Employment: Massages at Work and the Shifting Burden of Proof: Raj v (i) Capital Business Services Limited (ii) Ward [2019] UKEAT/0074/19 6 June 2019 (published 16 September 2019).

Barbara Zeitler

The employee appealed against the Employment Tribunal's dismissal of his harassment claim which arose out of his (female) line manager giving him massages at work.

S. 26 Equality Act 2010 (EqA) defines harassment as unwanted conduct related to a relevant protected characteristic and which violates a person's dignity or has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. S. 136 EqA ensures that where claimants establish facts from which it may be presumed that there has been a contravention of the provisions of EqA, the burden of proving that there has been no breach falls on the respondent.

Mr Raj, a customer service agent, alleged that on two or three occasions, when he was sitting at his desk in an open plan office, his manager, a Ms Ward, had stood behind him and briefly given him a massage, feeling his shoulders, neck and back. He said this was unwanted conduct either of a sexual nature or unwanted conduct relating to his sex under S. 26 EqA.

The ET concluded that Mr Raj had proven physical contact that, although lasting only two or three minutes, had made him feel uncomfortable. The Tribunal also found that the manager's purpose in administering the massages was to give misguided encouragement to Mr Raj to improve his performance; the massages were not of a sexual nature and not related to the Claimant's sex. The ET's reasons did not expressly refer to the shifting burden of proof provision under s. 136 EqA.

The EAT dismissed Mr Raj's appeal that the ET had failed to apply the provisions under s. 136 EqA. The EAT held, on the basis of *Madarassy v Nomura International* [2007] ICR 867, CA, it is not itself an error of law not to make express reference to the shifting burden of proof. The Tribunal had correctly stated that, in the first instance, it was for Mr Raj to establish that the unwanted conduct related to his sex. The findings of the ET indicated that the massages were not connected to the Claimant's sex. While the ET has rejected some of the Respondent's evidence, *Birmingham CC v Millwood* [2012] UKEAT/0564/11/DM did not lay down a rule of law that the burden of proof would always shift where a Tribunal rejected aspects of the Respondent's evidence. The ET had not erred in law.

Property: Does the FTT have jurisdiction to decide the extent of a party's beneficial interest? Hallman v Harkins [2019] UKUT 0245 (LC)

David Sawtell

The Upper Tribunal (Lands Chambers) has answered a very important practical question about beneficial interests – despite being able to determine whether a party has a beneficial interest in land, the First-tier Tribunal has no jurisdiction to quantify it.

The First-tier Tribunal (Property Chamber) Land Registry (formerly the Adjudicator to Her Majesty's Land Registry until 2013) is conferred a number of powers to decide disputes referred to it by the Registrar arising from objections to applications for registration by statute (Land Registration Act 2002, sections 73(7) and 108(1)(a); the First-tier Tribunal also has the power to rectify certain documents under section 108(1)(b): see *Megarry and Wade: The Law of Real Property (9th edition)* at 6-130). Where a dispute is

referred to the First-tier Tribunal, it may direct the registrar either to cancel the application, or to give effect to it in whole or in part as if the objection had not been made. In *Hallman v Harkins*, the First-tier Tribunal was asked to decide whether a party had a beneficial interest that justified the registration of a restriction.

The question of whether the First-tier Tribunal has the power to determine the quantification of the applicant's alleged beneficial interest has led to debate. In *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch), [2010] 1 WLR 2106 at [29], Briggs J assumed without deciding that separate court proceedings would have to be commenced to determine the quantification of the applicant's alleged beneficial interest. The authors of the latest edition of *Megarry and Wade* noted this issue was "*not clear*" (6-130, fn.897). Notwithstanding these doubts, the Tribunal in this case went on to give an indication as to the extent of the applicant's interest.

What this has meant in practice is that if there is a dispute as to the extent, as well as to the existence, of a beneficial interest in a property, either the First-tier Tribunal has had to direct a party to commence proceedings in the court to obtain the court's decision on that matter (section 110(1) of the 2002 Act), or the parties will have to commence separate proceedings in court following the determination of whether there is a beneficial interest at all. These kinds of disputes do not only arise in the context of separating couples who have cohabited, when one party contests the registration of a restriction to protect their beneficial interest (as in *Hallmark v Harkins)*; they can arise as well, for example, in applications relating to the registration of charging orders where there is a dispute as to the interest that is the subject of the charge.

In *Hallman v Harkins*, Martin Rodger QC closed down the debate as to jurisdiction. Following a close analysis of the 2002 Act and the case law, he held that the First-tier Tribunal had no jurisdiction to decide the parties' beneficial interests, and that in this case the first instance Tribunal was "*wrong to embark on that exercise even subject to the disclaimer that the decision would not be binding*" (para 73).

