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Harvey on Industrial Relations and Employment Law

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LEGISLATION

Code of practice on dismissal and re-engagement

The Secretary of State's code of practice on dismissal and re-engagement is brought into force on 18 July by the Code of Practice (Dismissal and Re-engagement) Order 2024 SI 2024/708. It will be put into Division S in Issue 318 and into Div AII in Issue 319. In the meantime, there is a direct link to it in the Explanatory Note to the Order.

Paternity leave and bereavement

The Paternity Leave (Bereavement) Act 2024 received Royal Assent on 24 May. It is a one section Act which fills a gap by permitting the taking of paternity leave by a father or partner where the mother has died. There is no requirement of qualifying service. It operates by amending the ERA 1996 ss 80A, 80B and 80D. These give the necessary regulation-making powers and so the details will be contained in such regulations. It is to come into force on a date set by order. In the meantime it will be incorporated into Div Q in Issue 318.

DIVISION AI CATEGORIES OF WORKER

Definition of worker; position of volunteers

AI [54], AI [83.02]; L [535.04]

Groom v Maritim and Coastguard Agency [2024] EAT 7 **(*9 May 2024, unreported*)**

The principal point at issue here was whether a volunteer with the Agency had a contract with it, the first requirement of the 'worker' definition. This was important because he had complained of a refusal to allow him union accompaniment at a disciplinary hearing (eventually leading to his dismissal),

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contrary to the ERelA 1999 ss 10, 11 and 13, a right available to 'workers'. The ET, considering the documentation, held that he was not a worker because of his voluntary status and lack of normal remuneration, even when on duty. The relationship was categorised as 'a genuinely voluntary one'.

The claimant appealed, arguing that there was a contract, at least during times 'on' (a subsidiary argument for an umbrella contract was ruled out because it had not been raised below). Mansfield DHCJ in the EAT upheld the appeal. The ET had misconstrued the documentation; instead, there was a sufficient element of remuneration for actual activities (even if some volunteers did not claim it) to produce a contract during those activities. That finding was substituted by the EAT, with the caveat at the end of the judgment that the question of times between activities had not been determined.

To this extent, the case concentrates on its facts, *but* it is also of importance on the status of volunteers *as such.* This is because at the appeal the Agency argued that volunteers are a *sui generis* category who do not have contracts or qualify as workers *at all.* The judgment considers fully the case law here (mostly arising in the context of discrimination law, see **L [535.04]** ff) and very clearly holds against this view. Like office holders and casual workers generally, there is no magic to the phrase 'volunteer', and whether they qualify as workers (or, indeed employees) has to be resolved by applying normal principles to their specific facts. At [75]–[79] the judgment explains:

> 'The Respondent argued that volunteering is a category of relationship that is "sui generis". A key feature is the absence of intention to enter into a contractual relationship. The Respondent relies on [*South East Sheffield CAB v Grayson* [2004] IRLR 35, EAT] as an example of the sui generis nature of the relationship. A voluntary agreement sits, it is said, outwith those agreements regulated by the law, so as to be binding only in honour, and therefore outwith the scope of s.230 ERA 1996. I reject this argument. There is nothing in the authorities to which I was taken to support the proposition that a volunteering is a sui generis category, nor that as a matter of law a volunteer provides service on a non-contractual basis. *Grayson* does not stand as authority for the proposition that the volunteer relationship is sui generis. In my judgment, Rimer J's remarks at paragraph 12 that a volunteer worker would ordinarily not be an employee or worker appear to be a proposition of fact based upon general experience. It is clear from the following sentences of paragraph 12 that the status of any particular volunteer depends on the circumstances and, in particular the terms (if any) upon which they are engaged. As Elias LJ said in [*X v Mid-Sussex CAB* [2011] IRLR 335, [2011] ICR 460, CA] (paragraph 3): "Volunteers come in many shapes and sizes, and it cannot be assumed that all will have the same status in law." In each of the cases to which I have referred the court analysed the nature of relationship to establish whether there was a contract between the parties. In most of the cases referred to there was held to be no contract. However, that was not because the claimant was a volunteer per se, but because examination

of the parties' obligations (or lack of them) showed there was no contract. [*Murray v Newham CAB* [2001] ICR 708, EAT] is an example of a case where the analysis led to the opposite conclusion, i.e. that there was a contract.'

