Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Part-time workers; less favourable treatment; causation

AI [146.01]

***Mireku v London Underground Ltd [2025] EAT 57* (*29 April 2025, unreported*)**

The text at **AI [146.02]** considers the problem that has arisen in relation to causation under the Part-time Worker Regulations 2000 SI 2000/1551 reg 5 **R [1292]** as to whether the alleged less favourable treatment must be *solely* because of the part-time status, or it is sufficient that that status was *an effective* cause. The conflicting case law at EAT level is set out in the paragraph, plus the complicating factor that the Scottish Court of Session (IH) in *McMenemy v Capita Business Services Ltd* [2007] CISH 25, [2007] IRLR 400 considered the point directly and held for the 'solely' interpretation. The most recent case on this until now has been the decision of Eady P in *Augustine v Data Cars Ltd* [2024] EAT 117, [2025] ICR 19 where it was held that, in spite of strong a priori arguments for the wider view, it was in the interests of judicial comity for the EAT to follow *McMenemy*, even though it was not technically binding in England.

In the instant case before Pilgerstorfer DHCJ in the EAT the claimant, having lost in the ET, invited the EAT to depart from *Augustine* and give him the benefit of the wider approach. However, the EAT declined to do so, pointing out that much of the previous case law had only approached the question incidentally, that *Augustine* had addressed it head on and that none of the relatively restricted circumstances where the EAT will decline to follow its previous decision (as set out in *British Gas Trading Ltd v Lock* [2016] IRLR 316, [2016] ICR 503, EAT, see **PI [1432]**) applied here. It was pointed out that *Augustine* is under appeal to the Court of Appeal, but pending that the EAT's decision stands.

DIVISION AII CONTRACTS OF EMPLOYMENT

Implied terms; general; primacy of express terms

AII [28]

***Brake Bros Ltd v Hudek [2025] EAT 53* (*28 April 2025, unreported*)**

A basic principle here, from general contract law, is that an implied term cannot negate an express term, though much of the case law in the employment law context is concerned with how close to the wind a party can sail, for example in arguing that the claimed implied term only qualifies or interprets the express term. The instant case, before Lord Fairley P in the EAT, shows a slightly different aspect of the relationship, namely that it will usually be the case that recourse should only be had to the implication of a term after any express term has been explored and applied to the facts of the case. Those facts here were instructive.

The claimant was a salaried lorry driver. His contract provided for him to work five nine-hour shifts per week, but with the proviso that this required such hours in each shift as were necessary to complete his duties. Overtime was included in the contract, but only to kick in if he worked an extra four-and-a-half hours (ie half a shift). Any time above nine hours but less than an extra four-and-a-half hours was not paid for. The claimant challenged this (as an unlawful deduction from pay) arguing that there should be an implied term that time worked above nine hours per shift should be paid for on a pro rata basis. The ET upheld his claim but the EAT allowed the employer's appeal. The question of remuneration throughout shifts and the overtime regime were covered by the *express* terms and there was no justification for implication of further terms, which were not necessary, for example on a business efficacy basis. The key to this was the following dictum from Lord Neuberger in *Marks & Spencer plc v BNP Paribas Securities Services* [2015] UKSC 72, [2016] AC 742, [2016] 4 All ER 441:

> 'In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term … Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied.'

DIVISION CIII WHISTLEBLOWING

Who is protected; job applicants not covered

CIII [10.01], CIII [94]

Sullivan v Isle of Wight Council [2025] EWCA Civ 379

The text at **CIII [10.01]** covers the EAT decision in this case that whistleblowing protection only applies to 'workers', with the particular extension to job applicants in the NHS; it does not apply to job applicants generally. This is clearly the case in the legislation itself, and this case concerned an unsuccessful attempt to challenge this and amend it under art 14 of the European Convention. That decision has now been upheld by the Court of Appeal in a judgment given by Lewis LJ, on slightly different grounds.

The appeal raised three main points under the article:

(1) Are job applicants generally analogous to NHS applicants? The decision was that they are not, especially as when the law was being changed in 2015 to include NHS applicants there was a proposed amendment to an extension to applicants generally but this was voted down in Parliament.

(2) Regardless of this, is being an applicant 'other status' within the article? Here, the appellant won, given that this element of art 14 can be given a wide interpretation.

