EAT acknowledged that this departs from the approach of HMRC in relation to similar problems in tax law); (2) the ET had erred in putting a burden of proof on to the employer, the correct position being that the claimant has to raise the issue, with which the ET must itself struggle (on the above all-or-nothing basis).

(2) *Time limits.* The claimants' argument that their claims over time constituted one linked series of claims was rejected by the ET which applied the 'no gaps more than three months' rule in *Bear Scotland Ltd v Fulton* [2015] IRLR 15, [2015] ICR 221, EAT, but since its decision the Supreme Court in *Chief Constable of the Police Service of Northern Ireland v Agnew* [2023] UKSC 33, [2024] IRLR 56 have of course disapproved of that rule and the decision had to be reversed by the EAT on that basis alone. The judgment goes on to affirm that there are (shorn of the three-month limit) two requirements for there to be a 'series' for these purposes: (1) sufficient similarity in their nature between the holiday payments; and (2) a sufficient temporal link between them. The ET had considered the first but not the second which had to be ruled on on the reconsideration, the EAT adding that it should be viewed realistically, bearing in mind that there can be considerable gaps between payments of holiday pay.

(3) *Statutory versus contractual holidays.* The decision in *Agnew* said that there are no general rules on which comes first, statutory holidays or any greater contractual rights. Here, the EAT said that in the absence of statutory guidance or right for the employer simply to determine it, there can be a role for a contractual stipulation as to the sequence, *but* with the caveat that any such stipulation must not result in the worker being in a less favourable position than they would otherwise have been.

DIVISION CIII WHISTLEBLOWING

Whistleblowing detriment; establishing the reason in an organisation

CIII [99], CIII [126]

William v Lewisham & Greenwich NHS Trust [2024] EAT 58 (24 April 2024, unreported)

This whistleblowing detriment case failed before the ET and the appeal to the EAT under Bourne J was unsuccessful, primarily as a question of fact. However, the judgment considers one important point of law which has been open since the Supreme Court's decision in *Royal Mail Group v Jhuti* [2019] UKSC 55, [2020] IRLR 129. In that well-known case, it was established that in a whistleblowing dismissal case under the ERA 1996 s 103A, liability on the employer can be established where the actual decision-maker (the dismissing manager) was ignorant of the whistleblowing and ostensibly acted on another (spurious) reason fed to them by another manager who *did* know the

true facts and was using the spurious reason to get rid of the whistleblower (notably christened by Underhill LJ as an 'Iago case'). The question that arose in the instant case was whether this also applies to a whistleblowing *detriment* case under s 47B **Q [671.03]**.

At first sight, this ought to follow, but in *Malik v Centros Securities plc* UKEAT/0100/17 (17 January 2018, unreported) the EAT under Choudhury P held that it was *not* so because the two sections vary in their wording, especially since an amendment in 2013 added personal liability on the Iago under s 43B, but not under s 103A (see **CIII [98]**). The point is even neater because *Malik* was decided when *Jhuti* was at Court of Appeal stage, when a *form* of Iago liability was posited as possible, before the Supreme Court's adoption of a wider principle. Choudhury P held that this did not affect s 43B, and then *Malik* was not mentioned in the Supreme Court's judgment. The key point was that under s 103A only 'the employer' can be liable, whereas under s 43B both the employer and a guilty fellow employee can be (obviating the need for the *Jhuti* extension). In the instant case, the ET had followed and applied *Malik* and the EAT held that it had been right to do so. Addressing the question whether this EAT should decline to follow the earlier case, the judgment states at [82]:

> ' Following the approach set out in *British Gas v Lock*, I am not satisfied that I should depart from this Tribunal's decision in *Malik*. It was not reached per incuriam and I find no "other exceptional circumstances". The only question is whether *Jhuti* now shows it to have been manifestly wrong. In my judgment it does not. As Lord Wilson made clear in his judgment at [46], the decision in *Jhuti* turned on the meaning and purpose of section 103A. Lord Wilson compared that unfair dismissal regime with the detriment regime under section 47B at [54]–[58] and went on, at [60], to set out the Court's decision as to "the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X". That decision does not purport to change, and does not logically change, the interpretation of section 47B or the other sections in Part IVA.'