DIVISION AII CONTRACTS OF EMPLOYMENT

Express terms; generally; benefits provided by third parties

AII [23], AII [420.03]

Adekoya v Heathrow Express Operating Co Ltd [2024] EAT 72 (16 April 2024, unreported)

The text gives the decision in *Amdocs Systems Ltd v Langton* [2022] EWCA Civ 1027 as a warning to employers who provide contractual benefits through a third party that if they want to tie the continuation of those benefits to the continued involvement of that third party, it will be necessary to spell that out clearly. If not, a court or tribunal is likely to apply a *contra proferentem* approach and hold that what may or may not have happened between the employer and the third party does *not* impact on the employee's contract which is purely with the employer. The origin of this lay several years ago in the litigation over permanent health insurance but *Amdocs* extended it to (insurance-backed) long-term sickness pay generally. In the instant case before Judge Auerbach in the EAT (whose judgment in *Amdocs* was adopted by the Court of Appeal) the question was the continued applicability of a free travel concession. This was part of the relevant employees' contracts (after a certain period, which they had served). It was in fact underwritten by another rail company. When these employees were made redundant, the employer maintained that they could not retain the benefit because, prior to that, the other company had withdrawn from the arrangement, thus terminating the right for the employees. They sued for breach of contract. They lost before the ET which upheld the employer's argument, but they succeeded before the EAT, where *Amdocs* was applied and it was held that there was nothing to suggest that the employees' own contracts had been varied to remove the right. The employer's underwriting agreement may have gone, but the employees' right subsisted. One significant point in the judgment is that it was established that the employees *knew* of the third party involvement but that was *not* enough to involve this (and its continuance) in their own contracts. Caveat employer.

DIVISION CIII WHISTLEBLOWING

Whistleblowing detriment; establishing the reason in an organisation

CIII [98]

***First Great Western Ltd v Moussa [2024] EAT 82* (*24 May 2024, unreported*)**

The question of the responsibility of an organisation for whistleblowing detriment under the ERA 1996 s 47B **Q [671.03]** (and indeed for other heads of detriment) is getting more difficult. Last month's **Bulletin 550** covered the case of *William v Lewisham and Greenwich NHS Trust* [2024] EAT 58 (24 April 2024, unreported) where Bourne J in the EAT held that the extension of liability of an organisation to cases where the decision-making manager was ignorant of the whistleblowing, but was fed false information by another manager who was motivated by that whistleblowing (a '*Jhuti* case'), only applies to whistleblowing *dismissal* under s 103A; it does not apply to s 47B detriment because the latter contains the vicarious liability provisions in sub-ss (1A)–(1E) (added in 2013) under which the 'Iago' can be sued anyway in such a case. That restriction was capable of causing a rustle in the reeds of employment law by itself, but it has now been followed by the instant decision of Kerr J in the EAT adding a further complication, this time possibly extending organisational liability.

The claimant alleged instances of detriment by several managers, which he said could be traced back seven years to when he had made certain disclosures and been dismissed but then reinstated during ET proceedings. He alleged that he had experienced managerial hostility and an underlying negative attitude to him, coming from the management's 'collective memory' of his past. What made it at least look like a *Jhuti* case was that one of the managers who had imposed a detriment did not know of this past. The ET upheld his claim under s 47B, holding that he had been subjected to a detriment by 'the employer'. Its conclusion was that:

> '… we find that the [employer] did subject the claimant to detriments on the grounds of the protected disclosures and protected acts. We do not suggest that there was a conspiracy among the protagonists but we find that the myriad examples of unfairness and less favourable treatment cannot simply be explained by a string of unfortunate errors. In our view, they show the existence of an underlying negative attitude towards the claimant shared and understood by management …'

On appeal, the EAT held that the ET were entitled to come to this conclusion.

As an affirmation of the primacy of an ET on facts, this in itself explains the decision, but it is the reasoning used that adds to the nuances of these cases. The employer has argued that the ET should have applied the reasoning in *William* (which was available to this EAT) in following *Malik v Centros Securities plc* EAT/0100/17 (17 January 2028, unreported) and held that, as a

Jhuti case, it was only the motivation of the ultimate decision-taker that counted; the ET had erred in adopting a 'composite approach' looking at the overall machinations within the organisation. However, this was disapproved. The judgment in fact disapproves of what it sees as over-analysis of the whole question, seeking to establish rules and categories in a series of cases not internally coherent, and for example denies that this was simply a *Jhuti* case. Instead, the judgment adopts a 'principled approach' applying the wording of the section. Here, the ET had done so in a rational manner and held on the facts that (although two managers had also been joined but unsuccessfully) it was overall 'the employer' which had imposed the detriments.

