Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

Employment (Allocation of Tips) Act 2013 and the Code of Practice on Tips brought into force

The Employment (Allocation of Tips) Act 2023 is brought into force on 1 October 2024 by SI 2024/829, and the Code of Practice on Tips made by the Secretary of State under the ERA 1996 s 27P **Q [651.16]** and passed by Parliament in May 2024 is brought into force on the same date by SI 2024/831. These changes will be incorporated into Divs Q and S in Issue 319.

DIVISION AI CATEGORIES OF WORKER

Part-time workers; less favourable treatment; pro rata temporis; whether 'solely' due

AI [145], AI [146.02]

***Augustine v Data Cars Ltd [2024] EAT 117* (*15 July 2024, unreported*)**

This decision of the EAT under Eady P shows the importance of the pro rata principle, but is of greater relevance in being the latest contribution to the difficult question as to whether any less favourable treatment must be 'solely' because of the part-time status. On the latter point, the EAT felt obliged to follow the line set by the Scottish Court of Session (IH), even though free from that authority it would have decided to the contrary.

The claimant was a taxi driver operating on a part-time basis for the respondent. He had to pay a flat-rate fee of £148 per shift to do so, which was the same as full-timers. Perhaps not surprisingly, he complained that this was unfavourable treatment as a part-timer. However, the ET rejected his claim

under the Part-time (Prevention of Less Favourable Treatment) Workers Regulations 2000 (SI 2000/1551 reg 5 **R [1292]** for three reasons:

(1) the flat-rate fee levied on everyone was not less favourable treatment;

(2) if it was, the respondent had not intended to treat him less favourably;

(3) in any event, any less favourable treatment had not been *solely* because of his part-time status, there being other factors at play involving the place of the fee in the respondent's business model.

On his appeal, the EAT held in relation to these three grounds:

(1) the ET had erred in finding no less favourable treatment, which *was* shown on a proper application of the pro rata principle; this established that the fee was higher in his case as a *proportion* of the hours worked, leading to a lower rate of take home pay than a full timer (*BA plc v Pinaud* [2018] EWCA Civ 2427, [2019] IRLR 144 (**AI [145]**) applied);

(2) the ET had erred in taking into consideration the intent of the respondent (*R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] IRLR 136 applied);

(3) however, the ET had not erred in holding that the claim failed because on the facts found the part-time status was not solely the reason for the treatment. The appeal therefore failed.

It is on this last point that the judgment becomes a complex one. Had the matter been open, the EAT would have followed earlier (English) EAT cases in holding that, although the backing directive uses that word, it need not be imported into domestic law because: (i) it is open to domestic law to go beyond the directive; (ii) not to import it enhances the protection intended generally by the directive; and (iii) the approach generally in domestic law here and in discrimination and whistleblowing law is to look for 'an effective cause', not the sole one. *However,* the problem then became the decision of the Court of Session in *McMenemy v Capita Business Services Ltd* [2007] CSIH 25, [2007] IRLR 400 which clearly approved the application of the 'solely' requirement (see **AI [146.02]**), as had subsequent decisions of the EAT in Scotland. The judgment in the instant case contains a detailed (and well worth reading) consideration of the problems of precedent that have long laid relatively latent here (the EAT being one court north and south of the Tweed, but English courts not being formally bound by decisions of the Court of Session). If it had just been a case of conflicting EAT decisions, the EAT here would have felt able to follow the English EAT cases *not* applying 'solely', but the weight of authority generally is that, while not bound to follow the Court of Session, an EAT in England should do so in the interests of pragmatism and certainty. At [82] the judgment concludes:

> 'Although the decision in *McMenemy* does not bind us as a matter of law, we consider there is a compelling case for not departing from what has been acknowledged to be good practice, whereby the EAT – which has a Britain-wide jurisdiction – should ordinarily follow relevant decisions of higher Courts within Great Britain, notwithstanding that

the doctrine of precedent would not normally apply. Where, as here, the decision in question relates to a legislative protection that extends throughout Great Britain, and where there is no separate question as to the application of Scottish law, or the law of England and Wales, there is a legitimate public interest in consistency of approach. The fact that the issue raised by the present appeal has come before us by way of an appeal from an English ET is a matter of chance; as the case-law makes clear, this is an issue that has arisen (not infrequently) in cases both north and south of the England/Scotland border. In these circumstances, we consider that the appropriate course is to approach this appeal on the basis that the decision in *McMenemy* is binding upon us.'

