Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to **1 April**.

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LEGISLATION

Carer's leave details

The Carer's Leave Regulations 2024 SI 2024/251 fill out the details of the new carer's leave under the ERA 1996 ss 80J–80N, inserted by the Carer's Leave Act 2023. Application and transitional provisions are in Part 1. Part 2 then enacts the scheme itself, covering the conditions for entitlement for a carer of a dependant with long-term needs (defined in s 80J), the right to one week's leave on a rolling 12-month period and the necessary procedures, including for an employer to delay it. Part 3 provides for the continuance of terms and conditions of employment during the leave (apart from remuneration), the right to return to work and the usual regime of statutory protection from detriment or dismissal. Part 4 covers the case where there is already a contractual right to leave.

The regulations come into force on 6 April 2024 and will be incorporated into Div R in Issue 316. They will be covered in Divs DI and DII in Issue 317 and in Issue J in Issue 316.

Paternity leave changes

The Paternity Leave (Amendment) Regulations 2024 SI 2024/329 make changes relating to notice and evidence, the period within which paternity leave is to be taken and the existing requirement that the leave be taken in one continuous period. They operate entirely by way of making amendments: Part 2 makes them to the Paternity and Adoption Leave Regulations 2002 **R [1573]**, Part 3 to the Paternity and Adoption Leave (Adoption from Abroad) Regulations 2003 **R [1765]** and Part 4 to the Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 **R [3112]**. They come

into force on 6 April (with transitional provisions in Part 1) and will be incorporated into Div R in Issue 316. They will be covered in Div J in Issue 316.

Maternity, etc changes

The Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 SI 2024/264 make amendments to the Maternity and Parental Leave etc Regulations 1999 **R [1200]**, the Paternity and Adoption Leave Regulations 2002 **R [1573]**, the Paternity and Adoption Leave (Adoptions from Overseas) Regulations 2003 **R [1765]**, the Shared Parental Leave Regulations 2014 **R [2940]** and the Shared Parental Leave and Paternity and Adoption Leave (Adoptions from Overseas) Regulations 2014 **R [3065]**. The amendments extend existing requirements that apply to employers when redundancy situations arise where an employee is on maternity, adoption or shared parental leave, so that those requirements can also apply during pregnancy and for a period of time after that leave has ended. For those taking shared parental leave who have not taken maternity or adoption leave, there is a six-week threshold of continuous leave that needs to be met for the requirements to apply for a period of time after shared parental leave has ended. Where the six-week threshold is not met, the requirements apply during shared parental leave. These changes will be made in Div R in Issue 316.

Changes in flexible working brought into force

The provisions of the Employment Relations (Flexible Working) Act 2023 **Q [1762]** are brought into force on 6 April by SI 2024/438. The changes are that the employer will have to deal with a request within two months (unless an extension is agreed), an employee will be able to make two requests within a 12-month period, the employer will not be able to refuse a request until it has consulted the employee and the employee will no longer have to explain what effects they think the change would have and how they might be dealt with.

Social security benefits uprating

The annual uprating of benefits is contained in the Social Security Benefits Uprating Order 2024 SI 2024/242. Statutory sick pay is increased from £109.40 to £116.75, as from 6 April 2024. Statutory maternity pay, statutory paternity pay, statutory adoption pay, statutory shared parental pay and statutory parental bereavement pay are increased from £172.48 to £184.03, as from 7 April 2024. These changes will be made in Divs Q and R in Issue 316.

Increase in the national minimum wage

As from 6 April 2024, by virtue of SI 2024/432 the national living wage goes up to £11.44 per hour, and is payable to those who are 21 and over. The national minimum wage levels are £8.60 for those 18 to 20 and £6.40 for those 16 to 17 or on the apprentice rate. The amount of allowable accommodation goes up to £9.99. These changes will be made in Div R in Issue 316.

Tribunal procedure amendments

The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2024 SI 2024/366:

(1) amend rule 15 (sending claim form to respondents) to enable the Tribunal to direct that the time limit provided under rule 16(1) (response) for the presentation of a response to the Tribunal begins from the date that the Tribunal sends a copy of the claim form to an alternative address to that provided by the claim form. Where such a direction is made, any earlier sending by the Tribunal of a copy of the claim form to an address provided in the claim form is disregarded for the purposes of rule 16(1);

(2) amend rule 16(1) to specify that in addition to the requirement for a response to be presented to the Tribunal on the prescribed form and within the relevant time limit, it must also comply with any requirement specified by practice direction;

(3) insert a new rule 92A (digital case management) to provide that where provision is made by practice direction to allow for the delivery of documents to a party or the Tribunal through the Tribunal's digital case management system, and where a party or the Tribunal complies with those requirements then they will also be deemed to have complied with any requirements in the rules to provide a document to the Tribunal or another party.

