# Harvey on Industrial Relations and Employment Law

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## DIVISION CIII WHISTLEBLOWING

### Whistleblowing dismissal; establishing the reason in an organisation; Iago cases

**CIII [110], CIII [126]**

***Royal Mail Group Ltd v Jhuti [2017] EWCA Civ 1632***

This decision of the Court of Appeal concerns what Underhill LJ has christened 'Iago cases' in the law on whistleblowing, namely where manager A (Iago) sets up the employee for dismissal because of objections to disclosures that he or she has made, by manufacturing false accusations of other unrelated matters on which manager B (Othello) later dismisses the employee – 'reasonably' on the grounds before them, but without knowledge of the true facts of the protected disclosures. In such a case, has 'the employer' dismissed the employee for the reason or principal reason of the whistleblowing?

The text points out that normally it is the motivation of the dismissing manager (B) that counts, and hence in one of these cases the employer should not be liable for automatic unfair dismissal under ERA 1996 s 103A (and see the analogous discrimination case of *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] IRLR 562, considered at **L [274.03]**). However, as the text also points out, in *Co-operative Group Ltd v Baddeley* [2014] EWCA Civ 658 Underhill LJ set a hare running that it *might* be possible in such a case for A's motivation to be ascribed to the employer, 'at least where he was a manager with some responsibility for the investigation'. That possibility was then taken up by Mitting J in the EAT in the instant case (whose facts are set out at **CIII [126]**). Now, however, it has fallen to Underhill LJ to shoot this particular hare, at least in cases not meant to be covered by his obiter in *Baddeley*. The judgment of the court, which he gave, is thus a subtle one, not

just for this reason but also because he shows a way that, at least in some whistleblowing cases, a claimant may still be able to get compensation for future loss of livelihood ('career loss') by suing for detriment under ERA 1996 s 47B instead.

The basis for the court's decision was that it was bound by *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704 (an Iago situation in an ordinary, non-whistleblowing claim, which had not been referred to in the ET or EAT here) where the majority had held that an organisation's motivation is to be taken as that of the person deputed to carry out the employer's functions under the ERA 1996 s 98. The claimant here tried to argue that that may be the case for an ordinary unfair dismissal claim under s 98, but different rules should apply (for policy reasons) under s 103A. However, that was specifically rejected because whistleblowing is to be construed consistently with the rest of unfair dismissal law.

How did this reassertion of orthodoxy (reversing the EAT's decision) fit in with *Baddeley*? Underhill LJ started by saying that his remarks were obiter, but to his credit he did not then plead the well-known Scots Law Wisnamee Defence (as in 'Och, it wisnae me') but went on to draw an important distinction. As seen above, he had limited his suggestion to cases where A had some responsibility for the investigation (so that, to put it another way, there was an element of joint enterprise between A and B, fixing the employer with liability for both). Where, however, as in this case, A was merely acting surreptitiously in the background, that does not apply (see at [62]). Thus, the EAT had erred in applying the possible exception here. He accepted that this might work injustice on the claimant, but a line has to be drawn somewhere. Interestingly, at [63] he raised the possibility of another exception to the normal rule, namely where the Iago in question is very high in the hierarchy (especially a CEO) and his or her actions in the background as the éminence grise have orchestrated the revenge on the whistleblower; in such a case it may also be possible to fix the organisation with his or her motivation, but once again this was expressed to be obiter.

In a straightforward Iago case, is the claimant therefore without remedy? The ET here, having dismissed the unfair dismissal claim, had proposed to award career loss compensation under s 47B on the basis that the preceding detriment had *led* to the eventual dismissal, and there was an unbroken causal link to the loss flowing from that dismissal. It had cited the age discrimination case of *CLFIS UK Ltd v Reynolds* (above) as authority for this. Here, the court accepted that it is not possible to read across discrimination precedents as such, but thought that a similar principle should be applied, particularly by use of the personal and vicarious liabilities added to detriment law in 2013 (see **CIII [98]**). These points were remitted to the tribunal.