There is, however, more to this in the reasoning, as a matter of interpretation of s 47B. In *William* the EAT had used the insertion of vicarious liability in sub-ss (1A)–(1E) to justify going back to the purist approach of looking only at the motivation of the decision-maker. Here, the judgment in effect reverses that argument by holding that vicarious liability was indeed *added*, but as a secondary ground; it did *not* remove what it calls 'direct liability' under sub-s (1) which still asks if 'the employer' was responsible, ie the approach that the ET had taken in the light of the claimant's allegations of general managerial hostility based on his previous whistleblowing. The end result was that:

> 'A cause of action under section 47B(1) can in principle exist without an individual being motivated by a relevant protected disclosure.'

Interestingly, the judgment cites another case capable of backing this approach, namely *Western Union Payment Services Ltd v Anastasiou* UKEAT/0135/13 (21 February 2014, unreported) where at [74] Judge Eady (as she then was) spoke obiter of possible organisational liability due to 'organisational culture and chain of command'. To add complications further, however, that part of the judgment was dissented from in *Malik*, but prayed in aid in the instant case. It can be seen from all of this that the picture is now a complex one and, to state the obvious, we do now need a Court of Appeal decision on it.

DIVISION DI UNFAIR DISMISSAL

Applying ERA 1996 s 98(4); the range test; taking matters into consideration

DI [975]

Vaultex UK Ltd v Bialas [2024] IRLR 495, EAT

The text at **DI [975]** states that in applying the range test and whether dismissal was a reasonable sanction, the question is not whether some lesser sanction would have been appropriate, but whether the dismissal decided on was within the range. This decision of Judge Auerbach in the EAT adds an important point to that, namely that if the employee raises matters they say should have led to a lesser penalty, the question is whether the employer took those matters into consideration; if it did so and still decided on dismissal, it will be difficult to show that it acted outside the range; an ET may consider

that result harsh, but to impugn it and find unfair dismissal will risk a finding on appeal that the ET impermissibly substituted its own view.

The claimant posted a joke from a website which, though apparently aimed at people not being racist (by invoking the example of Mario the Plumber), used some objectionable language about black men, Mexicans and Jews. The employer, which operated a zero tolerance policy on the posting of discriminatory language, disciplined and dismissed him. On his claim for unfair dismissal , the ET accepted that the joke was racist but found that he had not realised that. It took into account that he had apologised fully and asked for retraining and found that in those circumstances a lesser penalty of a final written warning was appropriate and dismissal unfair. The EAT allowed the employer's appeal. The judgment draws an important distinction: on the one hand, if the employee at the disciplinary stage raises matters of exculpation or mitigation (such as the apology and training request here) arguing for a lesser penalty and the employer does not consider them fairly, then an ET may decide that that affects overall fairness, *but* on the other hand if the employer *does* consider them fairly and still decides to dismiss then that does not necessarily make the dismissal unfair. Here, in substituting a finding of fair dismissal, the EAT held that on these facts (including the policy) an ET properly applying the law could only have found the dismissal within the range, even if it felt the result harsh.

Capability dismissal; alternative employment; to be considered by ET itself if necessary

DI [1274], L [403.01]

***Bugden v Royal Mail Group Ltd [2024] EAT 80* (*28 May 2024, unreported*)**

The issue in this case before Gullick DHCJ in the EAT was the extent to which an ET should consider the possibility of alternative employment/ reassignment off its own bat, even if the claimant has not specifically raised it. One way in which this has been put recently is whether as an issue it 'shouts out' for consideration. The results in the case show a difference in emphasis between unfair dismissal and disability discrimination laws.

The claimant had had considerable health-related absences. The employer eventually decided to activate its absence policy, as a result of which the claimant was dismissed. He claimed disability discrimination (under the EqA 2010 s 20 on failure to make reasonable adjustments) and unfair dismissal (on the basis of medical incapability). He did so as a litigant in person; his claims were not fully formed and they were organised into a list of issues by the ET. At no point did he raise the question whether he should have been considered for alternative employment, in relation to either claim. The ET rejected his claims.