There are consequential amendments to rules 86 and 85(2). These changes come into force on 6 April 2024 and will be incorporated into Div R in Issue 316.

Fourth set of regulations on minimum service levels

The Strikes (Minimum Service Levels: Fire and Rescue Services) (England) Regulations 2024 SI 2024/419 are the fourth set of such regulations to be issued under the TULR(C)A 1992 s 234B. They will be incorporated into Div R in Issue 316.

Vento scales uprated

The *Vento* scales for injury to feelings have been uprated from 6 April 2024 to:

Lower rate	£1,200 to £11,700
Middle rate	£11,700 to £35,200
Higher rate	35,200 to £58,700
Exceptional cases	over £58,700

Code of practice on flexible working

By virtue of SI 2024/429 the updated ACAS code of practice on rights to flexible working which reflects recent changes is brought into force on 6 April 2024. It will be incorporated into Div S in Issue 316.

DIVISION AI CATEGORIES OF WORKER

Agency worker; rights between assignments; suspension

AI [206], AII [313.13]

***Donkor-Baah v University Hospitals Birmingham NHS Trust [2024] EAT 23* (*29 February 2024, unreported*)**

The claimant was a nurse operating through an agency and supplied to the hospital, with which she organised shifts on an ad hoc basis. Following an incident during a shift, she was told on 10 February 2029 that her assignment had terminated. On 6 November she was told that she could book shifts again. She claimed wages for the intervening period, on the basis that she had been suspended by the hospital, that a permanent worker on suspension would have been paid for the period and that she had a right to equality with such a worker under the Agency Worker Regulations 2010 SI 2010/93 reg 5 **R [2418]**. The agency and hospital defended the claim on the basis that she had not been 'suspended' by the hospital at all; as an agency worker she had had her current assignment terminated and not had any assignments in the following period, during which there had been no continuing relationship between them. The ET agreed with this analysis and struck her claim out as having no reasonable prospect of success.

On her appeal, the claimant accepted the assignment termination point, but argued that a combination of regs 5, 7 and 8 meant that in these circumstances there was an overarching 'agency relationship' with the hirer, which had been suspended thus enabling the comparison with a suspended permanent worker. Heather Williams J in the EAT disagreed and dismissed the appeal. It was held that the entitlement to equality with permanent workers in reg 5 only relates to a period of assignment to a hirer. This is backed by the proper interpretation of the section (especially reg 5(4)) and the Agency Work Directive 2008/104/EC art 5 which defines the entitlement as applying 'for the duration of their assignment to a user undertaking'. This is not subject to any continuing agency relationship. Moreover, this conclusion is in line with the decision in *Agbeze v Barnet, Enfield and Haringey Mental Heath NHS Trust* [2022] IRLR 115, EAT where a similar result occurred in the context of a zero-hours worker, see **AII [313.13]**.

DIVISION CIII WHISTLEBLOWING

Whistleblowing detriment; vicarious liability and liability for fellow workers

CIII [98.01]

***Wicked Vision Ltd v Rice [2024] EAT 29* (*4 March 2024, unreported*)**

The text at **CIII [98]** explains the 2013 reforms expanding personal liability of fellow workers and vicarious liability on the employer for such acts, in relation to whistleblower detriment. These reforms added new subsections (1A) to (1E) to the original provisions of the ERA 1996 s 47B **Q**

[671.03]. The issue that arose in this case before Bourne J in the EAT was that in those original provisions s 47B(2) states that the section does not apply where the relevant detriment was 'dismissal (within the meaning of Part X'). This was clearly meant to draw a clear line between detriment as such and a dismissal claim which was to be brought under s 103A instead. The question was whether that line only applies to the original parts of the section, or also applies to the inserted subsections.

The point arose in the context of an application by the claimant to amend his claim against the company to include one under s 47C based on its vicarious liability for the actions of Mr S (a director and, technically, a fellow worker) in procuring his dismissal. Ruled out by s 47B(2), surely? It was not so simple because the supposedly bright line in s 47B(2) had already been breached by the decision in *Timis v Osipov* [2018] EWCA Civ 2321, [2019] IRLR 52 where it was held (in a case of an insolvent employer but insured and sueable directors) that the claimant could sue those individuals under sub-s (1A) even though the detriment in question was having him dismissed. This was not defeated by sub-s (2). This decision is considered in detail at **CIII [98.01]**. The complication that arose in the instant case (where Mr S was not sued) was that in *Timmis* Underhill LJ had stated that the logic of this was that the employer could then be sued under sub-s (1B) as vicariously liable, again in spite of sub-s (2). In the instant case, the ET accepted this view of the law and granted the amendment.

