Harvey on Industrial Relations and Employment Law

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

Bulletin Editor
Ian Smith MA, LLB; Barrister
Emeritus Professor of Employment Law at the Norwich Law School, University of East Anglia.

LEGISLATION

New ET Procedure Rules

The Employment Tribunals Procedure Rules 2024 SI 2024/1155 introduce the new Rules, replacing the 2013 Rules, as from 6 January 2025. There are no transitional provisions, as the new rules apply immediately. They were made by the Tribunal Procedure Committee under the new system (aimed at increasing independence and making changes easier in future), after a consultation exercise. They largely re-enact the old rules, with updating and clarification where necessary and introduce two new rules to give more flexibility to delegate to Legal Officers and to give an express power to the ET Presidents to prescribe forms by practice direction. Given this very limited level of change, one unfortunate aspect is that they disturb the *numbering* of the old rules, even where there is no substantive change. Users will have to become familiar with the new numbers.

The new rules are introduced by the Employment Tribunals (Procedure Rulers) (Consequential Amendments) Regulations 2024 SI 2024/1156. One peculiarity here is that, while these repeal the 2013 *Rules*, as contained in the three schedules, they do *not* repeal the 2013 *Regulations* themselves. Thus, those Regulations (SI 2013/1237) remain in force with regard to regs 1–15 **R [2743]–R [2757]** which continue to introduce the rules. There are some amendments, including taking what were old rule 105(1) and 105(1A) into the old regulations as regs 14A and 14B.

These changes will be made in Div R in Issue 322.

DIVISION AII CONTRACTS OF EMPLOYMENT

Incorporation of collective agreement; effect of variation of collective agreement

AII [53]

Crabb v Tui Airways Ltd [2024] EWHC 2589 (KB), [2025] IRLR 32

The claimants were pilots for the respondent who were on a PHI due to medical incapacity. The employer, wishing to save money, entered negotiations with the relevant union, BALPA, to replace that PHI scheme with a less generous 'pilots' income protection' (PIP) scheme. The union agreed to this and it was applied to the claimants who sued the employer for breach of contract.

The claimants' contracts consisted of a basic contract plus a memorandum of agreement which covered the governing collective agreement and provided for it: (a) to be incorporated into individual contracts; and (b) to be subject to change by agreement between employer and union. Normally, this would cover the negotiation of the change to the PIP, but the claimants argued that this did not apply to pilots already in receipt of the PHI benefits. They founded this on a clause relating to the PHI which appeared to cover changes but with the caveat that it did not apply to existing recipients. However, the court at first instance held that this was not its proper meaning; that clause covered cases where the employer could change the PHI scheme *unilaterally*. That was not the case here, of a change negotiated with the union. The correct approach was that each individual's contract provided for incorporation of collective bargains, including the amendment of an existing one. On ordinary principles of incorporation, the change to PIP affected all pilots, including those already receiving PHI.

This is an interesting example of some very old law, considered at **AII [53]** ff. Although this does not appear to be one such, it has in the past tended to arise in cases where the question is whether a change to a governing collective agreement binds a *non-member*. Naturally, this does not arise if the new/amended agreement is advantageous to the workers (though it does give rise to the unions' 'free rider' argument). Where, however, the change is to substitute less favourable terms, the point is that if it is clear that the collective agreement *and any changes to it* are to be incorporated into contracts, then non-membership is irrelevant and the individual non-member is bound, whether or not they have assented individually.

Remedies for restraint on competition; injunctions; relevant factors

AII [266]

Derma Med Ltd v Ally [2024] EWCA Civ 175, [2025] IRLR 68

This case concerned a high-profile doctor who established a valuable company, which he then sold to the claimant company. He became a director and employee of the claimant under a contract that had two-year non-compete

and confidentiality restraints. When the claimant suspected that he was in fact operating on his own behalf, it suspended him, leading to his resignation. The claimant then brought proceedings for a no notice injunction to enforce the restraints. The first judge granted this, but on the return hearing the second judge discharged it on the bases that the claimant had failed to make full disclosure at the first hearing and that damages would be an adequate remedy.