(3) Is the restriction to NHS applicants objectively justified/proportionate within the article? This was the principal point on which the appellant lost. It was held that in applying this element a court must give appropriate weight to the judgment of Parliament in relation to social or economic policy, and that in practice that weight is likely to be substantial (citing *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, an unsuccessful challenge to the restriction of family benefits to two children). It is said that care must be taken with art 14 not to let it be used too widely to challenge legislative changes that the challengers are simply opposed to. At [81] the judgment adds that 'The fact that Parliament has chosen to legislate for one particular set of circumstances is unlikely, of itself, to demonstrate a lack of objective justification for the legislation that is adopted'.

That disposed of the appeal on its main point, but there was another point of separate interest as to the nature of the alleged protected disclosure itself. The appellant had failed to get the post after an interview before a panel including an individual against whom she then made allegations about his running of a charity not part of the council. The council had refused to revisit her application in the light of this. However, approving of the EAT's view on this, the court held that this fell foul of the rule in *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180, [2020] IRLR 230 that a whistleblowing detriment must have arisen in an employment context, see **CIII [94]**. That was not the case here, so the claim would have failed anyway.

DIVISION L EQUALITY

Sex discrimination; the protected grounds; the relationship with gender reassignment

L [191.01], L [220], L [264.01]; K [20.05]

For Women Scotland v the Scottish Ministers [2025] UKSC 16

This decision of the Supreme Court has of course been a major news story. Much now has to be worked out about its practical implications, in particular by the EHRC. As far as the substantive law is concerned, the key points were: (1) the statutory interpretation of the sex equality provisions of the EqA 2010 which led to an exhaustive analysis of the many aspects of this that could arise and the effects on them of the competing versions of 'sex'; and (2) the interaction between that Act and the Gender Recognition Act 2004 (GRA 2004), with the latter being held to be subject to disapplication by other legislation either expressly or, as here, by necessary implication. The result was that 'sex' means biological sex, that this is not affected by the GRA 2004 and that protections for transgender people are provided separately in the EqA 2010. Lord Hodge's judgment is long and comprehensive, but at the end (at para [265]) he very helpfully gave the following summary, which cannot be improved upon:

'(i) The question for the court is a question of statutory interpretation; we are concerned with the meaning of the provisions of the EA 2010 in the light of section 9 of the GRA.

(ii) Parliament in using the words "man" and "woman" in the SDA 1975 referred to biological sex.

(iii) The 1999 Regulations, enacted in response to *P v S*, created a new protected characteristic of a person intending to undergo, or undergoing or having undergone gender reassignment. The 1999 Regulations did not amend the meaning of "man" or "woman" in the SDA 1975.

(iv) The GRA 2004 did not amend the meaning of "man" and "woman" in the SDA 1975.

(v) Section 9(3) of the GRA 2004 disapplies the rule in section 9(1) of that Act where the words of legislation, enacted before or after the commencement of the GRA 2004, are on careful consideration interpreted in their context and having regard to their purpose to be inconsistent with that rule. It is not necessary that there are express words disapplying the rule in section 9(1) of the GRA 2004 or that such disapplication arises by necessary implication as the legality principle does not apply.

(vi) The context in which the EA 2010 was enacted was therefore that the SDA 1975 definitions of "man" and "woman" referred to biological sex and trans people had the protected characteristic of gender reassignment.

(vii) The EA 2010 is an amending and consolidating statute. It enacts group based protections against discrimination on the grounds of sex and gender reassignment and imposes duties of positive action.

(viii) It is important that the EA 2010 is interpreted in a clear and consistent way so that groups which share a protected characteristic can be identified by those on whom the Act imposes obligations so that they can perform those obligations in a practical way.

(ix) There is no indication in relevant secondary materials that the EA 2010 modified in any material way the meaning of "man" and "woman" or "sex" from the meanings in the SDA 1975.

(x) Interpreting "sex" as certificated sex would cut across the definitions of "man" and "woman" and thus the protected characteristic of sex in an incoherent way. It would create heterogeneous groupings. As a matter of ordinary language, the provisions relating to sex discrimination, and especially those relating to pregnancy and maternity (sections 13(6), 17 and 18), and to protection from risks specifically affecting women (Schedule 22, paragraph 2), can only be interpreted as referring to biological sex.

(xi) We reject the suggestion of the Inner House that the words can bear a variable meaning so that in the provisions relating to pregnancy and maternity the EA 2010 is referring to biological sex only, while elsewhere it refers to certificated sex as well.