The employer appealed against this decision and the EAT allowed the appeal. The point is a complex one, but essentially the judgment is that this latter part of *Timis* on vicarious liability was *obiter;* arguably, all that Underhill LJ was saying was that a claimant with an existing s 103A claim cannot repackage it as a detriment claim for some subsidiary reason (e g claiming for injury to feelings), but if it went further than that it was not to be followed. Sub-s (2) still rules out an action against the employer where the detriment is dismissal; to hold otherwise would empty the subsection of meaning. Thus, a claim cannot be brought directly against the employer for vicarious liability under sub-s (1B) in a dismissal case.

Two further points may be made. The first is that on the policy angle, the judgment points out that liability under s 103A has already been widened by the decision in *Royal Mail Group v Jhuti* [2019] UKSC 55, [2020] IRLR 129 in cases concerning the involvement of senior managers in procuring a dismissal and fixing 'the employer' with liability (see **CIII [126]**). The second is that, on first reading the instant case, it may seem that a basic reason for the decision was that the company was not vicariously liable because Mr S had not been sued (vicariously liable for *who*?), but at the end of the judgment the judge specifically says that that was not a relevant factor, thus strengthening the ruling on vicarious liability generally.

The judgment is an interesting one on a difficult issue, involving a heavy element of 'explaining' the previous Court of Appeal judgment. It is fairly clear that the passages on the employer's liability in *Timis* were indeed *obiter*

(the employer there was insolvent), but the EAT's view of them is very direct and it remains to be seen how it will fare in any future appeal to the Court of Appeal, in this case or any other.

Whistleblowing dismissal; establishing the reason in an organisation; knowledge of decision-taker

CIII [126.03]

***Nicol v World Travel and Tourism Council [2024] EAT 42* (*25 March 2024, unreported*)**

Most of this section of the text is concerned with 'Iago cases' where the dismissing manager is misled or kept in ignorance by a line manager who wants the whistleblower dismissed, but ostensibly for some other reason (ie the *Jhuti* point). The instant case before Sheldon J, however, concerns another possibility, namely where the line manager tells the decision-taker that *something* has been the subject of a complaint/allegation by the claimant, but without any further details. If (as in the case) the claimant is then dismissed, does that come within the automatic unfairness regime of the ERA 1996 s 103A **Q [727.01]**?

The ET thought not and rejected the claim. The claimant's appeal raised several issues but for present purposes the main one was this question of knowledge. The claimant argued that: (1) the ET had impermissibly read over the requirement of 'information' in the detriment provisions of s 47B; and (2) it is enough that 'a' protected disclosure had taken place (to the line manager) for any subsequent dismissal to be automatically unfair, regardless of the decision-taker's state of knowledge. The EAT rejected this argument. The judgment accepts that there has hitherto been no authority on the point. Taking an a priori approach to the drafting of the legislation, it was held that there is a need for *some* knowledge of the details by the decision-taker before the section applies. At [82] it says:

> 'The premise of [the claimant's] arguments would be that the content of the disclosure is entirely irrelevant to the decision-maker; the only question is whether a disclosure has been made. It does not matter to the decision-maker if the disclosure was a qualifying or protected disclosure or not. It seems to me that this interpretation involves a purely mechanistic application of the statutory wording, without properly appreciating that whistleblowers are intended to be protected because they have raised something of substance which Parliament has decided merits protection. For employers to be fixed with liability, therefore, they ought to know at least something about the substance of what has been made: that is, they ought to have some knowledge of what the employee is complaining or expressing concerns about.'

This does not expand on what that 'some knowledge' needs to be, but what the judgment does seem to suggest is that that question is one of fact for the ET, with its decision on it only assailable on a perversity challenge. Here, the ET had decided that what was passed on to the decision-taker was 'not sufficient' and that was not held to be perverse.

DIVISION DI UNFAIR DISMISSAL

Some other substantial reason; breakdown of trust and confidence

DI [1915]

***Matthews v CGI IT UK Ltd [2024] EAT 38* (*25 March 2024, unreported*)**

Most of the appeal in this case before Judge Walker in the EAT concerned the fairness (found by the ET) of a dismissal without going through the usual procedures. Ultimately, it was held that it was 'one of those rare cases' where that could be justified on the facts, citing *Gallagher v Abellio Scotrail Ltd* UKEATS/0027/19 (4 February 2020, unreported), which is considered at **DI [999]**. However, there is one further, more specific, point made about SOSR dismissals concerning breakdowns in working relationships.

