Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Personal service and substitution; franchise arrangements

AI [22], AI [81.10], AI [86]

***Patel v DPD Group Ltd [2025] EAT 202* (*5 March 2025, unreported*)**

There is considered in the text the case of *Stojsavljevic v DPD Group Ltd* EA-2019–000259 (21 December 2019, unreported) where a delivery driver working for the respondent company was held to be neither an employee nor a worker. In the instant case, the claimant also worked under an Owner Driver Franchise arrangement whereby he agreed to provide services delivering parcels. He did not have to do so personally and, subject to some basic requirements such as adequate training, was entitled to use some other individual to carry out the services. The EAT upheld the EJ's decision to strike out the claimant's claims because he had not shown any material distinctions with the previous case. The gist of his argument had been that that case pre-dated the decision of the Supreme Court in *Uber BV v Aslam* [2021] UKSC 5, [2021] IRLR 407, [2021] ICR 657 which, it was averred, had established a 'modern approach' of a purposive interpretation which should now grant employee/worker status in these circumstances. However, in line with other case law, it was held here that *Uber* is not a magic wand in this area. While accepting that tribunals have to be on their guard for contractual provisions that do not reflect reality, they cannot just ignore terms which do (see para [38]). In this case, the earlier decision held that they did, and that was to be followed here.

Agency workers; exclusion of permanent workers

AI [196.03]

Lutz v Ryanair DAC [2025] EWCA Civ 849

This is the further appeal in the case where the ET and EAT held that pilots supplied to the airline through an intermediary were 'agency workers' within the Agency Workers Regulations 2010 SI 2010/93, even though the arrangement for this lasted for five years. This hinged on the term working 'temporarily', which could mean either of short duration or time limited (however long). The court, in a judgment by Underhill VP, agreed with the ET and EAT that the latter is the correct interpretation. In doing so, it upholds the law as set out in the judgment in *Moran v Ideal Cleaning Services Ltd* [2014] IRLR 172, EAT (see **AI [196.01]**) and considers and approves the application of that law in the cases of *Brooknight Guarding Ltd v Matei* UKEAT/0309/17 (26 April 2018, unreported) and *Angard Staffing Solutions Ltd v Kocur* [2020] IRLR 732, EAT.

The text at **AI [196.03]** sets out the extensive guidance given in the EAT in the instant case as to how to approach this issue. There is no dissent from this in the Court of Appeal, where it is pointed out that only point (ii) was being queried in the employer's appeal. As this point was upheld and applied to the claimant, it is arguable that this guidance is still to be consulted in future cases.

DIVISION BI PAY

National minimum wage; time when travelling

BI [218.03]

Revenue and Customs Commrs v Taylors Services Ltd [2025] EWCA Civ 956

There are set out in the text at **BI [218.03]** the facts of this case which concerned agricultural process workers who had to spend significant amounts of time on the company's bus, often at antisocial hours, travelling to farms to work. The key point, however, was that the bus picked them up from their own homes, not from the company's premises. HMRC issued a penalty notice requiring payment for these hours. The ET upheld this but the EAT allowed the company's appeal, holding that this was not 'working time'. That decision has now been upheld by the Court of Appeal.

The principal judgment, given by Laing LJ, is very much along the lines of Judge Stout's in the EAT. The ET had erred by looking only at the general definition of time work, without applying properly the deeming provisions of reg 34 of the National Minimum Wage Regulations 2015 SI 2015/621 **R [3215]** which rule out travelling from home to workplace, subject to certain specific exceptions which did not apply here. The leading case on sleeping at work, *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8, [2021] IRLR 466, [2021] ICR 758, established that the provisions relating to time work are to be read together, and it was held that this was to be read over into

travelling cases. The question was therefore one of statutory construction, and given that once these provisions were indeed read together, the answer was clear that this was not working time, and there was no room for the Revenue's argument that this should give way to a purposive interpretation to achieve a desired result. Giving a short concurring judgment in which he states that the text here gives a particularly helpful analysis of reg 3, Underhill went to the heart of this by saying that the time on the bus was not 'actual work' and was not deemed to be so by anything in the regulation.

As the EAT said, this could lead to an anomaly and potential injustice if it allows employers to evade the law by deliberately arranging for transport to start at homes, not their own premises (though note that in this case the employer did put forward positive reasons why that had been necessary in a wide agricultural area). While acknowledging this, the Court of Appeal said that it was not for them to do anything about it because the legislation has its own procedure for dealing with such issues, namely consideration by the Law Pay Commission, with a view to amending legislation by the Secretary of State. Watch this space.