This judgment is obviously of major importance, but it contains caveats. It points out that many of these conceptual problems arise from the fact that detriment and dismissal in ss 47B and 103A are in different parts of the Act and are *not* similarly drafted; it also states that we may yet see further

examples of these differences. Moreover, although it shows a way forward for the claimant in this case, it accepts that there remain other conceptual issues. In particular, s 47B(2) on its face seeks to keep detriment and dismissal *apart*. The judgment states obiter that this should not preclude damages where the loss comes from dismissal, where it originates in detriment of a different kind, but accepts that this is not the obvious meaning of s 47B(2) and also that there may be difficulties here with the older whistleblowing case of *Melia v Magna Kansei Ltd* [2005] EWCA Civ 1547, [2006] ICR 410, which had stressed the separate nature of these two causes of action. We have not heard the end of all of this.

## DIVISION DI UNFAIR DISMISSAL

### Misconduct; reference to previous incidents; effect of procedural failure; reasonable investigation

**DI [1485]**

***NHS 24 v Pillar UKEAT/0005/16* (*4 July 2017, unreported*)**

Given the legal complexities of other cases reported in this Bulletin, this decision of Lady Wise in the EAT is a refreshingly old fashioned consideration of basic questions of the fairness of a dismissal. As she says at the beginning, it was a difficult case for the tribunal (concerning the dismissal of a long serving nurse for an alleged patient safety breach) because it concerned high stakes for both sides and necessitated a balance between fairness to the claimant and her career and on the other hand the hospital's duty to patients. In such a case, much is of course to be left to the tribunal and indeed the case was heavily fact-specific. However, the judgment is noteworthy for two statements of principle:

(1) In holding the dismissal unfair, the tribunal had criticised the employer for taking into account two previous similar incidents involving the claimant which had *not* been subjected to disciplinary proceedings or formal warnings. It had considered this to contravene the *BHS v Burchell* rules on fairness in misconduct cases. However, the EAT agreed with counsel for the employer that *Burchell* is concerned with whether the investigation was *sufficient*, so that it must be unusual (if not actually impossible) for it to be used to attack an investigation as *too* thorough. On these facts (where the claimant had objected to the two previous occurrences being cited in the original investigatory report, rather than any specific use of them by the officer deciding on dismissal) this was an error of law.

(2) Having largely come to the conclusion that the decision to dismiss had been within the range of reasonable responses, the tribunal had then isolated one particular procedural glitch in relation to openness and had proceeded to decide that that per se made the dismissal ultimately unfair. Citing *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, [2006] IRLR 613, the EAT again held that this was an error of law because the current approach is a broad one, considering any such glitches in the

context of the case as a whole, including their effects on the eventual decision to dismiss (which the tribunal here had failed to do). The decision cites Langstaff P in *Sharkey v Lloyds Bank plc* UKEATS/0005/15 (4 August 2015, unreported) where he said: '… procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.'

## DIVISION F TRANSFER OF UNDERTAKINGS

### Transfer of liabilities; tortious liabilities; liability contingent at the time of transfer

**F [124]**

***Baker v British Gas Services* (*Commercial*) *Ltd [2017] EWHC 2302* (*QB*)**

The decision of the Court of Appeal in *Bernadone v Pall Mall Services Group; Martin v Lancashire CC* [2000] IRLR 487 was important in holding that tortious liability for personal injury on a transferor employer can transfer to the transferee employer under TUPE SI 2006/246 reg 4 (see **F [124]**). That came as a bit of a shock in some quarters at the time, but is now well established. However, the instant decision of the High Court has explored one loose end to this principle. In both of the cases involved in the *Bernadone* appeals, the accident in question had already happened before the date of the TUPE transfer. What is the position if the accident was due to negligence occurring before the transfer but the accident itself did not occur until *after* it (ie any liability at that date was only contingent)?