The question was the extent to which an ET, faced with this rather open-ended category of case, should look at how the employer had *dealt with* that breakdown before resorting to dismissal. This was considered in the early unfair dismissal case of *Turner v Vestric Ltd* [1980] IRLR 23, [1980] ICR 528, EAT where Phillips J held that where an SOSR dismissal is based on breakdown of working relationships, it is necessary for the ET to ascertain if the employer had taken reasonable steps to try to improve those relationships. The judgment talks of 'sensible, practical and genuine efforts'. In the instant case, *Turner* was the central authority, with the claimant trying to extend it to a requirement that the employer had taken *all* possible steps (this applying on the facts particularly to the absence of any form of mediation). However, the judgment makes clear that there is no such requirement, stressing the reference in *Turner* to reasonable steps. On the facts here, the ET had taken the defensible view that there were no other reasonable steps that the employer should have taken (including mediation) because the claimant was so set on 'retribution' against the other party and the management that, as in the case of the lack of normal procedure, such steps would have had no effect.

DIVISION J FAMILY MATTERS

Dismissal for pregnancy, maternity, etc; generally; seeking to take leave

J [407.02]

***Hilton Food Solutions Ltd v Wright [2024] EAT 28* (*7 March 2024, unreported*)**

One of the heads of automatic unfair dismissal under the ERA 1996 s 99 and the MAPLE Regulations 1999 SI 1999/3312 reg 20(3)(b) is where the dismissal was because the employee 'took *or sought to take* parental leave'. This decision of Judge Tayler in the EAT is the first to construe the meaning of the italicised phrase.

The claimant brought proceedings for unfair dismissal, on the basis that he had been dismissed because he had let it be known that he intended to take paternity leave. The employer respondent applied to the ET to have the claim struck out because, it said, he had at no time made a *formal* application for it, under the procedure set out in the regulations. The ET rejected this argument and allowed the claim to proceed. The employer appealed, but the EAT held that the ET had acted correctly. It held that for an employee to have 'sought' to take leave there is no legal requirement that they have used the statutory procedure. Instead, the question is one of fact for the ET to apply its normal meaning in the light of all the circumstances. It was accepted that if an employee *has* used the statutory procedure, then they will almost certainly qualify, but it does not work the other way round. Here, the claimant had spoken to HR about his intention; he had then mentioned it to his line manager whose reaction was hostile; he had then raised that hostility with HR whose response was dismissive. In the light of these facts, the ET had been come to a rational decision in holding that they constituted having sought to take the leave.

DIVISION K EQUAL PAY

Material factor defence; need for objective justification; motivation of decision-taker

K [531]

***Scottish Water v Edgar [2024] EAT 32* (*6 March 2024, unreported*)**

The claimant (on the employer's grade C) and her eventual comparator (an external candidate) applied for a post on grade B but both lost to a third candidate. However, the managers considered that the comparator was a good prospect and asked him to consider taking an available grade C post, knowing that they would have to offer a salary comparable to his previous salary elsewhere. This was done, but ended up with him being paid £6k more than the claimant, who brought an equal pay claim. This was defended by the employer on several grounds, but its material factor defence (based on the comparator's experience and value) under the EqA 2010 s 69 **Q [1511]** was taken as a preliminary point. The ET rejected it, but the EAT allowed the employer's appeal and remitted the defence for reconsideration.

Lord Fairley's judgment starts by posing the overall question 'why was the comparator paid more than the claimant' but then isolates two points of principle where the ET had erred in law:

(1) although there will often be cases where the motivation of the decision-taker within an organisation will be highly relevant and so it will want to produce them in evidence, that is not always the case; there may equally be cases where it is not necessary (or even possible) to identify and produce them and then it is possible to run the defence on other surrounding evidence;

(2) although the emphasis will often be on comparing the experience and ability of the claimant and comparator at the time the latter is appointed, it may also be the case that how those factors work out *later* may also be relevant.

