

# Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to 1 September.

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## LEGISLATION

### New laws on minimum service levels during strikes

The Strikes (Minimum Service Levels) Act 2023 has received royal assent. It operates by making amendments to TULR(C)A 1992 and pending commencement will be incorporated into Div Q as it stands in Issue 311. At the time of writing, the government are consulting on how to define the appropriate levels, with a view to issuing a statutory Code of Practice.

### First commencement for the Neonatal Care (Leave and Pay) Act 2023

The Neonatal Care (Leave and Pay) Act 2023 (Commencement No 1) Regulations 2023 SI 2023/904 brought into force on 21 August s 1 and para 49 of the Schedule. The purpose of this limited commencement was to permit HMRC to begin work on payments of statutory neonatal pay.

## DIVISION AII CONTRACTS OF EMPLOYMENT

### Restraint on competition; interim injunction; serious issue; order for speedy trial

AII [203], AII [266], AII [271]

*Verition Advisors (UK Partners) Ltd v Jump Trading International Ltd* [2023] EWCA Civ 701, [2023] IRLR 787

*Waste Managed Ltd v Wilce* [2023] EWHC 1456 (KC), [2023] IRLR 767

As has been pointed out before in this Epistle to the Terminally Confused, most modern cases on restraint clauses tend to be merely interesting examples of the application of very old and well-established rules, and are very

## DIVISION AII CONTRACTS OF EMPLOYMENT

fact-specific (to use that well-worn but still expressive phrase). However, in *Verition* we have a Court of Appeal decision that concerns and elucidates two important points, the second one of which can also be seen in the first instance decision in *Waste Managed*, also reported in the IRLR.

The facts of *Verition* concerned a fairly standard issue of an ex-employer seeking to enforce a non-compete clause in the ex-employee's contract against him and his new employer. However, the unusual aspect of this was the form of the restraint – in addition to 12 months' garden leave, the actual restraint's period was for nought to twelve months, at the employer's discretion (to be exercised within 20 working days of notice of termination). On the ex-employer's action, the High Court judge ordered a speedy trial but, in spite of finding there were serious issues to try, refused an interim injunction largely on the ground of delay by that company. The new employer appealed on two grounds:

- (1) The order for a speedy trial. Here, the court in a judgment by Simler LJ held that the judge was within his powers to order this. The judgment lists the following factors to be considered on such an application: (i) good reasons showing real, objectively viewed urgency; (ii) whether any element of jumping the queue would affect other court business; (iii) any prejudice to the other party; and (iv) any other factors specific to the case, including delay. On the facts, the order here fitted this analysis. The judgment adds in quite strong terms that in the employment context the necessary urgency will often be present (even if, as here, an interim injunction has been refused).
- (2) The extent of the restraint. The new employer had argued that there was not a serious issue to be tried here because the unusual and discretionary nature of the restraint meant that it was unlikely to be justifiable by the old employer. At first glance, this might appear an attractive argument, but the court held against it in unambiguous terms. Pointing out that the old employer would have to justify it at its maximum length (12 months) and that the clause provided a mechanism for determining the actual length within that, the judgment takes the view that overall the form of the clause was not so unusual or illogical as to be clearly unreasonable. At [47] it states:

'As for the discretionary nature of the clause length and its consequences, at this preliminary stage I can see no meaningful distinction between the non-compete clause which is for a period of zero up to twelve months, and a covenant which imposes a restriction for a fixed period of twelve months, but expressly gives the employer a discretion unilaterally to reduce the length fixed (particularly given that, in practice, an employer always retains a discretion unilaterally to reduce the length of a fixed restriction by any amount or to waive it entirely). Mr Solomon accepted that there could be no challenge to the latter type of clause merely by virtue of the discretion to reduce or waive the restraint period. However, he submitted that the non-compete covenant in this case

is substantively different and egregious by virtue of the unilateral discretion retained by the employer. No qualitative difference was however identified.’

