The ET's duty to consider a case not pleaded

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The EAT considered whether the ET erred by failing to determine a case that was not pleaded and also reviewed the extent to which a party can run a new point in the EAT.

Whitaker v White Rose Academies Trust & Luminate Education Group [2026] EAT 43

The background

The claimant ("C") brought multiple complaints against two respondents, including detrimental treatment on the grounds of protected disclosures, unfair dismissal by reason of protected disclosures and unlawful deduction from wages.

C had commenced employment with White Rose Academies Trust ("R1") in 2016. He then became its CEO in 2019. R1 is a member of Luminate Education Group ("R2"), a multi-academy trust sponsor; they are two separate legal entities. In 2020, R2's remuneration committee agreed that C's salary would increase and agreed that, in addition to his role as CEO of R1, would also became the Deputy CEO of R2.

In C's claims to the ET, he asserted that he was an employee of R1 and that he was also an employee and/or a worker of R2. He asserted there was a contractual relationship with R2 as R2's Board determined his salary, performance targets, job description, and he undertook work on behalf of R2.

R1 accepted that C was its employee. R2 asserted that C had never been engaged by it as an employee or a worker.

At a case management PH (where both parties were represented by counsel), it was agreed that there should be a further PH to determine C's status with R2. Issues were identified as to whether C was an employee or a worker of R2 within s.230 Employment Rights Act 1996 ("ERA"). At the next PH (where C was unrepresented), the ET determined that C was neither an employee nor a worker of R2 within the meaning of s.230, and dismissed all of his complaints against it.

C appealed to the EAT on the basis that the ET had erred by not considering whether he was a s.43K(1)(a) ERA worker of R2.

The Appeal

C contended that:

(1) The ET erred by not considering whether C was a s.43K worker because, prior to the PH where the issues were identified, he had never stated that he relied only on s.230, and the facts pleaded supported a case where the ET should have considered that possibility;

(2) Alternatively, the ET should have considered s.43K "*as a matter of course*";

(3) Alternatively, C should be permitted to introduce the argument as a new point on appeal.

EAT conclusion

The EAT considered that, on a fair, objective reading, C advanced a case that he was a s.230(3) worker, and did not advance an alternative case that he was a s.43K worker.

Error by failure to identify and determine a s.43K case that was not pleaded?

Applying **Moustache**[1], the EAT held that the ET did not err by failing to identify and address a component of C's pleaded case, as s.43K was not pleaded.

In **Moustache**, Warby LJ had provided a helpful reminder of the nature and extent of the ET's role to determine claims. The full discussion is contained at paras.33 to 40 in the judgment but a concise summary is as follows:

(1) Proceedings in the ET are adversarial; in any given case the primary onus lies on the parties to identify which claims they wish to advance.

[1] **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2023] EWCA 185

(2) The contents of a statement of case must be analysed in their proper context but this does not require the ET to engage in an elaborate or complex interpretative exercise.

(3) Where a party seeks the ET's ruling on an issue that emerges from an objective analysis of the pleadings, the ET has a duty to address that issue.

(4) The ET's role is arbitral not inquisitorial or investigative. The ET has no general duty to take pro-active steps to prompt some expansion or modification of the case advanced by a party.

(5) ETs will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case. What level of assistance is "*appropriate*" depends on the circumstances of each case and can include whether the litigant is representing themselves or, if represented, whether the representative is legally qualified or not.

(6) The starting point for an appeal of this nature is to consider what claims emerge from an objective analysis of the pleadings. A failure by the ET to identify and address those claims is liable to amount to a breach of its core duty and hence an error of law. A failure to identify and determine a claim that does not emerge from such an analysis can amount to an error of law but only in rare or exceptional circumstances.

(7) A list of issues is not a pleading but a case management tool. The main purpose of such a document is to summarise the existing pleadings and not to amend them. There may be circumstances where it may be necessary in the interests of justice to depart from even an agreed list of issues, for example: (1) where a pleaded claim has been omitted from the list in circumstances that do not amount to abandonment of the claim; (2) where the claim has not been pleaded but the fundamental duty of fairness makes it necessary (that is to say essential) that it should be raised and considered.

In this case, C argued that: (i) C had represented himself at the PH that considered his status with R2; and (ii) that the pleadings / evidence / findings made by the ET overwhelmingly indicated that the three elements of the s.43K(1)(a) test were met.

