Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

Increase of employment protection limits

By virtue of the Employment Rights (Increase of Limits) Order 2025 SI 2025/348 the usual annual uprating takes place on 6 April, the increase being of 2.7% (the increase in RPI from September 2023 to September 2024). The maximum pay for statutory purposes goes up to £719 pw, giving a maximum statutory redundancy payment and basic award for unfair dismissal of £21,570. The maximum compensatory award goes up to £118,223, giving a combined maximum for an ordinary unfair dismissal case of £139,793. The special basic awards for certain provisions of the TULR(C)A 1992 and for certain forms of automatically unfair dismissal are raised by the same percentage.

These changes will be made in Div Q in Issue 325.

Social security benefits up-rating

The annual up-rating of social security benefits is contained in the Social Security Benefits Up-rating Order 2025 SI 2025/295. Statutory sick pay is increased from £116.75 to £118.75. Statutory maternity pay, statutory paternity pay, statutory adoption pay, statutory shared parental pay and statutory parental bereavement pay are increased from £184.03 to £187.18. These changes all take place on 6 April 2025 and will be incorporated into Divs Q and R in Issue 325.

National minimum wage increased

As from 1 April the new rates for the NMW are:

National minimum wage	£11.44 ph

NMW for 18 to 20 year olds	£7.55 ph
Apprentices	£7.55 ph
Accommodation amount	£10.66

These changes will be incorporated into Div R in Issue 325.

Neonatal care pay regulations

The Neonatal Care Leave and Miscellaneous Amendments Regulations 2025 SI 2025/375 set out the details of the new statutory scheme for leave, and the equivalent details of the new scheme for pay are set out in the Statutory Neonatal Care Pay (General) Regulations 2025 SI 2025/376. The Statutory Neonatal Care Pay (Administration) Regulations 2025 SI 2025/206 provide for the funding of employers' liabilities to make payments under this scheme. They also make requirements on employers in connection with such payments and set out the necessary powers of HMRC. The Statutory Neonatal Care Pay (Persons Abroad and Mariners) Regulations 2025 SI 2025/201 set out the specific rules for these classes of employees. All sets of regulations come into force on 6 April and will be incorporated into Divs Q and R in Issue 325.

Vento bands increased

As from 6 April the uprated *Vento* bands for injury to feelings in discrimination cases are:

Lower band	£1,200 to £12,100
Middle band	£12,100 to £36,400
Upper band	£36,400 to £60,700 (with the most serious cases capable of exceeding that)

This change will be incorporated into Div Q in Issue 325.

DIVISION AI CATEGORIES OF WORKER

Worker; the basic requirement of a contract; with whom?

AI [83.02]

Connaughton v Greater Glasgow Health Board [2025] EAT 32 (12 March 2025, unreported)

The claimant was a doctor who was a partner in the practice in question. He claimed to be a worker for the purposes of a claim for statutory holiday pay. The problem in the case was that the relevant contract for the supply of

medical services was between the respondent health board and the *partnership*. The question therefore arose as to with whom the contract had to be under the ERA 1996 s 230(3)(b) **Q [854]** and reg 2 of the Working Time Regulations 1998 SI 1998/1833 **R [1073]**. The ET dismissed the claim because there was no contract with the claimant personally. He appealed arguing that it either was or should be enough for him to work under *a* contract, as long as factors such as subordination and dependence were present.

Lady Haldane in the EAT, after an exhaustive consideration of the complex arrangements for health care, held that the ET had been correct to start with the existence of a contract. Linguistically, the part of the worker definition that refers to working 'under' a contract might aid the claimant; ultimately it was clear that the reference to performing work for 'another party to the contract' showed a requirement for a direct contractual relationship between a putative worker and putative employer. Particular backing for this was taken from *Plastic Omnium Automotive Ltd v Horton* [2023] EAT 85 (28 June 2023, unreported) where the intercession into the contractual nexus of the claimant's service company, with which the contact lay, meant that the individual failed to establish worker status (see **AI [83.02]**). Also relevant were *Catt v English Table Tennis Association* [2022] EAT 125, [2022] IRLR 1022, where it was held that a non-executive director was not a worker because of lack of a contractual relationship (the ET having been wrong to proceed immediately to factors of vulnerability, subordination and dependence), and *Groom v Maritime and Coastguard Agency* [2024] EAT 71, [2024] IRLR 618, a case on volunteers (see **AI [83.04]**) where again the central question was whether the essential contractual relationship had been shown.

