Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

Amendment to state immunity law

The State Immunity Act 1975 (Remedial) Order 2023 SI 2023/112 aims to bring immunity law into line with the major decision in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2018] IRLR 123, [2017] ICR 1327, which resulted in a declaration of incompatibility and is considered at **PIII [190]** ff. It came into force on 25 February and will be incorporated into Div PIII in Issue 307.

DIVISION AI CATEGORIES OF WORKER

Sham transactions and clauses; the Autoclenz approach; categorisation by the parties

AI [18], AI [46]

***Ter-Berg v Simply Smile Manor House Ltd [2023] EAT 2* (*4 October 2022, unreported*)**

This case concerned the employment status (or otherwise) of a dentist who had sold three practices but stayed on to work for the respondent acquirer as an 'associate'. His contract stated that it was not to give rise to either a partnership or a contract of employment. It also had a substitution clause which was held to be genuine. It was a complicated case, partly because the claimant's case was that he had started working for the respondent as self-employed, but this had changed over time to an employment relationship. The ET held that such a relationship had not been established. On his appeal, Judge Auerbach in the EAT held that the ET's general approach had been correct, but in relation to one point on the substitution clause had not been; the appeal was allowed on that point only, which was remitted for reconsideration.

The interest in the case is that it contains a very full consideration of the relationship between *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] IRLR 820, [2011] ICR 1157 (on which the claimant relied to get around the clause ruling out a contract of employment) and the later decision in *Uber BV v Aslam* [2021] UKSC 5, [2021] IRLR 407 (see **AI [18]**, **AI [19]**). In particular, it disapproves an argument for the claimant that *Uber* had qualified *Autoclenz* as to the way in which the latter is to be applied by an ET. In doing so, it had to take into account the correct approach to be taken to an express declaration by the parties as to status (see [46]) Usually, an EAT headnote gives the facts and decision, but here the judge gives a summary of his findings on the law, in a form that could hardly be improved upon, and so is set out here in full:.

> 'When deciding whether a claimant was an employee, a worker, or neither, and determining, for that purpose, whether the terms of a document relied upon as a written contract reflect what the parties in reality agreed, the employment tribunal should follow the approach set out in *Autoclenz v Belcher,* including not applying certain rules of contract law that would apply when considering other types of written contract. That approach is confirmed by the decision of the Supreme Court in *Uber BV v Aslam*, which provides further guidance as to the policy considerations underpinning it, which should be borne in mind when applying it. Provided that, in such a case, the tribunal does apply that approach, it is not necessarily an error for it, when explaining its reasons, to start with a consideration of the terms of any document said to amount to such a written contract. But it will be an error for the tribunal, in such a case, to confine its consideration to such terms, to treat them as conclusive, or to treat them as giving rise to a presumption which restricts what it might conclude from its consideration of all the facts and circumstances in accordance with the *Autoclenz*/*Uber* approach.
>
> In relation to clauses to the effect that a written agreement is not intended to create a relationship of employment or a worker relationship: (a) As held by the Supreme Court in *Uber,* such a clause will be void and ineffective if, upon objective consideration of the facts, the tribunal finds that it has as its object the excluding or limiting of the operation of the legislation in question (pursuant to section 203(1) Employment Rights Act 1996 or the equivalent provisions of other legislation); (b) In any event, if, apart from such a clause, the other facts found by the tribunal point to the conclusion, applying the law to those facts, that the relationship is one of employment or a worker relationship, such a clause cannot affect that legal conclusion; but (c) If neither (a) nor (b) applies, then, in a marginal case, in which the tribunal finds the clause to be a reflection of the genuine intentions of the parties, it may be taken into account as part of the overall factual matrix when determining the correct legal characterisation of the relationship.'

One particularly important point here may be the statement that there is no presumption either way.