On appeal, the EAT held that, while reasonable adjustments do not have to be fully set out by a claimant, there should be some indication of the measures envisaged (applying *Project Management Institute v Latif* [2007]

IRLR 579, EAT and *Noor v Foreign and Commonwealth Office* UKEAT/0470/10, [2011] ICR 695, EAT, see **L [403.01]**). That was not the case here on the facts and so this part of the appeal failed. However, the EAT went on to uphold the appeal in relation to unfair dismissal. Citing Underhill LJ's judgment in *Small v Shrewsbury and Telford NHS Trust* [2017] EWCA Civ 882, [2017] IRLR 889 on the question of areas of unfair dismissal law generally that are so integral as to be considered by the ET itself if necessary, the judgment here adds alternative employment in an incapability case to that pantheon. At [43] it states:

> '… in a case such as the Claimant's the question of whether the employer has considered redeployment as an alternative to dismissal, and the impact of that on the reasonableness of the decision to dismiss, is one that an Employment Tribunal can be expected to consider as a matter of course when addressing the statutory question of whether the employer's decision to dismiss was reasonable in the circumstances. In omitting to consider that question in this case, even though the parties had not specifically raised it, the Employment Tribunal erred in law.'

DIVISION E REDUNDANCY

Collective redundancies; proposing redundancies; timing of consultation

E [883], E [1063]

JLOG v Resorts Mallorca Hotels International SL C-589/22, [2024] IRLR 524, ECJ

For some time the controversy over a possible inconsistency between EU law on an employer 'contemplating' collective redundancies and UK law on it 'proposing' collective redundancies (as the trigger for consultation) seemed interminable, but the approach taken in the text is now that the ECJ decision in *Atavan Erityisdojen AEK v Fujitsu Siemens Computers* C-44/08, [2009] IRLR 944 has gone a long way to resolving it by moving EU law closer to the domestic approach (see **E [883]**). The instant decision of the ECJ may add a nuance to this in relation to the *numbers* required to trigger consultation, though it may be that there is a simpler answer to the actual question raised by the application of another part of domestic law.

The employer considered that redundancies might be needed, in numbers exceeding the threshold for consultation in Spanish law. However, by the time it came to action these there had been a number of volunteers for redundancy that took the overall number down below that threshold. On that basis the employer argued that the obligation did not arise. The Spanish court referred the matter to the ECJ which held that the Directive must be interpreted as meaning that the consultation obligation arises at the time when the employer, in the context of a restructuring plan, contemplates or plans a reduction of employment positions, the number of which may exceed those fixed in art 1(1)(a) of that Directive, and not when, after having adopted measures involving the reduction of that number, the employer became

certain that it would in fact have to dismiss a number of workers greater than those fixed by the latter provision. On that basis, the employer should have started consultations at that earlier stage.

This looks like an important development on this specific aspect of consultation law, but that is subject to two caveats:

(1) as a decision of the ECJ it is now not binding, though it may be that a domestic court or tribunal might find it persuasive generally; *but*

(2) it may be that in its actual context of the effect of redundancy volunteers there is a simpler way to reach the same conclusion – the ECJ decision is clearly predicated on those volunteers no longer counting by the second stage *but* it is established in domestic law that such volunteers *do* count; this was established in *Optare Group Ltd v TGWU* [2007] IRLR 931, EAT (see **E [920]**) and on that basis they would continue to count anyway.

DIVISION L EQUALITY

Religion or belief; nexus between the belief and the alleged manifestation; the reason for less favourable treatment

L [212.06], L [270]