That happened in this case. Faulty wiring was installed in a shop in 2004 by D2. Subsequent maintenance in 2009 and 2010 was carried out by Co X (not a party to the action) which was the claimant's then employer; it failed to notice and rectify the fault. Later in 2010 there was a TUPE transfer from Co X to D1, which involved the transfer of the claimant's employment. In 2012 the claimant was working in the shop and was electrocuted and seriously injured due to the fault. He sued D2 for the original negligence, but the question then arose as to liability for the subsequent negligent maintenance. With regard to this, he sued D1, his current employer who argued that the transfer of tort liability under *Bernadone* only applied to an accident that had actually occurred as at the transfer date. However, the High Court held against that defence, so that the action against D1 was the correct one. It was held that, as the purpose of TUPE is to protect the transferring employee (not to protect the transferee employer from unforeseen liabilities that might occur), it is proper to apply *Bernadone* to transfer tortious liability, whether accrued or contingent (as is the case with contractual liabilities). The end result was a finding for the claimant, with no contributory negligence and liability split 75% to D2 for the negligent installation and 25% to D1 for the negligent inspection/maintenance by Co X.

## DIVISION K EQUAL PAY

### Work rated as equivalent; content of job evaluation schemes; burden of proof

**K [258]**

***Armstrong v Glasgow City Council [2017] CSIH 56, [2017] IRLR 993***

There was reported in **Bulletin 468** the decision of the Inner House of the Court of Session in *Glasgow City Council v UNISON Claimants* [2017] CSIH 34, [2017] IRLR 739 which concerned the validity of a pay protection scheme (see **K [594.01]**). This second decision of the Inner House arose from the same extensive litigation, but concerned a different point, namely the legal requirements for a job evaluation scheme (JES) in order for it to be valid, and hence potentially a defence for an employer in an equal pay claim; it also raised questions about the burden of proof in relation to that validity question. One unusual point about this long-running litigation is that it arose under and remained governed by the old EPA 1971, but the principles are the same under the EqA 2010.

In seeking to come to an acceptable single status scheme for all its staff, the council conducted a JES. Disaffected members of staff brought an equal pay claim, challenging the design, methodology and implementation of the JES. The tribunal dismissed the claim and held the JES valid. In doing so, it said that it lacked the expert evidence necessary to resolve the matter properly and appeared to criticise the claimants for not adducing such evidence. The EAT upheld that decision, but the Inner House have now allowed the claimants' appeals and remitted the case to the tribunal to consider the substantive claim (the employer having no valid JES defence).

On the question of the burden of proof, the court held that it remains on the employer throughout the tribunal proceedings. The tribunal's criticism here of the claimants for not providing expert opinion was inconsistent with this because it suggested a burden on them. The proper approach was that, if after the employer's case the tribunal was not satisfied as to any of the requirements for validity, the result should be a finding that there was *not* a valid JES for the employer to rely on. Moreover, the judgment points out that in such an eventuality it is not for the tribunal to speculate as to whether the employer *might* have had a valid scheme if it was operated differently. This was all particularly important here because this JES was a one-off, bespoke scheme which needed more individual justification by the council.

On the question of validity itself, the court said that a JES must be subjected to rigorous testing before a tribunal. This needs it to be considered in the light of the following factors: (1) thoroughness of analysis, (2) objectivity, (3) transparency, (4) accuracy, (5) internal soundness and consistency, (6) sufficient detail and (7) fairness.

## DIVISION L EQUAL OPPORTUNITIES

### Justification of age discrimination; economic factors

**L [359]**

***Abercrombie & Fitch Italia Srl v Bordonaro: C-143/16, [2017] IRLR 1018, ECJ***

This decision of the ECJ concerns a provision of Italian employment law that has no equivalent here, but it may still be of interest because it arguably shows a relatively indulgent approach to the employer defence of justification for age discrimination (applicable even to cases of direct discrimination), to such an extent that the learned editor of the IRLR comments that it suggests that 'the [ECJ] has some way to go towards treating age discrimination in a similar way to discrimination on the basis of other protected characteristics'. It also has an interesting echo of current controversies here over the use and desirability of zero hours contracts.