DIVISION BI PAY

National minimum wage; sums for the employer's own use and benefit; enforcement by worker

BI [202.05], BI [246.01]

***Commissioners for Revenue and Customs v Lees of Scotland Ltd [2024] EAT 120* (*23 July 2024, unreported*)**

Fiat justitia et ruat coelum, as they always say in the pubs here in East Suffolk. This ancient injunction (let justice be done though the heavens fall) is usually invoked in major cases on high policy, but it could equally be relevant here in this case before Judge Clarke in the EAT applying a stringent approach to payment of the NMW which, it was accepted, hit an employer with no evil intent and resulted in the closure of a scheme meant to benefit the workers (none of whom, as far as one can see from the judgment, had objected to it). It concerned the interpretation of the NMW Regulations 2015 SI 2015/621 reg 12 **R [3193]** (sums for the employer's own use and benefit) and s 17 of the NMW Act 1998 **Q [1046]** (monetary remedy; worker entitled to additional remuneration). It is a lesson for any employers with a similar scheme, though it does suggest a way out.

The company operated a savings scheme under which its workers voluntarily paid contributions into the fund, which were deducted from their wages, to help them save for holidays. The scheme was meant to be entirely for the workers' benefit. The company retained those deducted sums in its main trading account, and paid them upon request to its workers so that they had a convenient lump sum to pay for a holiday. However, in the case of some of its workers, the deductions pushed their wages below the national minimum wage. HMRC served a notice of underpayment on the company requiring it to pay arrears of the national minimum wage to the workers in question. The company appealed the notice to the ET, which had to decide whether these deductions were for the company's 'own use and benefit' for the purposes of reg 12(1). It decided they were not, and rescinded the notice, focussing on the intent of the scheme and a desire to interpret the regulation to avoid penalising an employer without blame.

HMRC appealed to the EAT which held that the ET had erred in law in its interpretation of reg 12(1). It held that that interpretation was contrary to the

two previous authorities of *Leisure Employment Services Ltd v Commrs for HMRC* [2007] EWCA Civ 92, [2007] IRLR 450 and *Revenue and Customs Commrs v Middlesbrough Football and Athletics Company* UKEAT/0234/19, [2020] ICR 1404, both of which are considered at length at **BI [202.06]** ff. The principal point taken here from the former in particular was that the legislation is to be applied in the light of the policy to ensure payment for the lowest paid and that this is best ensured by having 'broad and simple rules' to avoid 'endless debate'. That meant *not* taking into account whether or not there was a benign motive; the aim of catching bad employers had, if necessary, the result of also catching good ones. The conclusion therefore was that because the deductions were held in the company's main trading account, they were at its disposal and were for its use and benefit and so fell foul of reg 12. At [85] the judgment states:

> 'It may be of scant comfort to the company for me to say that the purpose of the holiday fund – encouraging its workers to save – was entirely laudable. There can be no suggestion that the savings scheme offended the other policy aim of the NMW legislation, namely to prevent undercutting of competitors. I recognise that the company may not appreciate a judgment being reached on the basis that other employers might act less honourably than it has done. Nevertheless, HMRC's appeal on the first ground succeeds.'

That then led on to the second question, as to what had to be repaid to the workers. This is governed by s 17 which focuses on repaying the necessary 'additional remuneration'. Again, the ET had sought to soften the blow by holding that, if it was wrong on the first point, the fact that the workers could at any time reclaim their amounts in the scheme meant that they had not lost out and the employer did not have to repay this amount as part of the NMW. However, the EAT held that it had erred again on this. Reclamation of these amounts did not in law amount to payment of arrears, because the legislation does not recognise any concept of deferred wages and to try to introduce it would again breach the idea of simple rules. Thus, the employer had to pay the outstanding NMW amounts as well as pay back the (same) amount owed from the scheme (the figure mentioned at one point being £81,000). The EAT recognised the unfairness of this and that it resulted in a double payment windfall for the workers, but again that was the price for taking what Elias J in the EAT in *Leisure Employment Services* had described as a 'strong line' to NMW enforcement.