(xii) Gender reassignment and sex are separate bases for discrimination and inequality. The interpretation favoured by the EHRC and the Scottish Ministers would create two sub-groups within those who share the protected characteristic of gender reassignment, giving trans persons who possess a GRC greater rights than those who do not. Those seeking to perform their obligations under the Act would have no obvious means of distinguishing between the two sub-groups to whom different duties were owed, particularly since they could not ask persons whether they had obtained a GRC.

(xiii) That interpretation would also seriously weaken the protections given to those with the protected characteristic of sexual orientation for example by interfering with their ability to have lesbian-only spaces and associations.

(xiv) There are other provisions whose proper functioning requires a biological interpretation of "sex". These include separate spaces and single-sex services (including changing rooms, hostels and medical services), communal accommodation and others.

(xv) Similar incoherence and impracticability arise in the operations of provisions relating to single-sex characteristic associations and charities, women's fair participation in sport, the operation of the public sector equality duty, and the armed forces.

(xvi) It is striking that the EHRC has advised the UK Government of the problems created by its interpretation of the EA 2010, which include many of the matters which we have discussed above, and has called for legislation to amend the Act. The absence of coherence and the practical problems to which that interpretation gives rise are clear pointers that the interpretation is not correct.

(xvii) The interpretation of the EA 2010 (ie the biological sex reading), which we conclude is the only correct one, does not cause disadvantage to trans people, with or without a GRC. In the light of case law interpreting the relevant provisions, they would be able to invoke the provisions on direct discrimination and harassment, and indirect discrimination. A certificated sex reading is not required to give them those protections.

(xviii) We therefore conclude that the provisions of the EA 2010 which we have discussed are provisions to which section 9(3) of the GRA 2004 applies. The meaning of the terms "sex", "man" and "woman" in the EA 2010 is biological and not certificated sex. Any other interpretation would render the EA 2010 incoherent and impracticable to operate.'

Victimisation; an allegation of contravention of the EqA 2010; level of specificity

L [475]

Kokomane v Boots Management Services Ltd [2025] EAT 38 (11 March 2025, unreported)

In this allegation of victimisation based on the handling of a grievance, the ET dismissed the claim because the claimant had not, when making her complaints, specifically referred to them being about 'race' or 'discrimination'. The ET had relied on the case of *Fullah v Medical Research Council* [2022] EAT 45 (24 June 2021, unreported) (see **L [476.01]**) which had stressed the need for a claim to be made clear. However, the claimant on appeal argued that this was too narrow an approach, as the judgment in that case had gone on to say that it may also be important to consider what was said in context. The EAT agreed. At [24], after referring also to *Waters v MPC* [1997] IRLR 589, [1997] ICR 1073, CA and *Durrani v London Borough of Ealing* UKEAT/0454/2012 (10 April 2013, unreported) (both considered at **L [475]**), Judge Beard said:

> 'It appears to me the law could be summed up in this way: what is necessary is that the ET should take account of all of the factors that are provided in the information given by the employee to the employer. In addition the ET needs to consider that information on the basis of how it would be understood by the employer in context. It would be understood by the employer, in part, because of the general facts about the employee and the place of work, which the employer would know of in any event. In terms, that the employee's complaint should be

considered by the ET by examining the way that it would be understood by the employer. When the employee makes the complaint explicit that will be an easy task. When the complaint is oblique the context becomes important.'

Here, there were facts from which the nature of her complaints could be understood, in particular the fact that she was the only black employee and her references to differences in treatment between employees.

Burden of proof; drawing of inferences; two-stage test

L [806]

Edwards v UNITE the Union [2025] ICR 493, EAT

The claimant sought the help of his union to bring proceedings against his employer. When this was not provided, he brought further proceedings against the union, inter alia for victimisation, based on how his request was dealt with, the actions of officials and threats that had been made. With regard to victimisation, the ET held that under the EqA 2010 s 136 **Q [1548]** he had not proved facts from which victimisation could be inferred (though it added that, if he had, it would have held that the union had not disproved that inference).

On appeal, Judge Stout rehearsed the law on s 136, in particular the two-stage test to be applied, namely: (1) has the claimant shown facts from which the inference could be drawn; and (2) if so, has the respondent disproved discrimination. The key point here was the reaffirmation that, although an ET does not have to hear these two points entirely separately, it must make findings on them without running them together. In particular, it must not effectively determine the second point while considering the first, because of the danger if doing so of putting the burden on to the claimant of *disproving* the respondent's defence. At [49] and [50] this is put as follows:

'Therefore, whilst requiring a degree of intellectual rigour, possibly gymnastics even, the tribunal, when considering its factual conclusions at this point (the first stage), must assiduously leave out of its analysis any evidence regarding a proffered adequate explanation. To do otherwise, and to include the explanation at this stage runs the risk of inadvertently and, wrongly, requiring the claimant to disprove the validity of that explanation.

