Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Employee; office holders; company directors and majority shareholders

AI [125]

***Secretary of State for Business and Trade v Karpavicius [2025] EAT 89* (*29 May 2025, unreported*)**

When a company becomes insolvent there are statutory provisions (ERA 1996 s 182 **Q [806]**) permitting the Secretary of State to make payments to staff with redundancy rights they are unable to enforce. One issue that caused disagreements for many years was whether these provisions can be used by a person who was a director and/or majority shareholder in that company; see **AI [117]** ff. Legally, it is possible for such a person to be an employee of their own company, but there were always arguments of policy as to whether this was an abuse. Eventually, it was held in *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] EWCA Civ 280, [2009] IRLR 475, [2009] ICR 1183 (upholding the decision to like effect by the EAT in *Clark v Clark Construction Initiatives Ltd* [2008] IRLR 364, [2008] ICR 635) that director/shareholder status does not automatically rule out the individual (see **AI [125]**). Instead, the matter is to be considered in each case on its particular facts. The problem that arose in the instant case before Judge Auerbach in the EAT is that the ET, in permitting the ex-director to claim against the Secretary of State, had in effect gone to the opposite end of the spectrum of the early case law and held that the fact of director/shareholder status was 'wholly irrelevant'. This, it was held on appeal, was a misreading of *Neufeld* (which requires a more nuanced approach) and as such an error of law. The question of his employee status was remitted to a different EJ.

Who is the employer? Relevance of payment

AI [132.02]

***Scully v Northamptonshire County Council [2025] EAT 83* (*11 June 2025, unreported*)**

Almost all of the case law on employment status concerns the potential employee, but occasionally a question arises as to the identity of the employer. One factor here will naturally be the payment of some form of remuneration, but the question that arose in this case before Lord Fairley P in the EAT was whether that can be enough in itself. The decision suggests that normally the answer will be no.

The facts were unusual. The claimant looked after his disabled brother, S. He was paid for this out of a direct payment made to the family by the respondent council in exercising its powers under the Care Act 2014. The claimant wished to bring ET proceedings for discrimination and moneys outstanding against the council, which required proving that it was his employer. The ET held that there may be a contract of employment between the claimant and S, but there was none with the council and the claims were dismissed.

On the claimant's appeal, he relied on the case of *South Lanarkshire Council v Smith* UKEAT/0873/99 where under similar legislation in Scotland it was held that there was a contract of employment with the council making payments. However, dismissing the appeal, the EAT held that this case was not determinative for two separate reasons: (1) as a matter of fact, in that case the council retained a greater level of control over the provision of the care than in the instant case; and (2) as a matter of law, in that case the emphasis in the decision was very much on that element of control in determining the existence of a contract of employment, but later cases had developed the 'necessity' test for such a contract (citing particularly *James v Greenwich LBC* [2008] EWCA Civ 35, [2008] IRLR 302, [2008] ICR 545, see **AI [190]**) and here there was no such necessity, especially as there was a contract directly with S. Thus, the ET had correctly held that there was no contract, directly or indirectly with the council.

DIVISION DI UNFAIR DISMISSAL

Capability dismissal; overlap with SOSR

DI [1196]

***Granger v Scottish Fire & Rescue Service [2025] EAT 90* (*23 June 2025, unreported*)**

The text makes the point that there may be a crossover between dismissal for medical incapability and dismissal for some other substantial reason (SOSR), citing the decision in *Kelly v Royal Mail Group Ltd* UKEAT/0262/18 (11 June 2019, unreported) where SOSR was held to be an appropriate categorisation in a case which had its origins in ill-health. However, the instant decision of Lady Haldane in the EAT shows that some care may be needed with this in a

case where the employer has clearly dealt with the problem as one of incapability and specified that as the reason given to the employee.

The claimant was an operational firefighter whose health deteriorated, leading to numerous absences from work. The employer commenced its capability process; the result of a medical examination was that he was deemed unfit to work and qualified for an ill-health pension. He did not want to take it, but the employer proceeded to dismiss him 'on grounds of capability due to ill health'.