There was a subsidiary argument that the claimant should be considered a worker under EU law, as applying to the Working Time Directive (the facts having arisen before Brexit), but while this was a possibility, the extensive consideration of the details of the medical services arrangements showed that the claimant's level of professional independence and lack of detailed supervision was insufficient to show the level of subordination envisaged by the EU cases. The appeal was therefore dismissed under both domestic and EU law.

DIVISION CIII WHISTLEBLOWING

Who is protected; detriment; extended liability; equivalent provisions in discrimination law

CIII [11], CIII [98]; L [499]

***W v Highways England [2025] EAT 18* (*18 February 2025, unreported*)**

The actual decision in this case before Lord Fairley P in the EAT is that applying the extended coverage of whistleblowing and discrimination laws (through an extended definition of worker and statutory vicarious liability) is highly fact-specific in each individual case and will rarely be amenable to final resolution in a strike-out application. Overall, however, the case is a

good example of how widely these provisions can apply, especially in cases where there is no contract of employment between the claimant and the body accused of inflicting the detriment on them.

The claimant was employed by Highways England (HE), which engaged KPMG for management consultancy services. The claimant was one of a team interacting with KPMG on these services. She alleged that KPMG staff had discriminated against her and forced her out of her job due to protected disclosures and on the basis of her sex. She brought proceedings against KPMG for: (1) whistleblowing detriment (ERA 1996 s 47B), (2) direct sex discrimination (EqA 2010 s 13) and (3) victimisation (s 26). KPMG denied liability on the basis that she had never been employed by them. The claimant countered that she had been under an implied contract with them and, even if not:

(i) re whistleblowing, she came within the extended definition of 'worker' in ERA 1996 s 43K **Q [668.10]** and/or KPMG acted as HE's 'agent' under s 47B(1A)(b) **Q [671.03]**;

(ii) re discrimination, KPMG was an agent under ERA 1996 ss 109 and 110 **Q [1527]**, **Q [1528]**, had instructed, caused or induced contraventions under s 111 **Q [1529]**, or had aided contraventions under s 112 **Q [1530]**.

The case had a complex history, with prolonged attempts at case management, leading to a strike-out application by KPMG. The ET held that there was no contractual nexus between it and the claimant and that her secondary statutory arguments stood little realistic chance of success. The strike-out application was granted.

On her appeal, the EAT agreed that there was no contract, express or implied and held that the s 111 argument could not succeed because of the limiting effect of s 111(7) (citing with approval the passage at **L [522]** explaining the section). However, it upheld her arguments on the other elements:

(a) with regard to s 43K, although it did not apply in *Sharp v Bishop of Worcester* [2015] EWCA Civ 399, [2015] IRLR 663, [2015] ICR 1241, that was because in that case there was no contract with anyone; more helpful was *McTigne v University Hospital Bristol NHS Foundation Trust* [2016] IRLR 742, EAT where it was held that there need not be a contract with the respondent body (see **CIII [11](a)**);

(b) with regard to whistleblowing under s 47B(1A)(b) and discrimination under ss 109 and 110, there is no need for any long-term or formal 'agency' agreement between the two bodies; whether a sufficient relationship existed on the facts has to be considered in each case;

(c) with regard to s 112, the question whether KPMG 'knowingly helped' HE to commit what the section calls a 'basic contravention' again has to be considered on the facts of the case.

