Harvey on Industrial Relations and Employment Law

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

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

DIVISION AI CATEGORIES OF WORKER

Part-time workers; less favourable treatment; causation; sole reason

AI [146.02]

Augustine v Data Cars Ltd [2025] EWCA Civ 658

This is an important decision on the causation requirement in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 reg 5 **R [1292]**. Must the part-time status be the *sole* cause of the less favourable treatment being relied upon, or is it sufficient that it was *an effective* cause? This well-worn controversy and the conflicting case law on it are set out at **AI [146.02]**. In last month's **Bulletin 562** there was reported the decision in *Mireku v London Underground Ltd* [2025] EAT 57 (29 April 2025, unreported) where the EAT held that it would follow the EAT in the instant case where Eady P had held that it was the sole cause approach that should be applied because of the decision that way by the Scottish Court of Session (IH) in *McMenemy v Capita Business Services Ltd* [2007] CSIH 25, [2007] IRLR 400, though making clear that this was because of judicial comity and that in principle she agreed with the previous English EAT cases which strongly favoured the effective cause approach. It now turns out that the EAT in *Mireku* were right because the Court of Appeal have heard the appeal in *Augustine* and upheld the EAT's decision. However, that may well not be the final word.

The Court of Appeal in fact split on the legal correctness of *McMenemy* on the interpretation of the regulation. Giving the lead judgment, Edis LJ considered that the effective cause approach was the correct one in law, as had been held in *Sharma v Manchester City Council* [2008] IRLR 336, EAT and *Carl v University of Sheffield* [2009] IRLR 616, EAT. However, he agreed

with Eady P in the EAT here that this was outweighed by the importance of consistency north and south of the Tweed in the interpretation of the Regulations, even though technically English EATs are not bound by the Court of Session (applying on this point *Jwanczuk v Secretary of State for Work and Pensions* [2023] EWCA Civ 1156, [2024] KB 275, though this case has been heard on further appeal by the Supreme Court and judgment is awaited). He thus dismissed the claimant's appeal because in his case the part-time status was not the sole cause. Bean LJ agreed with this. Elizabeth Laing LJ decided to the contrary that *McMenemy* was correctly decided in law and so agreed to dismiss the appeal, but for different reasons.

Bean LJ's concurring judgment is significant for the possible future because he made it clear that this left the law in an unsatisfactory state and that, if the claimant so wishes, he should be given leave to appeal to the Supreme Court, in the hope of obtaining a definitive answer to this conundrum.

DIVISION CIII WHISTLEBLOWING

Whistleblowing detriment; vicarious liability for agents

CIII [98]

Handa v Station Hotel (Newcastle) Ltd [2025] EAT 62 (2 May 2025, unreported)

This decision of Judge Auerbach in the EAT affirms a basic point about the meaning of 'agency' in the ERA 1996 s 47B(1A)(b) **Q [671.03]** and adds an important qualification as to *when* a person established to qualify as an agent will be liable.

The claimant was dismissed and brought proceedings for unfair dismissal, including under the whistleblowing legislation, based on protected disclosures relating to alleged financial irregularities. In addition, however, he sued two independent HR consultants who had assisted the employer for detriment under the ERA 1996 s 47B, that detriment being his dismissal. He sued R4 who had been retained by the employer to investigate grievances brought against the claimant by other employees; he found two instances established. The employer had then instituted disciplinary procedures and had retained R5 to conduct those procedures; she found the charges substantiated and gave her opinion that they could merit dismissal. The employer then took the decision to dismiss.

At a preliminary hearing the ET acceded to the request to strike out the proceedings against R4 and R5 on the basis in law that they could not be the employer's agents. The claimant appealed against this, but with only partial success. The first question was whether these two could be agents. Here, the EAT held, following *Hoppe v HMRC* EA-2020–000098 (11 October 2021), that the reference to 'agency' in s 47B is to be construed as in the EqA 2010 s 109(2) **Q [1527]**; that meant that it was to be construed as a reference to the common law concept of agency, applying *Kemeh v MOD* [2014] EWCA Civ 91, [2014] IRLR 377 and *UNITE the Union v Nailard* [2018] EWCA Civ 1203, [2018] IRLR 730, see **L [501]**. On that basis, it was held here that the HR

consultants could be agents and so the ET had erred. However, the actual decision was that these agents were *not* liable on the facts and so the strike outs stood. The reason was that once it is established that a person is an agent, they will still only be liable for matters falling *within the remit* of that particular agency arrangement. Here, there was no evidence (and the claimant had not argued) that either R4 or R5 had decided upon or implemented the actual dismissal which was the alleged detriment. For good measure, it was also held that there was no evidence that either had been motivated by the protected disclosures.