The Law Commission has previously recommended that the First-tier Tribunal's jurisdiction be extended so that disputes about the quantum of beneficial interests can be determined without the need for an application to the court in its report, *Updating the Land Registration Act 2002* ((2018) Law Com. No. 380, paras 21.45 to 21.90), noting that this would reduce the need for extended litigation and the expertise of the First-tier Tribunal in these matters. It remains to be seen if this recommendation will be implemented.

Prorogation: High Court of England & Wales v Inner House of the Court of Session

Dominic Bright

The highest courts in *England and Wales*, and in *Scotland*, considered prorogation in principle, and the decision to prorogue on 9 September 2019 in practice, before coming to a different, reasoned judgment and opinion, respectively. Permission to appeal to the highest court in the *land* was granted from both. Judgment of the Supreme Court is awaited.

Prorogation is the means by which the government, through exercise of prerogative power, can bring a parliamentary session to an end. Once prorogued, Members of Parliament cannot debate government policy or legislation, submit parliamentary questions for response by government departments, scrutinise government activity through parliamentary committees, or introduce their own legislation.

Typically, the duration of prorogation in recent times has been very short. Rarely more than a couple of weeks. The Prime Minister's plan to prorogue Parliament for five weeks is not.

High Court of England & Wales

In *R (on the application of Miller) v Prime Minister* [2019] EWHC 2381 (QB), the Lord Chief Justice of England and Wales, the Master of the Rolls, and the President of the Queen's Bench Division concurred that:

> "The main issue we [had] to decide is whether the decision of the Prime Minister to seek the prorogation of Parliament is justiciable (is capable of challenge) in Her Majesty's courts or whether it is an exclusively political matter."

Judgment

The claim failed. The High Court of England and Wales concluded that prorogation is an exclusively political matter.

There remains common law, prerogative powers which are immune from judicial review. In other words, "non-justiciable". Many judicial statements that bind the High Court of England and Wales prescribe that *whether the subject matter of the power is non-justiciable* is the first question when considering the court's power to review the exercise of prerogative powers.

The test for the courts is whether it involves matters of "high policy", or it is otherwise "political". Absence of judicial, or other legal standards by which to assess the legality of the executive's decision, or other action, indicates that it is "political".

The decision to prorogue, the date, and the duration of prorogation are inherently political in nature. There are no legal standards against which to judge legitimacy. Accordingly, it is impossible to assess, in law, whether the duration of prorogation is excessive.

Inner House of the Court of Session

The Court of Session is Scotland's supreme civil court. It has been since 1532. The presiding judge, the Lord President is Scotland's most senior judge.

The Inner House is the primary appeal court. It reviews decisions, mostly from the Outer House. Cases in the Inner House usually have three judges. Each with an equal vote. There is no casting vote.

The Lord President, Lord Brodie, and Lord Drummond Young heard the reclaiming motion by Joanna Cherry QC MP and others. The issue was when the prorogation of parliament can be the subject of judicial review.

Two central questions

In *Cherry QC MP & Ors v Advocate General* [2019] CSIH 49, the first plea-in-law was for declarator that it is ultra vires, and unconstitutional for the government to advise the Queen to prorogue parliament with the intention of preventing sufficient time for proper consideration of Brexit. At first instance, the Lord Ordinary refused the prayer, principally because the provision of advice to the Queen on the prorogation of Parliament was non-justiciable.

There were two central questions. One of law. The other of fact. First, whether prorogation can be judicially reviewed where it is alleged that it has been requested for what is said to be an improper motive. Second, whether improper motive has been demonstrated.

There were two subsidiary questions. First, whether the press should have access to documents in the court process, produced in obedience of the duty of candour. Second, whether the court should call for unredacted copies of the same.

Opinion

The reclaiming motion was allowed. On the two central questions, as a matter of law, a prerogative decision may be the subject of judicial review. As a matter of fact, an improper motive was demonstrated:

> "The circumstances demonstrate that the true reason for the prorogation is to reduce the time available for Parliamentary scrutiny of Brexit at a time when such scrutiny would appear to be a matter of considerable importance, given the issues at stake."

Accordingly, the court was unanimous that both the advice to prorogue, and the prorogation in fact was unlawful, null, and of no effect. The court produced a declarator to that effect.

On the two, subsidiary questions, there is no difficulty in the press having access to pleadings. In the absence of special circumstances, written notes of argument in a reclaiming motion – intended to be a concise summary of the submissions to be developed – are open for inspection.

If production of an unredacted version of a document to the petitioners is necessary for fairly disposing of the proceedings, the court could override objections from the government based upon public interest considerations. In the instant case, however, redactions were justified.

Supreme Court

In both *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)* and *Cherry & Ors (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, the essential question is whether a challenge to the decision of the Prime Minister to advise the Queen to prorogue Parliament is justiciable.

It appears that the decision for the Supreme Court is binary: no, and by doing so, appear to endorse the judgment of the High Court of England and Wales; or yes, and by doing so, appear to endorse the opinion of the Inner House of the Court of Session. The President of the Supreme Court has indicated that judgment will be handed down early this week. It is eagerly awaited.