Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to **1 December**.

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

LEGISLATION

Period for early conciliation extended

The period for ACAS early conciliation is extended from six weeks to twelve by the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2025 SI 2025/1153. This comes into force on 1 December and the change will be made in Div R in Issue 330.

DIVISION AI CATEGORIES OF WORKER

Employment status of agency workers; intervention of an umbrella company

AI [186]

***Madden v Waracle Ltd [2025] EAT 173* (*20 November 2025, unreported*)**

The employment status of an agency worker has long caused problems, which were not solved by the enactment of the Agency Worker Regulations 2010. As can be seen from the text at **AI [186]**, a particular problem has been, if there is a contract of employment, with whom, agency or end user? This case before Lady Poole in the EAT considers a third possibility in modern agency dealings, namely where the agency has set up a separate 'umbrella' company to employ the people on its books. Does that hold water legally?

The claimant was a professional recruited by agency C to work for end user W (the respondent) in supplying IT services to its bank client. This only lasted a short time and the claimant sought to bring ET proceedings, but against whom? He wished to do so against W but the problem was that C had set up company P to deal with its workers and the claimant had signed a

formal written contract of employment with P. W argued that P was therefore his employer and no action lay against it as the end user. The ET considered all the facts of these particular relationships and held the contract with P was valid and not a sham, so that the action did not lie against W.

On appeal, the claimant argued that the ET had not considered sufficiently the question of the truth and reality of the contract with P (the *Autoclenz*/*Uber* approach) and that it should have disregarded it; the true agreement was an implied contract with W. The EAT rejected the appeal. Stressing that its function is of course only to review the ET's decision to see if it was one open to it, the decision was that the ET had understood and applied the law in the light of its findings of fact, so that its decision on the merits stood.

Strictly speaking, the ratio is just that. However, there is much in the judgment to note on this particular form of contracting. Key points were:

(1) This form of employing and paying agency workers through a third company has become increasingly common, especially since the inception of the IR35 system which attacks the use by the *worker* of a separate service company, for which it can be a substitute. The judgment states:

> 'The work arrangements under consideration in this case are sometimes known as working through an umbrella company. Umbrella companies may become involved when recruitment agencies find temporary workers for a client. Because of the temporary nature of the work on offer, the client prefers to pay a fee for services of temporary workers supplied to them, rather than employ them. The recruitment company prefers the temporary worker to be employed by a different company, rather than itself becoming the employer of people it recruits to work for others. This allows the recruitment company to concentrate on its business of recruiting, and reduces potential liabilities. Accordingly, an umbrella company employs the temporary worker, in return for a fee from the recruitment company. The umbrella company becomes responsible for payroll, deduction of tax and national insurance, sick pay, and other statutory rights such as holiday, maternity and paternity pay in respect of the worker. The temporary worker or contractor is able to demonstrate that they are paying tax and national insurance, and may elect to use the contract with the umbrella company for subsequent temporary IT jobs (which may assist in showing continuity of employment where that is helpful).'

(2) From this can be seen that the EAT was taking a relatively positive view of this form of contracting, not just assuming that it must be some sort of scam to deprive workers of their statutory rights. Indeed, on the facts here the judgment stresses the ET's findings that the contract with P was largely to the contrary, given that it went out of its way to *preserve* the claimant's rights in such matters as annual leave, working time, minimum wage, sick pay, pensions and notice periods.

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(3) Such contracting is now common in the industry and this contract had been freely entered into by the claimant who had in the past worked both under his own service company and through umbrella companies such as P.

(4) It was therefore entirely open to the ET to find that the contract was not a sham, albeit that its conclusions were expressed concisely ('It is true that the decision of the tribunal is succinct. But keeping decisions simple, clear and concise is to be encouraged', at [34]).

(5) At its end at [51] the judgment cautions that the question of who is the employer remains one of fact in each case and that this decision is not a general endorsement of all working arrangements involving working through umbrella companies. Arguably, the key aspect here was the perceived bona fides of the commercial use of this particular arrangement and the preservation of the claimant's rights. In another case where this is not so and there is a strong suspicion of *misuse* of a third entity, to the worker's prejudice, the result may be different.

DIVISION CIII WHISTLEBLOWING

Vicarious liability and liability of fellow workers; application to dismissal

CIII [98.03]

Rice v Wicked Vision Ltd; Barton Turns Developments Ltd v Tradwell [2025] EWCA Civ 1466

This decision of the Court of Appeal settles a problem that has caused divergence between two EATs, but possibly only for the time being. It decided that the court had to follow dicta from an earlier Court of Appeal decision, but made very clear that they thought that those dicta were actually wrong in law and that if they had had a free hand they would have decided to the contrary. At the end of the judgment they gave a pretty strong steer towards a further appeal to allow the Supreme Court to approach the issue from first principles.