This second point is of general importance in applying s 47B(1A)(b). It is of particular importance in a case like this of the use of outside professionals/consultants by the employer where the scope of the reliance will be important and a potential claimant will have to take care in exactly what allegations are made about their involvement.

DIVISION F TRANSFER OF UNDERTAKINGS

Effect of a transfer; tortious liability; limitation

F [124]

***ABC v Huntercombe* (*No 12*) *[2025] EWHC 1000* (*KB*)**

In the earlier days of TUPE there were many cases exploring what the regulations could cover apart from the obvious. One major development came in *Bernadone v Pall Mall Service Group* [2000] IRLR 487, [2001] ICR 197, CA, where it was held that tortious liability for personal injury could transfer automatically under reg 4(2) **R [2293]** from the transferor employer to the transferee who became the appropriate defendant. Thus, in that case where the transferor was the claimant's employer when he suffered an industrial injury, a subsequent TUPE transfer meant that the action lay against the transferee (see **F [124]**).

The instant case before Judge Bird in the King's Bench however adds a limitation to this general principle, namely that under SI 2006/246 reg 4(2) the tortious liability must arise 'under or in connection with any such contract', ie a contract of employment which is transferred. The case is authority that that will *not* be the case where the tortious liability is to a third party, not an employee. In the case, the claimant had been a patient of health firm A where it was alleged that he had been injured by medical negligence; when A's business was transferred to medical firm B (in what was accepted to be a TUPE transfer) the claimant brought proceedings against B, relying on *Bernadone* and the one other first instance decision that had considered this point, *Doane v Wimbledon Football Club* [2007] 12 WLUK 2 which concerned a sport injury and where it was held that liability to a third party could transfer. This decision was mentioned in *Sean Pong Tyres v Moore* [2024] EAT 1, [2004] IRLR 363 (see **F [122.06]**) but only to be distinguished and not approved. Approaching the matter *de novo*, the judge in the instant case held that *Doane* was wrongly decided, that injury to a third party which is not connected with a contract of employment is too remote and so does not transfer.

DIVISION K EQUAL PAY

Equal value claims; effect of an existing job evaluation study

K [302]

***Brady v North Lanarkshire Council [2025] EAT 69* (*15 May 2025, unreported*)**

This case before Lady Haldane in the EAT concerned a large-scale multiple equal value claim where the dominant factor was the existence of a string of job evaluation studies (JESs) which the council relied on as showing that the jobs in question were not comparable. The relevant statutory provision was the EqA 2010 s 131(5), (6) **Q [1543]** which states that (in effect) an equal value claim is not to succeed if the jobs in question have been given different values in a JES *unless* the ET has reasonable grounds to suspect that the JES was either based on a sex discriminatory system or is otherwise 'unreliable'.

In this case there were several JESs over 12 years and the ET found a majority of them were valid but a minority were unreliable. The claimants appealed against the former and to a large extent the decision of the EAT was based on these factual findings. However, the point of law of interest in the case was whether in applying s 131 there is a 'principle of the one bad apple', namely that if there is evidence that there have been flawed or manipulated evaluations in relation to some of the findings, that taints the whole JES(s) to the extent that it all falls foul of s 131 and cannot be relied upon. The claimants argued that there is such a principle and that the ET should have applied it here. The ET accepted such a principle (as had been upheld in the ET case of *Hartley v Northumbria NHS Foundation Trust* No 2507033/2007) but held that on the facts it did not apply here.