At the ET hearing HMRC had conceded that if the employer had put the moneys deducted into a separate account of its own, that would have been lawful. However, at the EAT hearing that was refined to a concession that it would only be lawful if the moneys were put into *an account run by a third party* (such as a building society or credit union). This all came too late for the instant case because the end result was that the employer (not surprisingly) shut down the whole scheme.

DIVISION DI UNFAIR DISMISSAL

Compensatory award; contributory fault; whether nil amount possible

DI [2727]

***N Notaro Homes Ltd v Keirle [2024] EAT 122* (*31 July 2024, unreported*)**

When the ERA 1996 s 123(6) **Q [747]** says that in a case of contributory fault on the employee's part the tribunal 'shall reduce the amount of the compensatory award by such proportion as it considers just and equitable …', does that mean that it must make *some* reduction, or only that it must *consider* a reduction. If the latter, that opens the way to a reduction of *nil* on the basis that that would be just and equitable. After a detailed consideration of such authority as there is on this point, Judge Auerbach in the EAT in this case has held that it is indeed the latter and has upheld an ET decision to make no reduction.

The claimant was dismissed ostensibly because of certain social media posts he had made, but the ET found that this was a pretext (the real reason having been whistleblowing) and on that basis found the dismissal unfair. It also found that the posts had indeed been culpable or blameworthy conduct which had caused or contributed to the dismissal, *but* that it was not just and equitable to make any reduction.

The employers appealed, arguing that having found the culpable conduct the ET should have made some reduction. Dismissing the appeal, the EAT considered both the wording of s 123(6) (and its legislative history) and the existing case law, in particular *Warrilow v Robert Walker Ltd* [1984] IRLR 344, EAT, *Parker Foundry Ltd v Slack* [1992] IRLR 11, [1992] ICR 302, CA and *Optikinetics Ltd v Whooley* [1999] ICR 984, EAT. These three cases can be read as siding with the 'must be some reduction' school but the judgment points out that none of them were directly on the point. Instead, it focuses on the decision of Simler P (as she then was) in *British Gas Trading Ltd v Price* UKEAT/0326/15 (27 March 2016, unreported) where she said that, in the normal course of events, once culpable conduct is found there will be a reduction of sorts (the just and equitable element then relating to its amount) but she added that that was not a legal requirement and that there could be an unusual case where the ET could lawfully decide on no reduction. After holding that there was no binding authority against a nil reduction and that it was desirable to follow the (admittedly obiter) view in *Price*, the judgment then considers the language and history of s 123(6) and holds that neither of those require a mandatory reduction either.

This is an important decision addressing this relatively obscure but potentially important point of interpretation. Hitherto the emphasis in the case law has been on the opposite question as to whether there can be a 100% reduction (see **DI [2747]**), but we now have a direct authority on the opposite end of the just and equitable scale.

DIVISION F TRANSFER OF UNDERTAKINGS

Relevant transfer; business transfer; service provision change

F [32], F [67]

***Mansfield Care Ltd v Newman [2024] EAT 128* (*31 July 2024, unreported*)**

In *Eddie Stobart Ltd v Moreman* [2012] IRLR 356, [2012] ICR 919, EAT, at [19], Underhill P (as he then was) said that '… there is no rule that the natural meaning of the language of the [TUPE] Regulations must be stretched in order to achieve transfer in as many situations as possible'. Arguably, this decision of Eady P in the EAT is an example of this. The case also concerned employment status and alleged failure to consult on redundancies, but it is the TUPE point that is particularly worth noting.