Tribunals are entitled to draw inferences from primary facts. However, the statutory demarcation around "explanation" remains. Without doubt, therefore, at the first stage, the question the tribunal must ask is: on these facts, could we conclude that discrimination/victimisation took place? The question is not would we so conclude, or should we so conclude. It is simply could we so conclude from the proven primary facts or from inferences we could draw from those primary facts?'

On the facts here, the ET had fallen into this error and the appeal was allowed.

DIVISION PI PRACTICE AND PROCEDURE

Amending the claim; cases where the amended claim would have been in time

PI [312.34]

***Dethling v Metropolitan Police Service [2025] EAT 58* (*8 April 2025, unreported*)**

Normally, cases where an amendment is being requested to add to or alter the original claim will be ones where, if the amendment were to be granted, there would be the further complication that the amended/added claim(s) would be outside the time limit (given that an amendment is not to be backdated). However, this case before Judge Auerbach in the EAT concerned the rarer case where the amended/added claim would in fact be *within* the time limit.

At **PI [312.34]** this is discussed in the context of the extent that the merits (or lack thereof) of the new claim can be taken into account when deciding whether to allow the amendment. It cites *Gillet v Bridge 86 Ltd* UKEAT/0051/17 (16 June 2017, unreported) for Soole J's statement there that where an application to amend is made in time, he found it difficult to conceive of a case in which a pessimistic view of the merits (falling short of there being no reasonable prospects of success) could provide support for a refusal of the request. He considered that timeliness was a factor of considerable weight, if not necessarily decisive. That overall approach was followed in the instant case. The judgment cites *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132 (26 April 2022, unreported) for the proposition that there is no absolute rule against considering the merits, and goes on to point out that the difference in a timeous case is that the claimant could in fact have started a *new* claim for the matters to be added. Generally, it is better to avoid that complication and to allow the amendment, though with the caveat that there could be circumstances where the application to amend, though timeous, came so late in the proceedings that it would unduly disrupt them (citing *Patka v BBC* UKEAT/0190/17 (12 April 2018, unreported)). However, a role for a merits consideration was accepted and the actual decision here was that the ET, in refusing the amendment to include victimisation on a merits basis, had misconstrued the law on victimisation by applying too exacting a standard to the question of causation. Its merits-based decision to refuse was thus wrong in law; the EAT allowed the claimant's appeal and took the decision itself to grant the amendment.

Disclosure and inspection; inclusion of information

PI [454]

***Bari v Richmond and Wandsworth Councils [2025] EAT 54* (*25 March 2025, unreported*)**

An order for disclosure usually relates to a 'document', on which there is much authority. However, the instant case before Judge Auerbach considered

the position where what the requesting party is seeking is *information* more generally. Do the 2013 ET Rules permit such a request? The judgment seeks to set the matter to rights. The problem was that *Carrington v Helix Lighting Ltd* [1990] IRLR 6, [1990] ICR 125, which was primarily concerned to hold that there is no obligation to *create* a document, suggested that there was no power for an ET to order disclosure of information or the answering of questions put by that party. However, the EAT here have confirmed that there is such a power, for two reasons: (1) *Carrington* was decided under the previous Rules, which differed in their approach to case management; and (2) subsequent cases had accepted such a power, in particular *Essex County Council v Jarrett* UKEAT/0087/15 (1 May 2015, unreported) and *Tesco Stores Ltd v Element* UKEAT/0228/20 (13 January 2021, unreported). The key passage here is at [44]:

> 'I conclude, having regard to all the authorities, that the general test and principles are broadly the same whether the application is for disclosure or for information. However, when it comes to the application of the test to a request for information there may be real practical differences. If what is being sought is not an existing document or documents, but pure information, the task involved in complying with the order, if made, may be practically very different. For example, it might require considerable work to find and collate the information or to ascertain if it even exists. It may require analysis or processing of raw information in order to answer the specific questions asked. Even if some answers might turn out to be found within existing documents, the substantive nature of the exercise may involve significantly different work. Of course, what would be involved in the given case is case-sensitive.'