The question of a serious issue also arose in *Waste Managed* before Morris J where again an interim injunction was refused. This was a ‘sum of the parts’ case where the issue was whether a business model composed of elements which in themselves were in the public domain could have the necessary confidentiality. The refusal was for several reasons including (again) delay and the balance of convenience, but the key point seems to have been the categorisation of the claim as being based only on a high level of inferences and suspicions by the claimant which contained gaps and was based on alleged correlations which might, or might not, have been indicative of causation.

### DIVISION DI UNFAIR DISMISSAL

#### **Misconduct; breach of discipline; importance of specifying disciplinary rules**

DI [1397]

*Hewston v OFSTED [2023] EAT 109 (4 August 2023, unreported)*

This case was widely reported in the media generally, and, in relation to the employment law behind it, it is potentially a significant reminder to employers and their advisers of the importance of spelling out disciplinary rules to employees before simply applying them to justify dismissal, particularly summary dismissal.

The facts were that the claimant was an OFSTED inspector. During a school inspection visit a group of school children came in soaking from the rain. The claimant briefly touched a pupil’s head to wipe away rain that was dripping down his face, lightly touched the top of his shoulder and asked if he was alright. The respondent (OFSTED) accepted that the claimant had not acted to harm the pupil and it was accepted that this case did not give rise to any safeguarding risks. The claimant had over 12 years of service and a completely clean disciplinary record. The respondent had provided no training to staff on the use of inappropriate touch during inspections and there were no disciplinary rules in place defining inappropriate use of touch as misconduct, let alone gross misconduct. There was however a subsequent complaint from the school being inspected leading to a disciplinary process, as a result of which the claimant was dismissed for gross misconduct. The dismissing officer concluded that the claimant had failed to exercise ‘good inspection judgment’ by initiating physical contact with a student when it was not invited or expected, and that the student had reported feeling uncomfortable. Neither the school’s complaint nor the student’s own statement was disclosed to the claimant prior to his dismissal. Moreover, an investigating local authority officer had recommended to the respondent that the proportionate response would be an internal investigation and consideration to raising awareness of professional boundaries and any training needed to

## DIVISION DI UNFAIR DISMISSAL

support this (ie not dismissal). That recommendation was not disclosed to the claimant either. The claimant brought claims of unfair dismissal and wrongful dismissal but both claims were dismissed by an employment tribunal.

The claimant's appeal to the EAT was allowed in no uncertain terms. There were obvious procedural gaffs relating to non-disclosure of important evidence and a failure to take into account his service record that would probably have made the dismissal unfair anyway, but the key to the case was the *reason* for the dismissal, which was OFSTED's reaction to the touching itself. It had tried to muddy the waters by later arguing that it had really dismissed because of his attitude to their objections to the touching (on the principle of the zoo notice 'This animal is dangerous; if attacked, it will defend itself') but the EAT under Judge Auerbach would have none of that. On the key point of dismissal for the touching itself, the judgment accepts that there will be cases where the touching is so wrong that any employee would realise it must not be done, but this was not such a case, especially as it was accepted from the beginning that there were no actual safeguarding considerations. Short of such obvious cases, it will be potentially unfair for an employer to dismiss for acting in a way that had not been specified as being unacceptable to the employer and a ground for dismissal. This is doubly so in a case of summary dismissal for a one-off act. At [73]–[75] the judgment states:

'... the underlying principle of fairness ... is not hard to grasp. It is that it is not fair to dismiss an employee for conduct which he did not appreciate, and could not reasonably have been expected to appreciate, might attract the sanction of dismissal for a single occurrence. As the authorities point out, there are some types of conduct, the nature of which is inherently such that any employee ought reasonably to appreciate that it would attract the sanction of dismissal without needing to have it specifically spelled out in advance. But there are other types of conduct where this is not inherently obvious, and in respect of which the stance of different organisations may differ, depending on circumstances peculiar to, for example, their activities or their employees. All of this explains why the ACAS Code at [24] indicates that individual employers should give examples of the types of conduct which they regard as gross misconduct. If an organisation makes it clear to employees in advance, in a disciplinary code, or in some other suitable way, that, in *this* organisation a certain type of conduct will be regarded as gross misconduct, then it will be able to say that its employees have been fairly forewarned of what to expect. The Code refers to *types* of conduct, again no doubt because not every *precise* scenario can be catered for. But even if the precise conduct in question was not mentioned in the employer's disciplinary code, there may be an issue as to whether, in light of the general examples that were given, the employee should have appreciated that their conduct, being of a relevantly similar kind or category, would be regarded equally seriously.'

The task of the ET is to determine the dividing line between these two categories, which had not been done here. The EAT also found fault with the ET's consideration of the alternative complaint of wrongful dismissal, which requires an objective assessment of the gravity of the conduct and must not be conflated with any earlier consideration of an unfair dismissal complaint. The decision of the EAT was so clear on the facts here that it substituted its own conclusions in the claimant's favour, rather than remitting the case.

As stated above, this is a useful restatement of the need to set out disciplinary rules. It echoes perhaps the wider question of when an employer, faced with serious concerns, can operate a 'zero tolerance' approach – it will usually be incumbent on it to introduce this with a clearly enunciated policy and possibly training in it. What the employer must not do is to adopt the Admiral Byng principle, ie decide internally on what is now unacceptable and then shoot the first one in contravention, *pour encourager les autres*.

## DIVISION E REDUNDANCY

### **Offer of alternative employment; meaning of reasonable refusal; subjective element**

E [256]

*Mid and South Essex NHS Foundation Trust v Stevenson [2023] EAT 115 (31 August 2023. unreported)*

On being made redundant, the three claimants (HR practitioners) were offered other work in a similar but reorganised context, but they had personal reservations about this and how it would work out in practice. When they turned it down, the employer refused to pay them the statutory redundancy payments to which they were otherwise entitled, on the basis that they had unreasonably refused suitable alternative employment (ERA 1996 s 141 Q [765]). The ET initially agreed with the employer but the claimants won their first appeal to the EAT (see E [242]). This led to a remission to the same EJ who this time held that, while the alternative work was objectively suitable, the claimants had not acted unreasonably by declining it, thus awarding the payments. The employer appealed on this point, arguing that the ET should have placed greater emphasis on how the facts 'ought to have appeared to the claimants'. The EAT under Judge Tayler accepted that this was a possible *factor* in the overall decision, but held that it is not the ultimate test. Relying particularly on *Bird v Stoke-on-Trent PCT* UKEAT/0074/11, [2011] All ER (D) 142 (Aug) (see E [256]), it was held that the correct test is the amalgam of objective and subject as set out in the first sentence of that paragraph (cited and approved in *Bird*), so that the question is whether the claimant(s) acted unreasonably from their particular point of view. Here, the EAT held that the EJ had applied that test properly, and permissibly found on the facts that the claimants' fears about the new posts were not groundless from their perspective. The decision of the ET was upheld.

## DIVISION F TRANSFER OF UNDERTAKINGS

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#### **Relevant transfer; date of transfer; a series of transactions; situated in the United Kingdom**

F [103], F [18]

*Rajput v Commerzbank AG [2023] EAT 116 (29 August 2023, unreported)*

TUPE SI 2006/246 reg 4(2) states that rights and obligations pass to the transferee ‘on completion of the relevant transfer’. Perhaps surprisingly, there has hitherto been little direct authority on this in the context of a transfer effected by a series of transactions. In the light of this, it has been argued at F [103] that the date should be the *end* of that series (even if any earlier dismissals may have to be then post-dated to that date). The alternative theory is that the date should be earlier if necessary to reflect the reality of when the undertaking substantially changed hands and was continued by the transferee. In this decision of Kerr J in the EAT (in which F [103] was cited), the latter is preferred. This clarification is welcome, but there are (perhaps inevitably) a couple of loose ends relating to the exact way this test should be phrased and whether this approach applies to both a standard (original) transfer of undertaking and the more recent category of a service provision change.