He brought proceedings for unfair dismissal, but the ET held it was a fair dismissal for SOSR in the light of the qualification for the ill-health pension. What gave this decision to, in effect, change the basis for the dismissal a particular 'sting' was that the ET made findings that, had it been for incapability, there were certain procedural lapses that would have made it *unfair*. On his appeal the question was whether the ET had acted lawfully in adopting the SOSR categorisation. The EAT held that it had not. It held that *Kelly* was distinguishable because the question in that case was the categorisation of dismissal where issues of policy or procedure were at the forefront *against a background of* ill-health/absence. That was not the case here. The case was remitted to be considered again on the basis that:

'(i) The respondent had stated in terms that it was dismissing the claimant on grounds of capability;

(ii) That the ET had fallen into error in conflating process (medical assessment within a Capability Process) with outcome (the claimant qualifying for ill health retirement at the higher tier);

(iii) That the matter required to be assessed from the proper start point; that is to say that the dismissal was on the grounds of capability; and therefore standing the ET's findings in relation to aspects of the process that it considered unsatisfactory or unreasonable within a capability process, whether in light of those unchallenged findings the dismissal, properly understood as being on the grounds of capability, was fair or unfair.'

Redundancy; search for alternative work

DI [1721]

***Hendy Group Ltd v Kennedy [2025] EAT 106* (*23 January, unreported*)**

Redundancy dismissal cases in unfair dismissal law are subject to much ancient authority, so that normally they involve the application of this established law to the particular facts of the case. However, we occasionally still get cases that emphasise how important some of the classic factors remain, and this is one such. Most cases tend to concern whether the claimant was actually redundant and/or whether the selection was fair. In this case before Judge Tucker in the EAT, both of these were accepted. The question was whether the employer had complied with the requirement to take reasonable steps to look for *alternative work* for the claimant. The ET

had taken a dim view of the employer's efforts. In particular, it found that HR had done little to help him, he had only been given the same information as external candidates, he could not access an important email account, his managers were not informed of what was going on and, after he had managed to raise certain possibilities only to be rejected, he was in effect told not to bother further because of doubts over his motivation. In these circumstances, the EAT held that the ET was entitled to come to their conclusion.

Three points may be made:

(1) This was not a case of an ET improperly substituting its own view (as the employer had argued), as this was behaviour that no reasonable employer would have adopted.

(2) The decision perhaps can be seen as emphasising that the duty to seek alternative work is a *proactive* one on the employer, not just one to consider anything put to it.

(3) Redundancy cases are prime ones for the application of a *Polkey* reduction (ie even if a proper procedure had been adopted there was still a percentage chance they would still have gone) *but* here the ET made no such reduction on the basis that it was satisfied that without this behaviour by the employer the claimant was likely to have found other work within the organisation, and this was upheld by the EAT.

DIVISION L EQUALITY

Definition of disability; substantial adverse effect; ASD and ADHD

L [156]

***Stedman v Haven Leisure Ltd [2025] EAT 82* (*16 June 2025, unreported*)**

This case before Judge Stout in the EAT resulted in the overturning of an ET's preliminary decision that the claimant was not disabled within the EqA 2010 s 6 **Q [1459]** on the grounds of failures to apply the correct law on the statutory definition. Its legal interest however is in an obiter element in the judgment.

The claimant suffered from autism spectrum disorder (ASD) and attention deficit hyperactivity disorder (ADHD) for which he had received a specialist diagnosis. In considering this aspect, the judgment adds to the actual decision on one aspect of the appeal that it had been argued that these conditions are only relevant to whether there is an 'impairment', ie the first element of the definition. In the judge's opinion, this was wrong. While it is true that not every claim of one of these disorders means there is a disability, it is the case that a formal diagnosis also involves an assessment of abnormal functioning and so can be relevant to the separate question of the existence of a substantial adverse effect. At [60] and [61] the judgment states:

> 'Where a Tribunal has before it evidence of a clinical diagnosis of autism or ADHD, accordingly, then (unless there is some reason to doubt the reliability of that clinical judgment), the Tribunal must take that diagnosis into account not just as evidence that someone has a condition or impairment, but as evidence as to the impact of that impairment. The diagnosis means they have been judged by a clinician to have significant (i.e. clinically "more than minor or trivial") difficulties with the areas of functioning covered by the diagnosis.
>
> It does not, of course, follow that the Tribunal must accept the clinician's view as answering the disability question under the Act. The Tribunal still needs to consider what it was that led the clinician to make the diagnosis in the claimant's case, and to make findings about the claimant's ability to carry out day-to-day activities. If the claimant is not a reliable narrator, that may undermine any clinical opinion that is based on the claimant's account. However, as regards something like social interaction and communication, if a clinician has judged a claimant's difficulties in that respect to be significant enough to merit a diagnosis of autism, a Tribunal will need to engage with that view in its reasons when dealing with the question of "substantial adverse effect".'

The judgment adds that, while it cannot be assumed that every EJ is conversant with the details of these conditions, there is guidance on them in the disability glossary in the Equal Treatment Benchbook.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time for presentation of claims; discovery of new facts; relevance of suspicion

PI [283.02]

Jones v Secretary of State for Health and Social Care [2025] EAT 76 (4 June 2025, unreported)

There is considered at **PI [283.02]** the decision of the Court of Appeal in this case allowing the claimant's appeal on the merits of the discrimination claim. It was sent back to the EAT who have now sent it back to the ET. However, one particular facet of the case that is picked up here is the secondary question of extension of the time limit. The specific issue is whether it is a good reason for an extension if the claimant *suspected* the existence of facts that could show discrimination, but lacked actual knowledge. In the Court of Appeal, Bean LJ took a relatively strong line against this being an important factor, but as was reported in **Bulletin 558** another division of the Court of Appeal in *HSBC Bank v Chevalier-Firescu* [2024] EWCA Civ 1550, [2025] IRLR 268 considered the matter afresh (without knowledge of the decision in the instant case) and there Underhill LJ took a rather more nuanced approach. One issue is that the older case of *Barnes v MPC* UKEAT/0474/05 (14 November 2005, unreported) was disapproved by Bean LJ but cited with approval by Underhill LJ.

On this remission, the EAT decided the case on its substantive basis. With regard to the procedural 'suspicion' point, Judge Tayler only notes the issue and says at [21]: 'We mention this because there might be a difference of approach between the two cases that may require resolution should the issue arise again'. The point therefore remains open.

Early conciliation; the s 207B(3) extension

PI [290.03]

***Raison v DF Capital Bank Ltd [2025] EAT 86* (*17 June 2025, unreported*)**

In this case Heather Williams J in the EAT has resolved a technical point on the application of the extension of time to follow ACAS early conciliation (EC) in ERA 1996 s 207B(3) **Q [831.02]**, which has caused differences in opinion in the ETs and in the commentaries (see paras [39] and [40] of the judgment).

Where the EC period takes place wholly within the normal three-month limitation for bringing an action, the position is a straightforward add-on at the end. However, problems arise if, as here, some of that EC period took place before the commencement of the limitation period (ie before the effective date of termination (EDT) of the dismissal itself). An expansive view has been that you still just tack on the whole EC period at the end, but the ET here held that that is too simplistic and that any part of that period before the EDT does *not* count. That more nuanced position has now been upheld by the EAT.

In doing so, the EAT held that this narrower interpretation is in line with the statutory wording and context of s 207B. Moreover, although there was no direct appellate authority on this precise point, the case of *HM Revenue and Customs Commissioners v Garau* UKEAT/0348/16, [2017] ICR 1121 was relevant. It was largely about the separate point of the existence of more than one EC certificate, and on its facts the whole EC period had pre-dated the EDT. However, it was treated as persuasive authority that time cannot be suspended before it has started to run (or as the judge in that case put it, a clock which has not started to run cannot be paused).

The importance of this determination can be seen from the facts of the instant case:

11 February	Claimant started EC procedure
17 February	Employment terminated (the EDT)
28 February	EC procedure ended
30 May	Claimant commenced proceedings for unfair dismissal

If the EC period was simply tacked on at the end of the normal three-month time limit, the claim would have been in time, *but* on the interpretation adopted the period from 11 to 17 February could not be counted, giving an

expiry date of 27 May. The claimant was thus out of time and the ET had also permissibly taken the view that it should not exercise its discretion to extend time.