The result was that the ET had erred in law in striking out on the basis of (a) to (c) and the case was allowed to proceed for these points to be considered on the merits.

DIVISION DI UNFAIR DISMISSAL

Misconduct; summary dismissal; offence not specified in contract

DI [1397], DI [1915.02]; AII [474.07]

Hewston v OFSTED [2025] EWCA Civ 250

The facts of this high-profile case are set out in full at **DI [1397]**. It concerned the summary dismissal for gross misconduct of a longstanding OFSTED inspector following a complaint from a school that he had touched a pupil to wipe away rain from them. The ET had upheld the dismissal as fair, but the EAT allowed the appeal in no uncertain terms. That decision has now been upheld by the Court of Appeal, in a judgment given by Underhill LJ with a concurring judgment by Warby LJ echoing the principal points made, again in no uncertain terms.

The main point of law in the case concerns dismissal for gross misconduct where the conduct in question is *not* specifically covered by the contract of employment. That was the case here because the claimant's contractual disciplinary terms did not contain a strict 'no touching' rule. Clearly, there can be cases where summary dismissal is warranted without an express term and the ET took the view that this was such a case, but the EAT and Court of Appeal disagreed. Two points of law in the judgments are of particular significance for future such cases:

(1) *No express coverage*. Here, there is an important clarification. It is not just a case of the employer determining that the conduct deserves to be classified as gross misconduct, but an important factor is whether the employee could *reasonably anticipate* that his or her actions were likely to lead to instant dismissal. Arguably, this can give an employee in such circumstances more protection from over-arbitrary decisions by the employer. Obviously, some forms of misconduct will still qualify easily because of the reasonableness qualification (there will still be no need for an express provision that 'You will not kill a customer'). However, the decision was that this was not such a case, especially as there was here no allegation that the touching was sexual and no actual safeguarding issue arose, factors which the court found significant.

(2) *No 'bumping up' of charges*. The decision is also important for a strong disapproval of any attempt by an employer to bump up the seriousness of a misconduct charge by adding in allegations such as 'breakdown of trust and confidence', which has already been referred to by Underhill LJ in previous cases as dangerous and possible 'mission creep' (see **DI [1915.02]**). Echoing this, Warby LJ said that this cannot be a standalone justification for dismissal; at the least there must be some proven misconduct. However, the case goes further because it instances

also bumping up by using 'lack of insight', 'lack of contrition' or 'reputational damage' as make-weights. These must be treated with great caution. It is accepted that if there is proven minor misconduct and the employee refuses to agree not to repeat it, that can be relevant, but where the misconduct is more serious and in particular where it is strenuously denied and defended, the first two should not make the dismissal fair. Reputational damage, if it is to be used at all, would need clear proof.

Two other incidental points are of interest (and adverted to in both judgments):

(a) Objection is taken to the use in this context of the weasel phrase 'inappropriate' behaviour, which could easily be ambiguous and could give an inference that there in fact was a sexual motive.

(b) There are references to the origin of the school's complaint about the claimant, as being just one of a series of complaints about the inspection itself and those conducting it, which were 'redolent of hostility to the inspection and inspectors'; one of the procedural irregularities also found in the case was a failure to give details of the child's original complaint which appeared to be much less serious that as conveyed in the school's complaints to OFSTED.

DIVISION L EQUALITY

Compensation; general principles; improper reductions

L [852]

***Gourlay v West Dumbartonshire Council [2025] EAT 29* (*10 March 2025, unreported*)**

This decision of Lord Fairley in the EAT concerned the correctness of two reductions made in the successful claimant's prima facie compensation; his appeal was allowed on both, one as a matter of law and one as a matter of fact.

Having succeeded in claims for disability discrimination and victimisation, the claimant succeeded in his argument that his treatment by the respondent had rendered him permanently unfit for work, *but* then had his compensation reduced by 80% for two reasons: (1) the likelihood that his employment would have ended fairly anyway after a certain time due to a relationship breakdown and/or him deciding to leave; and (2) he would probably have taken ill-health retirement anyway because of his disabilities themselves (MS and diabetes).

