Case Summaries

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Among the current crisis, the appellate courts are still handing down a number of decisions. We have provided a brief summary of a number of those published in the last month.

EAT decisions

Royal Bank of Scotland Plc v AB **UKEAT/0187/18/DA** – *assessing capacity to conduct litigation*

The Respondent appealed the decision of a remedy hearing in which the Claimant had been granted over £4 million pounds following a successful disability discrimination claim. The Claimant contended that the Respondent had caused her serious psychiatric injury, preventing her from working for the foreseeable future and requiring round the clock care.

The EAT allowed one ground of appeal that the Tribunal had erred by not adjourning the hearing to assess the Claimant's capacity to conduct litigation. Nevertheless, it went on to conclude that this failure did not affect the fairness of the proceedings or the substantive outcome, and therefore the matter did not need to be remitted to the ET. The Respondent's grounds of appeal relating to the substance of and reasons for the Tribunal's decision were all dismissed.

Secretary of State for the Home Department v Parr **UKEAT/0046/20/BA** – *revoking privacy orders (Rule 50)*

The Claimant brought claims of equal pay, race and sex discrimination. It was conceded by the Respondent that he did 'like work' with his female comparator. The comparator was also of BME heritage. The Respondent contended that the difference in pay was due to a policy

which aimed to reduce senior salaries. At a Preliminary Hearing (PH) (at which the Respondent was represented by counsel, but the Claimant was a litigant in person), the Respondent made an application for an order under Rule 50 to the effect that evidence and submissions (and any reasons given by the ET) in relation to the negotiation of terms of appointment be heard in private/not be made public. The application succeeded at the PH, but the order made it plain that it could be reviewed by the Full Tribunal panel at the final hearing. At the final hearing, the Claimant was represented by counsel and the ET (on the Claimant's application) revoked the Rule 50 order it is entirety. The Respondent appealed.

The EAT concluded that the ET at the final hearing had been entitled to revoke the Rule 50 order it its entirety under Rule 29. The EAT's core reasons can be summarised as follows.

First, the fact that the full ET had the benefit of the witness statements and bundles (which the EJ at the PH did not) was a very important change in circumstances. (NB: the power to vary, suspend or set aside a case management order is not limited to cases in which an affected party did not have a reasonable opportunity to make representations.) The EAT noted that the Rule 50 order itself appears to give an unfettered power of review to the ET at the final hearing.

Second, the EJ at the PH was not referred to any authorities at all on the principle of open justice and/or authorities explaining that the protection of genuinely confidential information will not always justify a breach of the open justice principle. The EAT noted the obligations on solicitors and barristers when appearing against litigants in person.

Finally, the ET had noted that the comparator was not a party to the proceedings and therefore had no choice whatsoever about being referred to in the proceedings. However, the ET was not obliged to take the Respondent's/comparator's concerns about confidentiality at face value; the application was light on detail. The salary paid to the comparator was already in the public domain. It was not clear why publication of the negotiations would be damaging to the comparator. In any event, the ET had taken the view that the information in question was at the heart of the case.

Accordingly, the appeal was dismissed. The ET had been entitled to set aside the Rule 50 order in its entirety.

Riley v Belmont Green Finance Ltd (t/a Vida Homeloans) **UKEAT/0133/19/BA** – *protected disclosures*

The Claimant was on a temporary assignment with the Respondent. He made complaints in a meeting on 13 March. On 14 March his assignment was terminated with immediate effect. The Claimant contended that his complaints amounted to protected disclosures (for the purposes of Part IVA Employment Rights Act 1996 ('ERA 1996')). He brought detriment claims in respect of the termination of his assignment and the manner in which he was removed from the office on 14 March.

The ET preferred the Respondent's evidence in respect of what was said in the meeting on 13 March and concluded that no protected disclosure was established.

Ground 1 – perversity

The Claimant contended that the ET's findings about what was said on 13 March were perverse. He relied on a lengthy email which referred to 'regulatory matters'. The EAT concluded that it was not permissible to unravel the ET's conclusion based on a single piece of evidence which was at best hearsay evidence from ten days after the relevant events.

Ground 2 – was a protected disclosure established on the ET's findings?

It was conceded by the Respondent that the ET had erred by stating that the information 'did not tend to show' that the Respondent had failed, was failing or was likely to fail to comply with a legal obligation; all that is required is a reasonable belief. However, this was not a material misdirection: the complaint related to the system 'freezing' appeared to be a complaint about a common IT problem. There was nothing to indicate a potential breach of a legal obligation. Furthermore, the Claimant had not explained to the ET or EAT how the information found to have been communicated was capable of showing a breach or potential breach of a legal obligation.

