Harvey on Industrial Relations and Employment Law

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DIVISION L EQUALITY

The duty to make reasonable adjustments; applicability of associative discrimination

L [384.04]

GL v AB SpA [Bervidi] C-38/24

In the text at **L [384.04]** it is pointed out that, although the concept of associative discrimination (ie based on someone else's protected characteristic) is well accepted in discrimination law generally, the Court of Appeal in *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763, [2014] IRLR 728 held that the exception was the obligation to make reasonable adjustments under the EqA 2010 s 20. They held that there is no such obligation here because the person who must provide the adjustment is an 'employer' and the duty is only owed to its employee. The point has been considered settled for the last ten years and there has been no further case law on it.

Now, however, the ECJ has held that art 5 of the Equal Treatment Directive 2000/78 is to be interpreted as including associative discrimination in its obligation to make 'reasonable accommodation'. The case concerned an Italian employee who cared for a severely-disabled child who needed particular care in the afternoon. She sought changes to her work pattern to cope with this, but was only given lesser measures than she asked for and on a temporary basis. Her claim for lack of accommodation was dismissed by the Italian courts, but a reference to the ECJ was successful. The judgment affirms the applicability of associative discrimination under the directive's general provisions on direct and indirect discrimination (citing *Coleman v Attridge Law* C-303/06 [2008] IRLR 722, [2008] ICR 1128, ECJ, see **L [276]**) and then went on to extend this to the separate art 5 requirement of reasonable accommodation. This is summed up at [76] and [77]:

> 'Accordingly, as the Advocate General states in point 56 of his Opinion, those measures of reasonable accommodation must enable the working environment to be adapted to the person with a disability in order to enable him or her to participate fully and effectively in professional life on an equal basis with other workers. Where the employee does not him- or herself have a disability but cares for a child who has a disability, those measures must also enable his or her working environment to be adapted to the same end.
>
> However, Article 5 of Directive 2000/78 does not oblige an employer to take measures that would impose a disproportionate burden on it. In that regard, it follows from recital 21 of that directive that, in order to determine whether those measures give rise to a disproportionate burden on the employer, account should be taken in particular of the financial costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance. In addition, the possibility of assigning a person with a disability to another job is only available where there is at least one vacancy that the worker in question is capable of holding'.

This is directly contrary to domestic law as set out in *Hainsworth*. Of course, this ECJ decision is no longer binding here, but it does raise the question whether it might indirectly reopen the matter in the domestic courts.

Ancillary matters; liability of employers and principals; liability for what acts?

L [500]

***AB v Grafters Group Ltd [2025] EAT 126* (*28 August 2025, unreported*)**

The ET in this case held that the claimant had been subjected to sexual harassment by a male colleague who was giving her a lift in his own car to a work event. The question then became whether the employer was liable under the EqA 2010 s 109 **Q [1527]** on the basis that it occurred in the course of the colleague's employment. The ET held that it did not, but Judge Tayler in the EAT allowed the claimant's appeal and remitted the case for reconsideration.

These cases of activities not directly within the work context are always difficult, and the judgment starts by accepting that the question is very much a factual one for the ET, so that the EAT should be slow to intervene. However, on the facts here it was held that, eschewing any 'pernickety critiques', this was one of the rare cases where the ET had given itself a correct self-direction as to the law BUT had then overlooked or misapplied it at the point of decision (see para [28]). Two points as to the law here may be noted:

(1) The judgment quotes extensively from Choudhury P's summary of the case law in *Forbes v LHR Airport Ltd* [2019] IRLR 890, [2019] ICR

1558, EAT (see **L [505]**) and also relies on a factual analogy with *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81, [1999] ICR 547, EAT.

(2) At para [13] the judgment sets out its own conclusions on the state of the law in the light of the leading cases; this is done in 13 short numbered points which are too long to set out here but merit reading in full. Also, at para [14] there is a discussion of the interplay between s 109 sub-ss (1) and (3) and the issue of the relevance or otherwise of any element of employer knowledge or approval of the acts in question.

Enforcement; time limits; continuing acts

L [823]

***Ahmed v Capital Arches Group Ltd [2025] EAT 133* (*17 September 2025, unreported*)**

One of the exceptions to the normal straightforward time limit for an ET claim for discrimination is in the EqA 2010 s 123(3)(a) **Q [1535]** which applies where there has been conduct occurring over a period, which can be construed as 'done at the end of the period'. As the text points out at **L [823]**, the key distinction here is between a continuing act (covered) and a one-off act with continuing effects (not covered). This distinction was applied in this case before Judge Auerbach in the EAT.

The claimant was employed in a fast food outlet, working in the kitchen. In 2018 he had an altercation with other employees and was subsequently transferred to work in the restaurant itself. He and the employer disagreed about the reasons for this. He worked there until going off sick in 2021. He commenced ET proceedings for discrimination in 2022. The ET held that his complaints were out of time and it was not just and equitable to extend time.