The Italian provision in question permitted the use of (in effect) zero hours contracts for persons under 25 (and over 45, but that was not relevant here). The claimant had been employed under such a contract but when he reached 25 he was dismissed. He challenged this, in the course of which he argued that the provision itself was unlawful age discrimination, contrary to the Equal Treatment Directive 2000/78/EC and the EU Charter of Fundamental Rights. It may have been thought that such a blanket provision would be vulnerable to challenge under EU law, but in fact the ECJ had little hesitation in upholding the Italian provision. It found that there was a difference of treatment on the grounds of age *but* went on to hold that it was justified on economic grounds – the policy behind it pursued a legitimate aim, which was to facilitate the entry of young people into the labour market; moreover, it was proportionate because it allowed employers to conclude less rigid employment contracts in order to achieve a level of flexibility in the labour market, encouraging the taking on of staff. The latter free-market economic argument was held to be within the broad discretion of member states to decide on their social and employment policy.

It may be that this is a less stringent approach than in domestic law, particularly where it is (as here) *direct* discrimination that is being justified. Although this precise point cannot arise under UK law (which has no such age-specific provisions), on an even more general level the judgment suggests that any possible future challenge under EU law to zero hours contracts here will not be certain of a sympathetic response. The economic arguments in the judgment based on liberalising markets in order to promote hiring levels have obvious parallels here in the current issues over such contracts – are they an unfair exercise of managerial power or a desirable form of flexible working for atypical workers ? Or to put it another way – Uber uber alles ? Watch this space.

## DIVISION NI LABOUR RELATIONS

### The right to associate; refusal of employment on union grounds; membership or activities?

**NI [822]**

***Jet2Com Ltd v Denby UKEATl0070l17* (*25 October 2017, unreported*)**

In this EAT decision, Judge Eady settles a question on the interpretation of TULR(C)A 1992 s 137(1)(a) **Q [371]** (Refusal of employment on grounds related to union membership) that has needed resolution for 22 years. While this does not quite compete with Lord Mansfield's famous remark about a succession case before him that he had thought about that will for 30 years at the Bar and on the Bench and saw no need for further delay, it is a most welcome clarification. The question is whether the statutory ban on refusing employment because of an applicant's union 'membership' extends to a refusal because of his or her union *activities*. The parallel provisions of TULR(C)A 1992 ss 146 and 152 on detriment to and dismissal of an existing worker/employee specifically cover activities (and have been amended to cover making use of union services) but that has never been the case with s 137. In the case of *Harrison v Kent CC* [1995] ICR 434, EAT, it was held that a broad interpretation should be given to 'membership' in this context, to cover essential union activities as well. That remains the only reported case directly on s 137 but, as the text points out, the position was muddied at much the same time by other case law – in relation to s 152, in *Discount Tobacco and Confectionary Ltd v Armitage* [1990] IRLR 15, [1995] ICR 431n, EAT, a similarly wide interpretation had been given, but in 1995 this was subject to varying obiter in the House of Lords in the famous *Wilson & Palmer* litigation (see **NI [828]**) with the majority doubting it; on the other hand, the following year the EAT in *Speciality Care plc v Pachela* [1996] IRLR 248, [1996] ICR 633 went out of its way to hold that those remarks were *only* obiter and that tribunals should continue to view *Discount Tobacco* as correct. There matters stood.