The rationale for this decision is set out at [61] and [62] as follows:

‘I agree with the respondents that there is no presumption or rule that a transfer effected by a series of transactions occurs at the end of the series. Completion may be artificially delayed. The last transaction in the series may be a minor detail, putting the last piece of the jigsaw in place long after the transferee has started running the business to the exclusion of the transferor. An example arises in this very case ... By similar reasoning, the gloss “full and final” should not be added to the concept of responsibility for running the business. A transferor might retain minor responsibilities for mopping up work long after responsibility has shifted to the transferee in substance.... Ingenious devices to defeat employees’ TUPE rights may lie in seeking to delay transfer or in seeking to accelerate it. No rule or presumption about the date of a transfer assists in discouraging that.’

The decision was important on the facts of the case which were rather unusual because it concerned not the commercial aspects of a TUPE transfer but the validity in point of time of the dismissed claimant’s personal discrimination claims against the transferor. The claimant wanted the date to be May 2020 at the end of the sale of part of the transferor bank’s business to the transferee which was effected over a considerable period in ‘batches’, to preserve her ET claims, but the ET held that it was October 2019 by which time nearly all the batches had been completed, the EJ using the formulation that this was when the ‘essential nature of the activity’ was transferred. The claimant appealed against this but the EAT held that this was a proper decision by the EJ.

## DIVISION F TRANSFER OF UNDERTAKINGS

As stated above, however, there are two uncertainties here:

- (1) *The actual test.* The EAT rely on the ECJ decision in *Celtec Ltd v Astley* [2005] IRLR 647 where it was said (in a slightly different context – see F [99]) that the date is when ‘responsibility as employer for carrying on the business of the undertaking transferred moves from the transferor to the transferee’. It may seem that this does not take us much further than emphasising that it is a question of fact for the ET. In the light of that, the EJ here had used the phrase ‘essential nature of the activity’ which comes from the judgment of Judge Burke in *Churchill Dulwich Ltd v Metropolitan Resources Ltd* [2009] IRLR 700, [2009] ICR 1380, EAT (again in a slightly different context) and may seem a useful guide, *but* the EAT here thought that, although the use of that phrase had not prejudiced the ET’s overall decision, it did not in itself express the overall test, which remains that in *Celtec*.
- (2) *Application to service provision changes.* Opposing the expediting of the date by use of the phrase, the claimant argued that *Churchill* was in fact a case of a service provision change (see F [70.01], F [72.25]), not (as here) a standard business transfer. Her arguments generally were disapproved but on this point the EAT declined to express a final opinion. You can see arguments both ways towards the end of the judgment – on the one hand, the two types of transfer are legislatively separate, but on the other there is cited a remark by Elias LJ that many transfers can actually qualify as *both*. Ultimately, the ratio of the case (and especially its reliance on *Celtec*) is restricted to standard transfers.

These two issues are finally summed up at [70]:

‘HHJ Burke QC in *Metropolitan Resources Ltd* did not need to decide whether the judicial approach to a service provision change and to a standard transfer case should always be exactly the same. No more do I in this appeal. The provisions in TUPE are not the same for the two kinds of case. The present case is a standard transfer case governed by the *Celtec* test, unvarnished by any gloss such as the “essential nature of the activity” or, for that matter, “full and final” responsibility. Such glosses are an unnecessary distraction and best avoided. But if the judge’s decision in this case is otherwise defensible, it is not vitiated by his invocation of the “essential nature of the activity”.’

