Harvey on Industrial Relations and Employment Law

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DIVISION AII CONTRACTS OF EMPLOYMENT

Disciplinary procedures; suspension; right to payment; ready, willing and able to work

AII [313.10]; BI [7]

***B S Eaton Ltd v Hughes [2025] EAT 140* (*3 September 2025, unreported*)**

The judgment of Bowers HHCJ in the EAT in this case refers to *North West Anglia NHS Foundation Trust v Greig* [2019] EWCA Civ 387, [2019] IRLR 570, [2019] ICR 1279, as the 'seminal decision' on the right to wages during suspension, and indeed more generally. It is considered at **AII [313.10]**. The instant decision concerned one specific point about the law as set out there, correcting a basic error in the ET decision.

In a case concerning wages during both a lay off then a suspension, the question became whether the employee in question had remained 'ready, willing and able' to work, the key concept here. Ordering payment of the wages, the ET did so on the basis that the *employer* had not established that he was *not* willing and able to return to work at the relevant date. Applying *Eaton,* the EAT held that this was an error of law because the burden of proof is on the employee to prove readiness, etc, not on the employer to disprove it. The judgment also cites the leading case of *Miles v Wakefield MBC* [1987] IRLR 193, [1987] ICR 368, HL to like effect (see **BI [6]**).

DIVISION CIII WHISTLEBLOWING

Whistleblowing detriment; non-applicability of Jhuti

CIII [98.04]

***Henderson v GCRM Ltd [2025] EAT 136* (*6 October 2025, unreported*)**

In a case concerning an ostensible dismissal of an embryologist for misconduct where she argued that the real reason was her whistleblowing, the ET upheld a claim of ordinary unfair dismissal (which was not appealed) but then went on to consider her separate claims of whistleblowing dismissal under the ERA 1996 s 103A against the employer and of whistleblowing detriment under s 47B(1A) and (1B) against the employer and the dismissing officer. Here, the matter became more complicated. As the ET accepted evidence that the dismissing officer had been influenced by a line manager and had not been fully aware of the whistleblowing element, the applicability of the *Jhuti* principle in ‘Iago cases’ (here, referred to as ‘tainted information’ cases) arose. The ET held that the dismissal case had not been made out, but upheld the detriment claims, applying *Jhuti*.

On the first question, the EAT upheld the claimant’s appeal because the ET had not fully considered the *Jhuti* point, even though she had raised it. This was largely a question of fact, but turning to the respondents’ appeal on detriment a question of law arose on which there is authority. This was whether *Jhuti* applies there at all. As the text points out, in *Malik v Centros Securities plc* UKEAT/0100/17 (17 January 2018, unreported) and *William v Lewisham & Greenwich NHS Trust* [2024] EAT 58, [2024] ICR 1065, the EAT have held that, because of differences in the drafting of ss 47B and 103A and the argument, there is no actual need for the *Jhuti* extension of liability in detriment cases since the legislative amendments in 2013 (see **CIII [98]**). The employer argued that this applied here, while the claimant argued that these cases should not be followed. Upholding the respondents’ appeal, the EAT held that these cases do represent the law, with Lord Fairley commenting that not only is there no need to extend the ratio of *Jhuti* into complaints under s 47B, but very good reason not to. At [51] he said:

> ‘I see no reason, however, to depart from the conclusions reached in each of *Reynolds*, *Malik* and *William* that a “composite approach” to liability is unacceptable in principle in a section 47B(1A) complaint because it cannot have been the intention of Parliament to impose unlimited liability upon innocent individuals who have not personally been motivated by a proscribed reason. The purposive approach to the legislation in both *Timis* and *Jhuti* reflected, in each case, the need to provide the claimant with an effective remedy. That purposive approach provides whistle-blowers with a full and effective range of causes of action and remedies for protected disclosure detriment without liability ever having to be imposed upon a wholly innocent party. There is no need to extend the ratio of *Jhuti* into complaints under section 47B(1A), and very good reason not to do so.’