Omooba v Michael Garrett Associates Ltd [2024] IRLR 440, EAT

This case was widely reported in the press and is considered here primarily for a particularly pointed comment on it by the learned editor of the IRLR, in the context of continuing controversies over culture wars, media storms about individuals and concerns over freedom of expression. The claimant is an actor who agreed to take on a role as a lesbian character in a play. Another actor, knowing her Christian beliefs and a Facebook post by her five years earlier describing homosexuality as a sin, accused her of hypocrisy, causing a social media storm. As a result, the theatre terminated its arrangement with her, as did her agent. She sued both for religious belief discrimination but lost in the ET. The EAT under Eady P dismissed her appeal. The basis for this was that the ET were entitled to come to the conclusion (on the key question of the reason for the admittedly less favourable treatment) that, while her belief was the background for the actions of the theatre and the agent, the operative reason was, in the case of the theatre, the adverse publicity from the media storm and its effect on the cast, the audience, the producers and the commercial viability of the production and, in the case of the agent, the commercial risk to his business. It has to be said that there was another aspect of the facts that weighed against the claimant, who accepted that it was only at a late stage that she had actually read the play and she would in any case have turned it down (which was referred to in the judgment as having 'detonated' her claim). However, it is the wider implications of this acceptance of belief as merely background and the potential of this to undermine legal protection in the face of online disapproval of an individual that concerns the IRLR editor who comments that this decision:

> 'seemingly offers a way to sidestep [the previous legal framework] altogether by arguing that the manifestation was merely the context for the employer's decision rather than part of the reason for it. That left the social media storm and its consequences as the operative reason for termination, but does the Equality Act 2010, correctly interpreted, allow such a separation where the social media storm itself was about the claimant's religious belief? If the claimant's belief had not been manifested, there is no reason to think that she would have been dismissed. Employers and service providers face increasing pressure from a wide variety of protest groups challenging freedom of speech. The EAT's restrictive interpretation in *Omooba* may weaken the position of workers caught up in the cross fire.'

Discrimination arising out of disability; causation

L [374.07]

***Bodis v Lindfield Christian Care Home Ltd [2024] EAT 65* (*1 May 2024, unreported*)**

The leading case of *Pnaiser v NHS England* [2016] IRLR 170, EAT on the EqA 2010 s 15 **Q [1468]** is considered at **L [374.07]** where the guidance given by Simler P is set out in full. The instant decision of Judge Tayler in the EAT expands on the element concerning the causal requirement in the section and deprecates any attempt to narrow it or to subject it to paraphrasing.

The claimant suffered from depression and anxiety which constituted a disability. Following a series of annoying events in her office which was traced to her, she was investigated; at this meeting her answers were short and evasive, which led to her being subject to disciplinary proceedings culminating in her dismissal. She brought proceedings for unfair dismissal and disability-related discrimination. The ET dismissed both. With regard to the latter, based on the decision to take the disciplinary action, it accepted that her answers had influenced the decision but were only a 'trivial' cause, not the effective one, and so her detriment did not 'arise' from her disability and on that basis it rejected the claim.

The EAT upheld this part of her appeal. Applying the established law as in *Pnaiser*, it is enough if something is *an* effective cause, thus permitting multiple causes. At [44] the judgment states:

> 'The statutory test is that of whether the unfavourable treatment was *because* of something arising in consequence of disability; there is no statutory concept of "causal triviality"; nor do I consider it assists in analysing the statutory provisions. To introduce a concept of causal triviality ignores the injunction of Lord Nicholls that "subtle distinctions, are better avoided so far as possible". The last thing that is needed is another statutory paraphrase. The key question is whether the unfavourable treatment is because of the something arising in consequence of disability, which the authorities clearly establish does not require that the treatment be solely or principally because of the

> something, but only that the something is of sufficient causal significance that the unfavourable treatment can be said to be because of it.'

Overall, however, her appeal was dismissed because the ET had gone on to hold that in any case the employer had shown justification for its actions. The appeal against the rejection of the unfair dismissal claim was also dismissed, for similar reasons.

Prohibited conduct; liability for agents

L [501]

Anderson v CAE Crewing Services Ltd [2024] EAT 78 (22 May 2024, unreported)

It is well established that when the EqA 2010 s 109(2) **Q [1528]** refers to liability for 'agents', this means agency as understood at common law (see *Kemeh v Ministry of Defence* [2014] IRLR 730, [2014] ICR 625, CA and *UNITE the Union v Nailard* [2018] EWCA Civ 1203, [2018] IRLR 730, considered at **L [501.01]**, **L [502]**). The instant decision of Judge Tayler in the EAT adds a useful point to this, namely that the test is not necessarily the same as that for vicarious liability in tort, and so the fact that the individual in question was an independent contractor does not in itself determine whether they come within the subsection as an agent.