As the text points out at **CIII [98.01]**, the Court of Appeal in *Timis v Osipov* [2018] EWCA Civ 2321, [2019] IRLR 52 held that the provisions of the ERA 1996 s 47B(1A) **Q [671.03]** on the liability of fellow employees for detriment towards whistleblowers is wide enough to cover procuring the whistleblower's *dismissal*, even though s 47B(2) states that no action lies for detriment if the claimant is an employee and the detriment amounts to dismissal. That was held to apply only to an action against the employer. So far, so good, and that part (the actual ratio) was not in issue in the instant case. The problem arose because in discussing this Underhill LJ gave the opinion that if the fellow worker was liable (or at least potentially liable) for a dismissal under sub-s (1A), then the employer could be *vicariously* liable for that under sub-s (1B), in spite of sub-s (2) which only applies to a *direct* action against the employer 'for his own act of dismissal', which has to be brought under s 103A (see **CIII [98.01]** and **CIII [98.02]**, heading (1)). When this issue came

before the EAT in these two cases it produced an acute difference of opinion. As discussed at **CIII [98.03]**, in *Wicked Vision* the ET allowed a vicarious action against the employer in a dismissal case, but the EAT overturned this, treating the extension in *Osipov* as mere obiter which was wrong in principle and not to be followed. However, in *Barton Turns* a different EAT held exactly to the contrary, following *Osipov* as a matter of course and declining to apply *Wicked Vision.*

In the further conjoined appeal, the Court of Appeal considered the amendments to s 47B in 2023 in the light of pre-2023 case law and then the analysis in *Osipov.* In a lengthy passage at [66]–[86] they give their a priori interpretation to the section and the amendments, coming to the view that, to put it simplistically, sub-s(2) says what it means and means what it says. The effect is that it rules out a detriment action against an employer for a dismissal however it arises. What, then, of *Osipov?* The judgment (given by Elizabeth Laing LJ) held that the remarks about vicarious liability were so intricately bound up with the main point in the case (on the meaning of sub-s (2)) that it was not possible to treat them as mere obiter and on that basis they were bound to follow and apply them, against their better judgement. The result was that the appeal in *Wicked Vision* was allowed and that in *Barton Turns* dismissed. The final paragraph states that 'it is plainly unsatisfactory that the construction of this legislation has now produced conflicting decisions at three levels of court, but that can only be resolved by the Supreme Court or by amendment to the legislation'.

DIVISION DI UNFAIR DISMISSAL

Constructive dismissal; affirming the contract

DI [527.01]

Barry v Upper Thames Medical Group [2025] EAT 146
(*25 September 2025, unreported*)

The judgment of Judge Tayler in this case starts by saying that the issue was whether an employee faced with a repudiatory breach by the employer should be deemed to have affirmed the contract (and thus lost the right to sue) by delaying for a period, with some limited contractual compliance while seeking to persuade the employer to remedy the breach. The general answer is that in employment cases a court or tribunal should be slow to accept that argument.

The facts here concerned a medical employee on lengthy sick leave, after most of which the employer refused to continue paying sick pay. Although other bones of contention were pleaded, it was this one that eventually founded her claim of constructive dismissal, on the basis that the employer was in breach of contract with the refusal. That had occurred in August 2020; the claimant through her union continued to query it (while still off sick or declining to recommence work until it was all sorted out) until March 2021 when the employer refused to reconsider. She resigned in April.

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Her claim for constructive unfair dismissal was dismissed by the ET on the basis that she had affirmed the contract due to the length of time involved and the fact that she had indicated her willingness to return to work on resolution. The EAT allowed the claimant's appeal, holding that the ET had taken too narrow an approach to the facts overall and had relied heavily on the elapse of time. As with the next case in this Bulletin, the judgment starts its consideration of the law on affirmation with a venerable case in the history of unfair dismissal, this time *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443, [1981] ICR 823, EAT (**DI [523.01]**). This is followed by *Chindove v William Morrison Supermarkets Ltd* UKEAT/0201/13 (26 June 2014, unreported) (**DI [524]**) but most particularly by the more recent authority of *Leaney v Loughborough University* [2023] EAT 155 (23 November 2023, unreported) which is considered at length at **DI [527.01]** and which argues strongly against affirmation where the employee continues the employment while seeking a resolution. With regard to the latter, one point of difference was that during the relevant period that employee had continued to work and receive pay, but that was not determinative here where the whole issue revolved around sickness absence and the lack of pay.

