2023 into 2024: reflections on eye catching cases

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Annual seminar 5 March 2024

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Has the SC[whistle]blown it? Kong KO'd

The long-anticipated analysis by the Supreme Court of the so-called principle of 'separability' in respect of determining the 'reason why' a dismissal or detrimental act happened fell away when in January 2023 when permission to appeal to the SC from the CA was refused in *Kong v Gulf International* UKSC 2022/ 0131. According to the SC the application did not raise an arguable point of law.

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Fernandez v Department of Work and Pensions [2023] EAT 114 (14 September 2023, unreported) S124 EQA 2010

- What is the notional date from which time begins to run where there is failure to act once a duty to make adjustments has been established?
- That notional date will accrue if the employer does an act inconsistent with complying with the duty.
- If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee.'
- the key element missing from the ET's approach to s 123(4)(b) which was to consider the reasonable date from the point of view of factors known by, or reasonably knowable to, *the claimant.* The test is therefore an objective one (not just what the claimant subjectively thought).

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Bear Scotland reviewed Chief Constable of the Police Service of Northern Ireland v Agnew [2023] UKSC 33

- *Bear Scotland v Fulton* [2015] IRLR 15, [2015] ICR 221, EAT that a 'series' of unlawful deductions from wages for the purposes of recovering. underpaid statutory holiday pay is broken by any gap of greater than three months.

- *SC held this is wrong: 'But to assume that a gap of more than three months between an act of which complaint is made and any acts which preceded it will necessarily extinguish the claimant's ability to recover in respect of the earlier acts would be largely to ignore the exception to the general rule which the "series" extension provides and the protection it is intended to confer.'*

- what is a series? (1) the similarities and differences of the failures by the employer; (2) their frequency, size and impact; (3) how they came to be made or applied; (4) what links them together; and (5) all other relevant circumstances.

- Reg 30 WTR to be used a vehicle for avoiding the 24-month backstop under Reg 23?

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Reconsideration applications where a party is let down by adviser

Phipps v Priory Education Services Ltd [2023] EWCA Civ 652

- The established situation was set out by Mummery J in *Ironsides, Ray & Vials v Lindsay* [1994] IRLR 318, EAT. He held that that:' Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review'.
- Broader interpretation of 'generally? Dedman no so strictly applied.
- Discreditable behaviour of legal adviser, multiple failures to provide medical evidence to support an adjournment application.
- No fault of the client at all.
- Not a question of the error occurring at trial/ so as impact core issue of the finality of litigation.

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Dismissal or resignation do special circumstances exist in determining the true picture? Omar v Epping Forest District Citizens Advice/UKEAT/2023/132

The tribunal failed to direct itself properly in accordance with the applicable legal principles and failed to make adequate findings of fact relevant to the core question of whether,

- (i)viewing the situation objectively from the perspective of the reasonable employer, the employee not only used words that when construed in accordance with normal contractual principles constituted words of resignation, but also
- (ii) that objectively it would have appeared to the reasonable employer that he 'really intended' to resign. Instead, the tribunal erred in law by asking itself whether there were 'special circumstances' that justified departure from the general rule that an employer is entitled to rely on words of resignation in accordance with their plain and natural meaning. The tribunal also erred:
- (iii) by focusing on the issue of whether, after the altercation, the employer had offered the employee a new role.

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Guidance on the use of comparators

Virgin Active Ltd v Hughes [2024] IRLR 4

EAT guidance on the application of s 23 EQA 2010

- i.e. the characteristics of comparators for Direct (s13), Combined (s14) and Indirect (s19) discrimination.
- Case focuses on the practical realities of using an actual v hypothetical comparators and how one can help the other.
- What inferences are proper to draw from the treatment of the actual comparator when looking at the (no material difference) s 23 comparator.

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2023 into 2024: one eye on the future…

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What to look forward to…..

- Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers and Others - UKSC 2022/0133
- Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd – UKSC 2021/0220
- McClung v Doosan Babcock Ltd & Others – ET 4110538/2019
- Mr P E Manjang v Uber Eats UK Ltd and Others – 320621/2021

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Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers and Others - UKSC 2022/0133

- Fire and Re-Hire – due to be heard in the Supreme Court on 23rd and 24th April 2024
- Tesco seeking to fire and re-hire to remove ‘Retained Pay’ from workers in its distribution centres. Made a series of Pre-contractual statements and changes to contract.
- High Court – Ellenbogen J held in favour of Claimants. Implied term allowed of not exercising notice for purpose of removing ‘Retained Pay’.
- Court of Appeal – Allowed appeal. Ordinary and natural meaning should be followed. Implied term not clear enough and so not possible. Estoppel not in question.
- Supreme Court – Is the implied term possible?.....

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Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd – UKSC 2021/0220

- Heard in the Supreme Court on 26th and 27th June 2023. Issue to be determined: Whether the relationship between a company responsible for paying football referees to the Football League and part time referees an employment relationship so as to trigger obligation on the company to deduct Income Tax and National insurance at source.
- First Tier Tribunal – Overarching contract and Individual contract; Yes. No sufficient mutuality of obligation and no control in respect of individual contracts.
- Upper Tribunal – Upheld FTT on mutuality of obligation but FTT erred on control.
- Court of Appeal – UT and FTT had erred in law; need to look at all circumstances! Do not over complicate it.
- Supreme Court - remarks will be of interest…..

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McClung v Doosan Babcock Ltd & Others – ET 4110538/2019

- Philosophical Belief – Is supporting a football team enough?
- Dispute at preliminary hearing to determine whether support for Glasgow Rangers Football Club was a Philosophical belief in terms of Section 10 of the Equality Act 2010.
- Claimant is a supporter of over 42 years. Spends most of his income on games and shares the views of unionism and monarchism associated with the club. Just as important as going to church.
- Employment tribunal – Test in **Grainger plc v Nicholson [2010] IRLR 4** not met.
- Awaiting on EAT judgment to confirm.

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Mr P E Manjang v Uber Eats UK Ltd and Others – 320621/2021

- Artificial intelligence – the beginning of the issues…
- Claim of harassment related to race, victimisation and indirect race discrimination. Claimant is a black male of African origin.
- Uber Eats introduced Microsoft Facial Recognition Software. Real time photos to verify identity of its couriers. Question of worker status? – to be determined at hearing.
- Main issue – does the AI Software discriminate due to fake positive and false negative results. Issue more prevalent in ethnic minorities.
- Respondent sought strike out – not granted. We remain on full steam for tribunal.
- One of the beginning issues…

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Thank you for listening

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