DIVISION DI UNFAIR DISMISSAL

The reason for the dismissal; using reasons actually established

DI [800]

Alom v Financial Conduct Authority [2025] EAT 138 (30 September 2025, unreported)

In the introduction to the reason for dismissal, the text at **DI [800]** cites the case of *Greater Glasgow Health Board v Mullen* [2023] EAT 122 (12 September 2023, unreported) for the fundamental point that once a tribunal has established the reason (or principal reason) for the dismissal it must confine itself to adjudicating on the fairness of that and not speculate whether some other reason might have been operating. If the original reason was fair, that means it must not try to find some other that might have been unfair. The instant case before Judge Auerbach in the EAT does not cite *Mullen,* but is a good example of the application of its principle.

The claimant was investigated for several matters, but eventually the employer proceeded on only two – sending a harassing email to a colleague and breaching confidentiality in another email. He was dismissed for gross misconduct on these two grounds and claimed unfair dismissal. The ET rejected his claim and he appealed to the EAT, principally on the basis that the investigation generally by the employer into his case had suffered from procedural irregularities. Two of these consisted of particularly investigatory interviews, and that there had been searches that were arguably unlawful and contrary to his Convention rights. However, the EAT rejected his appeal, holding that on the facts both of these, even if potentially unfair, actually related to *other* aspects of the possible but unpursued accusations against him. Crucially, they had not affected the two actual grounds established. In relation to these, he had had adequate information otherwise and any material unlawfully gained had not been relied on in the actual disciplinary process. The element of causation is clear to see here. He had also complained that the dismissing officer had had a 'script' provided by HR but on the facts that did not show any closed mind or undue influence.

Compensatory award; in respect of which period?

DI [2542]

Davidson v National Express Ltd [2025] EAT 151 (21 October 2025, unreported)

The ET having found the dismissal only unfair on one ground (the inadequacy of the appeal), the question of compensation was heavily overlaid with issues of contributory fault and a *Polkey* reduction. The claimant appealed on several scores, mostly unsuccessfully on the facts, but one point of more general interest arose concerning the length of the compensatory award for future loss of earnings. This arose because at the time of dismissal she was 61. The ET decided that the logical way to fix the length of the loss was to end it at retirement age (initially fixed at 65, but then turning out to be 66 in her case). The problem was that she had given evidence that she felt that she would not be financially able to stop working then, and intended to work until 70. The EAT under Judge Auerbach allowed her appeal on that ground. While future intents and vicissitudes are of course uncertain, here the ET had not attempted to deal with them and take her evidence into account. There is an interesting discussion at [53]–[58] about the problems of dealing with future uncertainties, citing *Software 2000 Ltd v Andrews* [2007] IRLR 568, [2007] ICR 825, EAT and *Contract Bottling Ltd v Cave* [2015] ICR 146, EAT. The conclusion is that the fact that something is uncertain and speculative does not relieve an ET from having to grapple with it and come to a fair assessment. That includes taking into account such evidence as there is, here her evidence about likely retirement age. This element of the ET's decision was remitted for reconsideration.

DIVISION M TRADE UNIONS

Disciplinary proceedings; natural justice; absence of bias

M [3385]

Simpson v UNITE the Union [2025] EAT 149 (***16 October 2025, unreported***)

This is the second EAT decision in this litigation between a disciplined member and his union. His challenge in question before the Certification Officer under TULR(C)A 1992 s 108A **Q [342.02]** was that there had been a breach of natural justice because of the involvement of the same union officer in both the investigatory stage and the eventual hearing. As pointed out at **M [3383]** ff, this is a notoriously difficult area in which to draw the necessary border line – there must be observance of the basic principles, but on the other hand in the practical workings of a union it is impractical to expect the 'stern detachment of a Radamanthus'. In the first decision (*Simpson v UNITE the Union* [2022] EAT 154, [2023] IRLR 51) the EAT spelled out the test to be applied here by the CO (see **M [3385]**) and remitted the case to her for redetermination. When that was done, the challenge still failed. That second decision was the subject of this second EAT appeal, where (in spite of detailed criticism of the determination by the claimant) Pilgerstorfer DHCJ held that, on a proper construction, the CO had indeed applied the correct legal test for bias in these circumstances and so her decision stood.