Ground 3 – causation

In light of the EAT's conclusion on Grounds 1 and 2, the appeal was dismissed. However, the EAT did note that the ET had failed to deal properly with the issue of causation. It had found that the Claimant was dismissed in part because of his manner in the meeting. While in principle, the ET may draw a distinction between the information disclosed and the manner in which it is disclosed (*Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500), the ET's findings in this case amounted to findings of (at worst) "ordinary" unreasonable behaviour. The ET had not found that when making his complaints the

Claimant was offensive or abusive. Accordingly, the EAT concluded that the ET had failed to explain why the behaviour that had occurred was properly and genuinely separable from the making of the complaint. This amounted to an error of law.

***Agarwal v Cardiff University UKEAT*/0115/19/RN** – *redundancy and 'conspiracy'*

This case has had a long history with one issue having already gone to the Court of Appeal and been remitted to the EAT. The Claimant, who was employed as a Clinical Senior Lecturer in urology, raised a grievance in 2011. This was followed by a long period of sick leave, with other grievances and complaints raised. The Claimant was made redundant from her role in 2015 and brought a claim for automatic unfair dismissal, unfair dismissal, race discrimination, harassment, victimisation and breach of contract. Her overarching complaint was that there was a conspiracy in the department to engineer her dismissal. The ET rejected all of the Claimant's claims and she appealed to the EAT. Only two grounds of appeal were considered by the EAT (all grounds having been rejected at the sift stage and two allowed following a rule 3(10) hearing).

The first ground was that the ET failed to identify the correct decision maker. This meant that (a) the "mental processes" of those persons could not be subjectively examined to determine whether the decision was motivated by race and (b) that the real reason for her redundancy was that she had previously brought a claim in the ET. The EAT rejected this ground holding that the ET was entitled to find that the Claimant was validly dismissed by reason of redundancy, and its reasons adequately explained its decision.

The second ground was that the ET omitted in its reasons evidence from certain witnesses. The EAT held that the points omitted from one witness were of limited or no importance in a complicated and multifaceted case, and that the refusal to admit the evidence of another witness was justified when it transpired that she was not an expert in the field in which she was called to give evidence.

***Revenue and Customs Commissioners v Middlesbrough Football and Athletic Co (1986) Ltd* UKEAT 2501182/2018** – *National Minimum Wage 'reductions'*

By agreement with the employees concerned, Middlesbrough Football Club made deductions from their wages in respect of the cost of season tickets, taking the pay some

received below the National Minimum Wage. The ET held that the cost of the season ticket could be included in their pay, thereby there being no breach of the National Minimum Wage Regulations (NMWR). The Claimant (HMRC) appealed.

The EAT allowed HMRC's appeal. It concluded that as the deduction to pay was for the employer's benefit (i.e. it secured a certain amount of season ticket sales), reg 12(1) NMWR applied. This states that these *deductions* are to be treated *a reduction* to overall pay unless an exception in reg 12(2) applies. The EAT held that none of the exceptions applied. Most notably, unlike the ET, it held that reg 12(2)(e) did not apply (payments as respects the purchase by the worker of goods or services), as this only applied to payments and not deductions.

Itul v London Fire Commissioner **UKEAT/0298/18/BA** – *strike out on grounds of unreasonable conduct*

The Claimant brought claims including disability discrimination. On the Respondent's application (and agreement to pay the costs), the ET ordered that two joint experts be appointed to consider the issue of whether the Claimant had a disability for the purpose of the Equality Act 2010. A lengthy procedural history, including several Preliminary Hearings and written applications, followed. The Claimant selected two experts from a list produced by the Respondent but subsequently she raised objections to both and refused to see either: in the words of the ET the Claimant was doing 'all she can to prevent being examined by either Dr Cutting or Professor Povslen. That is unreasonable behaviour in the context of claims based upon the protected characteristic of disability.' The ET went on to strike out the disability discrimination claims.

On appeal, the EAT held that the ET had given adequate reasons for finding that the Claimant's conduct had been unreasonable.

The Claimant also argued that the ET had failed to consider whether the unreasonable conduct meant that there could not be a fair trial, she suggested that new experts could have been appointed. The EAT also dismissed this ground of appeal, holding that 'it is not necessary in considering whether a fair trial is possible, in effect to re-write the "rules" of the trial which is already contemplated... The fairness of the trial is the fairness of the contemplated trial and… should have involved the experts who had already been identified'.