DIVISION DI UNFAIR DISMISSAL

Constructive dismissal; the last straw doctrine

DI [480]

***Marshall v McPherson Ltd [2025] EAT 100* (*9 July 2025, unreported*)**

This decision of Lady Haldane in the EAT does not break any new ground on constructive dismissal, but is a useful worked example which also: (a) reaffirms that under the last straw doctrine the final act does not itself have to be repudiatory; and (b) reminds ETs of a useful summary of the law here.

The claimant was a night shift HGV driver. He faced increasing work pressures, about which he raised concerns. His manager told him to deal with this and later without warning sent someone to accompany him, to which he objected. He then raised other complaints going back several years, but these were not dealt with quickly. He resigned and claimed constructive unfair dismissal. The ET held against him, but the EAT allowed his appeal, holding that the ET had not applied the law properly, in particular on the last straw; here, that was either the delay in dealing with his complaints or the sudden accompaniment, but in either case it did not in itself have to be repudiatory, given the series of existing events.

The summary that the EAT hinges on comes from *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, [2018] IRLR 833. In his judgment, Underhill LJ cited the exhaustive consideration of the law overall here by Dyson LJ in the leading case of *Omilaju v Waltham Forest LBC* [2005] EWCA Civ 1493, [2005] IRLR 35 which is set out in full at **DI [481.02]**. He then went on at [55] to give the following summary of it for future use, as accepted in the instant case:

> 'I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe

that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part … of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the [trust and confidence] term?

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.'

DIVISION L EQUALITY

Disability discrimination; duty to make reasonable adjustments; effectiveness

L [398], L [401]

***Hindmarsh v North-East Ambulance NHS Foundation Trust [2025] EAT 87* (*16 June 2025, unreported*)**

The claimant was a non-emergency ambulance driver. During the COVID pandemic he developed extreme anxiety about catching the condition from patients, which stopped him from going to work. When this eventually led to his dismissal, he brought proceedings inter alia for failure to make reasonable adjustments under the EqA 2010 s 20 **Q [1473]**. The basis for this was that as a non-emergency driver he was provided with a FFP2 mask, whereas emergency drivers were provided with the superior FFP3 mask; he said that in his particular circumstances he too should have had the superior mask. The ET dismissed his claim, accepting the employer's argument that in fact even if this had been done, his phobia about COVID was so strong that he still would not have felt able to return to work.

On appeal, Cavanagh J in the EAT upheld that decision. The obligation is to make reasonable adjustments, and this can involve consideration of whether a particular measure would have removed the disadvantage. Considering the case law on this point (see **L [401]–L [402]**), it was held that the ET had applied the correct legal test here, which is whether there was a 'real prospect' of the adjustment being effective. The judgment also considered the Code of Practice (see **L [399]**) and states at [63] that there is nothing in the code to contradict the proposition that if there is no real prospect of the adjustment

making a difference, it will not be a reasonable adjustment. Two qualifications are then added: (1) it is enough to satisfy the section if the adjustment would help, but not completely remove the problem (*Noor v Foreign and Commonwealth Office* [2011] ICR 695, [2011] EqLR 448, EAT); and (2) it may be reasonable to adopt the adjustment even if at the time it is not guaranteed to work (*Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2016] IRLR 216). However, neither of these applied here because there was *no* reasonable prospect that provision of the FFP3 mask would have helped at all.

Burden of proof and drawing inferences

L [809.04], L [809.06]

Leicester City Council v Parmar [2025] EWCA Civ 952

The decision of the EAT in this case, upholding the ET's decision that the burden of proof was reversed under the EqA 2010 s 136 **Q [1548]**, is set out in the text. That decision has itself been upheld in the Court of Appeal. The essence of Laing LJ's judgment is that the law here is relatively well settled and its application here by the ET was a proper one on the facts. In fact, she commented, it was 'a relatively simple case' in which, in spite of the council's detailed criticisms, the ET had used the concept of comparators logically and had considered that the series of allegedly discriminatory acts could be factors from which it 'could decide' that discrimination had taken place, placing the burden of disproof on the employer, which on the facts had not been satisfied.