DIVISION PI PRACTICE AND PROCEDURE

Early conciliation; requirement of an EC certificate before a claim can be submitted

PI [288.10]

Reynolds v Abel Estate Agents Ltd [2025] EWCA Civ 1357

This is an odd case, in that the facts were very unusual and, according to the judgment, unlikely to arise often. To that extent its actual decision is limited, but by the time it reached the Court of Appeal it raised two points of much more general importance on the rules relating to EC certificates.

The problem here was that the claimant alleged whistleblowing dismissal and claimed interim relief, which meant that she did not need an EC certificate. However, she also claimed whistleblowing detriment, for which she did need one *but* this was missed by the ET staff who wrongly admitted this claim too. The respondent later challenged this. The ET held that it did not have jurisdiction to hear this claim, but proceeded to grant an amendment to add it in. The respondent appealed this. As seen in **Bulletin 559**, the EAT held that the requirement in the ETA 1996 s 18A for a certificate was on the claimant but lack of it did not act formally act as a jurisdictional bar. This involved going against previous EAT authority (in particular *Price v Baxterstorey Ltd* [2022] EAT 61 (9 December 2021, unreported)) and also obiter remarks by Bean LJ in *Sainsburys Supermarkets Ltd v Clark* [2023] EWCA Civ 386, [2023] IRLR 563 (see **PI [289]**).

The Court of Appeal, in a judgment by Underhill LJ, have now reversed that holding, following that earlier authority. It held that, although no-one can be obliged to *use* early conciliation, the scheme as intended by Parliament was that s 18A was indeed mandatory, in order to provide at least a *chance* of successful conciliation and so lack of a certificate (when needed, i e not within an exception) is a jurisdictional bar. In a notable phrase at para [56] the judgment states that 'What is important is that the horse is brought to water, even if it cannot be made to drink'. However, the court then went on to consider the second main point here, namely whether the ET had been correct to proceed to add the detriment claim by way of amendment. On this, it follows earlier authority that the only obligation is to get the *initial* EC certificate. Amendment can then take place, with no requirement of a further certificate if it adds another cause of action. To hold otherwise would unnecessarily complicate what Parliament had intended, i e the initial opportunity for resolution without going to an ET. This is also in line with the overall approach to the scheme that it is not to be applied too technically (once the original s 18A obligation is discharged).

Lack of response; tribunal's power to limit further participation by respondent

PI [350], PI [353.01]

Executor or Personal Representative of Khan v Vijendran [2025] EAT 125 (30 July 2025, unreported)

This short decision of Judge Tucker in the EAT is a good example of the approach now taken to the (limited) participation in matters of remedy of a respondent who has not lodged a response in time and has not been given an extension to do so. This is covered by r 22(3) of the ET Rules SI 2024/1155 **R [3619]** which provides that that respondent is entitled to notice of any hearings and decisions of the ET but otherwise is 'only entitled to participate in any hearing to the extent permitted by the judge'.

When should such permission be given? This was considered extensively by the Court of Appeal in *Office Equipment Systems Ltd v Hughes* [2018] EWCA Civ 1842, [2018] IRLR 748, which was applied in *Talash Hotels v Smith* UKEAT/0050/19 (19 December 2019, unreported). Both of these cases are considered in detail at **PI [353.01]** and were central to the decision in the instant case. The judgment here draws from them the principles that: (1) there is certainly no absolute rule that the non-appearing respondent should always be allowed to participate in the determination of remedy, but (2) it would be unusual and indeed wrong to refuse to consider written representations or submissions made by them, particularly having regard to proportionality and the overriding object (see para [23]).

The claimant brought proceedings for a redundancy payment and outstanding holiday pay. The respondent did not respond in time and an extension was refused. The ET heard the case and awarded sums under each of these heads. The judgment was sent to the parties and the respondent wrote to the ET asking for written reasons and a reconsideration, setting out in detail why it said the figures used for each had been incorrect. The ET refused both applications, relying on r 22. The respondent appealed against the judgment on the basis of wrong calculations and this was allowed. On the question of participation, the EAT said that factually this case was similar to *Talash Hotels* where the ET had erred in refusing to give reasons or consider written representations, which the EAT said offended both common sense and fairness and justice. On the substantive point, the EAT here said that, like the respondent, it could not understand how these figures had been adopted and used. The matter was remitted for reconsideration.