The decision of the EAT rejecting the appeal is given in [32] of the judgment which states that the ET's decision here was one that was open to it on the facts. The problem is to determine the status now of any such principle. This revolves around para [31] which is arguably *obiter* but contains the EAT's approach. Adverting firstly to the facts of *Hartley* and then contrasting them with those here, it states:

> 'The panel could not conclude that the distinction is immaterial, when one has regard to the possible consequences of the approach contended for by the claimants. It is not hard to appreciate the contention that a national JES which governs the evaluation of the roles of thousands of, say, nurses, which is demonstrably tainted by manipulation at its heart, gives rise to reasonable grounds for suspicion that the whole exercise is unreliable. The same cannot be said of a JES carried out on the basis of a scheme which is not itself said to be tainted by any such suspicion, rather certain evaluations carried out under that scheme are said to be so afflicted by manipulation or connivance such that they meet the statutory test of unreliability. The point [counsel for the council] makes in the context of the present cases is a powerful one – to follow the route suggested by the claimants and declare all of the local evaluations

> to be unreliable on the basis of a few "bad apples" would have the potential consequence that the evaluations of many posts within the respondent's organisation, many of which may not even have been the subject of challenge, would fall to be declared as unreliable and have to await the next re-evaluation exercise before they could be looked at again. That, it respectfully seemed to the panel, is the antithesis of the straightforward interpretation of the statutory language in a context such as the present.'

Does this approve of the principle, disapprove it or neither? The latter part suggests that as a 'principle' it is too blunt an instrument, capable of doing considerable violence to a complex JES or series of them going across a whole organisation and also negating the preferred approach to s 131, namely that whether there is reasonable suspicion of something dodgy is a wide question of fact for the ET. On the other hand, the former part suggests that if there *is* something fundamentally dodgy about the whole basis of the JES exercise, it will not be difficult for an ET to have a reasonable suspicion. On a positive note, this may be interpreted as meaning that, while the one bad apple idea cannot be a principle, it can at least be a factor under s 131. On a more negative note it may simply mean that it goes into that well-known legal category of a statement of the bleedin' obvious.

DIVISION L EQUALITY

Liability for an agent; definition of agent

L [500]

Fasano v Reckitt Benckiser Group plc [2025] EWCA Civ 592

This is another case on agency, this time under the EqA 2010 s 109 **Q [1527]**. The facts were that the claimant was employed by a subsidiary company within a group. The parent company ran a long-term incentive plan for its subsidiaries. When it made changes to this plan, the claimant argued that these constituted indirect age discrimination. The point at issue in this appeal arose because he claimed that in making the changes the parent company acted as the agent of his direct employer, the subsidiary, thus making the latter liable under s 109 and the parent liable under s 110. The ET agreed with that analysis but the EAT allowed the employers' appeal, holding that, applying the normal law of agency (as is accepted under s 109), the parent did not act with the authority of the subsidiary or on its behalf. The Court of Appeal have now upheld that decision, in the same terms. For good measure, it also upheld a second ground for dismissing the claim, namely that in any event there was no indirect discrimination because the changes to the plan were shown by the employers to have been objectively justified.

DIVISION L EQUALITY

Contract workers; what is the nature of the protection?

L [724]

***Djalo v Secretary of State for Justice [2025] EAT 67* (*12 May 2025, unreported*)**

In *Boohene v The Royal Parks Ltd* [2024] EWCA Civ 583, [2024] IRLR 668 the Court of Appeal held that the EqA 2010 s 41 **Q [1483]** on contract workers does not permit a contract worker to bring a discrimination claim against a principal which relates to the remuneration payable under the worker's contract with their employer (the supplier). Any claim must lie against that employer. The problem for the claimant here is that they wished to complain about a discrepancy between their contract payment and the wages paid by the principal to its own employees, which is not permitted. That decision came after the ET's decision in the instant case but before this appeal to the EAT.

The claimant was employed by Co O, a private facilities management company which supplies services to the MoJ, where she worked as a cleaner. She had no contractual relationship with the MoJ. She objected to the fact that the MoJ's direct employees received a higher rate than she did, and that this indirectly discriminated against the contract workers who were disproportionately of black or ethnic minority ethnicity. The ET rejected the claim. On her appeal to the EAT under Heather Williams J she had to try to distinguish the recent decision in *Boohene*. Her argument was that under the head contract there was a provision that would have allowed the MoJ to insist that Co C paid her the London Living Wage (as with its direct employees). However, it was held that this was not a sufficient ground of distinction and that she could not rely on the 'single source' concept from equal pay law. The EAT also rejected her argument in the alternative that the decision in *Boohene* on the interpretation of s 41 was contrary to art 14 of the European Convention.