A care home looking after both privately and council-funded residents was in the process of winding down when that process was hastened by an unfavourable regulatory inspection. The owner entered negotiations with another provider, as a result of which the private funders went to one of its homes and the council funders to another. This was accompanied by some rather inconclusive discussions about the existing staff at the original home. The ET, in trying to pick the bones of all of this, decided that there had been a reg 3(1)(a) 'business transfer' in relation to the private funders and a reg 3(1)(b) 'service provision change' in relation to the council funders. However, another view might be that this was just a case of residents moving to a different home, irrespective of the nature of the respective businesses (and so no transfer).

On appeal to the EAT, the question was whether the ET had applied the law properly in coming to its conclusion. It was held that it had not. It had not explained sufficiently what was the 'economic entity' involved in the business transfer (there being rather vague reference to 'responsibility' for the residents) or what was the 'organised grouping of employees' involved in service provision change (there also being confusion as to who the 'client' was). The successful appellants argued that the result should be a declaration of no TUPE transfer, *but* the EAT declined to do so, on the basis that on these difficult facts it was not impossible that there might have been, if analysed properly. The case was therefore remitted for reconsideration.

DIVISION L EQUALITY

Prohibited conduct; instructing, causing or inducing discrimination

L [521]

***Bailey v Stonewall Equality Ltd [2024] EAT 119* (*24 July 2024, unreported*)**

This is an important decision on the meaning of the EqA 2010 s 111 **Q [1529]** on instructing, causing or inducing discrimination. It was a newsworthy case

of a barrister suing her chambers over their treatment of her because of her beliefs in relation to the sex/gender controversy. She succeeded before the EAT in her claim for direct discrimination under s 47. However, she had brought another complaint against Stonewall who had made a complaint to the chambers about her, in particular about certain tweets to which it took exception. This claim came under s 111(2) (cause) and (3) (induce); it was rejected by the ET on the facts as found and she appealed against this.

In the EAT Bourne J first pointed out that s 111 (unlike other surrounding sections) does not specify any mental element necessary (e g no 'knowingly') and so its requirements have to be divined otherwise. Sub-s (1) on 'instruct' is held to contain its own requirement of intention, and this also applies to sub-s (3) on 'induce', which is synonymous with 'persuade' (by carrot or stick). The middle ground of sub-s (2) ('cause') was however more difficult. After full argument, the decision of the EAT is summed up as follows in the headnote:

(1) In relation to 'cause':

> 'A claim for causing a "basic contravention" contrary to section 111(2) will not succeed unless (in the terminology of the section) person A actually caused the basic contravention. That means not merely that person A caused person B to commit a particular act or omission inflicting a detriment on person C, but that person B was caused by person A to commit the act or omission because of a protected characteristic of person C. Further, by analogy with the approach to loss in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 WLR 1353 HL, a claimant must show first that person A's conduct causally contributed to person B's commission of the basic contravention on a "but for" basis and, second, that the causal connection is such that, having regard to the statutory context and to all the facts of each case, making person A liable would be "fair or reasonable or just", those adjectives being interchangeable. Whilst a claim is more likely to succeed if what person A did was significantly influenced by person C's protected characteristic, there is no fixed mental element for an infringement of section 111(2). Foreseeability of the outcome will often be relevant in the application of the test, but liability does not depend on a test of reasonable foreseeability.'

(2) In relation to 'induce':

> 'The word "induce" in section 111(3) is broadly synonymous with "persuade". In one case it could consist of pure verbal persuasion, and in another it could involve an element of carrot or stick. Person A must intentionally induce person B to carry out an act or omission which contains all the elements of the statutory tort that is a "basic contravention", including any mental element of the basic contravention'.

On the facts, the ET had legitimately come to the conclusion that Stonewall's complaint was just that and did not go further. It may have been the occasion for the chambers' actions, but it was not a cause. As for inducement, the necessary mental element had not been shown.