The logic behind this is clear, but from the point of view of the policy of protecting whistleblowers it may be seen as unfortunate. It may mean that where, as can be the case, the whistleblowing ex-employee runs together a claim of unfair dismissal along with one of detriment (based on events leading up to that dismissal), alleging that the decision-maker was induced to act in such a way by false accusations made by another manager, different tests have to be applied producing a result that unfair dismissal has been established but not detriment, even though they arose from the same factual circumstances.

DIVISION DI UNFAIR DISMISSAL

Termination by the employer; the rule in Hogg v Dover College; overlap with common law

DI [222]

Rajput v Sky Retail Stores Ltd [2024] EAT 46 (19 March 2024, unreported)

The rule in *Hogg v Dover College* is well established in the law on unfair dismissal, providing that where an employer forces through fundamental changes in an employee's contract but the employee continues to work under the new terms, it is open to an ET to decide that the changes were *so* fundamental that the employer is considered not just to have altered the terms, but to have *ended* the previous contract and entered a new one, thus permitting the employee to claim unfair dismissal from the original contract, even though now working under its replacement. The instant case before Judge Auerbach raised a question as to how this interacts with a *common law* action for wages. The actual result was that the EAT could not decide the matter because it had not been raised in argument before the ET and on ordinary appeal principles it was too late to do so on appeal. However, it is possible that this issue will have to be addressed in a future case, now that it has at least been flagged up here.

The claimants were store managers, qualifying for a store manager's extra payment. The employer made a major reorganisation, getting rid of store managers and their extra payments; the claimants were told that they were to revert to sales staff (though with a rise in basic pay). They brought actions inter alia for arrears of pay, based on an argument that their original contract had not ended and they could still claim the extra payments. Before the ET the employer argued not only that they had successfully imposed the change, but that under *Hogg* their imposed changes had been fundamental enough to have ended their contracts completely. This meant that they had been dismissed and therefore could not claim continuing (extra) wages. Note the twist here – *Hogg* is primarily a form of protection for employees in a statutory action, but here it was the *employer* pleading it (based on its own contractual breach) to avoid common law liability for wages. On appeal, the claimants sought to counter this by arguing that it is now the case that *Hogg* must be read in the light of the decision of the Supreme Court in *Geys v Société Générale* [2013] IRLR 122, [2013] ICR 117 that at common law the correct test is the elective theory (see **AII [463]**); they had not elected to treat their contracts as ended by the employer and so there was no dismissal (even under *Hogg*); and so they could claim for continuing wages. The EAT clearly considered that there were arguable points here, and did explore briefly some of the possibilities (does *Geys* qualify *Hogg* or actually negate it at common law?) but the decision was that this case had not been run before the ET and could not be relied on now. The ET's decision therefore stood.

The case is obviously an atypical one. Normally in a case of forced changes, an employer would not wish to open the can of worms called *Hogg* which

could, while saving it a few bob in wages, expose it to a much more embarrassing and costly unfair dismissal action. For whatever reason, such an action was not in issue in this case, which remained a common law matter. However rare such a case may be, it is not impossible that the point could arise again and its invertebrate metal container may then have to be addressed directly.

DIVISION F TRANSFER OF UNDERTAKINGS

Automatically unfair dismissal; a substantial change in working conditions; principal reason

F [108.02]

***Lewis v Dow Silicones Ltd [2024] EAT 51* (*12 April 2024, unreported*)**

This is in effect *Lewis* (*No 2*). The first appeal in this case before Judge Shanks is set out at **F [108.02]** where it was held that the fact that changes made by the transferee employer were not in breach of contract did not mean that they were not 'substantial' enough to activate TUPE SI 2006/246 reg 4(9) **R [2296]** with its deemed dismissal. The case was remitted for consideration of the fairness or otherwise of that dismissal. The second ET also held against the claimant, this time on the basis that under reg 7 the employer had shown that the principal reason for the (constructive) dismissal was health and safety concerns behind the changes objected to by the claimant, not the transfer itself. However, the EAT under Judge Tayler disagreed. It held that the respondent employer: (1) had not pleaded this reason in its defence; and (2) had then not laid an adequate factual basis for it, thus not discharging its burden of proof. At [22] the judgment states:

> 'HHJ Shanks held that regulation 4(9) TUPE 2006 applied, which requires that the transfer "involves" the substantial change in working conditions to the material detriment of the claimant. It does not necessarily follow from the fact that the transfer "involves" the substantial change in working conditions to the material detriment of employees, that the sole or principal reason for the dismissal must have been the transfer of the undertaking, or that there could not be an ETO reason for dismissal. The scheme of TUPE 2006 clearly allows that possibility. However, on the analysis required by *Kuzel v Roche*, where the transfer of the undertaking involves a change in working conditions to the material detriment of the claimant and the transfer is the occasion for the change in working conditions it is hard to see how it could be held that the claimant has not at least set up a sufficient basis for a claim that the transfer was the reason or principal reason for the change in working conditions to the material detriment of the claimant. It was for the respondent to establish the reason for dismissal. As Mummery LJ pithily put it in *Kuzel v Roche* "An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was." '

This was therefore a relatively rare TUPE case of an ET being shown to have come to a perverse conclusion on the facts.