The Court of Appeal allowed the claimant's appeal and reinstated the injunction. Of course, these cases are very much dependent on their own facts, but significant points in the judgment of Males LJ are:

(1) Although there may have been some failures of disclosure, they were relatively minor and were not deliberate. In such circumstances, a judge should keep a sense of proportion and not rule out an injunction too readily. It may be appropriate to grant one, subject to other measures to reflect the failure.

(2) The terms of the original injunction had, however, been too wide in two ways, which may be useful for those engaged in drafting in such cases: (i) it had used the phrase 'including, but not limited to' enumerated matters, which was too vague because a defendant must know clearly what they are enjoined from doing; and (ii) it had referred to matters 'that would reasonably be regarded as confidential' which imported too much subjective judgement, on which opinions could differ.

(3) The decision that damages were adequate was wrong. There is no rule of law that they cannot be, but care should be taken here because the normal expectation will be the granting of an injunction where that is what the parties have agreed to; that will be particularly the case where, as here, a significant element in the value of the business is attributable to the involvement and expertise of the defendant himself.

DIVISION CI WORKING TIME

Holiday pay; effect of bankruptcy; award of 'interest like compensation'

CI [198]

***Main v Spadental Ltd [2024] EAT 200* (*23 December 2024, unreported*)**

Most claims for unpaid holiday pay under the Working Time Regulations SI 1998/1833 reg 30 **R [1101]** are for relatively modest amounts, often consequent on other, more valuable claims on termination, but this one concerned an award of £85,513. Two complications arose before Bourne J in the EAT: (1) where should that money go, since for at least part of the period in question the claimant had been bankrupt and the trustee in bankruptcy was a party to the action; and (2) as the action here dated back to 2013, could interest (or something equivalent) be added to it (in the sum of £42k if awarded at 8%)?

The case had a history. The claimant worked for the respondent as a dentist from March 2013 to February 2019; from June 2017 to June 2018 he was subject to an order of bankruptcy, but continued the work. When it ended he claimed *inter alia* holiday pay on the basis that he had actually been a 'worker' all of this time. The first ET in 2019 held that he had not been but this was overturned by the EAT. The second ET in 2022 held that he had been and proceeded to a remedy hearing at which these issues arose. At this, the ET held that moneys recovered as unpaid holiday pay belonged to the trustee (though the parties agreed that this only applied to the amounts relating to the actual period of bankruptcy) and that, although it could award an amount equivalent to interest, it declined to do so on the facts. The EAT dismissed the claimant's appeal on the first ground but allowed it on the second.

(1) *The effect of the bankruptcy.* This depended on the application of the Insolvency Act 1986 s 306 (vesting the bankrupt's property in the trustee) and s 436 which defines property widely, including rights of action. There is a case law complication here arising from the leading case of *Heath v Tang* [1993] 4 All ER 694, [1993] 1 WLR 1421, CA, namely that an action for a purely 'personal' matter (such as personal injury) is not the sort of 'proprietory' action to which s 436 refers. The judgment here considers the relevant insolvency case law, which shows a further complication which made the claimant's position more difficult – a claim has to be looked at as a whole and if it is actually a 'hybrid' one with elements of both, that does not come within the *Heath v Tang* exception. The judgment here then considers the nature of a claim under reg 30 for unpaid holiday pay and concludes that it shows it is essentially a money claim (with, in particular, no general damages for hurt feelings) and so it is at the very least a hybrid one and the trustee was entitled to the money for the agreed period.

(2) *Entitlement to interest.* After pointing out that the only express power for an ET to award interest as part of the award itself (as opposed to for late payment) is in relation to discrimination claims, the judgment accepts the argument for the claimant that reg 30 is wide enough to permit an ET to make an award of what it calls 'interest like compensation' to reflect the diminution in the value of money where the period elapsing is significant, in order to ensure 'full' compensation. The claimant had argued this also on the ground of the EU law principles of equivalence and effectiveness, but the judgment holds that these are not necessary. However, in exercising this discretion the ET here had declined to award any for four factual reasons (including that the parties had both thought for many years that he was self-employed, that there was no evidence of bad faith by the employer, that he had paid tax on that basis and that there was no evidence of any other loss to the claimant). However (in a relatively rare interference on appeal by the EAT with an ET's discretion) the judgment concludes by holding that none of these were relevant in this reg 30 claim and remitting the matter for reconsideration.