DIVISION AII CONTRACTS OF EMPLOYMENT

Duties of the employer; to indemnify the employee

AII [145], AII [420.08]

Benyatov v Credit Suisse* (*Securities*) *Europe Ltd [2023] EWCA Civ 140

The obligation of an employer to indemnify an employee for costs and expenses incurred in the course of their employment is one that has largely been assumed, without very clear authority. The case law that is usually cited, from *Adamson v Jarvis* (1827) 4 Bing 66 onwards (see 39 Halsbury's Laws of England (5th edn) (2021) para 40), has largely concerned the relationship of principal and agent, but has been generally assumed to apply by analogy to that of employer and employee. The instant case before the Court of Appeal is of considerable interest because it did indeed concern employment directly. However, the point at issue was a relatively narrow one – it was accepted by both parties that there *is* an implied term of law in a contract of employment to indemnify, and the court did not demur from this (useful in itself). The question was whether it went beyond the usual mantra of 'costs and expenses' and could apply to economic loss caused to the employee more generally. The answer was that it could not.

The facts raised the issue in an unusual, indeed dramatic, fashion. The claimant was a banker employed by the respondent. He was sent to Romania to work on the privatisation of state-owned assets. He was arrested by state authorities and charged with espionage and participation in criminal gangs. He was allowed to leave the country but in his absence was convicted and sentenced to ten years' imprisonment (reduced to four-and-a-half years on appeal). Throughout, he maintained his innocence and argued that the proceedings were politically motivated. However, the conviction in effect ended his career in finance (and necessitated a move to the USA because of the danger of a European arrest warrant). He eventually sued his by-now ex-employer for economic loss caused by that career loss, quantifying it at £66m.

His case essentially fell into two parts. The first was in tort for negligence in exposing him to this danger by sending him to Romania. On a relatively straightforward application of negligence law on the existence of a duty of care and its breach (always difficult in economic loss cases), this failed on the facts at first instance and his appeal on it was dismissed. However, it is his second ground that is of interest for present purposes, because he claimed that (independently of tort) the respondent as his then-employer was liable to *indemnify* him for all of his losses. This too failed at first instance and again his appeal was dismissed, but this time as a matter of law.

The claimant argued that an indemnity, once acknowledged as an implied part of a contract, should cover *any* loss suffered as a result of the employment. The judgment, given by Underhill LJ, considered the case law on indemnities generally; it accepted that some of the cases do indeed talk of 'any' loss, but that begs the prior question of any of *what kind*. It was held

that there is actually no binding authority permitting an indemnity in relation to future, unliquidated loss, in particular of lost career. The question then was, in the absence of authority, *should* the law allow such recovery. The answer here was a resounding 'No'. This was because to allow such a strict liability claim against the employer based simply on having suffered loss would undermine large areas of existing law. There are many common law rights (including for personal injury) which are often dependent on proof of fault and these are now supplemented by many statutory employment rights, all with their own legal requirements. These provide sufficient protection for employees, but would be circumvented by an overarching right to indemnity. In particular, such a right would negate the longstanding rule that there is no implied obligation on an employer to protect employees from economic loss in all circumstances (applying *Reid v Rush & Tomkins Group Ltd* [1989] 3 All ER 228, [1990] 1 WLR 212, CA and *Greenway v Johnson Matthey plc* [2016] EWCA Civ 408, [2018] IRLR 526, which are considered at **AII [187.03]**, **AII [187.04]**). The judgment sums this up at [140]:

> '… the effect of the indemnity for which the Claimant contends is that the employer should be liable to compensate employees for a loss of earnings even where that loss is caused by someone else and there has been no fault on the employer's part, simply because the relevant harm was done "in consequence of" them doing their job. That means that the employer would be liable in an extraordinarily wide range of circumstances. An obvious example is where the loss of earnings is consequent on personal injury – the employee driving for work who is injured by the negligence of another driver; or who visits someone else's office for a work meeting and trips on a defective stair; or whose work brings them into contact with a carrier of an infectious disease and they become seriously ill. However, as the present case illustrates, the indemnity would also operate where there was no physical injury. An employee's reputation and career prospects might be injured by an association with a client of their employer who (unforeseeably) turned out to be dishonest; or they might be libelled in a work-related context; or they might lose their job, and suffer long-term loss of earnings, because the employer's customer unreasonably takes against them and they cannot be moved to other work. In some, though not all, of these examples the employee might have a claim against the third party (who might or might not be solvent or insured), but that is immaterial: if the Claimant is right he or she has in all cases a straightforward right to be compensated by the employer irrespective of whether there is a claim against anyone else.'