DIVISION L EQUALITY

Enforcement; burden of proof and drawing inferences

L [805], L [808.01]

***Verifone* (*UK*) *Ltd v Zena [2024] EAT 54* (*18 April 2024, unreported*)**

The statutory provision in the EqA 2010 s 136 **Q [1548]** covering the reversal of the burden of proof where there are facts from which an ET could find unlawful discrimination is a wide one, but the fact that it is not inexhaustible can be seen from this case, along with an application of the view recently expressed in *Field v Steve Pye & Co Ltd* [2022] EAT 68, [2022] IRLR 948 (**L [808.01]**) as to the desirability of applying a two-stage approach to the section, and yet another example of the eternal verity that bad behaviour by an employer does not establish discrimination, even under s 136.

The claimant (a black woman) was employed by the respondent as a manager, based in the UK until her dismissal, purportedly by reason of redundancy. The ET found, however, that the claimant's dismissal had in fact been because of a decision to retain another, more junior, white employee, based in Poland. It further found that, although the respondent had purported to go through an information and consultation process with the claimant, this was a sham and the outcome was pre-determined, as was her subsequent appeal. This all resulted in a finding that there had been an inadequate investigation into the claimant's case. Not surprisingly, this led to a finding that the claimant's dismissal was unfair, *but* the ET did *not* go on to uphold that the claimant's joined complaint of direct race discrimination as it was not satisfied that the claimant had established facts from which it could conclude (in the absence of any other explanation) that the respondent would have made different decisions in relation to a hypothetical comparator of a different race; the burden of proof did not move to the respondent under s 136 and this claim was dismissed.

On appeal, the EAT found that the ET had properly applied a two-stage approach and come to defensible conclusions, especially as it found that the predetermination had been caused by a prior decision to retain the Polish employee, albeit that this had a knock-on effect on the treatment of the claimant. One peculiarity of the case is that the lay members of the ET had gone on to uphold the claimant's third claim of victimisation, but the EAT held that this was inconsistent with the ET's overall findings of fact and allowed the employer's cross-appeal on it.

DIVISION NI LABOUR RELATIONS

Right to associate; detriment relating to industrial action

NI [675.03]; NII [697]

Secretary of State for Business and Trade v Mercer [2024] UKSC 12

The facts and importance of this case are set out in the text at **NI [675.03]** ff. It concerned the lack of protection in TULR(C)A 1992 s 146 **Q [380]** from detriment imposed for taking part in industrial action, the longstanding interpretation being that this is because the protection is limited to activities 'at an appropriate time', ie outside working time. That interpretation is not altered, but instead the question has been what (if anything) can be *done* about it. When the claimant objected to a suspension that she said was because she took part in organising industrial action (though that remained a contended issue on the facts), the ET held that she did not come within s 146. The EAT allowed her appeal, by holding that she could rely instead on art 11 of the European Convention **Q [1088]**, breach of which could be remedied by inserting wording into the definition of 'appropriate time' to cover a case such as this. The Court of Appeal allowed the Secretary of State's appeal, accepting that there was a breach of the article, but holding that it was not possible to remedy it by extra wording *and* that this was not a case for a declaration of incompatibility, because this went beyond mere incompatibility and would have involved filling in a lacuna in the law.