DIVISION M TRADE UNIONS

Status and capacity; defamation

M [171]

Prospect v Evans [2024] EWHC 1533 (KB)

The question of whether a trade union can bring an action for defamation in its own right has for years been blighted by the first instance decision in *EETPU v Times Newspapers* [1980] QB 585, [1980] 1 All ER 1097 which, apparently going against previous authority, held that it cannot do so, any pre-existing right having been removed by TULR(C)A 1992 s 10(2) **Q [226]**. That decision is subject to strong criticism in the text at **M [169]** ff, culminating in the advice that the case 'should therefore be quietly forgotten as an aberration'. Now, however, Steyn J has gone one better and actually disapproved it as having been decided 'erroneously'.

The union sought to bring defamation proceedings against one of its ex-members, who argued that this should be struck out as impermissible, relying on *EETPU*. Considering the arguments on s 10 and noting that the major texts on defamation all consider that case wrongly decided, the judge rejected the defendant's application and allowed the case to proceed. Reinforcing the basic point that a union has its own reputation separate from its members, she pointed out that this was consistent with an employer's association being able to sue for defamation and with a union being able to be *sued* for defamation (see *Turley v UNITE the Union* [2019] EWHC 3547 (QB)). It is true that in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, [1993] 1 All ER 1011 the House of Lords held that, on policy grounds, a local authority cannot sue for defamation, but that was distinguished in this judgment as being confined to public bodies and not applicable to unions, as voluntary and democratic bodies.

DIVISION NIII EMPLOYEE INVOLVEMENT

Transnational consultations; the effect of Brexit

NIII [605.16]

HSBC European Works Council v HSBC Continental Europe [2024] EAT 104 (4 July 2024, unreported)

The facts of this case and the decision of the CAC are set out in the text at **NIII [605.16]**. The parties' European Works Council Agreement provided that the central management was located in the United Kingdom, at the time a member state within the EEA. The employer took the view that, post-Brexit the UK could no longer be the location of the central management under the Agreement and gave notice that, as from 1 January 2021, it would designate a

representative agent in Ireland to assume the role of central management, exclude HSBC's UK business from the scope of the Agreement and exclude UK Representatives as members of the EWC. The EWC objected and brought two complaints before the CAC contending that the employer had failed to comply with the Agreement and ought to have treated existing arrangements as continuing after exit-day. As set out in the text, the CAC held that the complaints were not well-founded. The EWC appealed this but the EAT (Choudhury J) dismissed the appeal. This was essentially on two grounds:

(1) The CAC had not erred in its interpretation of the Agreement. The parties had expressly contemplated that there could be changes to the scope of the Agreement dependent on whether the employer's operations expanded or contracted so as to include or exclude a Member State, and it could not be said to be outside the contemplation of the parties that the scope could also be affected by changes in EU membership status. Essentially, what this meant was that the Agreement was intended to include operations in Member States *as they were from time to time*.

(2) In any event, after exit-day, the UK could no longer be where central management was located for the purposes of the backing Directive. This had the effect of changing the scope of the Agreement *by operation of law*.

DIVISION PI PRACTICE AND PROCEDURE

Employment tribunals; case management; unless orders

PI [390]

***Chumbu v The Disabilities Trust [2024] EAT 113* (*9 July 2024, unreported*)**

At the heart of this case before Eady P in the EAT was the relationship between ET Rules SI 2013/1237 Sch 1 r 38 (unless orders) and r 39 (deposit orders). The claimant, who had a history of non-compliance with ET orders, was made subject to an unless order, to provide witness statements by a certain date, which he failed to do. The ET did not believe his reasons for this and so dismissed his claims for breach of the order. It also refused to grant relief from sanctions. The claimant's appeal to the EAT was dismissed, the holding being that the ET was entitled to take this course in the light of its findings of fact.