Thus, the accepted implied term of law to indemnify is restricted to the classic formulation of 'costs and expenses' already incurred by the employee; it does not apply to general, unliquidated losses into the future, which are properly the subject instead of various common law or statutory actions for damages. Perhaps a shorthand key to this can be seen in para [114], at the beginning of the discussion of this part of the claim, where it is said that, simply as a matter of ordinary English, it would be a peculiar use of the word 'indemnity' to cover this claimed type of loss.

One final point may be noted. Towards its end, the judgment accepts that in an appropriate case there could be an implied term of *fact* obliging an employer to indemnify for a wider type of loss, depending on the dealings of the parties and the standard common law tests for such a 'real' implied term (officious bystanders, et al). However, that was not the case on the facts here, for much the same reasons that defeated the tort action for negligence.

DIVISION BI PAY

National minimum wage; salaried work; basic hours for part-year worker

BI [208.01]

Lloyd v Elmhurst School [2022] EAT 168, [2023] IRLR 129
(*19 January 2023, unreported*)

Whenever complex statutory laws apply across the board to all forms of employment, their application can sometimes produce results that are, to use an ungainly but expressive word, counterintuitive. In this case on the NMW as applied to a salaried part-year worker, the ET came to a conclusion that seemed the commonsense one, but they were wrong in law.

The claimant was employed as a part-time learning support assistant at the respondent school and was paid a salary in equal monthly instalments. She worked three days (or 21 hours) a week during term time and, according to clause (4) of her contract, was entitled to the usual school holidays 'as holidays with pay'. She brought a claim for unlawful deduction from wages, contending that she had been paid at below the level of the national minimum wage. The ET dismissed her complaint, holding that her 'basic hours' for the purpose of reg 21(3) of the National Minimum Wage Regulations 2015 SI 2015/621 **R [3202]** were based on 21 hours over 40 weeks, comprised of (i) the 36 weeks she worked in term time, and (ii) her four weeks' leave due under the Working Time Regulations 1998 SI 1998/1833. So far, so apparently clear, *but* her appeal was allowed by Ford DHCJ in the EAT.

It was held that the claimant's 'basic hours' for the purpose of reg 21(3) were to be ascertained from her contract and could include hours which were not working hours. Where a worker is contractually entitled to receive their normal salary for a period of absence, such as contractual holidays, the periods of absence from work can count towards the 'basic hours' of salaried hours work *even if they are not absences from a period when a worker would otherwise be working* (arguably the key point). The ET had erred in focusing on the weeks the claimant in fact worked, to which it had added her statutory entitlement to paid annual leave, rather than ascertaining the claimant's basic hours from her contract alone. It may have been that the contract was not well expressed on this point, but that could not affect the outcome.

DIVISION DI UNFAIR DISMISSAL

Effective date of termination; automatic dismissal; elective theory not applicable

DI [727]; AII [467]

