Breakfast Bites

28 February 2022

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This morning's agenda

- ***Smith v Pimlico Plumbers*** [2022] EWCA Civ 70
- ***Shittu v South London and Maudsley NHS FT*** [2022] EAT 18
- ***Bennett v MiTAC Europe Ltd*** [2022] IRLR 25
- ***Kocur v Angard Staffing Solution Ltd*** [2022] *EWCA Civ 18*
- ***Burn v Alder Hey Children's NHS FT*** [2021] EWCA Civ 1791
- New: Neutral Citation of EAT judgments

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Smith v Pimlico Plumbers – how did we get here (again)?

- 2018 – Supreme Court determined worker status in Mr Smith's favour
- Therefore entitled in principle to 5.6 weeks' paid leave under Reg 13 WTR (derived from Art 7 WTD)
- Back in the ET- holiday pay claim rejected- held that he had not pleaded a case for holiday accrued but not taken to the end of the engagement (2005-2011), only a claim for non payment of wages for leave actually taken in each year of engagement, which had been submitted out of time.
- ET rejected Mr Smith's submission that ***King v Sash Window Workshop*** permitted a claim on termination for all unpaid annual leave (whether taken or not).

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On appeal to the EAT

Choudhury P dismissed the appeal:

- ***King*** was not concerned with leave that was taken but unpaid.
- Concerned the right to carry over until termination leave that is not taken because of a failure to remunerate leave.
- Did not concern a right to carry over leave that is taken but not remunerated.
- ET also correctly construed the pleaded claims

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Court of Appeal

4 grounds of appeal, 3 main issues:

1. Did the ET & EAT err in holding that Mr Smith's only pleaded claim was for pay for the holiday leave he actually took (without pay) during his engagement with Pimlico Plumbers?

2. What is the scope of King and do its principles mean that someone in Mr Smith's position was entitled to carry over and accumulate his entitlement to paid annual leave until his engagement was terminated?

3. Is the series of deductions within the meaning of s.23(3)(a) ERA broken by a gap of 3 months or more?

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(1) Did the ET & EAT err in holding that Mr Smith's only pleaded claim was for pay for the holiday leave he actually took (without pay) during his engagement with Pimlico Plumbers?

No:

- Claim as originally pleaded did not encompass a Reg 14 WTR claim for payment in lieu of leave not taken at the date of termination.

- Did not adequately identify the substance of his claim, that he was refused or otherwise did not take his full entitlement to 4 weeks' leave each year such that he was entitled to a payment on termination under Reg 14 (or words to that effect).

- Not helped by repeated references to Regs 13 and 16 WTR in subsequent clarification schedule & lack of timely application to amend.

But – query the effect of ***King*** on the way in which his claim should have been viewed***, if a single right to paid leave which is denied by the R because it refused to remunerate, might be that it should have been viewed as inherent in the claim form …***

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(2) What is the scope of *King* and do its principles mean that someone in Mr Smith's position was entitled to carry over and accumulate his entitlement to paid annual leave until his engagement was terminated

- ***King*** based on broader principles, not confined to its facts:
  - Article 7 WTD & 31(2) Charter
  - No precondition to claim that worker has requested and been refused annual (paid) leave

- Where a worker is prevented from taking paid leave over a period of time, rules or practices preventing the worker from carrying over and accumulating the leave are precluded by the WTD.

- The single composite right in EU law is to take annual leave and to have the benefit of the remuneration that goes with it when the leave is taken. Emphasis on health and safety of workers.

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Accordingly:

- A worker can only carry over and accumulate a claim for payment in lieu on termination when the worker is **prevented from exercising the right to unpaid annual leave** and does not take some or all of the leave entitlement, or takes unpaid leave, for reasons beyond his control, because the employer refuses to recognise the right and to remunerate annual leave (§ 87).

- Provided a claim for breach of Regulations 13 and 16 are made within a period of 3 months beginning with the date of termination, it will be in time (§ 87).

- Burden on the employer to show all due diligence in respecting the composite right (§ § 81-83), as per CJEU cases of ***Shimizu***, ***Kreuziger*** and ***Bauer***

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3. Is the series of deductions within the meaning of s.23(3)(a) ERA broken by a gap of 3 months or more?