So far, so ordinary. However, the interest in the case arose because there was a second element to the unless order, namely an order to pay a costs order outstanding from an earlier case. On this second point, the EAT held that the ET had erred. The reasoning was that this had the effect of turning that costs award into a de facto deposit order, without the safeguards for a party in r 39. This was particularly inappropriate in this case because a deposit order *had* already been made for a much lesser sum, and also the claimant had

arguments that his circumstances had changed since the original costs order. The key point about the relationship between the two rules is set out at [56]:

> 'Accepting that rule 38 ET Rules does not specify the type of orders to which it might apply – and, therefore, does not exclude the possibility that a costs award might be the subject of an unless order – it seems to me that it would be rare for the making of such an order to be consistent with the overriding objective. Certainly, such an order would generally be counter to the aim of ensuring that the parties were on an equal footing, and – given the ET's ability to make deposit orders in appropriate cases – it would seem unlikely to be a proportionate step in most proceedings. By making a costs award the subject of an unless order, the paying party would have to pay the costs due as a condition of pursuing their claim or defence to trial. Although the ET Rules provide for a means of imposing such a requirement – through a deposit order under rule 39 – the safeguards that are in place in that context are not replicated in the rules relating to costs. Thus, while rule 39 requires the ET to make reasonable enquiries into the paying party's ability to pay, and to have regard to that information when deciding the amount of the deposit (itself limited to £1,000), there is not the same obligation in relation to costs …. Moreover, a costs award may be imposed (for example) in respect of the unreasonable conduct of a party in relation to the proceedings, or a part of those proceedings, and need say nothing about the merits of the claim or response. Making the pursuit of what might be an entirely meritorious claim or defence conditional upon the payment of a costs award would plainly place the paying party at a particular disadvantage notwithstanding the possible strength of their case. Again, this can be contrasted with the deposit order regime, where the ET will have formed a preliminary view as to the merit of the claim or response, considering that it has little reasonable prospects of success.'

This in fact made no difference to the outcome of the appeal because the unless order was still valid in relation to the witness statement failure.

Disclosure and inspection; confidentiality; redaction

PI [469]

Virgin Atlantic Airways Ltd v Loverseed [2024] IRLR 651, EAT

Rather than confidentiality of documents as such, this case before Crowther DHCJ concerned a mid-way possibility, namely disclosure of a document but subject to redaction. This may concern names of individuals, but here concerned financial information argued to be sensitive, but which the claimants said was essential to their case.

Pilots who were selected for redundancy claimed unfair dismissal generally, but also that the selection criteria adopted were indirectly discriminatory on grounds of age and/or sex. They sought to challenge the employer's explanation that the selection criteria used did not include maximum permanent salary savings and changes to contractual terms. The employer disclosed

internal management documents on this point, but in redacted form. The claimants contended that financial information which related to pilot costs and potential savings was relevant to their claims and should not have been covered up. An employment judge agreed that the material was relevant to the issues pleaded in the case and that disclosure was necessary and proportionate. On appeal by the employer, the EAT held that the correct test is whether the parts of the documents which had been covered up were likely to support or adversely affect the case of any of the parties' pleaded cases and so whether the disclosure was necessary and proportionate for the fair disposal of the issues. On the facts here, the decision was that the financial information was relevant to question of the amount of transparency on the part of the employer regarding the selection criteria. The material was also relevant to exploration of what actual criteria were used, and whether in fact the criteria selected were influenced by a desire to achieve longer-term change to terms and conditions to maximise long-term savings in pilot costs. Thus, the ET order for non-redaction was upheld.

Deposit orders; little reasonable prospects of success; use of previous adverse decision

PI [590]

***Addison Lee Ltd v Afshar [2024] EAT 114* (*18 July 2024, unreported*)**

The result of this case was that in deciding whether to make a deposit order (based on little reasonable prospect of success) an ET is entitled to look at a previous decision in a similar case involving similar parties. At first glance this may seem obvious, but in fact in coming to this conclusion Griffiths J had to deal with one of the most difficult areas of the law of evidence and ensure it did not apply.

In *Addison Lee Ltd v Lange* [2021] EWCA Civ 594 the company had lost a claim that its drivers were workers. The ET and EAT so held and when the company sought to appeal further the Court of Appeal not only refused permission but took the unusual step of giving full reasons for doing so. End of the matter? Not quite, because in the instant case, on facts not a million miles away but with different drivers, the company sought in effect to reargue the point by way of a defence. The claimants sought a strike out of the defence and alternatively deposit orders. The ET declined the former but granted the latter.