DIVISION PI PRACTICE AND PROCEDURE

Case management; general principles; dealing with time points

PI [373], PI [377]

***Mesuria v Eurofins Forensic Services Ltd [2025] EAT 103* (*24 July 2025, unreported*)**

In this EAT decision, Judge Tayler emphasises the care that is needed when using a preliminary hearing to decide a time limit point (especially, but not only, where it is argued that the events took place over one overall period). There are two ways that this can be done:

(1) by determining it as a matter of substance (under ET Rules SI 2024/1155 r 52); or

(2) by deciding whether to strike the claim out for no reasonable prospect of showing that the claim was within time (under r 38).

It is stressed that these are two fundamental procedures that require different preparation, with the comment that lawyers often confuse these questions, so it is not surprising that litigants in person find the distinction difficult to understand.

The judgment cites the discussion of this problem by Judge Auerbach in *Caterham School Ltd v Rose* UKEAT/0149/19 (22 August 2019, unreported) at [58]–[66], which urges caution here. It then points to a difference of opinion on one specific point – in *E v X, L, Z* UKEAT/0079/20 (10 December 2020, unreported) at [47], Ellenbogen J took issue with the view in *Caterham* that in a strike out the ET should take the claimant's arguments at their highest and not require any actual evidence or findings of fact, saying that that may be so in some cases but is not an invariable rule. However, in the instant case it was said that these cases basically agree on the main point and then at [17] addressed one point of terminology here, namely the use of the phrase 'prima facie':

> 'Despite differing with HHJ Auerbach about the appropriateness of hearing evidence when considering strike out, Ellenbogen J accepted the distinction between a preliminary issue and strike out when dealing with time points. When considering strike out in a case where it is asserted that there is conduct extending over a period, some authorities refer to a test of whether there is a prima facie case that there was conduct extending over a period. I agree with HHJ Auerbach that this is an example of the application of the strike out test set by Rule 37 ET Rules 2013 (now rule 38 ET Rules 2024) of whether the complaint has no reasonable prospect of success. There is no other basis in the rules to dismiss a complaint which is said to be part of conduct extending over a period on the basis a prima facie case has not been made out.'

Bias and the appearance of bias; recusal by the judge; tests to apply

PI [913.02], PI [913.03], PI [914.01]

***Swansea City Council v Abraham [2025] EAT 93* (*11 July 2025, unreported*)**

At the case management stage of an equal pay multiple case the respondent council applied for the judge to recuse herself. This was on the basis that ten years earlier when she was a practising solicitor she had acted as such in similar union-backed equal pay claims against local authorities. The same union was involved here and some claimants were in common. Applying the leading case of *Porter v Magill* [2002] 2 AC 357, [2002] 1 All ER 465, it was argued that any fair-minded person would think that there was a real possibility of bias.

The ET judge refused the application and Lord Fairley P in the EAT upheld that decision. The *Porter* test was not shown to have been satisfied, given that the previous involvement was not sufficiently significant, her recollection of the earlier cases would have diminished, this was only at the case management stage, and in any event the council had not identified any specific area of actual or potential factual overlap, residual knowledge of which would or might consciously or unconsciously influence her decisions.

That disposed of the application as a question of fact, but the legal interest in the decision is that it disapproved of an argument for the council that the test for potential bias has been lowered in recent times. This took two forms:

(1) The relatively high bar set out in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] IRLR 96, CA (set out at **PI [914.01]**) which had been cited by the EJ has been softened by the later cases of *Jones v DAS Legal Expenses Insurance* [2003] EWCA Civ 1071, [2004] IRLR 218 (see **PI [913.03]**) and *Hamilton v GMB (Northern Region)* [2007] IRLR 391, EAT (see **PI [913.02]**) which the EJ should have relied on instead.

(2) The strict *Porter* rules have increasingly been supplemented by 'the precautionary principle', placing more emphasis on a lower level of possibility of bias.