***Meaker v Cyxtera Technology UK Ltd [2023] EAT 17* (*21 February 2023, unreported*)**

Although in general in a common law claim the leading *Geys* litigation held that the elective theory applies (so that a repudiatory breach by the employer gives the employee an option to accept it or not – see **AII [463]** ff), it is important that this does *not* apply to the quite separate statutory concept of the effective date of termination (EDT) for the purposes of an unfair dismissal claim, because the elective theory could drive the proverbial horse-drawn transport though it. This differential approach, based on the old case of *Robert Cort & Son Ltd v Chapman* [1981] IRLR 437, [1981] ICR 816, EAT (see **DI [728]**), has fortunately been held to have survived *Geys* in several cases, including *Rabess v London Fire and Emergency Planning Authority* [2016] EWCA Civ 1017, [2017] IRLR 147 and *Feltham Management Ltd v Feltham* UKEAT/0201/16 (21 December 2027, unreported) (see **DI [731]**). That has now been applied again in the instant decision of Judge Auerbach in the EAT, which also shows that an employee must be wary of this with regard to complying with the three-month time limit, particularly where the circumstances of the dismissal are not crystal clear. The facts are instructive.

The claimant was a manual worker who suffered a back injury requiring significant time off. It was accepted that he could not continue with that work, but even so he was not entitled to the company's income protection scheme. He had a conversation with HR, at which it was intimated that the company intended to end his employment and wanted him to enter a settlement agreement. At a further such meeting, the claimant thought that HR were still looking for alternative work. However, on 5 February the company sent him a letter (which he received on 7 February) stating 'without prejudice' that there would be a 'mutual termination' on 7 February, with payment in lieu of notice and holiday pay to follow. This occurred on 14 February.

The claimant brought a claim for unfair dismissal. He argued that his EDT was 14 February, in which case his claim was in time. The company argued that his EDT was 7 February, in which case his claim was out of time. The ET held for the company, and refused to extend time. The claimant appealed against this, but the EAT dismissed his appeal. It was held that ET were entitled to find that the letter of 5 February was, overall, an unambiguous letter of dismissal, in spite of the 'without prejudice' heading and the rather weasel words 'mutual termination'. This effected a unilateral termination on 7 February. The offer of payment may have been outstanding because conditional on signing a settlement agreement, but that did not affect the EDT. Moreover, applying *Robert Cort* and *Rabess*, it was not possible for the

claimant to argue that he had not accepted the employer's dismissal (as he might have been able to at common law). Caveat employee.

DIVISION L EQUAL OPPORTUNITIES

Indirect discrimination; provision, criterion or practice (PCP); whether has to be applied

L [301.02]

***Glover v Lacoste UK Ltd [2023] EAT 4* (*2 February 2023, unreported*)**

The text at **L [301.02]** gives the case of *Little v Richmond Pharmacology Ltd* UKEAT/0490/12, [2014] ICR 85, as a example of a PCP arising in a sex discrimination case. In it, the EAT agreed with the ET that a prima facie case of discrimination in refusing a request to go part time was in effect cancelled by a subsequent successful appeal against the decision, meaning that the PCP of full-time work had never actually been applied to her, and so there was no case for indirect discrimination. That case may now have to be applied with care because in the instant case before the EAT under Judge Tayler it was distinguished on its facts and held not to establish what the respondent and the ET had thought. The facts of both cases were ostensibly pretty similar.

In *Glover* the claimant was a full-time employee who went on maternity leave. She requested to return for only three days per week. This was refused by a letter which mentioned the possibility of an appeal. The claimant in fact never returned to work; at the end of her leave she took accrued holidays and was then COVID-furloughed. She did, however, appeal; this was upheld to the extent that four days per week were to be allowed *but* to be worked flexibly over any days. The claimant's solicitor then wrote asking the employer to reconsider this (with the threat of her resigning and claiming constructive dismissal). This was done, agreeing to her initial request. She returned to work on that basis.