The instant case is very similar on its facts to *Harrison* (see **NI [825]**). The claimant, a pilot and member of BALPA, was employed by the respondent company, which has had a strained relationship with that union. As a pilot representative, in 2009 the claimant suggested to the Executive Chairman M that BALPA might be involved, which produced from M not just a straight refusal, but also an invitation to go forth and multiply, albeit in less Biblical terms. In fact, in 2011 the union secured a CAC ruling for statutory recognition. Also that year the claimant left to work for another airline. In 2014 he applied to rejoin the respondent but was unsuccessful. He reapplied in 2015 and was again refused. This time he brought proceedings under s 137. The tribunal found as fact that M had been the principal decision taker in the refusal and that he had been motivated by the claimant's previous union activities. On that basis, the claim was upheld. On appeal, the company relied on the longstanding argument that, unlike ss 146 and 152, s 137 does not apply to union activities. Thus, the 20-year issue was raised directly.

The EAT held that *Harrison* is good law and that membership must include what Mummery P in that case referred to as 'the outward and visible manifestation of trade union membership'. With regard to *Wilson & Palmer* (HL), the view was (as in *Pachela*) that the 3–2 split there was only obiter and in relation to a differently drafted section. More significantly, as argued at **NI [830]**, it is now incumbent on a tribunal or court under the HRA 1998 s 3 to construe s 137 in compliance with the Convention, and when *Wilson & Palmer* went to the ECtHR it was held that art 11 applies and that there should be protection for the essential services of a union. Thus, a wide interpretation is to be adopted, otherwise in practice the s 137 protection would be 'left without substance'. At [48] of the EAT judgment this is summed up as follows:

> 'Where an applicant who has been refused employment cannot point to their inclusion on a blacklist (so, cannot bring their complaint under the 2010 Regulations), it is very likely that the employer's objection to their union activities – the outward manifestation of their union membership (past or present) – will be the best evidence that the refusal was in fact due to their union membership. More specifically, it may evidence the employer's objection to the union membership of that particular applicant, in contrast, perhaps, to the lack of objection to union membership (not similarly made manifest) on the part of others who have been offered employment. To avoid allowing a lacuna in the protection, section 137(1)(a) must be construed in such a way as to allow that these circumstances might be found to amount to a breach.'

Subject to any further appeal, this should resolve the problem posed by the case. However, there is one other aspect mentioned in the text (at **NI [831]**) that did not arise on these facts. The result is that an employer is on thin ice if refusing employment to what it considers a 'known union troublemaker' – but what 'trouble' does this cover? Holding views disapproved of by the employer and/or putting them into practice in bona fide union actions must be covered, but presumably there must also be a line to cross somewhere into territory where the employer can genuinely claim that the real objection is to his or her methods/personality/hostility/extremism, albeit expressed in a union context (ie that he or she is, to use a technical legal expression, an *agitator excretae simpliciter*). That could be a very difficult and controversial line to draw.

## DIVISION NIII EMPLOYEE INVOLVEMENT

### Consultation in UK undertakings; standard I & C provisions; negotiating with a view to reaching agreement

**NIII [347]**

***R* (*Public and Commercial Services Union*) *v Minister for the Cabinet Office [2017] EWHC 1787* (*Admin*), *[2017] IRLR 967***

This challenge by the Civil Service union to an alleged failure by the government to consult properly before reducing certain benefits under the

compensation scheme for those leaving the service arose in the specific context of the Superannuation Act 1972, which is not covered in this work, *but* it concerned a phrase which is also used in the ICE Regulations SI 2004/3426 reg 20(4)(d) **R [2214]**. That phrase is a requirement to consult/negotiate 'with a view to reaching agreement'; as (1) this is an unusual provision in UK employment law generally and (2) there is a dearth of authority as to its meaning in reg 20, the decision of the Administrative Court on the 1972 Act in the instant case may be significant in its interpretation in the ICE Regulations.