Case management; unless orders; assessing material compliance

PI [390]

Peposhi v Go Crisis Ltd [2025] EAT 27, [2025] IRLR 822

> 'Unless Orders are useful case management tools and orders to ensure that the Tribunal's orders are complied with. They are, however, draconian in nature and can lead to the strike out of an entire claim, without

further consideration. They are not, therefore, regular case management orders. Care should, in my judgment, be taken not to use, deliberately or inadvertently, Unless Orders as a means of disposing of what may be considered to be a weak or unmeritorious claim. They should not, in my judgment, be used to address issues such as the strength or weaknesses of a claim, where matters such as that can more properly be addressed through other case management tools available, including the making of a Deposit Order or a Notice to show cause why a claim should not be struck out, if there are concerns about a litigant's conduct. Similarly, they are, in my judgment, blunt, if not inappropriate, tools to use to establish issues relating to honesty or credibility of explanations for steps taken, or not taken or a party's conduct in litigation'.

This summary of the current position in relation to unless orders from para [22] of Judge Tucker's judgment in this case is fully applied to its substance, which concerned the potentially difficult question whether there has been substantial compliance with the unless order.

The claimant, a litigant in person being helped by his sister, had hearing problems which he said made it difficult for him to follow proceedings. After some such difficulties, he applied for a postponement which was refused. The EJ then issued an unless order under r 38 of the ET Rules SI 2024/1155 **R [3636]** requiring him to submit a written statement as to why he had been unable to proceed, with documentary evidence. He did send three emails within the stipulated time, including from his sister, with some documentation. However, the EJ held that he had not complied and dismissed his case.

Taking the view that he had done enough to constitute material compliance and that in any case there were ambiguities in the terms of the order, he appealed on two grounds: (1) the EJ had applied a qualitative test (had he supplied a 'good enough' or 'valid' explanation), rather than a quantitative test required by authority and (2) she had resolved any ambiguities against him. The EAT upheld the appeal on both grounds. As to the law, the judgment refers to the extensive guidance given generally by Judge Tayler in *Minnoch v Interserve F M Ltd* [2023] EAT 35, [2023] IRLR 491, [2023] ICR 861, which is set out in full at **PI [420.03]**, and as to the ambiguity point references *Amey Services Ltd v Cunning* UKEAT/0008/18 (10 August 2018, unreported), see **PI [394]**. Here, the EJ had erred in looking for a sufficient or valid explanation, whereas the law requires an objective approach, on which basis he had done enough. Secondly, there was sufficient possible ambiguity in the order to require the benefit of the doubt to be given to him.

Privacy and restrictions on disclosure; late applications

PI [933]

DBP v Scottish Ambulance Service [2025] EAT 147 **(*123 October 2025, unreported*)**

Having had her complaints rejected by the ET, it was only several months later that the claimant made an application for a permanent anonymity order, on the basis that a public judgment on the Register would disclose evidence of previous self-harm and suicidal thoughts which might be prone to return. She sought an oral hearing and offered to pay for expert psychological evidence. However, the EJ refused the application on the papers, on the basis that it was not accompanied by medical evidence. On her appeal, Judge Clarke in the EAT held that it was unfair not to give her a reasonable opportunity to gather the evidence. The matter was remitted for reconsideration.