The EAT held, as to (1) that the ET had erred in law. Starting from first principles, the aim of compensation is to put the claimant back in the position they would have been in but for the unlawful acts of the respondent. What the ET must do is to look at the effect that the dismissal had on the ability to find other work and compare the effect of two scenarios of the discriminatory dismissal on the one hand and a non-discriminatory dismissal

on the other; only if a similar impediment would still have resulted from a lawful dismissal will a reduction be justified (see para [28]). On the facts here, of a permanent inability to work, a reduction for a possible future fair dismissal was only logical if that hypothetical fair dismissal would also have rendered him incapable of future work, for which there was no evidence. As to (2), this was possibly a legally sound basis for a reduction, but this had to be established on the facts. Here the ET had accepted it only as a matter of speculation and so its decision was perverse. The question of compensation was remitted to a different ET for reconsideration.

DIVISION M TRADE UNIONS

Status and capacity; defamation; ability to sue

M [172]

***Prospect v Evans [2025] EWHC 499* (*KB*)**

In the case of *Prospect v Evans* [2024] EWHC 1533, [2024] IRLR 835 it was held by Steyn J that a union has sufficient legal personality by statute to bring legal proceedings for defamation against itself (see **M [172]**). This is the next stage in that litigation, in which Eady J in the King's Bench has held that on a natural and ordinary reading the allegations in question about potentially criminal activities by the union were of a defamatory nature. The claimant's case had started with an argument that, although the previous decision had decided that a union could sue, that did not mean that it could sue one of its own members, such as the defendant. However, that argument was disapproved.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time; just and equitable; relevance of suspicion

PI [281], PI [283.02]

HSBC Bank v Chevalier-Firescu [2024] EWCA Civ 1550, [2025] IRLR 268

There was considered in **Bulletin 558** the decision of the Court of Appeal in *Jones v Secretary of State for Health and Social Care* [2024] EWCA Civ 1568, [2025] IRLR 282 in which Bean LJ gave an analysis of the position where a claimant who is out of time with a discrimination claim seeks a just and equitable extension and the question arises whether they knew *or suspected* the existence of the relevant facts at the time.

The instant case, before a different division of the Court of Appeal, was decided at the same time which meant that *Jones* is only mentioned at EAT level. In it, the ET held that the claimant could not have her extension, but the EAT and now the Court of Appeal came to the opposite conclusion. The principal judgment by Laing LJ is largely concerned with the facts, but there

is also a short concurring judgment by Underhill LJ which mentions the question of whether suspicion of the true facts can be enough to defeat a time extension. He says (at [101]):

> 'As to whether suspicion, as opposed to knowledge, of the facts which would found a valid claim is sufficient when considering whether a claimant reasonably could or should have brought proceedings sooner, I do not think that this can be a black-or-white question. There is a broad spectrum between certain knowledge, which is obviously sufficient, and mere speculation, which is obviously not; and "suspicion" is an imprecise term which may connote a point anywhere on that spectrum. Clearly it will often be reasonable to expect a person to bring proceedings where their knowledge of the facts material to the prospects of success, or of the availability of the evidence necessary to prove those facts, is less than certain. Whether that is so in any given case depends on the particular circumstances, including, but not limited to, the degree of the uncertainty in question.'

In *Jones* Bean LJ took a relatively strong line against suspicion, which could be seen as consistent with the reference above to *mere* suspicion. One slightly unfortunate point is that Underhill LJ goes on to quote with approval from *Barnes v MPC* UKEAT/0474/05 (14 November 2005, unreported) which was discounted as an authority by Bean LJ because of its too ready recourse to suspicion. However, it is to be hoped that not too much legal ink will be expended on trying to discern possible inconsistencies between these two decisions. If there is any doubt, *Jones* is clearly the authoritative case because the point was central to the decision and is more fully explored.