DIVISION L EQUALITY

Disability discrimination; duty to make reasonable adjustments; trial periods

L [392]

***Rentokill Initial UK Ltd v Miller [2024] EAT 37* (*14 March 2024, unreported*)**

The question whether something would be a reasonable adjustment is normally thought of as a wide question of fact for an ET. However, there have been two cases where, unusually, the EAT ruled that something could not qualify as a matter of law, namely consultation with the employee (*Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664, EAT) and obtaining a medical report (*Spence v Intype Libre Ltd* UKEAT/0617/06 (27 April 2007, unreported)). The question in the instant case before Judge Auerbach was whether granting a disabled employee facing dismissal a trial period for a possible alternative post came within the same category. The answer was that it did not and so came under the normal rule and could be used by the claimant.

Trial periods had in fact arisen in two previous cases, but in each it was in obiter statements. In *Smith v Churchill Stairlifts plc* [2006] IRLR 41, [2006] ICR 524 the Court of Appeal thought that such a period could be taken into account, but that was in the course of a complex judgment and, at best, as part of subsidiary reasoning. Conversely, in *Environment Agency v Rowan* [2008] ICR 218 the EAT said obiter at [61] that it thought that such a period would not qualify. In the instant case, the EAT said that the key distinction is between adjustments that can affect the substantial disadvantage that has been shown and others (such as consultation or medical opinions) that may be desirable but ultimately do not *in themselves* address the disadvantage. The decision was that a trial period can affect the disadvantage of imminent dismissal and possibly avoid it, and so can qualify (preferring the view in *Smith* to that in *Rowan*). This is summed up at [35], [36]:

> 'In my judgment, and in respectful disagreement with that passage in *Rowan*, offering an employee a trial period in a different role, in the way that the tribunal in the present case considered the respondent ought reasonably to have done, is not, for the purposes of this statutory test, analogous to consulting the employee or seeking a medical report. Neither of those things, in or of themselves, involves any change to an employee's substantive terms, working conditions or arrangements. By contrast, putting an employee into a new role on a trial basis does. It effects a substantive change in what they are doing, though it remains to be seen how it will work out, and how long it will last.

Further, where, as in this case, the substantial disadvantage is that the claimant is at almost certain risk of dismissal, it is then open to the tribunal to consider whether, in the given case, the proposed trial period in another particular role would remove the risk of dismissal, or had sufficient prospects of averting dismissal, such that it was reasonable for the employer to be expected to take that step. Thus, I conclude that there is no rule or principle of law that a trial period in a new role cannot, in law, be a reasonable adjustment. Conversely, a tribunal is not bound in every case where the employee was facing dismissal, to conclude that the employer ought to have given them a trial period in a particular other role. Whether or not it ought reasonably to have done so is a matter for the appreciation of the tribunal, taking account of all the circumstances, including the suitability of the role, and the prospects of the employee succeeding at the role and passing the trial.'

Duty to make reasonable adjustments; substantial disadvantage; triviality threshold

L [396]

Pipe v Coventry University Higher Education Corpn [2024] EWCA Civ 191

The decision of Eady P in the EAT in this case is cited at **L [396]** for the proposition that the fact that a PCP applies to both the disabled and non-disabled does not prevent it impacting more on the former and so constituting substantial disadvantage. The judgment also utilises the phrase 'the triviality threshold' in relation to the statutory test of 'more than minor or trivial'. The case has now gone to the Court of Appeal which has upheld the decision of the ET that, although the claimant's claims for discrimination were made out, her claims relating to reasonable adjustments failed. The court found on the facts that the ET's decision was merited, as was its approval by the EAT. The judgment is heavily factual, but nothing in it detracts from the above points made in the EAT.

Armed forces; service complaints

L [780.08]

***Edwards v MOD [2024] EAT 18* (*5 March 2024, unreported*)**

By virtue of the EqA 2010, s 121 **Q [1533]**, a person serving in the armed forces who wishes to bring a claim under the Act must show that they first brought a service complaint; in order to show this, they must have indicated in their service complaint that they were making allegations of discrimination or harassment based on one (or more) of the applicable protected characteristics or (as the case may be) that they are making a complaint of victimisation because of an action that it can be seen is capable of amounting to a protected act. This case before Heather Williams J in the EAT is the first to consider how specific this defining of 'the matter' in question must be.

The judgment accepts that it must be possible to identify the nature of the complaint, but it then goes on to hold that (1) whether the act complained of

to the tribunal is the 'matter' raised in the earlier service complaint should be approached in a non-technical way, by identifying the substance of the service complaint, assessed as a whole and so (2) the service complaint need not use the words 'discrimination', 'harassment' or 'victimisation' and equally, there is no need for the service complaint to refer to the relevant protected characteristic(s) by the terminology used in the Act or to use the phrase 'protected act'. In other words, the service complaint must spell out the overlap with the Act either expressly or by implication.