What is particularly interesting about the judgment is its remarks about later privacy applications generally. In the days when the Register was only kept physically, there was relatively little chance in practice of third parties trawling it for sensitive information, but this has changed significantly with the advent of the Internet and search facilities for online records, which remain there permanently. At [14] and [15] this is related to the particular aspect of the recent increase in late applications such as this:

> 'This has given rise to a trend: an increase in post-hearing applications by parties (and sometimes witnesses) who consider that the contents of a judgment published on a searchable online database has saddled them with the risk of personal and reputational harm or, in the case of individuals, damages their prospects of future employment. Many ET users, especially those who are professionally represented, will be aware that the judgment will appear on the online Register; that consideration will feature in the assessment of litigation risk. Yet the Register's existence still comes as a surprise to some.
>
> There is no bar to applications being made after a case has concluded, and no temporal limit on when they can be made; see paragraph 38 of *Fallows & Ors v News Group Newspapers* [2016] ICR 801 and paragraphs 46 and 48 of *X v Y* (EAT/0302/18). Thus post-hearing applications often refer to changed personal circumstances that are said to justify anonymisation. Sometimes, an oral hearing will be necessary to test the veracity of the assertions being made.'

Costs; no reasonable prospects of success; timing

PI [1054]

***Huntley v Siemens Healthcare Ltd [2025] EAT 152* (*23 October 2025, unreported*)**

There is considerable case law on ET Rules SI 2024/1155 r 74(1)(b) **R [3671]** which contains the important power to award costs on the basis that the claim had no reasonable prospect of success. In the main, this concerns the order in which the ET is to adjudicate on this and what may constitute such unreasonable conduct. However, this case before Pilgerstorfer DHCJ in the EAT raised another, separate point concerning the *timing* of the application of this paragraph. Does it only apply to the prospects when the claim was initially brought, or can it apply as from some subsequent stage in the progress of the litigation? The answer given here as a matter of law is the latter.

The facts of the case raised the issue neatly. The claimant, initially a LIP, brought a range of claims. They were subject to a split hearing over several days in April then a final five days in November, at which all the claims were dismissed. These claims were poorly presented, tending either to expand or to be abandoned. During the April hearing, the ET tried on several occasions to rationalise them and/or point out what proof they needed, but by and large this was not done by the claimant. Moreover, after this part of the hearing the respondents issued him with a costs warning. When the claims failed, they applied for costs, but limited to the period after April and essentially for the costs of their counsel at the resumed hearing. The ET agreed that as from that point it had been unreasonable for him to have continued and awarded £7,500.

The claimant appealed (by this time legally represented) and argued as a matter of law that the weakness of a claim must be judged as at its commencement, so that this award was wrongfully made, citing cases on the separate rule on strike outs and two cases on r 74 which spoke in those terms. However, the EAT rejected the appeal. It held that as a matter of construction there is no such temporal restriction, the strike-out rule is differently phrased and the two cases cited on r 76 were cases where it was being argued that the *whole* claim was unreasonable from the very start. At [30] the judgment states:

> ‘I see nothing as a matter of construction of Rule 76(1)(b), or as a matter of principle, to prevent an application for costs being made on the basis that, from a particular point in time subsequent to the outset of the litigation, a claim or response had no reasonable prospect of success (even if it might have enjoyed such prospects at an earlier point in time). Indeed, as a matter of principle, there is good reason to construe the Rule in this way. Doing so encourages litigants at all stages of the litigation to review their prospects of success and ensure that they are only pursuing claims and defences that have a reasonable prospect of success. This helps achieve the overriding objective.’

REFERENCE UPDATE

Bulletin	Case	Reference
558	*Main v Spa Dental Ltd*	[2025] ICR 1013, EAT
559	*Abel Estate Agents Ltd v Reynolds*	[2025] ICR 1032, EAT
559	*Eddie Stobart Ltd v Graham*	[2025] ICR 1051, EAT
564	*Madu v Loughborough College*	[2025] ICR 1126, EAT
565	*Mesuria v Eurofins Forensic Services Ltd*	[2025] IRLR 864, EAT

Bulletin	Case	Reference
565	*Taylors Services Ltd v Revenue and Customs Commissioners*	[2025] IRLR 878, CA
566	*Curtis v Ministry of Defence*	[2025] IRLR 809, EAT
566	*Bailey v Aviva Employment Services Ltd*	[2025] IRLR 831, EAT
566	*Chen v Coach Stores Ltd*	[2025] IRLR 840, EAT
566	*Aslam v Transport UK London Bus Ltd*	[2025] IRLR 870, EAT

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