There was one other principal ground for the appeal in relation to which the claimant won and the case was remitted to a new ET for reconsideration. Part of the business to be transferred related to its operations in Germany. Given that the definition of a ‘relevant transfer’ in reg 3(1) applies to an undertaking or business ‘situated immediately before the transfer in the United Kingdom’, the EJ ignored this element of the series of bundles. The EAT held that this was wrong. Citing guidance by the then-BIS in 2014, the question is whether the undertaking/business itself is so situated; if (as here) that is the case, the fact it *operates* outside the UK is irrelevant. This holding was potentially of more than theoretical importance here because the German operation constituted about two-fifths of the purchase value and there

## DIVISION F TRANSFER OF UNDERTAKINGS

was evidence that it came within a batch that was transferred *late* in the series. If counted in, it had the potential to push the overall *Celtec* date further back than October 2019, to which the claimant was objecting.

### **Relevant transfer; effect on individuals; transferability of a share incentive plan**

F [121]

#### *Ponticelli v Gallagher [2023] CSIH 32*

The facts of this case when before the EAT are set out at F [121]. It concerned whether or not membership of a share incentive plan (SIP) transferred on a TUPE transfer. The problem arose because it was not part of the claimant's contract of employment, but was instead voluntary and contained in a separate scheme. On the transfer, the transferee refused to continue that SIP or (as in *French v MITIE Management Services Ltd* [2002] IRLR 512, EAT, see F [119]) a substantially equivalent plan. Under TUPE SI 2006/246 reg 4 R [2293] a right can transfer if it arises 'under' the contract or 'in connection' with it. The latter has caused the problems here. The EAT held that that phrase applied and that the SIP (or equivalent) did transfer. In doing so, it cast doubt on the earlier case of *Chapman v CPS Computer Group plc* [1987] IRLR 462, EAT, which had taken a narrower approach. As a result, the text suggests that *Chapman* would not now be decided the same way. The instant case has now been appealed by the employer to the Inner House of the Court of Session. The employer argued that *Chapman* was still good law and that the connection with the contract was not sufficient, but the court dismissed the appeal. Citing ECJ authority that the transfer provisions are to be applied liberally to achieve the protective aims of the backing directive, it was held that *Chapman* is of little help here and that the EAT had properly applied the 'in connection with' test.

## DIVISION L EQUAL OPPORTUNITIES

### **Disability discrimination; reasonable adjustments; disadvantage; meaning of substantial**

L [310], L [396]

#### *Pipe v Coventry University Higher Education Corporation [2023] EAT 73, [2023] IRLR 745*

The claimant was disabled by reason of ADHD and sleeping problems. He was a grade 6 assistant lecturer who applied three years running for promotion to grade 7 but was refused. He eventually resigned and claimed failure to make reasonable adjustments, disability-related discrimination, indirect disability discrimination and indirect age discrimination. The principal reason for the failure of his applications was the university's recent internal progression framework which (1) required a PhD or (exceptionally) equivalent professional activity and (2) required consideration of whether there was a budget/business case for a particular role. The ET rejected his claims and he appealed.



The judgment of Eady P in the EAT is complex, reflecting the interplay of his claims. It is largely concerned with the facts here, and essentially he failed again on appeal in relation to reasonable adjustments and disability-related discrimination because the ET had accepted the university's case that there was no business case for advancing him; this stopped him, even if there were maintainable arguments of discriminatory elements in the PhD/professional equivalence test. Moreover, in relation to adjustments, the ET had permissibly found that the university had shown that the adjustments put forward, in particular if necessary creating a new post specifically for him, were not reasonable given the university's financial position and the wider effects that would have had on the department and others working there. The EAT did however find fault with the ET's approach to indirect disability/age discrimination and these claims were referred back.

One specific point of law (as opposed to fact) that arises in the judgment is the meaning of 'substantial' disadvantage. The point is that that is *not* to be applied in a common sense or literal way because it is defined in the EqA 2010 s 214 Q [1587] as 'more than minor or trivial'. It is thus a term of art which is referred to in the judgment (citing particularly *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090, EAT, see L [396]) as 'the triviality threshold'. The EAT held that the ET had not misunderstood this or erected too high a barrier.