In spite of this broad, potentially pro-claimant interpretation, the end result of the case was to uphold the ET's judgment that it did not have jurisdiction to hear the claims under the Act because, although the service complaint related to the same events as the later ET claims, it was couched in very general terms concerning essentially a lack of support from senior officers after she suffered a serious injury on duty, without tying this in with possible breaches of the Act (either expressly or by necessary implication).

DIVISION NI LABOUR RELATIONS

Unfair dismissal; health and safety activities; principal reason; workplace danger

NI [3587.02], NI [3589]

***Accatatis v Fortuna Group* (*London Ltd*) *[2024] EAT 25* (*29 February 2024, unreported*)**

***Goldstein v Herve [2024] EAT 35* (*14 March 2024, unreported*)**

Events during the COVID-19 pandemic continue to produce case law relating to the protection of employees faced with health and safety dangers in the ERA 1996 s 100 **Q [724]**, with its regime of automatic unfairness and no qualifying period. These two cases before, respectively, Judge Auerbach and Eady P, raised questions of what was the 'principal reason', the importance of 'appropriate steps' and how 'workplace danger can arise'.

In *Accatatis* the claimant made demands to work from home or be furloughed. When he was dismissed before reaching two years' employment he claimed breach of s 100(1)(e) (taking appropriate steps in circumstances of serious and imminent danger). The ET rejected this claim, taking into account that the employer said the reasons were that he was a difficult and challenging employee since before the pandemic and had made 'impertinent' demands by email. On that basis of several reasons, s 100 did not apply, even though on the facts the ET had found serious and imminent danger. The EAT allowed the claimant's appeal. In common with ordinary unfair dismissal law, the section requires an ET faced with several possible reasons to determine which was the *principal* one and whether it fell within the section (citing *Balfour Kilpatrick Ltd v Acheson* [2003] IRLR 683, EAT, considered at **NI [3587.02]**). It was accepted that that can be difficult in these circumstances, but ultimately that was no more so than in other areas. The matter was remitted for reconsideration. A second ground of challenge was that the

ET had not given sufficient consideration to s 100(2) which expands on the s 100(1)(e) element that the steps taken must have been 'appropriate'. Again, the EAT remitted this point. In doing so, the judgment says of s 100(2) that:

(1) the question of appropriateness is an objective one for the ET to determine in all the circumstances of the case;

(2) it is separate and additional to the test of belief in serious and imminent danger, but there will be cases where there is a connection between them on the facts;

(3) the last part ('in particular, his knowledge and the facilities and advice available to him at the time') means that the ET must consider these if relevant and should show in its judgment that it has done so, *but* it does not mean that these factors should be given more weight than other relevant considerations.

Goldstein is of interest in its application of the leading case of *Rodgers v Leeds Laser Cutting Ltd* [2022] EWCA Civ 1659, [2023] IRLR 222, [2023] ICR 356 (see **NI [3589]**) but coming to the opposite result on the facts. The claimant worked for the two individual respondents in their financial services company, working from their home. She had to get there by Tube and had a vulnerable partner. During the first lockdown she worked from home, but then the respondents wanted her back in their home. When the second lockdown came, she had concerns about the travelling and also what she considered a lax attitude by them about social distancing and mask wearing (based on what the ET held was their mistaken view of the official guidance). The claimant felt obliged to resign and brought proceedings for health and safety detriment under the ERA 1996 s 44 and (constructive) unfair dismissal under s 100. The ET upheld her claims under several of the heads of ss 44(1) and 100(1) and the EAT upheld that decision. The decision in *Rodgers* featured in argument and in the judgment, where it was held that the application of its basic approach (the danger can come from factors outside the workplace, but must have some connection to it) meant that on these facts, although there were worries about COVID generally, her particular concerns about the mask wearing and social distancing within the workplace engaged ss 44 and 100.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time limits; not reasonably practicable; liberal approach

PI [193]

Cross v NHS Somerset Clinical Commissioning Group [2024] EAT 20 **(*3 January 2024, unreported*)**

The claimant genuinely but mistakenly believed, after contacting ACAS, that she had to await the result of her internal grievance before issuing ET proceedings. By the time that she belatedly received that result, her EC certificate had expired and her claim was out of time. The ET held that,

although she had acted quickly once she found out her mistake, that initial mistake was not reasonable. Her claim was therefore ruled out. On appeal, the EAT found that this was a misdirection and allowed her appeal.