The judgment rules against both of these, stating at [43] and [44]:

> 'I do not accept the submission that either *Hamilton* or *Jones* diminishes the weight of *Locabail* as an authority on apparent bias, either generally or specifically in relation to the passages of *Locabail* relied upon by the employment judge in this case. As is clear from Lord Hope's speech in *Porter* at paragraph 103, the court's preference for a test of "real possibility" over "real danger" was not regarded as a change of substance. In both *Locabail* and *Porter* the two formulations were regarded as synonymous.
>
> I also reject the appellant's submission that the precautionary principle is an integral part of the pragmatism of the precautionary approach on the one hand and the strict application of the *Porter* test itself on the other. There may, therefore, be situations where it is clear that the *Porter* test is met. In those cases, recusal is mandatory. There may also be cases where the *Porter* test is clearly not met, in which case the judge's duty is to continue to hear the case (see *Locabail*, para. 24). Apart from those positions of clarity, however, there may also be cases where it is not clear whether or not the *Porter* test may be met in relation to the particular judicial decision under consideration at the time of the recusal application. Alternatively, there may be substantial grounds for concern that a basis for apparent bias could first surface at a later stage in the case and cause delay, disruption and expense. Those are scenarios where the precautionary principle may be relevant as a guiding principle, but not as an aspect of the *Porter* test.'

EAT; disposal of the appeal; principles of remittal; application to case management decisions

PI [1711], PI [1713.04]

***Gillani v Veezu Ltd [2025] EAT 97* (*8 July 2025, unreported*)**

The text considers the problems that have arisen through the restrictive approach to the EAT taking its own decision rather than remitting to the ET in *Jafri v Lincoln College* [2014] EWCA Civ 449, [2014] IRLR 544, [2014] ICR 920. The instant case before Kerr J in the EAT considered a particular

version of this, namely where there has been a successful appeal against a case management decision. The question was whether in line with *Jafri* the EAT could substitute its own decision (under the ETA 1996 s 35(1)(a) **Q [907]**) only if: (a) the parties consented; or (b) there was only one possible answer reasonably possible. In the case here, neither applied.

The case was a multiple on worker status involving 509 individuals engaged to drive for the respondent private hire companies. The ET made a case management order for sample cases to be forwarded, but then ordered that all claimants were to provide the dates and times when they were logged on to apps, including for other firms. The claimants appealed against this on the grounds of its unreasonable and oppressive extent. The EAT agreed and set the order aside, but the question then arose as to what to do about it. There were several options and the claimants would not consent to the EAT making an order unless it was for the substitute order that they put forward. Hence the above *Jafri* issue.

That issue was complicated also by *Kuznetsov v Royal Bank of Scotland* [2017] EWCA Civ 43, [2017] IRLR 350 where Elias LJ had stressed obiter the importance of consent. However, having reviewed the authorities, the judge held that he did have the power to remake the order. The decisions and reasoning in *Jafri* and *Kuznetsov* did not bind him to accept the claimants' proposition that a case management decision (as opposed to a determination on the facts at a substantive hearing) could only be re-taken by the appeal tribunal if the parties consented or there was only one possible outcome. The weight of judicial opinion strongly supported the view that the claimants' proposition, if applied to case management decisions, would undermine the overriding objective by causing delay and increasing costs. He accepted the respondents' submission that the appeal tribunal could properly exercise its power under section 35(1)(a) to take the decision itself if it was a case management decision, not based on findings of fact. The dicta to the contrary effect in *Jafri* and *Kuznetsov* were obiter and the respondents' position was supported by *Canadian Imperial Bank of Commerce v Beck* [2009] EWCA Civ 619, [2009] IRLR 740; *Medallion Holidays Ltd v Birch* [1985] IRLR 406, [1985] ICR 578, EAT; *Adams v West Sussex County Council* [1990] IRLR 215, [1990] ICR 546, EAT; and *Amey Services Ltd v Cardigan* [2008] IRLR 279, EAT (see **PI [1714]**). The appeal tribunal would exercise its power, in furtherance of the overriding objective, to take the decision itself, rather than remitting the matter back to the employment tribunal. The order made below would be replaced by one requiring only the pool of 12 potential lead claimants to provide the particulars sought in full. A randomly selected sample of 125 claimants would be required to answer a questionnaire verified by a statement of truth, giving their best estimate of the extent and frequency of their 'multi-apping' for other companies. In both cases, the requirement would be limited to a period starting two years before the date of the claim.

DIVISION PIII JURISDICTION

Territorial jurisdiction; expatriate and partial expatriate employees

PIII [26], PIII [36]

Cable News International Ltd v Bhatti [2025] IRLR 579, EAT

This decision of Kerr J in the EAT upholding an ET decision that it did have territorial jurisdiction shows the complexities that can arise in a case of wholly or partially expatriate employees, but also the possible importance of where the employment ended.