Significantly, the judgment then goes on to warn against the use of this power for 'fishing expeditions', as to which see **PI [451.05]**.

Costs; vexatious etc conduct in conducting proceedings

PI [1073]

***Gold Panda Ltd v O'Keefe [2025] EAT 47* (*22 April 2025, unreported*)**

In the course of an action by the claimant, the respondent company took steps to remove itself from the register of companies, in effect making any award impossible to enforce. The ET made a costs order under SI 2013/1237 Sch 1 r 76(1)(a) on the basis of unreasonable action, which was challenged on appeal by the company. It accepted that there had been unreasonable action, but denied that this was in relation to 'the way the proceedings had been conducted', another requirement of the sub-paragraph. This was a rather purist interpretation of the phrase (rather akin to a traditional *res inter alios acta* defence in tort law), arguing that it might well affect recovery, but not the proceedings themselves.

Lord Fairley P approved a passage from **PI [1056.01]** which cites *Bolch v Chipman* [2004] IRLR 140 accepting that *some* actions outside the proceedings may not come within r 76(1)(a) but also showing the sort of distinction

that has to be drawn here. On these facts, the EAT held that this conduct *did* impinge on the proceedings themselves and so the costs order was proper. It was accepted (on the ET's findings) that this conduct was not confined to any future award, but had the purpose of preventing the actual complaints from proceeding any further; this was not extraneous to the proceedings overall. There was no error of law in the ET's costs order.

EAT; institution of appeal; time limits

PI [1446]

Davies v BMW (UK) Manufacturing [2025] EWCA Civ 356

In *Ridley v H B Kirtley* [2024] EWCA Civ 884, [2024] IRLR 845 the Court of Appeal revisited the longstanding issue of when the time limit for appealing to the EAT can be extended, arguably showing a more liberal approach than in some of the earlier cases. The judgment in the instant case considers *Ridley* (see the detailed analysis at paras [10]–[30]) and the result was to allow the appellant's appeal against the refusal by the EAT to forgive her failure to enclose one particular document with an otherwise timely appeal (partly due to a known deficiency in the EAT's server). The reasons for so doing are set out at [35], arguably showing the influence of the earlier judgment:

(1) The EAT did not expressly recognise the legally relevant distinction between a case in which an appellant lodges an appeal within the time limit and a document or part of a document is missing, and a case in which an appellant misses the deadline altogether (a key point arising in *Ridley* which had not been fully considered before).

(2) It treated the relevant delay as the gap between the date when the deadline expired and the date when the appellant lodged the missing document (the ET's judgment). The relevant delay is the delay between the time when the EAT told her of her mistake and when she corrected it.

(3) It treated the making of a mistake (which Underhill J in *Jurkowska v Hlmad Ltd* [2008] EWCA Civ 231, [2008] IRLR 430 had categorised as a 'venial' mistake even when made by professional employment solicitors who should have known better) as *itself* a reason for not extending time.

(4) It failed to recognise that this case was on all fours with *J v K* [2019] EWCA Civ 5, [2019] IRLR 723 because it was her awareness of the limitations of the EAT's server which led her to attach the relevant documents to separate emails, and thus to duplicate one relevant document, and to leave out the ET's judgment.

(5) It failed to recognise that, on the facts, she had very substantially complied with the Rules; the fact that it was obvious overall that she had lost in the ET, coupled with the inclusion of the ET's reasons, reduced the importance of the judgment to the institution of the appeal.

The decision is a useful indicator of the current approach, but one continuing issue, not addressed here, is the possible complications at EAT level caused by post-*Ridley* decisions which have not always seemed consistent, see **PI [1446.04].**

REFERENCE UPDATE

Bulletin	Case	Reference
555	*Kikwera-Akaka v Salvation Army Trading Co Ltd*	[2025] IRLR 341, EAT
556	*Ministry of Defence v Rubery*	[2025] ICR 52, EAT
558	*London United Busways Ltd v de Marchi*	[2025] IRLR 352, EAT
559	*Eddie Stobart Ltd v Graham*	[2025] IRLR 334, EAT
560	*Marston Holdings Ltd v Perkins*	[2025] IRLR 318, EAT
560	*Higgs v Farmor's School*	[2025] IRLR 368, CA
555	*Kikwera-Akaka v Salvation Army Trading Co Ltd*	[2025] IRLR 341, EAT

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