- Conflicting authority – ***Bear Scotland*** (EAT) vs ***Agnew*** (NICA)
- Obiter – but strong provisional view that ***Agnew*** should be preferred – nothing in s.23(3)(a) ERA that expressly imposes a limit on the gaps between particular deductions making up a particular series, nor can it be implied.
- A series is a matter of fact and degree, importance of the focus being on the identification of a sufficient factual and temporal link.
- (2 year long stop applies to series of deductions claims presented after 1st July 2015- query its relevance in the circumstances of ***King*** et al)

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Appendix to re-issued CA Judgment

Insertion of additional suggested wording to Reg 13 (building on the text suggested in ***NHS Leeds v Larner*** and ***Plumb v Duncan Print Group***), by the insertion of Reg 13(16) with consequential references in Regs 14 and 30:

(16) Where in any leave year an employer (1) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and / or which is not taken, into subsequent leave years.

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Points arising

- Precision in pleadings does matter, as do timely amendment applications. If applicable, plead Regs 13, 14 and 16 plus the remedy in Reg 30.

- Bear Scotland arguments in relation to deductions of holiday pay unlikely to survive future appellate argument.

- Practical implications of the burden on the employer to prove *'all due diligence in order to enable the worker to take the paid annual leave to which he is entitled*'- see § 82

- Impact of Brexit

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Shittu v South London & Maudsley NHS Foundation Trust

- C successful at ET in claims of constructive dismissal and discriminatory dismissal (s.15 and s.21 EqA 2010)
- At remedy, C awarded a basic award, loss of statutory rights, ITF and interest.
- C not awarded compensation or damages for loss of earnings.
- ET found that C would have resigned anyway on account of the myriad of other allegations (which had not been upheld) & medical evidence about psychiatric health.
- C appealed.

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EAT- (1) Did ET assess compensation on balance of probabilities or loss of a chance?

- Approach to the assessment of compensation in discrimination and unfair dismissal complaints will be materially identical notwithstanding the different wording of s.123 ERA 1996 & s.119 EqA 2010

- Where multiple reasons for resignation, some of which were causative some of which were not, the task for the ET was to identify what losses were attributable to unlawful conduct and what were not.

- ET correctly adopted the loss of a chance approach – 100% assessment of the prospects of resignation due to other non-liability reasons.

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EAT (2) – Could or should the ET assess compensation in constructive unfair and discriminatory dismissal claims on the balance of probabilities

- No

- Three basic questions for the ET:
  - Was the loss occasioned as a consequence of the dismissal?
  - Was the loss attributable to the conduct of the employer?
  - If so, was it just and equitable to award compensation?

- A 100% outcome (or 0% outcome) will be in result similar to a balance of probabilities analysis but arrived at through loss of a chance assessment.

- Principles in professional negligence cases (e.g. ***Perry v Raley*** Solicitors) not applicable in ET.

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Possible outcomes include (para 95)

- There was a less than 100% chance of indefinite continued employment in which case ET must assess the % chance and apply that % reduction

- ET is satisfied in the evidence that there was a 100% chance that employment would have ended anyway by a certain time or at the same time as the dismissal, C awards 100% of whatever that period or nil if it was the same date as dismissal.

- Employment would have continued indefinitely, no % reduction.

- 100% chance employment would have continued for a certain period followed by a lesser % chance.

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Bennett v MiTAC Europe Ltd [2022] IRLR 25

- Claim of associative discrimination because of a colleague (and line manager's) disability (cancer).
- C alleged that he had been dismissed because of his colleague's disability.
- Decision maker did not give evidence before the ET.
- Whilst s.136 EqA 2010 burden had shifted, ET found that C dismissed because of his own poor performance, not the association with his colleague.

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EAT – on associative discrimination

- Situations in which associative discrimination can be asserted (§ § 37-38):
  - Because of caring responsibilities for a person with a protected characteristic, such as disability
  - Refusal of an instruction to discriminate
  - Detrimental treatment because it is thought that a person possesses a protected characteristic
- Labels are not that important- the real question is whether the protected characteristic of the other person was an effective cause of the treatment of C.

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EAT on s.23 comparators

- In disability discrimination cases, the relevant circumstances include a person's abilities.
- In direct disability discrimination claims it is necessary to compare the treatment of C with an actual or hypothetical person with comparable abilities.
- In such circumstances, it may be that s.15 would be more apt – not helpful in an associative case.
- However, if stereotypical assumptions are made about the ability and / or likely future ability of a disabled person this can about to direct discrimination.