### **Reasonable adjustments; employer knowledge; genuine applicant**

L [405], L [538.02]

*Aecom Ltd v Mallon [2023] EAT 104 (10 August 2023, unreported)*

The claimant, who had been employed previously by the company in Birmingham but dismissed after failing a probationary period, applied for a similar post in London. The process for doing so involved an online application requiring the creation of an account to access the online form and then to give the necessary information and answers on that form in the relevant boxes. The claimant informed the company that he had dyspraxia, gave information as to its effects and asked to make an oral application. When asked for further details of his need for this, he only referred to his difficulties generally. When his application was unsuccessful, he claimed disability discrimination. The employer argued that it had some knowledge of the disability but not sufficient as to the extent of the disability and its effects due to the claimant's answers. However, the ET upheld his claim, holding on this point that the employer should have telephoned him to get this additional information, to make any necessary adjustments to the application process. On the employer's appeal, the EAT under Judge Stout held that this was a permissible approach for the ET to take.

There was, however, a secondary ground of appeal which succeeded. The ET had dealt with his previous experience with that company by holding at the liability stage that the job in London was in a different team and so not likely to pose problems, but at remedy stage it had made inconsistent findings on

## DIVISION L EQUAL OPPORTUNITIES

this. The EAT found that in fact it would have been in a similar team and under the same manager as before. This was of course a question of fact, but of such importance that it rendered the decision on this point perverse. The underlying issue here was whether he was a *genuine* applicant because it is established that if a person is not such, then there is no material disadvantage in being turned down and no discrimination action, even if there is evidence of a discriminatory motive – see **L [538.02]**. This question was remitted to the ET. One straw in the wind here is that there is mention at one point in the judgment that the claimant has brought 60 ET claims based on requirements to complete applications online.

## DIVISION PI PRACTICE AND PROCEDURE

### **Extension of time; not reasonably practicable; effect of mistake**

PI [190]

*The Sports PR Company Ltd v Cardona [2023] EAT 110 (4 August 2023, unreported)*

This case before Judge Auerbach in the EAT demonstrates the relationship between the primary ‘not reasonably practicable’ ground for an extension of time (here, being a wages claim, under the ERA 1996 s 23(4) **Q [647]**) and the power of an ET to decline to accept a claim in the first place under the ET Rules of Procedure SI 2013/1237 Sch 1 r 12 **R [2769]** because of a mistake on the ET1, particularly in relation to the necessary ACAS EC certificate. It also shows a level of indulgence to a litigant in person who makes a reasonable mistake in naming the intended respondent.

The claimant presented a wages claim in respect of her notice period. The ACAS EC certificate that she obtained before doing so correctly identified her employer by its corporate name. However, in box 2 of the ET1, in the space for the name of the employer, she put the name of a director of the respondent. Elsewhere she referred to ‘the company’, to the name of the company, and to the director named in box 2. The EJ rejected the claim under rule 12 because of the discrepancy between the name of the respondent on the ACAS EC certificate and the name given in box 2; she considered that the mistake was not minor and it was not in the interests of justice to overlook it. When informed of her mistake, the claimant confirmed the proper company name of the respondent and the judge treated the claim on reconsideration as validly presented. However, because she considered her original decision to be correct, it was treated as presented only when the error was corrected. As a result it was presented out of time and the claimant had to apply for an extension. At the full merits hearing, the ET decided that the error the claimant had made was reasonable, that it was therefore not reasonably practicable for her to have presented her claim in time, and therefore time was extended. The employer appealed, in effect arguing that there was inconsistency between the r 12 decision and that under s 23(4). However, the EAT dismissed the appeal, holding that there can be an extension on the ground of

the claimant’s reasonable mistake (citing *Adams v British Telecommunications plc* UKEAT/0342/15, [2017] ICR 382); here, the claimant had made what the EAT considered an easy mistake for a litigant in person in box 2 in naming ‘the boss’ as the ‘person against whom you wish to claim’. Moreover, as soon as the claimant had been told of her mistake she had corrected it (and indeed there was then a delay in that being processed at the ET end, leading to the exhaustion of the primary time period). Thus it was within the ET’s power to extend time, even though the claim had originally been rejected for the same mistake.