Finally, would a lesser sanction have been appropriate? It was suggested that an unless order should have been made. The EAT rejected that contention; as the Claimant was clearly refusing to see either of the experts such an order would have been pointless and would merely have involved additional delay and expense. Similarly, the Claimant was refusing to be physically examined and so it was not clear that appointed a different expert would have helped. The EJ had stated that he had no confidence that, if new experts were appointed, the claim would proceed without delay. The ET was entitled to take account of the prejudice suffered by the Respondent.

Fincham v Alpha Grove Community Trust **UKEATPA/0993/18/RN** – *late appeals*

The Claimant sought to appeal against an ET judgment promulgated on 11 October 2018. Accordingly, the last day on which an appeal to the EAT could be properly instituted was 22 November 2018. The Claimant delivered a Notice of Appeal to the EAT by hand on 20 November 2018. The Notice of Appeal contained accompanying documents but on 11 December 2018, the EAT emailed the Claimant stating that the ET3 appeared to be incomplete. On 12 December, the Claimant emailed the EAT the missing page.

The Registrar concluded that the Claimant's appeal had not been properly instituted in time and decided not to grant an extension of time.

The Claimant challenged the Registrar's decision and the matter was heard by His Honour Judge Auerbach. The EAT held that the burden is on the Claimant to establish, on the balance of probabilities, that his appeal was properly instituted in time. The Claimant did not have any evidence (e.g. a record of the documents he had copied) to demonstrate positively that what he handed to the EAT was complete and included the last page. The EAT took the view that it was more likely that the Claimant made an error (e.g. in the copying process), as opposed to the EAT making an error when placing what the Claimant had handed in onto the EAT's file. The Registrar was correct to hold that the appeal had not been properly constituted until 12 December 2018. It was stressed that the EAT has no duty to ensure that a Notice of Appeal contains all of the requirement information and accompanying documentation.

However, the EAT decided to grant the Claimant an extension of time. He acted promptly when the issue of the missing page was brought to his attention. The Claimant's mistake did not come about because he only lodged his appeal with two days to go. If the Claimant had

put in his paperwork seven days before the deadline, the EAT might still not have raised the matter with him until 11 December. Furthermore, the content of the missing page, while not negligible, was not necessary in order to appreciate the substantive basis of the appeal. The EAT concluded that aside from the mistake in question, the Claimant had not been lax in complying with the Rules or Practice Direction in any other way. For these reasons, the EAT concluded that this was an exceptional case that merited an extension of time being granted.

Court of Appeal decisions

Allen (t/a David Allen Chartered Accountants) v Dodd & Co Ltd **[2020] EWCA Civ 258** – *inducing breach of contract*

The Claimant is the former employer of Mr Pollack, and the Defendant one of the Claimant's competitors. The Defendant offered Mr Pollack a job while he was still employed by the Claimant. Prior to Mr Pollack taking up this position, the Defendant took legal advice as to whether restrictive covenants in Mr Pollack's contract of employment with the Claimant were enforceable. The advice given (and relied upon by the Defendant) was that it was more likely than not that they were not enforceable. Nevertheless, following a claim by the Claimant against Mr Pollack, and a contested hearing, it was held that the clauses were enforceable.

The issue in this litigation was whether the Defendant had sufficient knowledge to expose it to liability in tort for inducing a breach of Mr Pollock's contract. Both at first instance and in the Court of Appeal, it was held that if an individual or company honestly relies on advice that it is more probably than not that no breach of contract will be committed, there will be no liability for inducing breach of contract.

Hudson Contract Services Ltd v Construction Industry Training Board **[2020] EWCA Civ 328** – *worker status and industry levies*

Hudson acts as an engager of freelance operatives to specialist construction firms. The standard form contract signed by operatives provides that they have no contract of any type with the client, that they are self-employed, and that they are contracted to carry out services for Hudson's client 'operating in the construction sector'.

Is Hudson liable to a levy (assessed by the Construction Industry Training Board) imposed by the Industrial Training Act 1982 ('the Act')?

Hudson argued that it was not an employer in the construction industry and/or that because it carries out payroll and related services in relation to self-employed operatives who in turn perform construction activities, it is not a construction establishment from which construction industry activities take place. Hudson's arguments had failed in the ET and before Lambert J in the EAT. The Court of Appeal dismissed the appeal.