Striking out for failure to comply with ET orders; relevance of unless order instead

PI [385], PI [629]

***Forrest v Abazon Web Services EMEA SARL UK Branch [2025] EAT 81* (*10 June 2025, unreported*)**

The claimant, a litigant in person, failed to comply with a case management order. As a result, the EJ struck his claims out. On appeal, Griffiths J in the EAT reversed this strike out and in doing so (and in particular reliance on the judgment of Simler J in *Baber v Royal Bank of Scotland plc* UKEAT/0301/15 (18 January 2018, unreported)) made the following important points:

(1) It remains a fundamental requirement of a strike out that a fair trial is no longer possible; that is so even if there is a clear failure to comply with an order.

(2) It will usually not be justifiable to go straight to a strike out in such cases without first trying an unless order.

(3) In that context, the purpose is to 'ratchet up' pressure on the party in question.

(4) Sanctions are to secure compliance, not to act as a punishment.

Applying this to the present case and emphasising the importance of going via an unless order, the judgment states at [35]:

> 'If an unless order had not been complied with, the case would have been struck out automatically, and the avoidance of expense and delay which the judge envisaged would have been achieved anyway. But if it had been complied with, a fair hearing was certainly possible. The proceedings were at an early stage. No final hearing had even been listed. There was, in fact, a draft list of issues in existence. The Appellant's pleadings were clear and chronological, and on the face of it pleaded all the primary facts upon which he relied in some detail already. Whilst greater refinement of legal analysis was, no doubt, desirable, this was a litigant in person, and to say that if it were not provided the whole claim must be dismissed was to throw the baby out with the bathwater.'

Procedure at hearing; splitting or combining liability and remedy

PI [786]

***Okeze v Cygnet Healthcare Ltd [2025] EAT 88* (*13 June 2025, unreported*)**

The gist of the claimant's appeal here was that it was unfair of the ET to have gone straight on from partially upholding the claim of race discrimination to

determine remedy. The EAT under Judge Clarke dismissed the appeal. In doing so, it gave guidance at [37]–[42] on the question of split or combined hearings. It starts by pointing out that combined hearings are the norm in Scotland and states that they should be the default position in England and Wales. This assists in the efficient administration of the ETs, which would in general be impeded by any routine 'parking' of the remedy stage to a later date. The obvious difficulty is finding future dates that all members / parties can attend. Moreover, it is a 'good discipline' for parties to prepare both liability and remedy together, especially as an early understanding of the value of a claim may aid settlement before incurring significant costs. While r 55 of the 2024 Rules SI 2024/1155 **R [3652]** gives an ET a power to use split hearings, it does *not* enshrine them as the norm. Moreover, presidential guidance on witness statements (August 2022) observes that the issue of remedy is 'routinely dealt with as part of a single hearing'. The judgment adds two further points: (1) an ET retains a discretion to split in an appropriate case, for example where the remedy stage might itself need specialist evidence (e g in pension loss cases) or where the parties request time to negotiate a settlement; (2) Elias LJ emphasised in *Salford Royal NHS Foundation Trust v Roldan* [2010] EWCA Civ 522, [2010] IRLR 721, [2010] ICR 1457, that where an ET does decide on split hearings it needs to be made clear how evidence is to be given at each stage to avoid unnecessary duplication.

Costs orders; discrimination cases and litigants in person

PI [1046]

Madu v Loughborough College [2025] EAT 52, [2025] IRLR 497

> 'Should costs applications in discrimination complaints be treated differently to costs applications in other types of complaint? In one sense, obviously no, but in another sense, the answer will often be yes. Let me explain. The legal test for an award of costs is the same whatever the complaint. But there are features about many, but not all, discrimination complaints, and other similar complaints, that require special consideration when that legal test is applied. There are also policy considerations that may be relevant to discrimination and similar complaints.'