DIVISION DI UNFAIR DISMISSAL

Potentially substantial reasons; breakdown of trust and confidence

DI [1915]

***Alexis v Westminster Drug Project [2024] EAT 188* (*12 November 2024, unreported*)**

The text at **DI [1915]** makes the point that the development of this head of SOSR dismissals has been controversial. It arguably involves *reversing* the implied term of trust and confidence on to the employee, whereas its true home is on the employer and in the context of constructive dismissal. In one case Underhill P referred to it as 'mission creep'. However, the conclusion in the text is that it is indeed now a possible head of SOSR, though subject to several judicial warnings that it is not to be resorted to too easily and that employers should not be allowed to use it too easily as a 'solvent of obligations'.

This case before Judge Shanks in the EAT shows that it does indeed lie within the ET's powers to conclude that such a breakdown was a fair reason for dismissal. More importantly, however, it may add a further sting in the tail for the claimant in such a case, weakening their position further.

The case could be seen as a 'locked horns' one. The trouble started when the claimant and two others were subject to a restructuring exercise, leading to two new posts. The claimant was unsuccessful at interview in obtaining one of these. She raised a grievance on the basis that her dyslexia should have been taken into account. This led to the offer of another interview but she rejected this and appealed. Again, this was largely favourable to her but again she rejected it. She wrote numerous emails to the relevant manager and the organisation's chairman. She was called to a meeting with the manager who concluded that she had no confidence in the employer and that the relationship had irretrievably broken down. She was dismissed by notice on the ground of a SOSR.

The ET rejected her claim of unfair dismissal; the claimant had shown that she would not accept any suggestion from the employer, which had genuinely and reasonably concluded that there was a breakdown, had made reasonable enquiries, had given the claimant an opportunity to put forward her arguments and needed to get on with the reorganisation. On her appeal, the EAT found no reason to interfere with the ET's factual conclusion generally, but the possible importance of this case arises from two specific aspects of her appeal – first, she argued that the ET's decision was wrong because it did not take into account her length of service and second it did not consider the alternative outcome of a warning. Both of these were given short shrift by the EAT which held that: (1) an employer is only required to consider length of service where it is *relevant* to the decision to dismiss, which it is not where trust and confidence has irretrievably broken down; and (2) this was not a

case where any other sanction would have been appropriate, again because of the breakdown against the background of the need to progress the reorganisation.

This is a relatively short judgment, largely based on the ET's right to come to such conclusions, not saying that these are rules of law, *but* it does suggest that once it is established (bearing in mind the judicial warnings above) that irretrievable breakdown is available to the employer on the facts, the position of the claimant is relatively weak with normal considerations such as length of service and alternatives to dismissal likely to be given little weight.

DIVISION F TRANSFER OF UNDERTAKINGS

Right to object; substantial change in working conditions; relationship of TUPE reg 4(7) and (9)

F [106], F [108]

United Busways Ltd v De Marchi [2024] EAT 194 (10 December 2024, unreported)

This is a seriously fundamental case on the interpretation of TUPE, the like of which we have not had for some time. Readers of it will benefit from a wet towel around the head and an equally serious drink afterwards. It concerns an aspect of the law relating to the ability of an employee faced with a TUPE transfer to object under TUPE SI 2006/246 reg 4 **R [2293]**. This has always caused problems because in some circumstances it can lead to a disadvantageous result for the employee, and it must be said that this re-evaluation does not ameliorate that position in general and does not affect one constant here, namely that the one thing that an objector does not have is a legal right to continue employment with the transferor (see para [29]).

Under reg 4, there are two forms of objection, a general one in reg 4(7) and a specific one in reg 4(9) where there is or is to be a substantial change in working conditions. The first thing to note is that this case concerns a specific point here, namely what is the position of an employee who objects under reg 4(7) but who would also come under reg 4(9) (substantial change) but who chooses *not* to exercise that right to object? The EAT under Ellenbogen J had to consider the interplay not just between paras (7) and (9) but also para (8) and did so with the assistance of the old case of *University of Oxford v Humphreys* [2000] IRLR 183, [2000] ICR 405, CA which is considered at **F [109]**, coming to a conclusion (by the use of a purposive interpretation and reliance on the Acquired Rights Directive) that avoids the reg 4(9) objector falling foul of the exclusory effect of reg 4(8). The reasoning is lengthy and complex, but the judge has gone a long way to helping mere mortals reading it understand the result by including at the end a conclusion that could hardly be bettered. At para [39] she states:

> '1 Where a relevant transfer involves, or would involve, a substantial change in working conditions to the material detriment of a person whose contract of employment is, or would be, transferred under regulation 4(1) of the *Transfer of Undertakings* (*Protection of*

Employment) *Regulations 2006*, regulation 4(9) confers on that person the right to treat the contract of employment as having been terminated. If he elects to exercise that right, he shall be treated for any purpose as having been dismissed by the employer, which, depending upon the circumstances, may be the transferor or the transferee. If he elects not to exercise that right, he transfers to the employment of the transferee, unless he has objected to so doing under regulation 4(7).

2 Where he objects to becoming employed by the transferee under regulation 4(7) in circumstances in which regulation 4(9) applies, the effect of that objection is to preclude the transfer of his contract, and of any of the rights and obligations etc for which regulation 4(2) provides, to the transferee.

3 In those circumstances, notwithstanding the employee's election not to terminate the contract under regulation 4(9), regulation 4(8) operates so as to terminate the employee's contract of employment with the transferor, by which entity he is treated as having been dismissed, and against which any remedy lies. He has no remedy against the transferee.'

DIVISION L EQUALITY

Special cases; qualification bodies; problems of delegation/authorisation

L [746]

Davda v The Institute and Faculty of Actuaries [2024] EWCA Civ 1460

As the text points out, there is considerable case law on what constitutes a 'qualification body' for the purposes of the EqA 2010 s 53 **Q [1495]**. However, this decision of the Court of Appeal concerned a slightly different question, namely which was the right body to sue.

The claimant was an actuary wanting to progress to fellowship of the respondent (the IFA) which entailed a series of examinations. The IFA is the principal qualification body in this country, but it also has agreements to recognise certain other bodies abroad which can administer similar and recognised exams. One of these is the Indian Actuarial Institute (IAI). The claimant objected to the fact that, whereas for members of the IFA there was provision for taking exams twice a year, Indian members of the IAI could take them four times a year. This facility could be used for progressing more quickly or for resitting. The claimant brought proceedings for indirect and direct discrimination. He brought these proceedings against the IFA, as the principal qualification body. The ET upheld his argument that, in essence, the IFA was responsible for this discriminatory discrepancy, but the EAT and now the Court of Appeal have reversed that decision. The judgment of the Court of Appeal addresses several issues arising in the case, but ultimately it was decided on the basis that the IFA (admittedly *a* qualifying body) was not

responsible. It did not control the IAI which was responsible for the decision to permit four sittings. All that the IFA had done was to recognise the IAI and to set its own rules allowing two sittings to its own members (regardless of their nationality). There was therefore no discriminatory 'treatment' by the IFA for the purposes of s 53. As para [77] puts it: 'The arrangements by the IAI for holding exams were not arrangements made by the IFA within section 53(1). That is enough to dispose of the appeal.'

To an extent, the decision is largely one on its own, fairly complex facts, but it may be a useful one more generally in any other cases concerning a qualification body which delegates functions to or agrees to recognise the activities of other independent bodies.

Remedies; measure of damages; pecuniary loss; receipt of ill-health pension

L [876]; AII [518.04]; DI [2706.01]

***CJ v PC [2024] EAT 182* (*22 October 2024, unreported*)**

In this case the ET found for the claimant on her claims for disability discrimination. The question then became compensation. The occurrences in question had led to her employment being terminated, and her transferring on to the employer's ill-health retirement scheme. She was still capable of doing some part-time work in another context. In her pleaded schedule of losses, on legal advice, she had claimed for her future loss of income *minus* her drawings from the retirement scheme. The ET used this measure, and then deducted amounts likely to be earned in the other work, by way of mitigation.