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EAT on discharging the s.136 EqA 2010 burden

- S.136 particularly important when the decision maker is not called to give evidence, citing ***Efobi*** (SC & CA), as cogent evidence needed to discharge the burden
- Standard of proof necessary to discharge the burden is the balance of probabilities.
- The requirement to establish that the treatment was in '*no sense whatsoever*' because of the protected characteristic is related to causation, not the burden of proof.
- Requirement of 'cogent evidence' does not affect the standard of the burden of proof but relevant because R will always have the ability to choose what evidence to deploy about the decision making process.
- Whilst possible to discharge the burden with (compelling) documentary evidence, the absence of the decision maker makes that a difficult task.
- If the ET is going to accept documentary evidence in lieu of witness evidence from the decision maker, it should be the subject of careful reasoned analysis, including as to why the decision maker has not been called.
- The possibility that the witness has not been called because their evidence might be damaging should also be borne in mind. Distance no longer an insurmountable barrier.

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Disability- relevance of the date of diagnosis?

- ET adopted the incorrect approach that any evidence about the decision maker's attitude to C could only be relevant once they had knowledge that his ill health constituted a disability.
- ET focused on the date of diagnosis.
- EAT held that this was wrong- in the case of a disability such as cancer, EqA 2010 protects a person who has the disability, being diagnosed not a precondition to protection. (s.6 EqA 2010 & para 6, Sch 1 EqA)
- Diagnosis relevant as evidence relating to the period of disability & knowledge, although knowledge can be attributed before that point in time.
- Person can be directly discriminated against on the grounds of disability if at the time it is thought that a disability will arise at a later date. (obiter)

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Kocur v Angard Staffing Solution [2022] CA

- Agency Workers Regulations 2010 (AWR)
- Reg 13(1) AWR
- …agency worker has, during an assignment, the right to be informed by the hirer of any relevant vacant posts with the hirer. This is stated to be "*to give the agency worker the same opportunity as a comparable worker to find permanent employment with the hirer*."

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Kocur v Angard Staffing Solution [2022] CA

Facts:

- C employed by Angard (owned by Royal Mail)
- Vacancies put on notice board
- Priority: Permanent posts / Reserve class
- AW not eligible to apply
- C submitted Reg 13(1) AWR:

1. Right to be notified of vacancies
2. Right to apply
3. Right to be considered

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Kocur v Angard Staffing Solution [2022] CA

- ET: express right to *receive* information extended to an implicit right to *apply* for relevant vacant posts
- EAT: disagreed
- only to be notified of the vacancies (same level of information)
- no right to apply/be considered
- ***Coles v Ministry of Defence*** [2016]

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Kocur v Angard Staffing Solution [2022] CA

- ***Coles v Ministry of Defence*** per Langstaff J:
- "the Directive provides a right to information…The purpose … is to give temporary agency workers the same chance as other workers … to find permanent employment with that end user.
- It has nothing to say about the terms upon which there should be recruitment for any post.
- If an employer wishes to give preference to those being redeployed, perhaps to satisfy his obligations to them as his permanent employees, he is entitled to do so …

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Kocur v Angard Staffing Solution [2022] CA

CA:

- Art 6 (Temporary AW Directive 2008)
- Literal reading: notification
- Q: was purpose to equate notification with a right to apply and be considered?
- CA: no, striking the balance between competing interests
- Q: narrow interpretation right meaningless?
- CA: no, right to be notified is valuable

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Kocur v Angard Staffing Solution [2022] CA

CA:

- Narrow construction of Art 6 / Reg 13(1) was deliberate and valid.
- Adverse impact of C's argument: redundancy redeployment, preference to in-house recruitment, etc.

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Burn v Alder Hey Children's NHS FT (2021) CA

Facts

- C: consultant paediatric neurosurgeon
- C had "on call" responsibility for the care of a child (A) between 1 and 4 December 2017
- A surgeon (Dr M) operated on A on 3rd December, but a few days later, A died.
- R commenced a formal investigation
- Q: whether for C's participation in that investigation C should be supplied with copies of certain documents in the possession of R.

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Burn v Alder Hey Children's NHS Hospital (2021) CA

Injunction application

- restraining R from concluding the investigation until she had been given "the opportunity to be interviewed having had sight of all documents related to the investigation",
- disclosure of all such documents
- declaration as to her contractual rights
- Thornton J (HC)

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Burn v Alder Hey Childrens' NHS Hospital (2021) CA

Disclosure issue

"The practitioner concerned must be … made aware of the specific allegations or concerns that have been raised. … given the opportunity to see any correspondence relating to the case together with a list of the people that the Case Investigator will interview … afforded the opportunity to put their view of events to the Case Investigator ..." (para.1.16 Policy)

- Other provisions: accompanied; unbiased investigation; time scales; protection of data.