Amending the claim; general principles; the nature of the amendment

PI [311]

***Fong v Montgomery et al* (*tla Raemor Trout Fishery*) *[2025] EAT 31* (*11 March 2025, unreported*)**

The claimant, a litigant in person (LIP), brought a claim for unfair dismissal, but lacked the necessary qualifying period. A first attempt at a prehearing seemed to provide more heat than light and resulted in further correspondence over a period. Eventually, the claimant applied to amend his claim to include allegations of dismissal for the automatically unfair reasons of assertion of statutory rights (payment of the NMW) and whistleblowing (failure to pay it to others too). This was disallowed by the EJ and the claimant appealed.

In the EAT Judge Clarke started his judgment with a useful review of the law on amendments flowing from *Selkent Bus Co Ltd v Moore* [1996] IRLR 661, [1996] ICR 836, EAT, with its emphasis on the three factors of the nature of the amendment, the applicability of time limits and the timing and manner of the application (see **L [311.11]**). This case concerned the first of these and the always tricky question as to whether the effect of the amendment would just

be to amend or relabel an existing claim on the one hand or to make a wholly new claim (the latter then potentially raising questions of time limits). This can of course then be further complicated if, as here, the claim is being brought by a LIP who may have more difficulties in categorising claims in the first place. On the facts here, with the claimant's original documentation referring to dismissal for raising 'abuses' by the employer, the EAT held that this was (when properly considered by an ET, as the Court of Appeal have said, 'rolling up its sleeves' and trying to make constructive sense of a difficult or incomplete ET1) a 'paradigm case of relabelling exercise' which was permissible. The case was remitted to a different ET.

The case is thus an interesting one on the relabelling / new claim problem, but it also contains one other point of note, albeit obiter. At [11] it states that, although the point was not actively being argued, a case such as this can raise a question of law in relation to an original claim of ordinary unfair dismissal followed by an application to add specific allegations of automatically unfair dismissal. Are these the same thing, or legally distinct claims? This is considered at **PI [311.16]** where it is contended that the case of *Pruzhanskaya v International Trade & Exhibiters (JV) Ltd* UKEAT/0046/18 (17 July 2018, unreported) was wrong to hold that these are all just types of unfair dismissal and that the correct view is that they are separate claims, raising possible time limit issues, as subsequently held in *Arian v The Spitalfields Practice* [2022] EAT 67 (22 February 2022, unreported) and *MacFarlane v MPC* [2023] EAT 111, [2023] IRLR 34, [2024] ICR 22. Here, the EAT express the view that this is correct and that *Arian* and *MacFarlane* are to be preferred to *Pruzhanskaya*.

Striking out; importance of ET discretion; no fair trial possible

PI [650]

***Kamphues v Venator Materials UK Ltd [2025] EAT 30* (*19 March 2025, unreported*)**

This decision of Judge Tayler in the EAT does not develop the law on strike out but is a good example of the sort of problems that can arise with an uncooperative LIP and the lengths that the ET needs to go to in such a case. Legally, it re-emphasises that under SI 2024/1155 r 38 of the new ET Rules **R [3598]** there are two distinct stages to go through: (1) was the party guilty of conduct which *may* result in a strike out (the 'threshold conduct') and then (2) the exercise of the discretion *whether* to strike out (the 'discretionary decision'), which will often revolve around whether a fair trial is still possible.

In this case, case management was extended, with requirements of further particulars which were not forthcoming and repeated applications for adjournments by the claimant. The eventual result was the striking out of the claimant's claims. However, on his appeal, the EAT held that the ET had proceeded from the first issue to the decision, without considering (or at least showing it had considered) the second issue. On that basis, the appeal had to be allowed. The judgment cites the well known dictum from Sedley LJ in

Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684, [2006] IRLR 630 that the ETs must be open to the difficult as well as the compliant. It also says that in the case of the former there is a need for good judicial skills and a need to avoid excessive demands for, for example, further particulars capable of making LIPs more querulous and unco-operative. On the other hand, having allowed the appeal, the judgment points out that ultimately there can come a point where difficulty does indeed make a fair trial possible, that the history of this case has been 'lamentable' and that on a rehearing the claimant might still be subject to a strike out.