**Extension of time; just and equitable; no direct evidence of reason for delay**

PI [281.04]

*Owen v Network Rail Infrastructure Ltd [2023] EAT 106 (1 August 2023, unreported)*

The power to grant an extension of time under the EqA 2010 s 123 Q [1535] is a wide one, normally within the factual ambit of the ET, but, as the text states, there has been a difference of opinion at EAT level as to the obligation on the claimant to provide evidence as to the reason for the delay. One view was that there was a legal requirement to do so, failure to do which would mean that an ET had to refuse an extension. The alternative view was that, while such a failure would often prove fatal in practice, there was no actual rule of law to that effect, so that there could be cases where it was still possible for an extension to be granted in the light of other factors. In *Concentrix CVG Intelligent Contact Ltd v Obi* [2022] EAT 149, [2023] IRLR 35 the EAT clearly opted for the latter, holding that failure to show the reason is only a factor, relying on *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] IRLR 1050 (see PI [281.04]). That approach has now been adopted also in the instant case by the EAT under Judge Auerbach, which should settle the matter (if it had not been settled already).

The claimant brought proceedings for sex discrimination occurring over a period. The 25 main events occurred between 2014 and 2017. She raised a grievance which was not completed until she returned from sickness absence in 2019. She brought her ET proceedings in 2020, including a further eight events between 2019 and 2020, largely concerning the grievance procedure. Her problem was that the ET essentially upheld her version of the first set of events, but not the second. They did not therefore qualify as one series, so that her 2020 claim was out of time. She sought an extension of time under s 123, but at the hearing provided no direct evidence as to why she had delayed her claim; there was however other evidence before the ET, including her sickness absence. The ET refused to grant the extension. When she appealed to the EAT, most of her grounds were dismissed, given that the ET had been exercising its wide discretion. However, one ground succeeded, based on a statement at the end of the judgment, namely that the ET had *reluctantly* come to the conclusion that she had not provided evidence on

## DIVISION PI PRACTICE AND PROCEDURE

which the ET could exercise that discretion in her favour. It was held that this showed that the ET had applied a legal rule that such evidence had to come from her. That was now not the law. To be fair to the ET, *Concentrix* had been decided after its hearing of the case, but in conjunction with *Morgan* this was nevertheless an error of law and the matter was remitted to the ET for reconsideration.

### Disclosure; legal privilege

#### PI [505.01]

*University of Dundee v Chakraborty* [2023] CSIH 22, [2023] IRLR 778

The facts and the decision of the EAT in this case are set out at **PI [505.01]**. The decision there was that a report from an investigating officer that had subsequently been altered partly by the employer's lawyers was not privileged, in spite of the employer's argument that its disclosure would allow a comparison to be made with the amended version to show the amendments made pursuant to legal advice. That decision has now been upheld by the Inner House of the Court of Session. In a relatively short judgment, the court held that, although there may be cases where privilege may arise through information identifying legal advice, that was not the case here. For good measure, it also held that any privilege had been waived, either when the legal advice was shared with the investigator or later when it became known that the report had been altered in the light of the advice.

### REFERENCE UPDATE

Bulletin	Case	Reference
540	<i>Higgs v Farmor's School</i>	[2023] IRLR 708, EAT
540	<i>Greasley-Adams v Royal Mail Group Ltd</i>	[2023] IRLR 723, EAT
540	<i>Manning v Walker Crips Investment Management Ltd</i>	[2023] IRLR 729, EAT
541	<i>EasyJet plc v EasyJet European Works Council</i>	[2023] IRLR 782, CA

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