The claimant was disabled by reason of bipolar condition and heart problems. She sought to bring claims of disability discrimination against her employer based on the acts/omissions of two doctors used by it as aviation medical examiners (in charge of certain necessary certification). It was accepted that they were not the employer's employees, so the case was based on their being agents under s 109(2). The ET held that they were not, relying on the decision in *Various Claimants v Barclays Bank plc* [2010] UKSC 29, [2010] AC 973 that in similar circumstances the bank was not vicariously liable for doctors it had used because they were genuinely individual contractors. The EAT upheld the claimant's appeal. The ET had erred in treating the s 109 point as akin to vicarious liability and so *Barclays Bank* was not determinative. The judgment cites passages in *Bowstead and Reynolds on Agency* to come to the conclusion therein contained that in the law of agency an agent *may or may not* be an independent contractor. The question is a wider one than that in law; the judgment does add that the difference between using an in-house doctor and one in private practice may be relevant, that is as a matter of fact, not law.

Prohibited conduct; liability of employees

L [508]

Baldwin v Cleves School [2024] EAT 66 (3 May 2024, unreported)

Much of this case is about its facts, but it does contain one potentially important point of interpretation of the EqA 2010 s 110 **Q [1528]** on the liability of fellow employees in a discrimination case.

The claimant brought proceedings against the school that was the employer, and also against two named individuals. The ET found the school vicariously liable under s 109 for their acts. However, it then found that they were *not* liable individually under s 110 because in its view they had been acting in a misguided way to deal with a difficult situation. The claimant appealed against this second finding. The EAT under Ford DHCJ held that this was a misreading of s 110. The established law is that under that section all that must be shown is that: (1) the individual respondent was an employee; (2) they had done a discriminatory act in the course of employment; and (3) none of the specific exceptions in the section apply. Once these are shown, that respondent is liable, without more ado. There is no power for an ET to go behind that and look at motivation or mitigation in order to negate that liability.

Two points are ventured. The first is that there is a parallel here with the basic law on direct discrimination where again, once its legal elements are shown, there is no defence of justification or good motives. The second is that the historical precedents for this ET decision were not good – the last serious attempt to establish a general dispensing power was by James II and things did not turn out too well for him.

Contract workers; nature of the protection

L [724], L [724.01]

Boohene v The Royal Parks Ltd [2024] EWCA Civ 583

The decision of the EAT in this case is considered at **L [724]**. It concerned the contracting out of certain manual work by the respondent (RPL) to a supplier Vinci. RPL paid its direct employees the London Living Wage (LLW); Vinci gave it two cost options in its tender, whereby it would or would not pay its own employees the LLW too, and RPL opted for the non-LLW option. Employees of Vinci sued RPL for indirect race discrimination, on the basis that RPL was the 'principal' under the EqA 2010 s 41 **Q [1483]** and had contravened sub-ss (1)(a) and (d) (i e by discriminating against them as to the terms on which it allowed the workers to do the work and by subjecting them to other detriments). The ET upheld their claims, holding that s 41 applied here and that they had established a valid racial comparison between direct workers and contract workers. On appeal by RPL, the EAT upheld the finding that s 41 applied, on the basis that under sub-s (1)(a) it was RPL that was directing or effectively dictating the allegedly discriminatory wages paid by Vinci. In fact, the EAT went on to allow RPL's appeal on the separate ground that the comparison the employees had drawn was incomplete (see **L [724.01]**).

The Court of Appeal have dismissed the employees' further appeals. They agreed on the comparison point, but more importantly they disagreed with the EAT on the applicability of s 41 in the first place. Giving the judgment, Underhill LJ considered the various judgments on this issue in *Allonby v Accrington and Rossendale College* [2001] EWCA Civ 529, [2001] IRLR 364, [2001] ICR 1189, which are adverted to in **L [724]**. He draws from two of the

judgments that s 41 is not meant to apply to contractual terms between the supplier and its own employees; any challenge to these must be brought under s 39 ('Employees and applicants'). The EAT had tried to circumvent this by looking 'in the real world' at whether the principal had determined the wages of the supplier's workers, but this gloss was disapproved. At [66] the judgment sums this up:

> 'On the face of it, therefore, the Claimants can have no claim against RPL under section 41, because the discrimination which they allege relates to the remuneration payable under their contracts with Vinci and has nothing directly to do with the principal-worker relationship. Translating that specifically into the terms of heads (a) and (d):
>
> — As to (a), the only natural reading of the phrase "terms on which the principal allows the worker to do the work" is that it is concerned with a stipulation imposed by [the principal] on [the worker] as a condition of [the worker] being allowed by [the principal] to do the work, and not with any stipulation imposed by [the principal] on [the supplier]. [Counsel] submitted that we should adopt a broad construction of the word "allow"; but it is in my view artificial to the point of impossibility to describe the payment of the LLW by [the supplier] as a term on which Royal Parks allows the Claimants to work.
>
> — As to (d), it is Vinci, as their employer, and not RPL, who has subjected the Claimants to the detriment of being paid less than the LLW.'