She brought proceedings for indirect sex discrimination, the PCP being based on her having been required to work fully flexibly. The ET held that it was bound by *Little* to hold that because of the appeal the PCP had never in fact been applied to her. On her appeal, she in fact agreed that this was the effect of *Little* and argued that the EAT should reverse it (the concept of a 'disappearing discrimination' having no place in this area of law). Upholding her appeal, however, the EAT held that there was no need to do so because that case does not establish a general rule that a successful appeal removes a potential PCP. Instead, it was explained at the time as being on its particular facts, in particular that the final decision whether to apply the PCP (full-time working) was not taken *until* the (successful) appeal stage, by which time she had resigned. At [37] this distinction is explained:

> 'We also consider that, contrary to the view of the employment tribunal, there is a significant distinguishing feature between this case and *Little* in that the decision to agree to the claimant's request did not come at the appeal stage but only after a letter before action had been

sent. On any view that constituted the reversal of a previous decision, rather than being the final step in a decision being made, as was held to be the case when the appeal was determined in *Little*.'

Thus, once the application to change hours is determined, the PCP is established, even if the employee has not returned and/or attempted to work under any new arrangements.

It may be thought that the distinction between the two cases is rather thin, but the emphasis here on the factual nature of the *Little* decision may suggest that in these return-from-leave cases it is *Glover* that is likely to be applied now, with *Little* as the exception.

Discrimination arising from disability; unfavourable treatment

L [373]

***Mcallister v Commissioners of HMRC [2022] EAT 87* (*8 December 2022, unreported*)**

To succeed under the EqA 2010 s 15 **Q [1468]** on discrimination arising from disability it has to be shown that the claimant suffered 'unfavourable treatment'. It has been repeatedly stressed that this does *not* mean 'detriment' or 'less favourable treatment'; it is a more simple question of fact and, in particular, it does not include treatment that is essentially favourable merely because the claimant thinks it ought to have been *more* favourable. The leading case on this is *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65, [2018] IRLR 306, which is considered at **L [373]**. One way that this has been put is that once a scheme affecting the claimant has been shown to be favourable, it will be very difficult for them to challenge an *amount* payable under it. The instant decision of Eady P in the EAT is another example of this *Williams* approach.

The claimant had worked for HMRC for seven years, during which he had had substantial amounts of time off for conditions accepted as constituting a disability. During this time, he has co-operated up to a point, but not fully, with attempts to rectify the situation, and on his final return for a short period had acted disruptively. Eventually the decision was taken to dismiss him for incapability. He then qualified under the Civil Service Compensation Scheme (CSCS). This works on a notional sum basis, with a discretion to reduce it from 100%, with guidance on how to do so, involving factors such as co-operation and conduct. In the claimant's case, it was reduced to 50%, later increased on appeal to 80%. He brought proceedings under s 15 in relation both to the dismissal and the reduction. The ET held that the dismissal was disability related but on the facts here was justified. As to the reduction, it held that the original 50% was unfavourable treatment, but not the revised 80%. The claimant appealed on both points and the respondent cross-appealed on the initial finding relating to the reduction. The EAT dismissed the appeal and upheld the cross-appeal. With regard to the latter, applying *Williams*, it was held that there was no unfavourable treatment at all

and so s 15 did not apply; the CSCS was itself favourable to those being terminated in circumstances such as these, and the fact that a larger amount could have been awarded was neither here nor there. To hold otherwise would be to confuse the nature of the scheme itself with questions of quantification. This case has strong echoes of the President's earlier decision on s 15 in *Cowie v Scottish Fire and Rescue Service* [2022] EAT 121, [2022] IRLR 913 which was considered in **Bulletin 530**.

DIVISION PI PRACTICE AND PROCEDURE

Case management; unless orders; result of material non-compliance

PI [404]

***Mohammed v Guy's and St Thomas' NHS Foundation Trust [2023] EAT 16* (*24 February 2023, unreported*)**

Given the drastic nature of a finding of non-compliance with an 'unless' order (automatic strike out), the text points out at **PI [404]** that an ET has to be careful whether the result is to be to strike out the whole claim or only a part or parts of it. Three of the cases cited in the text, *Scottish Ambulance Service v Laing* UKEATS/0038/12 (17 October 2012, unreported), *Johnson v Oldham MBC* UKEAT/0095/13 (17 April 2013, unreported) and *Ijomah v Nottinghamshire Health Care NHS Foundation Trust* UKEAT/0289/19 (12 June 2020, unreported) are particularly relied upon in the instant decision of the EAT under Judge Tayler, which is a good example of the problems that can arise here.