DIVISION M TRADE UNIONS

Certification Officer; general jurisdiction; discretion to refuse application

M [4001]

***Chandra v University and College Union [2025] EAT 70* (*20 May, unreported*)**

This decision of Bourne J in the EAT explores the power of the CO to refuse an application under the TULR(C)A 1992 s 108A **Q [342.01]**, holding that it is not as wide as has hitherto been thought by the CO's office.

The claimant had been the chair of the LSE branch of the respondent union. Three complaints were made about his conduct, which were upheld by the union's NEC committee. An internal appeal against this finding was dismissed. In the light of this he made 12 complaints to the CO under s 108A(2)(b) but these were rejected because, she said, they were unarguable.

The claimant appealed, arguing that: (1) the CO had used a merits-based test which is not permitted under s 108B; and (2) this had involved holding a 'mini-trial' of the facts without any procedural safeguards (as criticised by Judge Tayler in *Morley v UNISON* [2024] EAT 143 (12 September 2024, unreported)). The union argued that the CO had operated lawfully, in the light of her power to strike out in ss 256 and 256ZA(6). The EAT allowed the claimant's appeal and remitted the case to the CO. It held that the decision to reject did not come within the narrow grounds in s 108B which do *not* permit a merits-based decision, and that on the facts the case could not be struck out under s 256ZA (it being affirmed that the test under this special provision is the same as under the ET Rules on striking out generally, see *Embery v Fire Brigades Union* [2023] EAT 134 (25 October 2023, unreported)).

The judgment sets out at [25]–[43] comprehensive guidance on the meaning and application of ss 108A, 108B, 256 and 256ZA, and in particular how they fit together. This is too long to set out here and should be consulted directly.

DIVISION PI PRACTICE AND PROCEDURE

Privacy orders; the importance of open justice

PI [932]

***XY v AB [2025] EAT 66* (*13 May 2025, unreported*)**

This was a rather unusual case on anonymity orders under (now) the ET Rules SI 2024/1155 r 49 **R [3646].** The actual decision of Cavanagh J in the EAT was that the ET was within its rights to grant the respondent a permanent anonymity order, primarily on the grounds of the claimant's conduct in unilaterally withdrawing her claim before her allegations were tested and ruled on, continuing to make allegations against the respondent in breach of an order and falsely asserting to third parties that she had won a sexual harassment claim against him. To that extent, the decision is one of fact, but what marks the case out is that in the course of a long judgment the judge not only conducted a detailed review of the case authorities, but also at [107] sets out a series of propositions from that case law ('Summary of the relevant law') which are said to be particularly relevant to the instant case, but which could be of considerable use by ETs in future cases too. It takes the form of 25 propositions. As in the earlier case here, it is too long to set out in full and merits reading in full, but to give a good idea, they are grouped under the following headings:

(1) the approach that should be taken by a tribunal;

(2) the common law stage of the analysis;

(3) considerations that are relevant to the common law stage of the analysis;

(4) considerations that are relevant to the check against Convention rights; and

(5) considerations that are of particular relevance in anonymity cases.

Privacy orders relating to disability; desire to keep disability hidden

PI [949]

F v J [2025] EAT 34, [2025] IRLR 416, EAT

The claimant, a university lecturer, was disabled by reason of autism. He had a diagnosis of this, but was concerned to keep it private (even from family members). When he brought several claims of disability discrimination he applied for an anonymity order. The bases for this were: (1) the possibility of future unemployability if the condition were known; and (2) the fear that if he went back to his previous engagement in school teaching, knowledge of it by the children could cause problems. In support of these (particularly (1)) he produced academic writings and reports on autism. The ET however were not impressed and refused the order.