The claimant was employed on rolling contracts by a global media organisation with headquarters in the USA but separate presences in London and Hong Kong. The claimant was a British national from London. From 2013 to 2017 she worked as a journalist mainly covering Asia. She returned to London for holidays and to attend that bureau. She suffered an injury which required long-term treatment, partly in London, but she was also living in her flat in Bangkok. She had asked to travel less and be based in London but this was refused. In February/March 2017 she was back in London for treatment and gave up her Bangkok home. The employer still refused a formal transfer. In August she was told that her contract would not be renewed. She was asked to return her pass and escorted from the premises. The last contract ceased at the end of December and in May 2018 she brought ET proceedings for discrimination and unfair dismissal. The ET found that up to February 2017 she was a fully peripatetic employee based in Bangkok who was very unlikely to be able to show jurisdiction, but that as from then her strongest connection was with GB and so could bring her claims. The EAT agreed. Her position had changed over time and from 1 March to the end of December her main base changed to London. It was there that she was dismissed. Her statutory actions were therefore valid. The judgment then covers two subsidiary points:

(1) The employer had sought to rely on the Brussels Regulation but that was held to be irrelevant here.

(2) The ET had held that it had jurisdiction anyway under (now) the ET Rules SI 2024/1155 r 10(2)(d) **R [3607]** but on this point it had erred because as a rule of procedure it cannot in itself establish territorial jurisdiction; it merely directs an ET as to whether a case should be brought in England/Wales or Scotland. However, this error was irrelevant because the ET had such jurisdiction anyway.

State Immunity Act 1978; distinguishing between sovereign and non-sovereign cases

PIII [191], PIII [191.09]

***Royal Embassy of Saudi Arabia* (*Cultural Bureau*) *v Constantine* [2025] UKSC 9, [2025] IRLR 636**

The employee, employed at the embassy as a post room clerk and secretary, wished to bring claims of religious discrimination; at a preliminary hearing it was held that she could do so because the nature of her work meant that the embassy was not covered by state immunity. That decision was upheld by the EAT and Court of Appeal and the matter went on further appeal to the Supreme Court, which dismissed the appeal.

The principal point in issue was not the employment claims themselves, but a procedural matter. After appealing to the Court of Appeal, the embassy did not appear and was not represented. The court dismissed the appeal on that ground. The Supreme Court held that that was wrong, because the State Immunity Act 1978 s 1(2) places an obligation on courts to consider state immunity, even in these circumstances of non-appearance. As for the employment claims, however, the Supreme Court upheld the ruling that the embassy's immunity did not apply on the facts.

The legal interest in the judgment lies in its consideration of the present law. As the text points out, in the leading case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2018] IRLR 123, [2017] ICR 1327, a declaration of incompatibility was issued under the Human Rights Act 1998 and the relevant provision in the 1978 Act disapplied. As a result, the government by regulations in 2023 amended s 16 to add s 16(1)(aa) to rectify the position (see **PIII [190.03]**). In the instant case, the Supreme Court held that that change is indeed effective to bring the law into line with *Benkharbouche;* under both, the ET had been correct to hold that state immunity did not apply.

REFERENCE UPDATE

Bulletin	Case	Reference
556	*McLennan v British Psychological Society*	[2025] ICR 977, EAT
558	*Jones v Secretary of State for Health and Social Care*	[2025] ICR 738, CA
558	*Kingdom of Spain v Lorenzo*	[2025] ICR 751, CA
558	*Walsall MBC v Oliver*	[2025] ICR 839, EAT
559	*Ryanair DAC v Morais*	[2025] ICR 863, CA

Bulletin	Case	Reference
559	*Abel Estate Agents Ltd v Reynolds*	[2025] ICR 1032, EAT
559	*Eddie Stobart Ltd v Graham*	[2025] ICR 1051, EAT
562	*Dethling v Metropolitan Police Service*	[2025] IRLR 571, EAT
563	*Augustine v Data Cars Ltd*	[2025] IRLR 624, CA
563	*Chandra v UCU*	[2025] IRLR 594, EAT
563	*ABC v Huntercombe (No 12)*	[2025] IRLR 599, KB
563	*Melki v Bouygues E and S Contracting Ltd*	[2025] IRLR 614, CA
564	*Madu v Loughborough College*	[2025] ICR 1126, EAT

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