The claimant appealed against this, primarily on the basis that (contrary to her own schedule of loss) the ET should have applied the well-known tort case of *Parry v Cleaver* [1970] AC 1 where it was held that at common law there must not be double compensation *but* that there is an exception to this where the claimant becomes entitled to something in the nature of (or analogous to) insurance moneys to which they have at least in part contributed. She argued that her retirement income was analogous and so should not have been deducted from the prima facie measure of future loss. Secondly, she argued that she had not been under a duty to mitigate, either because that should not apply to a case of early retirement or because either *Parry v Cleaver* applied and there was a duty to mitigate or it did not apply and there was. Judge Stout in the EAT rejected the appeal. She held that there was no authority for this view of mitigation, which remained a general requirement. On the major *Parry v Cleaver* point, she held that the ET should have applied it and not deducted the retirement payments. The judgment makes clear that these matters (particularly the latter) were capable of making a very substantial difference to the eventual amount she would recover, but for the claimant to succeed she had to establish that she should be allowed to raise the point on appeal. Given that her representatives admitted that they had got the schedule of loss wrong (not having considered *Parry v Cleaver*) and there had been no sharp practice by the respondents,

who had just accepted it, in the light of the authorities on allowing new points on appeal, the decision was that this was *not* a case where the interests of justice required the new point to be run. The judgment points out that her remedy, if at all, would lie against her legal advisers.

Remedies; non-pecuniary loss; injury to feelings

L [887]

***Shakil v Samsons Ltd [2024] EAT 192* (*11 December 2024, unreported*)**

The reason for the EAT under Judge Tayler allowing the claimant's appeal in this case was that, having found for her that she had been dismissed because of her pregnancy, the ET had gone on to make an award for injury to feelings of £5,000 in a short and very generalised way, without citing *Vento* or showing how it had come to that figure. The matter was remitted for reconsideration. So far, so ordinary. However, the judgment is of interest in its consideration of how an ET should normally approach this head of compensation. At [16] it sets out seven 'general propositions' to take from *Vento* and the subsequent case law. Then at [20] and [21] it gives the following valuable guidance:

> '20. Application of the Vento guidelines (as updated by the relevant Presidential Guidance) generally require that the Employment Tribunal:
>
> (1) identify the discriminatory treatment for which an award of injury to feelings is to be made;
>
> (2) hear evidence from the claimant about any injury to feelings caused by the discriminatory treatment;
>
> (3) make findings of fact about the injury to feelings suffered by the claimant because of the discriminatory treatment;
>
> (4) identify the relevant guidelines applicable to the award;
>
> (5) state the band the injury to feelings award falls within;
>
> (6) explain why the injury to feelings falls within that band;
>
> (7) explain where within the band the injury to feelings award falls and why the specific award was made.
>
> 21. It is not necessarily an error of law for an Employment Tribunal to fail to expressly consider each of these matters, but it will usually be helpful to do so, and will minimise the risk that the Employment Appeal Tribunal will conclude that the Employment Tribunal did not properly identify and apply the correct legal principles.'

DIVISION PI PRACTICE AND PROCEDURE

Time limits; discrimination; just and equitable extension; relevance of suspicion

PI [281], PI [283.02]

Jones v Secretary of State for Health and Social Care [2024] EWCA 1568

This case concerned an extension of time in a race discrimination case. The claimant had been passed over for a promotion after a competitive interview. He was told little about the result and suspected that his ethnicity might have been a factor. He kept asking about this and was not given information (in particular, the ethnicity of the successful candidate) until the pre-hearing of his eventual claim. This was not brought until after the expiry of the primary time limit. It was ruled out by the ET partly on limitation. He had relied on the delay in getting the information to request a just and equitable extension, but this was denied by the ET. The EAT upheld that decision, but the Court of Appeal allowed the claimant's further appeal.

Much of the case is factually based, leading to a relatively rare holding that the ET's decision had been perverse, but the judgment contains one important point of law. In ruling against him, the ET had stressed that he was already suspicious about discrimination and the EAT had relied on the judgment in *Barnes v MPC* UKEAT/0474/05 (14 November 2005, unreported) where the EAT at [19] had considered relevant factors, in particular when the claimant first knew *or suspected* that he had a reasonable claim, whether it was reasonable for him to know *or suspect* it *earlier* and, if he did know *or suspect,* why did he not present his claim earlier. It was accepted that all factors have to be in play, but suggested that these were particularly important where the state of mind of the claimant was in issue. In the instant case, these references to (mere) suspicion clearly worked against this claimant. However, the judgment of the Court of Appeal given by Bean LJ disapproved that approach. At [46] the judgment states:

> '*Barnes v Metropolitan Police Commissioner* is a 2005 decision of the EAT which remains unreported to this day and is not even referred to in the current version of *Harvey*. This suggests that [19] of the judgment does not lay down a formula. But to the extent that it does I cannot agree with it. In many cases involving the "just and equitable" discretion it will be highly relevant if the Claimant *knew* all the facts necessary to establish a discrimination claim but then failed without good reason to act promptly. I am much less persuaded that suspicion, or a firmly held belief based on suspicion, is a relevant factor. Until 2014 the statutory questionnaire procedure enabled prospective Claimants for discrimination to ask questions, with failure to answer them giving rise to the possibility of adverse inferences. That procedure is no longer available. Promptness in bringing ET claims remain important but this court, the EAT and ETs should not encourage cases to be brought on mere suspicion.'

Presenting a claim; the importance of pleading a claim

PI [293.01]

***Walsall Metropolitan Borough Council v Oliver [2024] EAT 193* (*20 December 2024, unreported*)**

One element of the initial presentation of an ET claim that has caused occasional difficulties is the extent to which a claimant must plead exactly that claim from the beginning and will be held to that later. Not surprisingly, a generally liberal approach has been taken to cases of ambiguity, but the tolerance here may be exhausted if what is involved is an attempt later to *change* the basis of the claim. That will usually be by the claimant, but the instant case before Eady P in the EAT shows that the same applies to an attempt by the ET itself to do so.

The claimant was made redundant while on maternity leave. She brought a claim for maternity discrimination under the EqA 2010 s 18. However, at the substantive hearing the ET decided that the evidence also showed a breach of the MAPLE Regulations SI 1999/3312 reg 10, leading to a finding of automatically unfair dismissal under the ERA 1996 s 99.

In these circumstances, the text at **PI [293.01]** states that an ET only has jurisdiction to determine the act or acts of which complaint has been made to it, showing the importance of the grounds of complaint set out and the precision with which they were set out (citing *Qureshi v Victoria University of Manchester* [2001] ICR 863, EAT per Mummery P, approved in *Anya v University of Oxford* [2001] IRLR 377, [2001] ICR 847, CA). That was the approach of the EAT in the instant case in allowing the respondent's appeal against the ET's action. Citing *Ladbrokes Racing Ltd v Traynor* UKEATS/0067/06 it was held that the proper course of action in such circumstances is to treat such a development as an application to *amend* (which would then involve, of course, the application of the classic tests in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661, [1996] ICR 836, EAT which are set out at length at **PI [311]** ff).

Amending the claim; the applicability of time limits

PI [312.06]

***Douglas v North Lanarkshire Council [2024] EAT 194* (*10 December 2024, unreported*)**

The question of how to deal with a situation where there is an application to amend a claim to add a new cause of action, but where that might raise an issue of time limits, has caused significant case law, considered at **PI [312.05]** ff. Some of this, as exemplified by *Amey Services Ltd v Aldridge* UKEATS/0007/16 (12 August 2016, unreported), held that where this combination arises the EJ must deal with both points together and may not grant the amendment, subject to later consideration of the time point. Some of it, as exemplified by *Galilee v Commissioner of Police for the Metropolis* UKEAT/0207/16, [2018] ICR 634 took the opposite view that, although it is desirable for both to be considered together, there is no rigid rule to that

effect. The text at **PI [312.06]** takes the view that the weight of authority is now in favour of the *Galilee* approach, with the time point if appropriate being left for determination at the later hearing. In the instant case before Lord Fairley in the EAT this approach is considered correct, albeit *obiter* because of the facts.

The claimant originally claimed unfair dismissal but later applied to add claims for whistleblowing detriment and dismissal. This was lacking in details as to the alleged detriments. In spite of this, the EJ allowed the amendments. However, at the subsequent merits hearing the ET held that it lacked jurisdiction to hear the detriment claim because it was outside the time limit and there was no basis to extend. The claimant appealed against this, arguing that in these circumstances it should be the law that the granting of the amendment *implicitly* allowed the time limit point too. The EAT refused the appeal. It treated the case as one where the lack of specificity at the earlier stage meant that the time point had been *overlooked*. In such circumstances, it remained a live issue at the merits stage where the facts could be determined. Thus, the EAT had not erred here. On the *Amey*/*Galilee* issue, the EAT said that it did not arise directly because these cases were distinguishable on the basis that they did not concern a case of lack of evidence and the point being overlooked, *but* the judgment goes on to say that had it been necessary to resolve the matter the *Galilee* approach would have been taken, because it better reflects the reality of pleading in the ET.