So far, so ordinary in this area. However, the judgment of Sarah Crowther KC contains one point of greater interest concerning the evolution of the power to extend under the ERA 1996 s 111(2). It concerned a dictum by Cavanagh J in *Cygnet Behavioural Health Ltd v Britton* [2022] EAT 108, [2022] IRLR 906 where he said, referring to the relatively liberal approach taken in the (voluminous) case law, that 'Section 111(2) has not been interpreted in this way in more recent cases'. At [47]–[49] the judgment states that if this is just meant to indicate that there is no general obligation on an ET to be liberal to claimants at large, there can be no objection to it, *but* if it were to be construed as meaning that a different interpretation is now being given to the section, the judge here would respectfully disagree, having seen no evidence in the case law of such a change; indeed that case law remains unaltered.

Case management; unless orders; material non-compliance

PI [395]

***Tattershall v Mersey and West Lancashire Teaching Hospitals NHS Trust [2024] EAT 24* (*28 February 2024, unreported*)**

In this case before the EAT under Linden J a claimant whose claim had been struck out for non-compliance with an unless order to produce medical evidence had his appeal rejected. The judgment at [73]–[79] contains a useful summary of the basic rules on such a strike out, as amplified at **PI [395]** ff. What was particularly important, however, was the disapproval of an argument (important in a case as here of complete failure) that, in deciding whether there had been *material* non-compliance, an ET could take into account whether that failure had little or no effect, for example on whether a fair trial was still possible. Factors such as this may arise at the later stage of deciding whether to strike out, but they are not relevant in deciding on non-compliance.

Postponement; exercise of the discretion; illness

PI [895]

***Hall v Transport for London [2024] EAT 26* (*1 March 2024, unreported*)**

As can be seen from the text, this area has been subject to considerable case analysis. In this EAT judgment, dismissing an appeal against a third postponement application by the claimant on the grounds of ill-health (in spite of the short time given to supply evidence), Eady P took the opportunity at [31] to synthesise the major principles into five propositions. This is likely to be particularly useful in future cases and is worth setting out in full:

'Whether thus considering an application for a postponement due to ill health as an exceptional circumstance under rule 30A, or under the ET's general case management powers under rule 29, the following principles may be discerned from the case law:

(1) The exercise of a discretion to grant an adjournment is one with which an appellate body should be slow to interfere, and can only interfere with on limited, or "Wednesbury" grounds (*Teinaz v London Borough of Wandsworth* [2002] ICR 1471 CA, paragraph 20; *O'Cathail v Transport for London* [2012] ICR 614 CA, paragraph 11; *Phelan v Richardson Rogers Ltd* [2021] ICR 1164 EAT, paragraphs 73–74).

(2) Where the application is to postpone a trial or other hearing, the outcome of which may dispose of the claim, or some other substantive issue in the case, the applicant's article 6 rights under the European Convention of Human Rights ("ECHR") and common rights to a fair trial will be engaged; thus, while an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice, and an applicant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of their own, will usually have to be granted an adjournment; (*Teinaz*, paragraphs 20–21; *Phelan* paragraph 75).

(3) Article 6 ECHR and common law rights to a fair trial do not, however, compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds if it would mean the hearing would take place in the applicant's absence; the ET has to balance the adverse consequences for the applicant with the rights of the other party to have a trial within a reasonable time, and the public interest in prompt and efficient adjudication of cases in the ET (*O'Cathail*, paragraph 47; *Phelan* paragraph 76).

(4) In any event, the ET is entitled to be satisfied that the inability of the applicant to be present is genuine, and the onus is on the applicant to prove the need for such an adjournment; if there are doubts about medical evidence, the ET has a discretion whether or not to give a direction allowing such doubts to be resolved, which may include directing that further evidence be provided promptly, although it is not necessarily an error of law to fail to take such steps (*Teinaz*, paragraphs 21–22).

(5) Fairness to other litigants may require that if an applicant has not adequately taken the opportunity to justify a postponement that indulgence is not extended (*Andreou v Lord Chancellor's Department* [2002] IRLR 728 CA, paragraph 46).'

Extension of time for lodging the appeal; new rule 37(5); application

PI [1444]

Melki v Bouyges E and S Contracting UK Ltd [2024] EAT 36 (13 March 2024, unreported)

As part of the changes made to the EAT Rules 1993 in September 2023 there was added the new para 37(5) **R [750]** which permits a more liberal approach to granting a time extension in the case of a 'minor error' in lodging the necessary documents. In this case before Burns DHCJ in the EAT the problem arose because the unsuccessful claimant had omitted to enclose the respondent's grounds of resistance with the documentation. When this was pointed out, he complied quickly, but this occurred after the expiry of the time limit and his appeal was still disallowed. This happened *before* 23 September 2023.