This is the opening of Judge Tayler's judgment in this case in which the EAT overturned a £20,000 costs order against the claimant after an unsuccessful discrimination claim. It goes on to explore the balance that needs to be struck in such a case, especially where the paying party is a litigant in person. It makes the basic point that the fact that the claimant was claiming discrimination does not confer any sort of immunity from a costs order, but also states that several practical issues may arise in such a case that may need sensitive handling by the ET. In particular, where the ground for a putative order is SI 2024/1155 r 74(2)(b) **R [3671]** (ie that the claim 'had no reasonable prospect of success'), it may be difficult in a discrimination claim (where

there is often little by way of direct evidence) for a LIP to take a wholly objective view of their chances. This also applies to whether the facts reach the 'threshold' tests under the rule (citing *AQ Ltd v Holden* [2012] IRLR 648, EAT **PI [1049]**). A problem here may be that of the 'sincere belief' in the alleged discrimination; this alone cannot be enough to defeat a costs claim but it can still be a factor (citing *Kescar v Governors of All Saints School* [1991] ICR 498, EAT **PI [1069]**). The principal reason in the case for reversing the order was that, as the claimant had started out as a LIP but had later engaged solicitors, the ET had made the assumption that his advisers must have warned him that his case was weak, which was impermissible.

DIVISION PIII JURISDICTION

The appropriate forum; the Civil Jurisdiction and Judgments Act 1982 and the Brussels Regime

PIII [271]

***Prahl v Lapinski [2025] EAT 77* (*12 June 2025, unreported*)**

On leaving the EU, the provisions of the Brussels I (Recast) regulation were replaced by new ss 15A–15E put into the Civil Jurisdiction and judgments Act 1982, especially s 15C. The text at **PIII [271]** states that the intention was to replicate the existing provisions which were generally in favour of claimants in employment cases with a significant international element. That approach has been upheld in this case before Judge Auerbach in the EAT. The context was a discrimination claim against a foreign LLP employer and also three non-UK domiciled individuals within it. There was no dispute that the causes of action generally fell within the ET's jurisdiction or that the claims passed the *Lawson v Serco* principles. The questions concerned the three individuals who claimed that the ET lacked international jurisdiction over them. The ET disagreed and accepted jurisdiction. This was upheld on appeal by the EAT. Service according to normal ET rules was sufficient; prior to 31 December 2020 the Brussels Recast Regulation would have covered this case and this level of protection is meant to continue under s 15C. This is summed up at [76] and [77] of the judgment:

> 'Firstly, the purpose of section 5 of the Brussels Recast Regulation was protective of the rights of employees (in the broad European sense), in particular with a view to avoiding them being driven to bring a multiplicity of claims and to litigate in a foreign jurisdiction, including in cases involving non-UK-domiciled respondents; and to provide clear rules that were favourable to such litigants in place of the potentially less favourable, and uncertain, forum non conveniens doctrine.
>
> Secondly, the purpose of the amendments to the 1982 Act is the same, and to preserve the position in that regard, so that such employment tribunal claimants are no worse off as a result of the Brussels Recast Regulation ceasing to apply, and continue to have the benefit of a more favourable regime than under forum non conveniens principles, as well as there being no service requirements over and above the provisions of the employment tribunal's own rules of procedure.'

The reference to 'in the broad European sense' meant that the claimant, as an LIP member, could qualify to bring the claims, even though not an 'employee' in domestic law.

REFERENCE UPDATE

Bulletin	Case	Reference
555	*Thomas v Surrey and Borders NHS Foundation Trust*	[2025] ICR 368, EAT
558	*CJ v PC*	[2025] ICR 401, EAT
558	*Shakil v Sampsons Ltd*	[2025] ICR 425, EAT
558	*London United Busways Ltd v De Marchi*	[2025] ICR 705, EAT
561	*Prospect v Evans*	[2025] IRLR 505, KB
562	*Edwards v UNITE the Union*	[2025] ICR 493, EAT
562	*Gold Panda Ltd v O'Keefe*	[2025] IRLR 502, EAT
562	*Davies v BMW (UK) Manufacturing Ltd*	[2025] IRLR 515, CA
562	*Sullivan v Isle of Wight Council*	[2025] IRLR 520, CA
562	*For Women Scotland Ltd v The Scottish Ministers*	[2025] IRLR 537, SC

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