Before laying regulations before Parliament to effect the changes to the compensation scheme, the government had carried out a consultation with unions including the PCSU; however, as the PCSU had expressed fundamental disagreement with the whole aim of making the changes, it was not invited to a second round of consultations before finalisation of the scheme. The Administrative Court held that this breached the requirement in s 2(3D) of the 1972 Act 'to consult with a view to reaching agreement with the persons consulted'. The basis for this can be seen in the judgment of Sales LJ at [59]. Having referred to this statutory formula as a 'strong and unusual duty of consultation', he said:

> '… the Minister is not entitled to consult unions on one set of proposals for changes to the CSCS to reduce compensation benefits, consider responses received and then proceed to make different changes without going back to consultees, as would be the case with a usual consultation requirement. Rather, if there are to be modifications from proposals as originally presented, the Minister is obliged to go back to the unions which fall within the scope of ss.1(3) and 2(3D) and check with them whether they will agree to the terms as so modified. Even if they will not, they may still have useful contributions to make which might lead the Minister to change the proposals before making changes to the CSCS. And if he does, the Minister would need to check again whether agreement on those revised modified terms could be reached.'

One other interesting observation in this context was the approval at [60] of the government's approach of consulting with union representatives *together*, meaning that different unions (which may have different aims) have the opportunity to comment on suggestions from the others before detailed changes are eventually formulated.

## DIVISION PI PRACTICE AND PROCEDURE

### Jurisdiction of tribunals; state immunity

**PI [62.04]; CI [19.04], CI [49.01]**

***Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62***

As with the following case on the allied but distinct question of diplomatic immunity, this case concerned allegations of mistreatment of employees in embassies in London. The facts are set out at **PI [62.04]**. The result was the

upholding of the Court of Appeal's decision, on similar grounds; this was in favour of the employees but only in relation to EU-based causes of action.

The judgment of Lord Sumption, with whom the other SCJs agreed, is notable for its lengthy and detailed examination of the history of state immunity in customary international law, and its current status. The upshot is a determination that it is not an absolute concept, leading to the view that the State Immunity Act 1978 ss 4(2)(b) (immunity in relation to contracts of employment with non-UK nationals) and 16(1)(a) (immunity in relation to employment of members of a diplomatic mission, including domestic staff) went beyond the requirements of current international law. The question then became what effect that had on the claimants' complaints under national employment law. Agreeing with the Court of Appeal, it was held that:

(1) Sections 4(2)(b) and 16(1)(a) are contrary to art 47 of the European Charter, with a result that (as they cannot be read down so as to be in compliance) they must be disapplied in any claim for a EU-based right. Thus, the claims relating to discrimination and breach of working time laws could proceed.

(2) Section 16(1)(a) is contrary to art 6 of the European Convention (right to a hearing) but the only result of this is a declaration of incompatibility under the HRA 1998. Thus, the claims in relation to lack of a section 1 statement, unpaid wages, breach of the national minimum wage and unfair dismissal remained barred by the 1978 Act.

## Jurisdiction of tribunals; diplomatic immunity

**PI [62.07]**

***Reyes v al-Malki [2017] UKSC 61***

The facts of this case, which concerned (disputed) allegations of unlawful treatment and modern slavery by the diplomat employer of the claimant domestic servant, are set out at **PI [62.08]**. The Court of Appeal held that diplomatic immunity applied to defeat the claims of race discrimination, unlawful deductions from wages and failure to pay the NMW. The Supreme Court have now allowed the claimant's appeal *but* on different grounds from those in the Court of Appeal's judgment; moreover, on those latter grounds, there are conflicting obiter remarks as to their correctness, thus leaving arguably the more important issue here unresolved.

The key difference in this latest judgment arose from the fact that the respondent diplomat (and wife) had in fact *finished* the posting and left the country. The Court of Appeal had considered whether he had had immunity *during* his posting, under art 31 of the Vienna Convention 1961, holding that he did because employing the claimant in his own residence did not come within the exception for a diplomat's professional or commercial activities. However, the case of an ex-diplomat comes under art 39 instead, and this only continues the immunity for acts done in the course of his or her *diplomatic* duties. The Supreme Court agreed that this did *not* cover the employment of the claimant at home, and on that basis the appeal was

allowed and the claims allowed to proceed. On a point of detail, at [49] Lord Sumption dealt with a possible beartrap here, namely that the acts complained of had occurred while he was still in post and had immunity. However, the fundamental point is made that diplomatic immunity operates as a bar on proceedings, but does not make the action itself a nullity.