Use of lists of issues; role of the ET; position where a litigant in person

PI [764.01], PI [764.05], PI [827]

Moustache v Chelsea and Westminster Hospitals NHS Foundation Trust [2025] EWCA Civ 185

The facts and decision of the EAT in this case are set out at **PI [764.05]**. The claimant (a LIP) had, over a period, agreed a list of issues to go before the ET, which included disability discrimination in relation to events leading up to her dismissal, but not in relation to the dismissal itself. Addressing all the issues on the list, the ET dismissed them all. On appeal, the claimant argued that the ET should have picked up that extra allegation, though not in her ET1 or the list. The EAT agreed and allowed her appeal, but the Court of Appeal have now reversed that decision, in terms that suggest perhaps a stronger approach to holding parties to an agreed list and not expecting the ET to go behind it, even in the case of a LIP.

The judgment, given by Warby LJ, considers the case law set out in the text and then at [33]–[39] gives guidance on the proper approach to lists of issues. This bears reading in full, but the main points are as follows:

(1) The basic principle is that employment tribunal proceedings are adversarial. The primary onus lies on the parties to identify which claims they wish to bring and which answers to the claims they wish to advance.

(2) The issues raised by the parties are those which emerge clearly from an objective analysis of their statements of case. The tribunal should not be expected to analyse a party's case by reference to documents which come after the pleadings and do not have the same status, such as a witness statement, or by reference to submissions.

(3) Where a party seeks the tribunal's ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction), the tribunal has a duty to address that issue. That is the tribunal's core function.

(4) However, given that the tribunal's role is arbitral, not inquisitorial or investigative (above) it must perform its functions impartially, fairly and justly. It may consider it appropriate, particularly in the case of an

unrepresented party, to explore the scope of a party's case by way of clarification, but whether it does so is a matter of judgement which will rarely qualify as an error of law such that the EAT can interfere.

(5) The starting point is to consider what claims emerge from an objective analysis of the statements of case. A failure by the tribunal to identify and address those claims is liable to amount to a breach of its core duty and hence an error of law. A failure to identify and determine a claim that does not emerge from such an analysis can amount to an error of law but only in rare or exceptional circumstances.

(6) The rare and exceptional circumstances are those identified in *Drysdale v Department of Transport* [2014] EWCA Civ 1083, [2014] IRLR 892 (a case concerning LIPs, see **PI [829]**) where a list is set out (quoted in the judgment here) of factors likely to be relevant in determining if the tribunal has acted in a way that no reasonable tribunal, properly directing itself, would have acted. It was in this overall context that the role of an agreed list of issues fell for consideration.

On the facts of this case, the court decided that this was not a case where the ET should have queried the list of issues. Interestingly, it specifically says that this was not a case like *Mervyn v BW Controls Ltd* [2020] EWCA Civ 393, [2020] IRLR 1364 where there was an apparent mismatch between the original pleadings and the list of issues. The judgment ends by stressing on the facts here that the claimant was a senior manager, literate and skilled in using words and with some knowledge of ET litigation. Her agreement to the final list was unequivocal, with nothing to suggest any undue influence from the employer's solicitors; the ET had started by confirming the list and the claimant had not demurred; any objection by her had only come after the ET's decision.

REFERENCE UPDATE

Bulletin	Case	Reference
558	*Shakil v Samsons Ltd*	[2025] IRLR 252, EAT
558	*Jones v Secretary of State for Health and Social Care*	[2025] IRLR 282, CA
558	*Kingdom of Spain v Lorenzo*	[2025] IRLR 288, CA
559	*British Council v Sellers*	[2025] IRLR 238, EAT
559	*Morais v Ryanair DAC*	[2025] IRLR 297, CA

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