Ground 1 – is Hudson an employer in the construction industry?
The Court of Appeal held that the focus of the legislation is on the activities (and whether they are in the construction industry) performed by the employer. An employer can only perform activities through its employees. The relevant definition of 'employee' includes the self-employed. There is no relevant freestanding definition of 'employer' or 'employment'. The whole purpose of the legislation is to fund the training of all workers in the industry; training is not confined to direct employees only. Nothing in the legislation requires a focus on direct employees only and, as Hudson's contracts make clear, its operatives carry out construction industry activities; therefore, Hudson performs such activities.

Ground 2 – did Hudson have a "construction establishment"?
The Court noted that the concept of a construction establishment is relevant to the assessment of the levy but not to the imposition of liability. For the purpose of liability, the governing concept in the Act is an 'employer in the industry'. The Court held that the legislation covers those employed (in the extended sense) from a different place (or base) to that at which they do their work activities. What does employed 'from' mean? The Court held that where an operative is employed by an entity with whom his only legal relationship is the contract they have entered into, and the entity is based at its head office, the operative may be employed 'from' the head office too. Accordingly, on the facts found, the Court held that the ET had been entitled to conclude that Hudson's operatives are employed 'from' its head office, which is a construction establishment.

Finally, the Court also rejected Hudson's argument that its clients are the employers of the operatives because they are responsible for the construction establishments in question.

Supreme Court decisions

WM Morrisons Supermarkets plc v Various Claimants **[2020] UKSC 12** – *vicarious liability and data protection*

A large group of claimants brought claims for breach of statutory duty under the Data Protection Act 1998 ("DPA"), misuse of private information, and breach of confidence against WM Morrisons Supermarkets ("Morrisons") after an employee stole data of other employees. The key issue was whether Morrisons could be vicariously liable for the acts of its employees in this situation. There was also an additional issue of whether the DPA excludes imposition of vicarious liability for either statutory or common law wrongs.

In a unanimous decision (judgment given by Lord Reed), the Supreme Court overturned the Court of Appeal and held that Morrisons was not vicariously liable. The crux of the decision was that the "close connection" test from *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 still applied; that is, whether the wrongful conduct was so closely connected with acts the employee was authorised to do that for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. Recent case law, most notably *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11 had not changed this test. Furthermore, the Court of Appeal were wrong to rely on the five-part test from *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 as those factors were only relevant to whether or not the relationship was 'akin to employment' for non-employees. In this case, as the wrongdoing by the employee was a personal vendetta and could not be seen as in the ordinary course of employment, Morrisons was not vicariously liable.

On the issue of whether the DPA excludes vicarious liability, the Supreme Court rejected this argument, holding that there is nothing inconsistent with imposing statutory liability on a data controller (in this case the employee), with a co-existing vicarious liability under common law.

Barclays Bank plc v Various Claimants **[2020] UKSC 13** – *vicarious liability and independent contractors*

The claimants in this case were all employees of Barclays Bank who alleged that they had been sexually abused while undergoing a medical examination at the start of their

employment by Dr Bates (now deceased). Dr Bates was a general practitioner who was engaged as an independent contractor to provide this service to the bank. The question for the Supreme Court is whether Barclays could be vicariously liable for his actions. The key issue was whether the relationship between Dr Bates and Barclays was 'akin to employment'.

The Supreme Court held unanimously that it was not. Lady Hale reviewed the recent case law (most notably *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, *Cox v Ministry of Justice* [2016] UKSC 10 and *Armes v Nottinghamshire County Council* [2017] UKSC 6) highlighting that the law of vicarious liability has not expanded into cases involving independent contractors. The position that employers of independent contractors are not responsible for their torts was set out in *D & F Estates Ltd v Church Comrs* [1989] AC 177 and has not changed since. As Dr Bates was not an employee nor in a relationship akin to employment with Barclays Bank, but rather was in business on his own account with a portfolio of clients, it was held liability did not extend vicariously to the bank that engaged his services.

At the conclusion of the judgment, Lady Hale suggested the test of whether an individual is a worker under s230(3)(b) Employment Rights Act 1996 may be helpful in identifying whether they are in a relationship akin to employment or a true independent contractor. Nevertheless, she declined to fully align the two tests, noting that they had been developed for very different purposes.

Whilst every effort has been made to ensure the accuracy of this article as of the date of writing (7 April 2020) it should not be relied upon as legal advice in respect of any particular case and no liability is accepted in respect of the same.

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