Harvey on Industrial Relations and Employment Law

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

DIVISION K EQUAL PAY

Equal value; the stage 2 hearing

K [307]

Tesco Stores Ltd v Element [2025] EAT 112 (31 July 2025, unreported)

This major equal pay litigation continues, being fought all the way. This case before Stacey J in the EAT concerned stage 2 of the equal value claims. The employers appealed against several of the ET's findings at this stage. The complexity of all of this can be seen from the fact that the EAT judgment is 74 pages long. Elements (pun, sorry) of the appeal succeeded but most did not. The end result is summed up by the judge as follows:

(1) The tribunal correctly understood the meaning of 'work' and followed the well-established case law. The tribunal did not approach their fact-finding task on the basis of generic jobs, but on what the claimants and their comparators were required to do in practice by their employer.

(2) On the particular facts of the case and on the basis of the evidence before it, the tribunal was entitled to conclude, as a fact, that the employer's detailed and prescriptive training materials which the claimants and their comparators were required to follow were important evidence as to the work that they did.

(3) There was no serious procedural irregularity vitiating the tribunal's decisions so as to amount to an error of law, although the narrative format adopted and making of findings by reference to a variety of documents led to practical difficulties in understanding the tribunal's findings.

(4) In some specific instances the tribunal had erred in part in failing to determine some disputed facts, but it was open to it in principle to decide not to accept agreed facts where there were grounds for doing so. Tribunals have a considerable leeway under the rules to manage their own proceedings and wide discretionary powers. However, obvious facts still needed to be recorded if relevant.

(5) The tribunal did not err in its interpretation of relevance.

(6) In relation to specific factual challenges some grounds were upheld, but nitpicking grounds of appeal are to be deprecated.

Seconds out, round three.

DIVISION L EQUALITY

Victimisation; different heads; close linkage

L [465]

***Aslam v Transport UK London Bus Ltd [2025] EAT 113* (*6 August 2025, unreported*)**

Victimisation is covered by the EqA 2010 s 27 **Q [1480]** which is set out at **L [465].** In sub-s (1) it applies where A subjects B to a detriment because (i) B does a protected act or (ii) A believes that B has done, or may do, a protected act. The 'or' is prima facie disjunctive, but the holding in this case before Mr Recorder Mansfield KC in the EAT is that these two possibilities are 'very closely linked' and the implication is pretty clear that the subsection should not be construed too narrowly or literally.

The claimant's claim for victimisation arose from the withdrawal of a job offer made to him. He had told the potential employer that he had brought a tribunal claim against a previous employer. Also, during an induction he had emailed the employer to enquire whether he was being treated differently from other job applicants because of his race. The ET upheld his victimisation claim on the basis that the withdrawal was because the respondent believed he was likely to do a protected act, ie bring proceedings against it. This came within s 27(1)(b). However, the respondent then applied for a reconsideration on the ground that in his ET1 the claimant had only pleaded and relied on s 27(1)(a) (ie where B *does* a protected act). The ET upheld that argument and dismissed the claim. The EAT allowed his appeal, on two principal grounds: (1) in general, the function of an ET is to determine the essence of the claim before it (citing *Chandhok v Tirkey* [2015] IRLR 195, [2015] ICR 527, EAT (see **PI [293.05]**); and (2) here, the difference between the two heads of claim on the facts was 'wafer thin', so that the ET should have found that both reasons were in the mind of the respondent so that it was not in the interests of justice to vary or dismiss the original decision.

One comment here is that, as made clear in the text in Division PI, *Chandhok* is primarily of importance in emphasising the necessary *precision* required in an ET1, with the ET only expected to deal with the case as pleaded by the claimant (a point subsequently approved by the Court of Appeal). In

principle, that should normally have backed the respondent's case here. It is perhaps the situation that this case operates not as a denial of that basic position (based on the modern emphasis on the ET's function being essentially adversarial) or even as a formal exception, but as a more nuanced approach to it based on the specific (and perhaps rather odd) wording of s 27(1). There, however, it is potentially important, especially for litigants in person.

Special cases; armed forces; need for a service complaint

L [738]

***Curtis v Ministry of Defence [2024] EAT 161* (*30 September 2024, unreported*)**

This decision of Judge Tucker in the EAT considers the nature of the procedure whereby a member of the armed forces can bring an ET claim. The difference here is that they must (to use phraseology from elsewhere) exhaust internal procedures first; these procedures are of a very specific nature, involving a 'service complaint' which must be made and processed by the relevant officer. Only if this is done and the complaint not withdrawn does an ET then have jurisdiction. A key case here is *Molaudi v MOD* UKEAT/0463/10 (15 April 2011, unreported) (upheld by the Court of Appeal [2012] EWCA Civ 576), see **L [738]**, which concerned a problem with the service complaint being out of time and which took a strict view of the service complaint requirement, capable of being interpreted as meaning that if *anything* goes wrong with it, the ET is automatically ruled out. The instant decision suggests that a less strict approach may sometimes be appropriate.

The claimant was a corporal in the RAF, coming up to a promotion. This required a medical board examination, but this was cancelled when she became pregnant. Although she remained in the service and was later promoted, she brought proceedings for pregnancy discrimination, arguing that her long-term prospects had been damaged. She initiated a service complaint, but the officer's report mistakenly omitted the board cancellation as one of her heads of complaint. She could have taken this further internally (to the Service Complaints Ombudsman) but was not informed that the medical board point had not been taken or given reasons. When she then sought to progress it, the ET struck it out because it did not appear in the service complaint.