The company appealed, arguing that the ET had erroneously taken into consideration the previous decision in *Lange*. In doing so it sought to exhume the rotting corpse of the notorious 'Rule in *Hollington v Hewthorne*', which in 1943 decided that at common law a later court could use as evidence the result in a previous case involving the parties. It arose in the context of a previous criminal conviction of the defendant which the claimant was wanting to use in a later civil action arising from the same facts. This was disallowed. In fact, this was such an inconvenient (and arguably unjust) rule that in its particular context (criminal followed by civil) it was specifically overruled by the Civil Evidence Act 1968 ss 11–13 (which also enacted

further rules relating to defamation cases where the rule had particularly bitten). As the judgment in the instant case points out, it is still capable of applying where the 1968 Act does not apply, in despite of some strong judicial criticism over the years (sometimes in injudicial language); on the other hand, it has been applied to civil followed by civil cases. Hence the difficulties. The question therefore became whether the rule could be distinguished here, in the ET context. The judgment held that it could, because it was meant to apply to cases of a *trial* of sorts, not to a preliminary matter such as an application for a deposit order. Moreover, in this case the company had not been able to show any material differences between the *Lange* claimants and the instant ones. This is explained at [60] and [62]:

> 'These authorities do not persuade me that the rule in *Hollington v Hewthorn* should be extended to the summary consideration by an employment tribunal under Rule 39 of whether a specific allegation or argument "has little reasonable prospect of success". If anything, they point away from that proposition. The tribunal in this situation is not making a binding decision about the allegation or argument in question. It is not conducting a trial, or anything like a trial. It is simply forming a view, well before the final hearing and determination, about whether (in the words of Rule 39) it "considers" that any specific allegation or argument in a claim or response "has little reasonable prospect of success"….
>
> There is no injustice in introducing the previous proceedings in this situation, not as evidence of truth, but as indicators of a future outcome, because the party which has to make a deposit order can proceed to the full hearing by paying the deposit, and the deposit will be set at a level which is within the means of the paying party so that they may do that. They are not prejudiced by the deposit order unless and until the subsequent hearing has taken place and they are only prejudiced at that point if they are the losers on these issues at the final hearing.'

Put simply, the judgment states at [65]: 'The rule in *Hollington v Hewthorne* does not apply to a non-binding assessment of merits under r 39.'

One further holding in the judgment is worth noting, namely that (contrary to the company's arguments) there was no inconsistency between the refusal of a strike out and the making of a deposit order because the statutory tests for each are different and there is no requirement of the same result (applying *Hemdan v Ishmail* [2017] IRLR 228, EAT, **PI [590]**).

Anonymity orders; power to revoke

PI [936]

Ajao v Commerzbank AG [2024] EAT 11, [2024] ICR 644, EAT

This case before Kerr J in the EAT concerned the power of an ET to revoke its own anonymity order in the light of later findings of fact; the answer was that it could do so here, but the judgment points out that there seems to be a lacuna here on slightly different facts (which could be fortuitous).

The claimant's ET proceedings included allegations that he had been sexually assaulted and harassed by a fellow employee. The ET granted a lifelong anonymity order under r 50 **R [2807]**, based on the Sexual Offences (Amendment) Act 1992 s 1(1) which provides for this 'where an allegation (of such offences) has been made'. However, when it came to the hearing, the ET found that the claimant's allegations were false. In the light of this the ET revoked the order due to a change of circumstances justifying revisiting it under r 29. On the claimant's appeal the EAT upheld the ET's decision, but on different grounds. It held that s 1(1) of the 1992 Act did not in fact apply here at all – when it talks of anonymity following 'an allegation' this means an allegation of a *criminal* offence. On the facts here, there had been no such allegation (the matter only being raised internally). Thus, s 1(1) did not apply, and the matter remained within the ET's discretion, which included revoking the order in the light of its findings.