On appeal to the EAT he argued that the ET should have categorised his claim as involving a continuing act based on the change of duties. This was rejected. At [36] the judgment sums up the leading case law as establishing 'that there is a distinction between conduct extending over a period, and a one-off act which is *not* such conduct, *even though*, after it has occurred, it has continuing *consequences*'. This distinction, it is accepted, can be thin and very much in the ET's province. However, here the judgment placed emphasis on the decision of the Court of Appeal in *Parr v MSR Partners LLP* [2022] IRLR 528, [2022] ICR 672 where it was held that demotion, like dismissal (considered in earlier cases), came within the category of a one-off act. One other way of looking at it, according to Bean LJ in that case, is that there is a distinction between an employer policy (eg barring the employee from receiving valuable benefits) which is likely to be a continuing act and, on the other hand, a mere exercise of a discretion in a particular case. In the instant case, the claimant argued (to avoid *Parr*) that the events of 2018 were not actually a 'demotion', but the EAT held that it still constituted a forced change in contractual duties with detrimental effects. There was no 'policy' applied to him and so his treatment aligned with the dismissal/demotion cases (and indeed the decision not to promote the employee in *Sougrin v*

Haringey Health Authority [1991] IRLR 447, [1991] ICR 791, EAT). He thus fell on the wrong side of the crucial divide and the ET had been right to reject the late claims.

DIVISION PI PRACTICE AND PROCEDURE

Presenting a claim; the importance of pleading the claim

PI [293.06]

***Malthy v Chestnut Inns Ltd [2025] EAT 130* (*12 September, unreported*)**

The present emphasis on the adversarial nature of ET litigation was recently backed strongly by the decision of the Court of Appeal in *Moustache v Chelsea and Westminster NHS Foundation Trust* [2025] EWCA Civ 185, [2025] IRLR 470 which is considered at **PI [293.06]** and in **Bulletin 561**, which emphasised the onus on a claimant to plead their case properly and not to expect the ET to seek to make up any deficiencies off its own bat. It was accepted that in some cases a gap in the pleaded case may be such that, in the well-known phrase, it 'shouts out' to be investigated properly, but that increasingly seems to be very much the exception.

This case before Judge Auerbach in the EAT is a good example of the application of *Moustache* in a disability claim. The claimant, a LIP at the early stage of his action, mentioned certain claimed disabilities at the outset, but as the preliminary procedures went on sought to add others in what became something of a movable feast for the EJ. Some were allowed in, but when these were substantively considered the decision was that he was not disabled. In his appeal, by which time he was represented, it was argued that this was a case where there was in fact an obligation on the ET to go behind the pleaded case. However, having considered *Moustache* in some detail, the appeal was rejected. These additional possible disabilities had not been pleaded properly or at all and the facts here contained no element of 'shouting out'.

Privacy; anonymity orders; Sexual Offences (Amendment) Act 1992

PI [936]

AYZ v BZA [2025] EAT 91, [2025] IRLR 748, EAT

This case before Cavanagh J in the EAT was said to be unusual, and led to the unusual step being taken of two judgments being issued, one heavily redacted. The claimant sought an anonymity order in her action against the respondent based on allegations of sexual misconduct. The ET refused this but the EAT issued a permanent order. Most of the judgment is concerned with dealing with what is referred to as the possibility of 'jigsaw identification', ie the possibility that, even with lesser redaction, there is still the possibility of indirect identification of the parties through the surrounding facts. To that extent, the decision is largely factual.

There is, however, one issue of law which could be important. As well as arguing for the order on ordinary ET procedure grounds, the claimant argued that they were entitled to one under the Sexual Offences (Amendment) Act 1992 s 1, which provides:

> 'Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.'

Obviously, this is most readily applied to criminal cases, but the question arose if it could apply to ET proceedings such as these. As well as the ET proceedings, the claimant had made a complaint to the police about a similar incident, though this had not been taken any further by them. Did this constitute an 'allegation' for the purposes of s 1? There is a definition in s 6 which excludes certain legal procedures (in particular indictments), but did this apply here? The judgment points out the arguments either way, but decides to follow the approach of Soole J in *A v X* [2019] IRLR 620, EAT holding that s 1 can apply to non-criminal cases; at [70] he said:

> 'It is routine for Judgments in criminal proceedings covered by the 1992 Act to be anonymised accordingly. Tribunal Judgments can be in no different position. A Judgment does not fall within the section 6 exception for "an indictment or other document prepared for use in particular legal proceedings".'

On the basis that there was here the necessary allegation, the argument for the order under the Act succeeded.

Extension of time for lodging the appeal; genuine mistakes; rule 37(5)

PI [1444]

***X v Y, Z and CORE Educational Trust [2025] EAT 128* (*1 September 2025, unreported*)**

'We all make mistakes from time to time'. That is perhaps the lesson from this decision of Judge Tayler in the EAT, in yet another case on extensions of time because of failure to lodge necessary documents and the effect of r 37(5) introduced in 2023 to cover minor errors. The appellant, a LIP, failed to attach the ET1, ET3 and the grounds of resistance, as then required. He eventually realised his mistake (though he could not say why he had made it) and supplied them, but 25 days out of time. The Registrar rejected the appeal.