The Supreme Court have now agreed with the Court of Appeal on all but, crucially, this last point. Their judgment, given by Lady Simler, contains a lengthy consideration of the legislative history of s 146 and of the extent to which Strasbourg jurisprudence does or does not protect all union activity (ie the well-worn *Demir* controversy). Holding, essentially, that it does not give total protection and that a state has a margin of appreciation in its laws, the question became whether the UK government has achieved a defensible balancing of interests. On the facts here, it was held that the complete lack of protection in s 146 for someone such as the claimant meant that there was indeed a breach of art 11. At [89] this is summed up:

> 'Even accepting as I do that there may be a wider margin of appreciation to be accorded to the legislature in this case, the margin of appreciation is never unlimited. Moreover, in my judgment the right of an employer to impose any sanction at all short of dismissal for participation in lawful industrial action nullifies the right to take lawful strike action. If employees can only take strike action by exposing themselves to detrimental treatment, the right dissolves. Nor is it clear what legitimate aim a complete absence of such protection serves. In the context of the scheme of protection that is available, it is hard to see what pressing social need is served by a general rule that has the effect of excluding protection from sanctions short of dismissal for taking lawful strike action in all circumstances. Seen in this way, section 146 of TULRCA both encourages and legitimises unfair and unreasonable conduct by employers.'

What to do about it? The court agreed with the Court of Appeal that this was not a case for purposive interpretation, which would have been 'tantamount to judicial legislation', undesirable here because amendment of the law would involve significant issues of policy. However, the court then disapproved the Court of Appeal's inconsistency/lacuna distinction here and decided that it was proper to make a declaration of incompatibility, putting the matter back to the legislature precisely so that those issues of policy can be considered in that more appropriate forum.

DIVISION PI PRACTICE AND PROCEDURE

Employment tribunals; list of issues; when to depart from

PI [764], PI [765.01]

***Z v Y [2024] EAT 63* (*26 April 2024, unreported*)**

In the leading case on lists of issues, *Parekh v London Borough of Brent* [2012] EWCA Civ 1630, [2012] All ER (D) 70 (Dec), Mummery LJ strongly approved on the device, but with the caveat that ultimately an ET is 'not required to stick slavishly to the list of issues where to do so would impair the discharge of its duty to hear and determine the case in accordance with the law and the evidence'. Much of the text on this subject at **PI [764]** ff is concerned with the drawing of this important line. The instant case before Eady P in the EAT is a good example of this in practice.

The claimant, a litigant in person, brought proceedings for unfair dismissal and disability discrimination. One element of this was an allegation that her constructive dismissal had also been discriminatory (which would be in time, whereas there were arguments over the timeousness of pre-dismissal episodes). She included the basis for this in her original pleadings, but during a lengthy procedure between the parties and the EJ to set out the issues she did not address it directly. On that basis, when it came to the hearing the EJ ruled it out as not part of her case. On appeal, the EAT reversed this decision. It was held that these facts came within Mummery LJ's caveat because there was sufficient other material before it to require the ET to look again at her case. In doing so, reliance was placed on *Parekh,* and also two other cases mentioned in the text, namely *Mervyn v B W Controls Ltd* [2020] EWCA Civ 393, [2020] IRLR 464 (**PI [767]**) (with Bean LJ's reference to cases where the facts 'shouted out' for a reconsideration) and *McLeary v One Housing Group Ltd* UKEAT/0124/18 (6 February 2019, unreported) (**PI [767.01]**) with its emphasis on the importance of this for litigants in person).

Employment tribunals; procedure at the hearing; reasonable adjustments relating to disability

PI [874]

Bella v Barclays Executive Services Ltd [2024] IRLR 375, EAT

The question of recording of legal hearings has always been a contentious one. In the ETs, it is potentially complicated by the need to make reasonable

adjustments for parties with disabilities (particularly in the case of litigants in person). This decision of Carr DHCJ in the EAT shows a relatively liberal approach to the possible need for it, though subject to the caveat that it remains very much a factual matter for the ET. Here, the EJ had refused permission requested by a disabled litigant in person. The EAT allowed their appeal, primarily on the basis that the EJ had not taken into account the guidance given on this subject by Choudhury P in *Heal v University of Oxford* UKEAT/0070/19, [2020] ICR 1294 at [27]; this makes the point that it is given in relation to the law generally (not just under the EqA 2010 s 20 on reasonable adjustments) *but* then goes on to concentrate heavily on disabled parties. The judgment in the instant case states that it is not mandatory to consider this guidance, but it gives a pretty clear steer that it is highly recommended, as it gives a framework to be applied to the individual facts of a case. In relation to this case, the judgment states:

> 'In considering the context of an application for permission to record proceedings, it is worth reflecting on the fact that in the vast majority of such cases, it is unlikely to be an adversarial process and is highly unlikely to produce an outcome which is adverse or negative to a respondent. This, it seems to me, goes to the reasonableness of the adjustment sought. A disabled appellant, particularly one acting in person, is already likely to be at a substantial disadvantage in facing experienced lawyers on the other side. If that disadvantage is compounded by his particular disability related difficulties in following the proceedings or responding to what has been said by a respondent, it seems to me that the threshold of reasonableness in terms of an adjustment to help alleviate that effect should not be set too high. The adjustment sought in this case was very unlikely to impact on the proceedings (save for the possibility of needing slightly longer breaks) but was likely to assist the appellant in resisting the respondents' strikeout application.'