DIVISION PI PRACTICE AND PROCEDURE

Striking out; abuse of process; seeking to re-litigate a point

PI [636]

Pady ('The FDA Claimants') v HMRC [2024] EAT 73 (20-May 2024, unreported)

The text at **PI [636]** states that the mere fact that a party has been involved in previous proceedings about a matter does not in itself justify a strike-out on the basis of abuse of process. That point is specifically mentioned in Eady P's judgment in this case, but the facts and result are a good example of when such a strike-out will be justified.

There were challenges brought by the PCSU to the Civil Service redundancy scheme on the grounds of age discrimination, in the nature of group actions. The President decided to take these together and resolve the key issue of the government departments' defence of justification at a preliminary hearing. Shortly before this, other group claims were brought by the present claimants with the backing of the FDA, making the same arguments. They were informed of the impending hearing; they sent lawyers to attend but did not take any further part. At the hearing the justification defence was upheld and

the sample claims dismissed. In spite of this, the FDA claimants sought to continue with their claims, arguing that they had other expert evidence on the question of proportionality. On the respondents' application for a strike-out, the ET held that the continuing claims were an abuse of process and so were struck out under ET Rules SI 2013/1237 Sch 1 r 37 **R [2794]**.

The EAT dismissed the claimants' appeals. It was true that such a further claim is not always an abuse, *but* on the facts here the ET had come to a proper conclusion that that was the case here. These claimants had full knowledge of the preliminary hearing and could if they wished have taken part. Moreover, the ET had taken into account what they claimed was new evidence and found that: (1) it could have been adduced earlier; and (2) in any event it did not have any significant effect on the ET's decision on justification. The rule against re-litigation is based on strong policy factors about finality of litigation; to have allowed it here would have subjected the respondents to repeat litigation and have brought the course of justice into disrepute. In the course of her judgment, the President relied heavily on the leading employment law case on this, *Ashmore v British Coal Corpn* [1990] IRLR 283, [1990] ICR 485, CA which is considered fully at **PI [637]** ff, and also quoted at length from the more recent professional negligence case of *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7, [2022] Ch 55, on the same point in a common law context.

Costs orders; procedure; when to be made

PI [1048.02]

***Ireland v University College London [2024] EAT 68* (*3 May 2024, unreported*)**

The text at **PI [1048.02]** makes the point that (apart from a longstop time limit) the ET Rules do not prescribe any particular procedure to be adopted by an ET when making a costs order, or *at what stage in proceedings* such an order should be made. That point is well illustrated by this decision of Eady P in the EAT.

The claimant having lost at the full liability hearing, the ET went straight on to consider the successful respondent's application for a costs order. This was made, in the sum of £14k. The claimant appealed against this on several grounds, but the principal one was that it had been wrong and unfair to proceed in this way, rather than at a later, separate stage. The EAT rejected the appeal. The judgment cites para 8 of Guidance Note 7 in the Presidential Guidance (see **PI [1048.02]**) which states that it is actually preferable in these circumstances to go straight on to consider an application for an order, in the light of the overriding objectives, including to save the time and expense of a subsequent hearing. Presumably there may be cases where a paying party can show unfairness on the particular facts, but that was not the case here for four reasons: (1) the ET had in fact adjourned for an hour before proceeding to the application and there were no time pressures on the day; (2) it had already made a deposit order, with its specific warning as to possible exposure to costs; (3) the respondent had made plain its intention to make an

application if it won; and (4) the claimant could not point to any further arguments that he would have wished to make which had not been covered in the liability hearing.

REFERENCE UPDATE

Bulletin	Case	Reference
545	*Williams v Newport City Council*	[2024] IRLR 487, EAT
548	*Martin v Board of Governors of St Francis Xavier College*	[2024] IRLR 472, EAT
549	*Pipe v Coventry University Higher Education Group*	[2024] IRLR 514, CA

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