The EAT considered the recent case law of *Ridley v H B Kirtley* [2024] EWCA Civ 884, [2024] IRLR 845, *Davies v BMW (UK) Manufacturing Ltd* [2025] EWCA Civ 356, [2025] IRLR 515 and *Melki v Bouyges E and S Contracting UK Ltd* [2025] EWCA Civ 585, [2025] IRLR 614, which are considered in the text and in **Bulletin 562**. *Melki* is particularly of note for

overturning the over-strict approach to the new r 37(5) taken by the EAT in that case. The EAT's conclusions on the law here are contained in paras [25] and [26]:

> 'We all make mistakes from time to time. No rational person who has gone to the trouble of drafting a Notice of Appeal will deliberately fail to submit documents that they know are required. The mistake will often be an oversight – forgetting to submit the documents. If you forget to do something it can be very difficult to explain why you forgot. That's the point – you can't remember. You may only be able to give your best guess as to why you made the mistake.
>
> Where a claimant fails to submit a required document because of an honest and genuine mistake, this may support the granting of an extension of time. The EAT will require transparency and candour. It remains the case that an extension is not to be granted as of right. The EAT will be very slow to grant an extension if a claimant is economical with the truth or seeks to mislead the EAT as to the reason for the default. While an honest mistake in submitting required documents may be understandable, it certainly is not the fault of the respondent, so any significant prejudice to the respondent is likely to weigh significantly against granting an extension. While the key period is generally that between the claimant having been notified of the missing documents and them being submitted, the analysis might be different if there has been extensive delay that has significantly prejudiced the respondent.'

Applying this to the facts here, the EAT granted the extension, focusing particularly on the factors that: it was a genuine mistake, the claimant thought that his dyslexia and back pains may have played a part, there was no attempt to mislead and he tried to explain what happened as fully as he could, he sought in fact to appeal early, the documents were of secondary importance and once alerted by the EAT to his failure he had acted with reasonable dispatch.

DIVISION PIII JURISDICTION

State Immunity Act 1978; claims by members of a diplomatic mission; waiver of immunity

PIII [186], PIII [191.05], PIII [194], PIII [195]

Royal Embassy of Saudi Arabia* (*Cultural Bureau*) *v Alhayali [2025] EWCA Civ 1162

The decision in this case concerns the general question of where to draw the line in deciding which members of a foreign embassy are covered by state immunity if they seek to sue and which members are not and so can bring their ET claims.

The claimant here was an employee working in the Embassy's academic and cultural affairs department. Her duties involved dealing with students and

supporting cultural activities; she had no decision-making powers. When she brought discrimination claims against the Embassy, it at first appeared to submit to the ET's jurisdiction, and dealings between the parties carried on for two years, after which the Embassy changed its approach and claimed immunity. The ET held, applying the *Benkharbouche* test of whether the work of the claimant was 'sufficiently close' to the exercise of sovereign authority to come within state immunity under the State Immunity Act 1978, that her work here did not satisfy that test and so there was no immunity. The EAT ([2023] EAT 149, [2024] IRLR 381, see **PIII [191.05]**) reversed this, partly on the ground that hers were not commercial activities (the usual antithesis of sovereign activities) and so came within the immunity. However, the Court of Appeal disagreed and reinstated the ET's decision.

Thus, the decision is squarely on the application of the existing case law to the facts. It did not need to go on to two other issues raised in the appeal, but the judgment goes on to express two opinions *obiter*:

(1) The decision in *Ogbonna v Federal Republic of Nigeria* UKEAT/0585/10, [2012] ICR 32 (see **PIII [194]**) is wrong in as much as it interpreted ss 4 and 5 of the Act in relation to mental injury as a head of damage; in particular, there is no requirement that it flows from physical injury.

(2) The decision of the Court of Appeal in *Republic of Yemen v Aziz* [2005] EWCA Civ 745, [2005] ICR 1391 (see **PIII [195]**) may need reconsideration on the question of waiver of immunity; a concern was expressed by all three judges that the approach it took could allow a sovereign body to appear to submit to the jurisdiction, only later to either change its mind or dispute the power of the person (or solicitors) who originally did so. This, it was said, would be contrary to the CPR and the overriding objective and would be a wrong interpretation of ss 4 and 5 of the Act.

REFERENCE UPDATE

Bulletin	Case	Reference
564	*Stedman v Haven Leisure Ltd*	[2025] IRLR 738, EAT
565	*Lutz v Ryanair DAC*	[2025] IRLR 748, CA
565	*Gillani v Veezu Ltd*	[2025] IRLR 752, EAT
565	*Leicester City Council v Parmar*	[2025] IRLR 782, CA

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