The claimant brought several claims for different types of discrimination. At a preliminary stage the ET made an order for her to provide specified further information about most of them, attaching an unless provision that in the case of failure 'the claim will be struck out'. Her solicitors replied giving information on one category but maintained that sufficient had been supplied already on the others. This led to the claim as a whole being struck out. She appealed against this, pointing out that the order covered one category about which no information had been requested and two that had already been fully particularised. The EAT allowed her appeal. The judgment stressed that SI 2013/1237 Sch 1 r 38 on unless orders specifically applies to striking out 'the claim' or 'part of it' and the above case law has stressed that an ET must be careful to maintain proportionality in making such an order. The ET here had not applied the law properly. At the end of the judgment, the following caveat was given (at [28]):

> 'An order dismissing the entire claim if there is a material failure to provide additional information in respect of any one of a number of requests will generally only be appropriate where there has been serious ongoing default in compliance with the orders that suggests that the claimant is refusing to engage with the tribunal process and there has been express consideration of why such a draconian order is required when a more focussed order could be made'.

Employment tribunals; admissibility of evidence; without prejudice communications

PI [928.03]

Garrod v Riverside Management Ltd [2022] EAT 177, [2023] IRLR 191, EAT

***Sheldebouw v Evanson [2022] EAT 157* (*29 March 2022, unreported*)**

A major issue in many cases arising because of a claim that certain matters cannot be disclosed or used in evidence because they have been given on a 'without privilege' basis is *when* in the course of actual or (more debatable) potential proceedings this doctrine arises. The key case is *Barnetson v Framlington Group Ltd* [2007] EWCA Civ 502, [2007] IRLR 598, [2007] ICR 1437, considered at **PI [928.03]**; essentially, it was held there that there must be an existing dispute between the parties, coupled with a genuine attempt to settle it. However, it was also said there that such cases are heavily fact-sensitive and it will often be difficult to draw this line. This is shown by the two instant cases, which both apply *Barnetson*, but to different effect.

In *Garrod* the claimant raised a grievance about alleged discriminatory conduct on her return from maternity leave. She was invited to a meeting with HR at which it was intimated that the employer wanted to terminate her employment, offering £80,000 by way of a settlement. This discussion was said by the HR manager to be 'without prejudice'. It came to nothing and the claimant left, claiming constructive unfair dismissal. She wished to give evidence of the meeting and the offer, but the ET agreed with the employer that she could not because of the without prejudice rule. On her appeal, Bourne J in the EAT held that the ET had been correct in its approach and the appeal was dismissed.

The claimant had raised two main points. The first was that the ET should have held that there was *no* existing dispute sufficient to invoke the doctrine at the time of the HR meeting. She relied on *BNP Paribas v Mezzotero* [2004] IRLR 508, EAT (see **PI [928.05]**) for a proposition that raising a grievance is not in itself a sufficient dispute for these purposes. However, the EAT held that this had not been the case here, because the claimant's references to breach of her legal rights, ACAS and early conciliation meant that it was not a case of a *mere* grievance, but there were enough indicators of a potential legal dispute to invoke the doctrine. This is much in line with the commentary at **PI [928.04]** on the effects of *Barnetson*. One sub-point here was that the claimant had also argued that she had not understood the meaning of 'without prejudice', which can be important with a litigant in person (see **PI [928.07]**) but this was disbelieved by the ET, especially as both she and her husband (who had been helping her) were law graduates. Alternatively, in her second point, she argued that the ET should have allowed the evidence in on the 'unambiguous impropriety' exception, again citing *Mezzotero* (see **PI [515]**) but that was also rejected and that case was distinguished because it concerned allegations of discriminatory behaviour at the without prejudice meeting itself, which was not the case here.