The claimant appealed, arguing that the ET had applied too high a test for an order, requiring objective proof of his fears for the future, relying on *Millicom Services UK Ltd v Clifford* [2023] EWCA Civ 50, [2023] IRLR 295 and, in the alternative, that the ET's decision on the facts was perverse. The EAT under Judge Barklam allowed the appeal on the first ground. It was held that the material he had produced was probative and that the ET had indeed applied too high a bar under r 49. It is impossible to prove objectively what may happen in the future in a case such as this (and the sort of medical evidence that may be required in other disability cases would not resolve that). The correct test to apply is whether the party seeking the order has shown a reasonable foundation for their beliefs/fears. On the facts here, the claimant had done so and the EAT itself made the order. It accepted of course the importance generally of open justice, but added the factor that in this case the identities of the parties were not critical to public understanding of the case. Interestingly, the EAT also made an order covering the respondent university because the facts likely to come out would be capable of identifying the claimant without such an order.

EAT; Institution of appeal; missing documentation

PI [1450.05]

Melki v Bouyges E and S Contracting UK Ltd [2025] EWCA Civ 585

The decision of the EAT in this case was the first on the amended EAT Rules SI 1993/2854 r 37(5) **R [750]** but it immediately caused problems with its interpretation. The aim of the amendment was to give a wider discretion to forgive a failure to give all the necessary documentation under r 3(1) if (1) the appellant had made a 'minor error' and (2) had rectified it. The case concerned missing grounds of resistance which were then required to be supplied by the appellant. The EAT held that this was not a minor error and so the appeal could not proceed. It has been argued in this work that this was too strict an approach to what was meant to be a liberalising change, and some subsequent cases seemed to agree but others to take the view that *Melki* was too stringent.

The Court of Appeal have now heard the appeal in *Melki* and overturned the EAT's decision. The principal judgment is by Elizabeth Laing LJ who cites extensively from *Davies v BMW (UK) Manufacturing Ltd* [2025] EWCA Civ 356 which was considered in **Bulletin 562.** Emphasis is then placed on the mischief behind the 2023 amendment, which was to remedy the position whereby approximately a fifth of appeals to the EAT were in time but missing some documentation, taking up too much of the EAT's time. The aim was therefore to relax the previous strictness in cases of *partial* failure to comply in a case where the appeal was otherwise in time (a distinction that was fundamental to the decision on the previous law in *Ridley v H B Kirtley* [2024] EWCA Civ 884, [2024] IRLR 845). The holding of the Court of Appeal was that the EAT's approach failed to give effect to this clear intent. At [50] the judgment states:

> ' "Minor" is an ordinary English word. It is a comparative adjective, as the Judge observed. The opposite of "minor" is "major". Rule 37(5) refers to "a minor error in complying with the requirement under rule 3(1) to submit relevant documents" to the EAT. Whether an error is "minor", or not, therefore, is not an abstract question. It is to be answered in the context of compliance with rule 3(1). I consider that the Judge's interpretation is wrong for three reasons. First, it ignores that criterion for testing whether the error is "minor". The relevant error is a minor error in complying with rule 3(1), not a "minor error" in doing something else, or a free-floating "minor error". Second, it adds a gloss, which comes from the cases on the unamended Rules, that the document or part of the document which is the subject of the "minor error" should have been irrelevant, or have no importance, to the "proper progress of the appeal". There is no support for that gloss in the words of rule 37(5). Third, an evident purpose of rule 37(5) is to confer a broad discretion on the EAT (in cases of a minor relevant error which has been rectified) to decide whether to give an extension of time having regard to all the circumstances. The scope for the exercise of that discretion is greatly reduced if the threshold condition for its exercise is interpreted too narrowly.'

Two further points may be noted:

(1) the judgment declines to give any further general guidance as to the meaning of 'minor', though accepting that it would be open to the EAT to do so;

(2) it was not necessary to explore whether there is any question as to the relationship between the general power to extend time under r 37(1) (as considered in *Ridley*) and the added specific power to forgive a documentary lapse in r 37(5).

REFERENCE UPDATE

Bulletin	Case	Reference
560	*Easton v Secretary of State for the Home Department*	[2025] IRLR 420, EAT
561	*W v Highways England*	[2025] IRLR 407, EAT
561	*Hewston v OFSTED*	[2025] IRLR 457, CA
561	*Moustache v Chelsea & Westminster NHS Foundation Trust*	[2025] IRLR 470, CA

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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