This is of course all of importance on these particular facts of an ex-diplomat, but more important would be the position of an *existing* diplomat. The court did not have to answer this question, but did consider it in obiter remarks. Lords Sumption and Neuberger thought that, in spite of strong policy arguments on the need to counter the modern scourge of slavery (especially domestic) and human trafficking, the Convention remained clear that an existing diplomat would have immunity under art 31, whatever the injustice. However, Lord Wilson (with whom Lady Hale and Lord Clarke agreed) expressed doubts about this and suggested that the matter might be more open in future litigation. He concluded by inviting the UN's International Law Commission to consider the matter afresh.

## Jurisdiction of tribunals; immunity for judicial proceedings

**PI [64.01]; CIII [13]**

***P v Metropolitan Police Commissioner [2017] UKSC 65***

This third decision of the Supreme Court on jurisdiction concerned judicial immunity and the lacuna it seemed to create in relation to the disciplining of police officers. The facts are set out at **PI [64.01]**; the decision of the Court of Appeal upholding the striking out of the claimant's complaint of disability discrimination was based on the need to follow and apply *Heath v Metropolitan Police Commissioner* [2004] EWCA Civ 943, [2005] IRLR 270 (see **PI [63.02]**) where it was held that reliance on EU law on discrimination was not to be used to trump important rules of domestic law such as judicial immunity. As a statutory police disciplinary board was a judicial body, an action against its deliberations and/or decision under discrimination law could not proceed.

That view has now been disapproved by the Supreme Court, holding that *Heath* is quite simply wrong on this issue. Instead, EU law (here, the Framework Directive) requires police officers to be able to bring such action before a tribunal, regardless of the decision having been made by a disciplinary panel, and so judicial immunity cannot apply. Ironically, perhaps, the judgment backs this modern emphasis on the supremacy of EU law by going back to the European Communities Act 1972, just in time for it to be repealed!

The question then arose as to how this result was to be achieved under the existing legislation. Police are covered in discrimination law by the EqA 2010 s 42 **Q [1484]**. Lord Reed's suggestion is that s 42(1) should now be read with the following italicised addition:

'For the purposes of this Part, holding the office of constable is to be treated as employment—

(a) by the chief officer, in respect of any act done by the chief officer *or* (*so far as such acts fall within the scope of the Framework Directive*) *by persons conducting a misconduct meeting or misconduct hearing* in relation to a constable or appointment to the office of constable;

(b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable.'

He added that: 'So interpreted, the Act overrides, by force of statute, any bar to the bringing of complaints under the Directive against the chief officer which might otherwise arise by reason of any judicial immunity attaching to the panel under the common law.'

## REFERENCE UPDATE

| | | |
|---|---|---|
| 466 | *Secretary of State for Justice v Betts* | [2017] ICR 1130, EAT |
| 467 | *R (Lidl Ltd) v Central Arbitration Committee* | [2017] ICR 1145, CA |
| 469 | *Innospec Ltd v Walker* | [2017] ICR 1077, SC |
| 469 | *Ministry of Justice v O'Brien (No 2)* | [2017] ICR 1101, SC |
| 470 | *R (UNISON) v Lord Chancellor* | [2017] ICR 1037, SC |
| 470 | *Efobi v Royal Mail Group Ltd* | [2017] IRLR 956, EAT |
| 471 | *Barbulescu v Romania* | [2017] IRLR 1032, ECtHR |
| 466 | *Secretary of State for Justice v Betts* | [2017] ICR 1130, EAT |
| 467 | *R (Lidl Ltd) v Central Arbitration Committee* | [2017] ICR 1145, CA |
| 469 | *Innospec Ltd v Walker* | [2017] ICR 1077, SC |

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