DIVISION PIII JURISDICTION

State immunity; nature of claimant's work

PIII [186.02], PIII [191.06], PIII [191.10], PIII [192.02], PIII [192.04], PIII [201]

The Kingdom of Spain v Lorenzo [2024] EWCA Civ 1602

This case featured several times in Division PIII when at EAT level. The decisions of the ET and EAT have now been upheld by the Court of Appeal, in a judgment by Bean LJ. It followed on from the leading case on state immunity, *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2018] IRLR 123, which is considered at **PIII [183]** ff, and which is analysed at length in the judgment here.

It will be recalled that this is the case of the claimant with dual Spanish/British nationality who worked in the Spanish Embassy, first as an administrative assistant (with little contact with confidential material) and later as a protocol officer whose main function was liaising with the Foreign Office. She was locally recruited here, primarily because she spoke Spanish, and she was not registered with the FO as entitled to diplomatic privileges. She resigned because, she said, of the way she was treated and spoken to and claimed constructive unfair dismissal and discrimination. The ET upheld the Embassy's plea of diplomatic immunity in respect of unfair dismissal (which was not appealed) but rejected it in relation to discrimination. The Embassy appealed to the EAT but this was rejected by Ellenbogen J in a wide-ranging judgment, see particularly **PIII [191.06]**.

Part of the appeal concerned the State Immunity Act 1978 s 4. In the light of *Benkharbouche,* s 4(2)(b) had to be removed by regulations in 2023. This case raised the question whether the EAT was right that s 4(2)(a) (excluding nationals of the state in question from s 4(1) which generally permits actions on a contract of employment) was also incompatible with the European Convention. It was held that it was. In any event, the dual nationality here was not enough, the judgment agreeing with the ET that her being part-Spanish was 'almost a coincidence' on the facts, though commenting that it might have been different if she had only had Spanish nationality.

The judgment follows the particular grounds of appeal by the Embassy which, apart from the dual nationality point, focussed on her status in the two jobs, the nature of her work while employed (according to *Benkharbouche*, likely to be more important than nationality) and whether having failed on state immunity the Embassy could rely on diplomatic immunity instead, for the individual who had allegedly caused her problems. On the first two, the decision was that the ET had applied the correct law and come to permissible conclusions on the facts. On the third, it was held that diplomatic immunity is personal to the diplomatic agent concerned and cannot be invoked by their state.

The judgment concludes with two other matters. The first was that the court would consider further whether to make a declaration of incompatibility in relation to s 4(2)(a). The second was to express concern at the extreme length that this case has already taken, only to get to the stage now where her substantive complaints can be determined. The resignation was in 2015. Understandably, the case was adjourned for a year pending the decision in *Benkharbouche*, but then there were major delays getting to the ET, then to the EAT, then getting its decision. Bean LJ commented pointedly that 'Whatever its outcome, Ms Lorenzo may understandably feel that the English ET system has not treated her well'.

REFERENCE UPDATE

Bulletin	Case	Reference
553	*Addison Lee Ltd v Afshar*	[2024] ICR 1445, EAT
555	*Masiero v Barchester Healthcare Ltd*	[2024] ICR 1419, EAT
556	*Commissioners for HMRC v Professional Game Match Officials Ltd*	[2024] IRLR 80, [2024] ICR 1480, SC
556	*McLennan v The British Psychological Society*	[2024] IRLR 4, EAT
556	*British Bung Manufacturing Co Ltd v King*	[2024] IRLR 20, [2024] ICR 1399, EAT

Subscription and filing enquiries should be directed to LexisNexis Customer Services Department (tel: +44 (0)330 161 1234; fax: +44 (0)330 161 3000; email: customer.services@lexisnexis.co.uk).

Correspondence about the **content** of this Bulletin should be sent to Nigel Voak, Analytical Content, LexisNexis, FREEPOST 6983, Lexis House, 30 Farringdon Street, London, EC4A 4HH (tel: +44 (0)20 7400 2500).

Published by LexisNexis