However, the judgment goes on to speculate on what the position would have been if there *had* been a criminal complaint. The 1992 Act provides for the revocation of an anonymity order where it turns out that a false complaint has been made to the police, *but* that power is only granted to a judge or magistrate. It would not apply to an ET. The result seemed to be that in such a case an ET would almost certainly wish to make a r 50 order based on the initial allegation, to comply with the 1992 Act, but then might not be able to revoke it if found to be based on false evidence. The judgment states that this needs addressing by Parliament.

EAT; institution of appeal; documents to be filed; extension of time

PI [1444]

Ridley v Kirtley tla Queens Court Business Centre [2024] EWCA Civ 875

Strictly speaking, although this is a decision of the Court of Appeal, it is now of historic interest because it focussed on two aspects of EAT procedure which were subsequently amended, namely EAT Rules SI 2013/1237 Sch 1 r 3(1)(b) which used to require the filing of the employer's ET response and r 37 covering extension of time. In September 2023 the former was revoked and the latter had para (5) added which gives an ET express power to extend time where a minor error has been made and it is 'just' to do so. This case dealt with the pre-2023 law, but it contains three points of continuing interest on time extension generally.

The three appellants had lodged their appeals within the 42-day limit, but without enclosing the employer's grounds of resistance. When this was pointed out, they rectified this *but* did so after the expiry of the period. The Registrar refused to extend time and the EAT backed this decision. The Court of Appeal allowed the appellants' appeals and remitted the cases to the ETs.

The joint decision of the Court includes a comprehensive examination of the ten leading cases on extension, from the leading judgment of Mummery P in

United Arab Emirates v Abdelghafar [1995] IRLR 243, [1995] ICR 65 onwards, as set out at **PI [1445]** ff. It later gives an overall analysis of them, being particularly critical of the very strict approach taken in *Kanapathiar v Harrow LBC* [2003] IRLR 571, EAT. The points which may have continuing relevance are:

(1) The court accepted the appellants' argument that this question had become too 'encrusted with authority' over time, masking its overall nature as the exercise of a wide discretion and leading to the impression that it is governed by numerous sub-rules that can be applied mechanically to individual circumstances.

(2) While *Abdelghafar* remains the starting point, it must be remembered (as Mummery P intended) that it is only guidance as to the *exercise* of the discretion. In particular, there is no rule that mistake as such cannot be a good reason (as indeed it was in this case).

(3) There is an important distinction (overlooked by the authorities in this case) between a case where the appellant lodges the appeal in good time but with an omission in the accompanying documentation and a case where they lodge the whole appeal out of time. This point figured largely in the court's decisions on the facts.

Clearly, an ET will now need to apply the post-2023 law, but it is possible that these three points will be relevant to that exercise.

REFERENCE UPDATE

Bulletin	Case	Reference
547	*Sullivan v Isle of Wight Council*	[2024] ICR 561, EAT
547	*Sean Pong Tyres Ltd v Moore*	[2024] ICR 619, EAT
548	*Warrington BC v UNITE the Union*	[2024] ICR 599, KB
549	*Wicked Vision Ltd v Rice*	[2024] ICR 675, EAT
549	*Edwards v Ministry of Defence*	[2024] ICR 687, EAT
549	*Donkor-Baah v University Hospitals Birmingham NHS Foundation Trust*	[2024] ICR 758, EAT
549	*Hall v Transport for London*	[2024] ICR 788, EAT
549	*Melki v Bouyges E & S Contracting Ltd*	[2024] ICR 803, EAT

Bulletin	Case	Reference
550	*Mercer v Alternative Future group Ltd*	[2024] ICR 814, SC
550	*Rentokil Initial UK Ltd v Miller*	[2024] IRLR 628, EAT
551	*JLOG v Resorts Mallorca Hotels SL C-589/22)*	[2024] ICR 588, ECJ
551	*Groom v Maritime and Coastguard Agency*	[2024] IRLR 618, EAT
551	*Baldwin v Cleves School*	[2024] IRLR 637, EAT
551	*Anderson v CAE Crewing Services Ltd*	[2024] IRLR 645, EAT
551	*The Royal Parks Ltd v Boohene*	[2024] IRLR 668, CA

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