Institution of appeal to EAT; time limits; attachment of documentation

PI [1444]

***Jasim v LHR Airports Ltd [2024] EAT 59* (*28 March 2024, unreported*)**

There was reported in **Bulletin 549** the case of *Melki v Bouygues E and S Contracting UK Ltd* [2024] EAT 36 (13 March 2024, unreported) which considered for the first time the new EAT Rules SI 1993/2854 r 37(5) **R [750]** which was added in 2023 to give a wider power to 'forgive' lapses in the presentation of appeal documents if this is considered to be a 'minor error'. It held that this applies to any case coming before the EAT after 30 September 2023, even if the facts had arisen before that date. It also went on to consider such a lapse and not apply the power to it. It seemed to show a relatively narrow approach, but was actually of historic interest because the lapse concerned a legal requirement that had itself also been altered. The

instant case before Judge Auerbach is the first to consider the new sub-rule substantively. It applies the temporal point in *Melki* (having also arisen before the sub-rule was enacted), but arguably shows a more liberal approach, applying the forgiving power where two documents were omitted, but supplied very quickly after this was pointed out to the appellant.

The judgment considers the scope of the sub-rule and gives the following guidance:

> 'When considering whether it is just to extend time under Rule 37(5): (a) the EAT should weigh the balance of justice or injustice to both parties, were it either to grant or refuse the extension; (b) there is greater scope for the EAT to be forgiving of mistakes when exercising its discretion under Rule 37(5) than under the jurisprudence relating to the discretion under Rule 37(1); (c) the three particular factors mentioned in the sub-rule must be considered and treated as relevant; (d) what other circumstances are relevant is a matter for the appreciation of the EAT on the facts of the given case; (e) what weight to attach to each of the factors mentioned in the subrule and each of the other relevant circumstances is a matter for the EAT.'

DIVISION PIII JURISDICTION

International or territorial? The appropriate forum

PIII [1.01], PIII [272]

***Stena Drilling PTE Ltd v Smith [2024] EAT 57* (*18 April 2024, unreported*)**

As is so often the case in a jurisdiction dispute, the full facts of this case read like a Law School exam question on Conflict of Laws (but without the obligatory inclusion of a Dutchman called Hertz van Rental). Essentially, the claimant in an action for unfair dismissal and discrimination worked as a seaman entirely abroad, for two companies within the Stena group, again based abroad. He performed all his duties abroad but retained a home in England. Complications arose, not just because these arrangements changed over time, but because of: (1) a change in his tax status at one point; and (2) the involvement of a third company in the group which ran his HR and contractual matters and which *was* based in the UK.

The ET held that it did have jurisdiction to hear his claims, but this was overturned by Lord Fairley in the EAT. As a matter of general approach, it was held that the ET had confused international jurisdiction with the territorial jurisdiction of the statutes in question. Moreover, when considering the former the ET had held that it was not bound by the jurisdiction provisions now contained in the Civil Jurisdiction and Judgments Act 1982 ss 15C and 15D (inserted in 2019 to replace the Recast Brussels Regulation) and could take into account other factors; the correct position is that these added sections are meant to be exhaustive (see **PIII [272]**). Turning to territorial jurisdiction, the ET had correctly applied the rules in *Lawson v Serco Ltd* [2006] UKHL 3, [2006] IRLR 289 to the claim of unfair dismissal

under the ERA 1996, *but* had erred in applying this also to the discrimination claim under the EqA 2010 because in these circumstances the matter was covered specifically by the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 SI 2011/1771 reg 3 **R [2718]**, which was not satisfied in the claimant's case.

REFERENCE UPDATE

Bulletin	Case	Reference
546	*Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali*	[2024] IRLR 381, EAT
547	*Sullivan v Isle of Wight Council*	[2024] IRLR 350, EAT
547	*Sean Pong Tyres Ltd v Moore*	[2024] IRLR 363, EAT

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