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Burn v Alder Hey Children's NHS Hospital (2021) CA

C's case:

- Q: was C entitled to see all documents related to the investigation (including "withheld docs")?
- 1) Para.1.16: wide scope: C entitled to see all documents seen by the Case Investigator in connection with the investigation
- 2) "implied term of trust and confidence" was that C should be able to see (at least) the withheld documents in order to respond properly to the investigation.

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Burn v Alder Hey Children's NHS Hospital (2021) CA

CA:

- HC rejected C's application. Bean LJ only permitted ground (1) of appeal through (para.1.16).
- "Correspondence" ≠ all documents
- "Relating to" = limited and high-level process obligation
- Implied term ….

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Burn v Alder Hey Children's NHS Hospital (2021) CA

Underhill LJ:

"C's core submission was that it would be impossible for a Case Investigator to perform their obligation to afford the practitioner "the opportunity to put their view of events" – which must of course be a fair opportunity – unless he or she was given access to the documents which will enable them to do so. She reminded us that the process is intended to look for exculpatory as much as inculpatory evidence."

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Burn v Alder Hey Children's NHS Hospital (2021) CA

Underhill LJ:

It comes down to a question of fairness:

"There may not on the orthodox view be a general implied duty on an employer to act fairly in all contexts, **but such a term is very readily implied in the context of disciplinary processes** – see para. 114 of the judgment of Simler J in ***Chakrabarty v Ipswich Hospital NHS Trust*** [2014] EWHC 2735 (QB), [2014] Med LR 379

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Burn v Alder Hey Children's NHS Hospital (2021) CA

Underhill LJ:

"that the practitioner must be given the opportunity to put their version of events, **necessarily implies that they must be shown any documents** that they fairly need in order to be able to do so; what those documents are will obviously depend on the particular circumstances of the case."

- C.f fairness-based obligation = very important / with general disclosure obligation

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Burn v Alder Hey Children's NHS Hospital (2021) CA

Implied term?

- Underhill LJ: not necessary as a matter of fairness for C to be given copies of the withheld documents before she is interviewed
- *Obiter*:

"I wish to add that I agree with Singh LJ's observations about the conceptual basis of the duty of procedural fairness to which I refer at para. 35 above. My strong provisional view is that it is preferable to treat that **duty as arising from the nature of the disciplinary process** rather than as an aspect of the trust and confidence duty. (para.42)"

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Burn v Alder Hey Children's NHS Hospital (2021) CA

Singh LJ:

- no freestanding obligation to act fairly which is separate from the term of trust and confidence (Coulson LJ in ***North West Anglia NHS Foundation Trust v Gregg*** [2019] CA);
- Simler J in ***Chakrabarty***:

"Rather where the authorities contemplate questions of fairness, they do so in the context of the implied term of trust and confidence, or on a narrower basis by reference to an implied term that disciplinary processes will be conducted fairly, without unjustified delay"

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Burn v Alder Hey Children's NHS Hospital (2021) CA

Singh LJ:

- No general obligation of "fairness"
- But procedural fairness: "there may be a narrower basis for an implied term that disciplinary processes will be conducted fairly, which is not conceptually linked to the implied term of trust and confidence."
- "important issue of principle open for a future case … but it does not appear to me that there would be a legal impediment to such an implied term."
- ***Braganza v BP Shipping Ltd*** (2015)

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Burn v Alder Hey Children's NHS Hospital (2021) CA

Singh LJ:

- ***Braganza v BP Shipping Ltd*** (2015)
- "In my view, if the law were to imply a term into the contract of employment that disciplinary processes must be conducted fairly, that would be a short step which builds on ***Braganza***."

- Positive judicial endorsement of a discrete implied term of procedural fairness in disciplinary process?

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And finally …

- **New Neutral Citation of EAT judgments**

The Senior President of Tribunals has issued a Practice Direction on the neutral citation of EAT judgments.

The EAT Office will begin to issue a unique neutral citation number for all judgments in respect of full hearings, in the form **[2022] EAT 1**.

From 1st January 2022.

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Thank you!

Next event – 16 March 2022

10th Annual (Hybrid) Seminar at the Watershed , Bristol

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