In *Sheldobouw* Cavanagh J in the EAT held that the ET had been correct to *allow in* evidence from a meeting that the employer later claimed was on a without prejudice basis. The claimant was employed as the respondent's Chief Risk Officer. The employer formed the view that there was no longer a requirement for the claimant's role and the parties met to discuss terms for termination. At that meeting no notes were taken and there was no suggestion by either party that they considered it without prejudice. In the event, the parties actually *agreed* on most issues but not holiday pay. It was suggested by the respondent that they would pay £68,199.60. It was agreed that a settlement agreement would be drawn up and the matter kept confidential. None of the subsequent correspondence was marked 'without prejudice'. However, final agreement was ultimately not reached, especially in relation to holiday pay, and the claimant brought proceedings for unlawful deduction from wages for this element. In his claim he referred to the offer made by the employer at the meeting. The employer objected to this, arguing that the offer made at the meeting was covered by the 'without prejudice' principle and should be redacted from the pleadings. The employment tribunal, applying *Barnetson*, held that the 'without prejudice' privilege did not apply on these facts.

The EAT rejected the employer's appeal. It concluded that overall the EJ had correctly directed herself as to the law and rejected the employer's argument that in effect she had put the pass mark for privilege being engaged significantly too high. The test for prospective legal proceedings is an objective one and the factors in this case militating against that were that: (a) there was no hostility or threat of dismissal on grounds that would potentially stigmatise the claimant; (b) ultimately the only area of disagreement was the narrow issue of holiday pay; (c) there was no dispute between the parties at the meeting and they went a long way towards reaching agreement – there was at that stage no reason to think that the discussions would not end amicably; (d) the claimant was not offering at this stage to take less in settlement; (e) the outcome of the meeting was described as a 'gentleman's agreement'; (f) the respondent's manager had not considered it necessary to take legal advice; (g) the purpose of proposing a formal settlement agreement was not a sign that the manager was contemplating litigation but was done for the sake of good order and as a sensible commercial precaution; and finally (h) neither party referred to the discussion as being without prejudice.

EAT; institution of appeal; extension of time

PI [1444]

***Hawkes v Oxford Economics Ltd [2022] EAT 179* (*31 January 2023, unreported*)**

Delivery of an appeal and accompanying documents by email has thrown up several issues over time, especially when done late in the 42-day period. This case before Judge Shanks in the EAT concerned lack of a 'bounce-back' stating that an email had not in fact been delivered. It was held that this *can* constitute good reason to extend time.

The claimant, a litigant in person, sent his notice of appeal at 3.33 pm on the last day; the necessary documents were sent in other emails between 3.29 and 4.00. For some reason, the notice of appeal was not received, but the claimant received no notification of this; he only realised ten days later when he received a letter from the EAT saying they had not received the notice. Allowing an extension of time, the judge said that it is unusual these days not to get a notification of the non-delivery of an email and so in the absence of a bounce-back it was reasonable to assume that the message would be delivered in a matter of seconds. This is a relatively liberal view of the time limit, which may have been affected by the fact of his being a LIP. More generally, it also may show the wisdom of many exhortations *not* to wait for the last day. On the other hand, logically, even if he had acted a week earlier and *then* not received a bounce-back, he would still have been out of time by three days by the time he received the EAT letter.

REFERENCE UPDATE

Bulletin	Case	Reference
533	*Tyne & Wear Passenger Transport Executive v NURMT*	[2023] IRLR 235, CA
534	*Teixera v Zaika Restaurant Ltd*	[2023] IRLR 170, EAT
534	*Olsten UK Holdings v Adeco Group European Works Council*	[2023] IRLR 180, EAT
534	*Rodgers v Leeds Laser Cutting Ltd*	[2023] IRLR 222, CA
535	*Arvunescu v Quick Release Automotive Ltd*	[2023] IRLR 230, CA

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