Dismissing his appeal against this, the EAT considered two main questions (in the first appellate decision on the new sub-rule):

(1) Did the new sub-rule apply here? The decision was that it did because, as a procedural change it applies retrospectively to all cases coming before the Tribunal after the day of change, including to cases arising before that. It may appear at first sight that that would have helped the claimant here, but he still lost because of the second point.

(2) Did this failure come within sub-rule (5)? Here, the decision was that the grounds of resistance were important documents and so (*pace* possibly a case of just a couple of pages missing) failure to enclose them was *not* a minor error. Thus, the EAT had no power to extend time.

The problem with this second ground is that as part of the 2023 amendments, the grounds of appeal are now not an absolute requirement *but,* as this was a *substantive* change, it only applies prospectively *from* 23 September. Does that affect the instant decision as a precedent? On the one hand, it could be used to restrict it to its pre-23 September facts, but on the other hand it is the first EAT decision on the new sub-rule and can be seen as validating a relatively narrow approach to its interpretation generally for future cases. Given what was arguably the reasoning behind the change, the Lexis Nexis+ employment team commentary on it queries such an approach and comments: 'It will be interesting to see if this decision is appealed or if other judges sitting in the EAT take a different view when considering the issue of what amounts to a "minor" error in other appeals.'

DIVISION PIII JURISDICTION

Territorial jurisdiction; peripatetic employees

PIII [26]

***Yacht Management Company Ltd v Gordon [2024] EAT 33* (*6 March 2024, unreported*)**

Questions of jurisdiction in peripatetic cases are largely ones of fact for an ET, with those facts potentially varying greatly. Essentially, the law principles here have been established in a series of higher court decisions covered in the text. This decision of Lord Fairley in the EAT breaks no new ground but is an interesting example of the application of the 'base' test to relatively common facts. It also straightens out what was claimed to be a conflict between two previous cases.

The claimant worked for the company which owned super yachts. She lived in Aberdeen but worked on a yacht which operated entirely abroad and never docked in GB for the period of her employment. It was common ground that she returned to GB between her 'tours of duty', but that those tours themselves started and finished abroad. When she was made redundant, she brought proceedings under the ERA 1996 and the EqA 2010, but the company argued that the ET did not have territorial jurisdiction. The ET however held that it did, applying in particular *Windstar Management Services Ltd v Harris* [2016] IRLR 929, [2016] ICR 847, EAT which is considered at **PIII [29]**.

The company appealed, arguing that the ET should have followed instead the Pensions Act 2008 case of *R (Fleet Management Services (Bermuda) Ltd) v Pensions Regulator* [2015] EWHC 3744 (Admin), [2016] IRLR 199 where the judgment of Leggatt J at [77] contains a passage on tours of duty abroad which seemed to point in the opposite direction. However, Eady P in the EAT dismissed the appeal, holding that:

(1) The ET had applied the dominant case law in *Lawson v Serco Ltd* [2006] UKHL 3, [2006] IRLR 289, [2006] ICR 250, and *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, [2012] IRLR 315, [2012] ICR 389 properly and had been right to apply *Windstar* on the question of the claimant's base, coming to an acceptable conclusion that it was within GB.

(2) A 'tour of duty' is not necessarily the same as a person's contractual duties which on the facts started and ended at home.

(3) In a maritime case, the base does not have to be a port.

(4) The passage in *Fleet Management Services* relied on by the company was explained as depending on its context and terminology, with another part of para [77] in fact supporting the claimant's case; there is thus no conflict with *Windstar*.

REFERENCE UPDATE

Bulletin	Case	Reference
545	*R (Independent Workers Union of Great Britain) v CAC*	[2024] ICR 189, SC
545	*R (Palmer) v North Derbyshire Magistrates' Court*	[2024] ICR 288, SC
545	*Omar v Epping Forest District Citizens' Advice*	[2024] ICR 301, EAT
545	*Anglian Windows Ltd v Webb*	[2024] ICR 339, EAT
545	*Ryanair DAC v Lutz*	[2024] IRLR 299, EAT
546	*SPI Spirits (UK) Ltd v Zabelin*	[2024] IRLR 285, EAT
547	*Holbrook v Cosgrave*	[2024] IRLR 262, EAT
547	*Jones v Secretary of State for Health and Social Care*	[2024] IRLR 275, EAT
547	*Bathgate v Technip Singapore PTE Ltd*	[2024] IRLR 326, CSIH

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