The EAT allowed her appeal and held that the ET did have jurisdiction. The ET had relied on the strict approach in *Molaudi* (EAT) but the EAT took some issue with this. That was a case about time limits but, more fundamentally, it had arguably put a gloss on the procedure by referring to there having to be a 'valid' complaint; this was potentially misleading, as the only question is whether the complaint was capable of being considered substantively by the military authorities. Here, the requirements for information about the board issue, reasons for any rejection and the right of appeal (arising in the legislation generally) had not been observed. The complaint was therefore

not properly rejected and so the ET retained jurisdiction. At [51] the judgment comments pointedly that 'The purpose of the statutory scheme is to enable consideration of complaints internally; not to facilitate their oversight or to otherwise place unnecessary hurdles in the way of their consideration'.

DIVISION PI PRACTICE AND PROCEDURE

Early conciliation; discrepancy between the respondent's name on the EC certificate and on the ET1; interests of justice

PI [289.23]

***Chen v Coach Stores Ltd [2025] EAT 108* (*10 July 2025, unreported*)**

The question here was the application of what is now r 13(1)(g) and (4) of the 2024 Rules. This provision, which has altered in its drafting through the last two versions of the Rules, states that an application in which the name of the respondent differs between the EC certificate and the ET1 is to be referred by the tribunal staff to the ET which is to reject it unless it considers that the claimant made an error in relation to the name and it would not be in the interests of justice to reject it.

The claimant was a litigant in person who sought to bring proceedings against her employer after a short period of employment. In her EC certificate she named as respondent 'Coach Stores Ltd'. However, when she completed her ET1 she named as respondent 'Emily Dickinson (Tapestry Group)'. The latter organisation was the holding company of the former company. The legal officer of the ET sent her a short letter saying that her claim had been rejected because of this discrepancy. It said that she could apply for a reconsideration but she did not meet the deadline for this. She appealed instead and the EAT allowed her appeal, taking the decision itself that the claim should be allowed to proceed. It was accepted that a decision such as this does not have to be long, but here there was no evidence that, having found the discrepancy, the legal officer had gone on to consider the next two stages – was this due to an 'error' (as opposed, eg, to a change of mind as to whom to sue) and then, if so, was it in the interests of justice to strike out (citing here *Stiopu v Loughran* UKEAT/0214/20 (20 July 2021, unreported), which was on similar facts). The facts here tended to show a mere error and that her intent all along was to sue Coach Stores, whose address was the same as that for Tapestry Group. The judgment stresses that the interests of justice is a broad test and that overall these EC rules are to be applied in a non-technical way.

Strike out; scandalous, etc conduct; fair trial possible?

PI [648], PI [650]

***Bailey v Aviva Employment Services Ltd [2025] EAT 109* (*24 June 2025, unreported*)**

This decision of Judge Auerbach in the EAT considered the relationship between three elements of a strike-out decision, namely the existence of prima facie grounds (scandalous conduct, etc), whether a fair trial is still possible and the question whether a strike out would be proportionate.

The claimant, in the course of a hearing that was unfortunately disrupted, made some wild accusations of judicial and tribunal corruption and bias which were sufficient to pass the initial hurdle of scandalous behaviour. The ET went on to consider how to deal with this. It cited the leading authorities, considered in the text, of *Bolch v Chipman* [2004] IRLR 140, EAT, *Chidzoy v BBC* UKEAT/0097/17 (5 April 2018, unreported) and *Blockbuster Entertainment Ltd v James* [2006] EWCA Civ 684, [2006] IRLR 684 and, applying the second and third factors in order (as in *Bolch*), came to the conclusions that a fair trial may no longer be possible *but* that it was still disproportionate to order a strike out. All this was against an application by the claimant for the EJ to recuse himself, which was refused.

Upholding the ET's decision not to strike out, the EAT pointed out that:

(1) The matter must be approached in the light of the overriding objective (*Emuemukoro v Croma Vigilant (Scotland) Ltd* UKEAT/0014/20, [2022] ICR 327).

(2) There may be cases where the conduct is so egregious that there is no prospect at all of a fair trial and so a strike out must follow.

(3) That, however, is an extreme case; elsewhere, as here, the ET should go on to consider if there are other steps, short of strike out that could be used to mitigate the impact of the conduct and so allow the case to proceed.

(4) Although the second and third factors are conceptually separate and were treated as such in *Bolch,* in practice they may well be intertwined.

Here, the ET's decision was interpreted as meaning a prima facie holding that a fair trial was no longer possible, but with then a reconsideration on the proportionality point. Its decision to continue was thus upheld. It was also held that there were no grounds for recusal.

REFERENCE UPDATE

Bulletin	Case	Reference
563	*Fascino v Reckitt Benckiser Group plc*	[2025] IRLR 706, CA

Reference Update

Bulletin	Case	Reference
564	*Forrest v Amazon Web Services EMEA SARL UK Branch*	[2025] IRLR 656, EAT
564	*Prahl v Lapinski*	[2025] IRLR 667, EAT
564	*Raison v D F Capital Bank Ltd*	[2025] IRLR 685, EAT
565	*Hindmarch v North East Ambulance NHS Foundation Trust*	[2025] IRLR 677, EAT

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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).

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