As to the first strand, the EAT noted that whilst C was a litigant in person representing himself at the PH, when he had presented his first claim to the ET he had been represented by solicitors and noted that he was represented by counsel at the case-management PH. This was not, therefore, a case where C had appeared without having had the benefit of any professional input to help him formulate the legal and factual basis of his complaints.

As to the second plank, the EAT concluded that this was not a case where the s.43K(1)(a) argument and analysis was one which "*shouted out*"[2] , not that it was for any other reason one in which, in **Moustache** terms, the fundamental duty of fairness meant that it was "*necessary (that is to say, essential)"* that the ET raise and consider it.

Should the ET have considered s.43K(1)(a) as a matter of course?

The EAT noted that in **Langston v Cranfield University** [1998] IRLR 172, the EAT discussed that there was certain types of case where "*a principle is so well-established that an Industrial Tribunal may be expected to consider it as a matter of course*". However, the categories of issue to which the general "*matter of course*" approach has been said, over the decades, to apply are limited and few.

The EAT concluded in this case that none of the established examples involve an ET being required as a matter of course to consider separate provisions of the statute which the party concerned has not in fact relied upon, and which set out a distinct legal test from that which the case presented to the ET requires it to apply.

Should C be permitted to run the s.43K argument as a new point in the EAT?

In **Secretary of State for Health v Rance** [2007] IRLR 665, the EAT reviewed a line of authorities which had considered the approach to be taken when a party seeks to run a point for the first time at the appeal stage. At para.50, the EAT drew out the following principles:

(1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities.

(2) The discretion covers new points and the re-opening of conceded points.

(3) The discretion is exercised only in exceptional circumstances.

(4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated.

(5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken.

[2] In the sense described by HHJ Auerbach in **McLeary v Housing Group Ltd** UKEAT/0124/18 at para.63.

(6) The discretion may be exercised in any of the following circumstances (which are given as examples):

a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant the point was not taken below.

b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the point fairly without recourse to a further hearing.

c) The new point enables the EAT plainly to say from existing material that the ET judgment was a nullity.

d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the ET.

e) The EAT can see an obvious knock-out point.

f) The issue is a discrete one of pure law requiring no further factual enquiry.

g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the ET is required.

(7) The discretion is not to be exercised where, by way of example:

a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence.

b) The issue arises as a result of lack of skill by a represented party.

c) The point was not taken below as a result of a tactical decision by a representative or a party.

d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of law to it by the first instance ET.

e) A represented part has fought and lost a jurisdictional issue and now seeks a new hearing (whether the jurisdictional issue is the same as that originally canvassed or a different way of establishing jurisdiction from that originally canvassed).

f) What is relied upon is the high value of the case.

The EAT concluded that this was a case where determination of the s.43K(1)(a) issue would at least have required further evaluative conclusions and determinations by the ET, which the EAT was not in a position to do in the same what the ET could. The EAT did not accept

that the s.43K(1)(a) analysis was, over and above being arguable and one that might succeeds, so obviously strong as to be an "*obvious knock-out*" point.

The EAT also concluded that this was not a case where the point should be allowed to be advanced to avoid a glaring injustice to an unrepresented party. Although C was a litigant in person at the hearing in question, he had had the benefit of professional advice when the basis on which his claims were advanced as formulated and first set out, and the relevant issues had been considered at an earlier hearing at which C was professionally represented.

The appeal was therefore dismissed.

Comment

This case does not break new ground. However, it does serve as a helpful summary of the extent to which there is a limited duty on ETs to determine issues that were not clearly identified in the pleadings and then set out in a list of issues. Whilst there are circumstances in which an ET might go beyond the issues identified in a list of issues, those circumstances remain limited.

This case does of course highlight the importance of having an accurate and comprehensive list of issues. Given the ET system is currently under significant pressure, where the time allocated for case management is almost always tight, and it would seem practitioners are facing increasingly lengthy pleadings, often influenced (at the very least) by AI, this is not always an easy task. Unpicking unduly lengthy, or narrative-heavy, pleadings can be a time-consuming and costly process. However, in order to ensure the ET addresses all the issues contended for by the parties, ensuring there is an accurate list of issues that is thought through and comprehensive is surely a juice worth the squeeze.

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