Capability; senior employee and formal warnings; Polkey reduction; timing

DI [1164], DI [2710]

***Zen Internet Ltd v Stobart [2025] EAT 153* (*27 October 2025, unreported*)**

The claimant was employed by the respondent as its chief executive. He was dismissed for incapability in achieving profitability for the company and brought proceedings for unfair dismissal. The company's disciplinary procedure mirrored the ACAS Code of Practice and the ET found the dismissal procedurally unfair because of breaches of it, in particular relating to investigation, information, allowing him an opportunity to defend himself, pre-determination of the result and lack of an appeal. When fixing compensation, the ET applied a *Polkey* reduction on the basis of the likelihood of a dismissal anyway if a proper procedure had been followed.

The company appealed on both of these issues. On fairness, it argued the well-known law on senior employees and the effect that that seniority may have on what would otherwise be the required procedure, going all the way back to the early case of *James v Waltham Holy Cross UDC* [1973] IRLR 202, [1973] ICR 398, NIRC (see **DI [1164]**). That case concerned particularly the need for formal warnings for employees who know exactly what is required of them, but can apply more widely. The appeal weas turned down by Pilgerstorfer DHCJ in the EAT. It was held that here the ET had been cognisant of this exception to normal procedural rules, had not imposed an absolute requirement of full procedure, had taken the claimant's seniority into account and had not substituted its own view for that of the employer. The decision shows clearly how fact-sensitive this area is and how it lies very heavily within the purview of the ET, whose decision is unlikely to be challenged on appeal in the absence of a clear misdirection on the law.

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With regard to the *Polkey* reduction, the company's appeal was allowed, on a very specific issue of timing. The claimant was dismissed on 31 March 2023, but had been told on 24 February that there were serious concerns about his performance and that he could not continue as CEO. The eventual decision to dismiss was made by the Board at a meeting on 17 March. In applying *Polkey*, the ET decided that it would have taken two months to have gone through the procedure properly (a decision entirely open to it) *but* had only dated this from 17 March. The company challenged this, arguing that it should have flowed from 24 February when the concerns had crystallised (or, to put it more bluntly, when the skids were clearly under him). The claimant argued that the ET had been right because the reduction must always be forward-looking from the date of dismissal. The EAT held, however, after a lengthy exposition of the law here that there is no such rule and that it depends on the nature of the unfairness. If the employer could have proceeded properly from an earlier date, that can be taken into account. At [104] the judgment states that in these circumstances an ET need not 'shut its eyes' to what would have occurred with as proper procedure, even if some or all of it would have taken place before the actual decision to dismiss. The matter was remitted to the ET for reconsideration.

DIVISION F TRANSFERS OF BUSINESS

Insolvency; applicability of TUPE; pre-pack agreements; appointment of provisional liquidator

F [167], H [485.02]

***Secretary of State for Business and Trade v Sahonta [2025] EAT 166* (*10 November, unreported*)**

The specific provisions on insolvency cases in TUPE SI 2006/246 reg 8 **R [2297]** are of some complexity, none more so that that in reg 8(7) which disapplies the usual regime of automatic transfer where the transferor is the subject of bankruptcy or other analogous insolvency proceedings under the supervision of an insolvency practitioner. The regulation does not define most of these terms, which are left as questions of fact to be applied across the whole gamut of different forms of insolvency. Added to this has been the recent prevalence of 'pre-pack' agreements to form a new business from the ashes of the old, but without having to take on all or any of the existing staff. This decision of Lady Poole in the EAT validated such an agreement.

Where reg 8(7) applies, the new business is not liable for the old business's staff, whose remedy for loss of employment lies against the National Insurance fund/Secretary of State under the ERA 1996 s 182 **Q [806]**, which was at issue here. Bakery company M was in financial difficulties. On 3 March 2023 a 'conditional business transfer agreement' (pre-pack) was entered into with company P, and M stopped trading. Its staff were laid off. On 7 March a provisional liquidator was appointed at the request of HMRC; on 13 March a letter was sent to the staff saying that they were dismissed on 7 March. On 23 March P commenced trading, with new customers and taking on about a third of M's staff. On 31 March a formal winding-up order was made. The

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staff not offered new employment made claims to the Secretary of State. Normally this would be the outcome, but here the Secretary of State refused payments, arguing that the date of the transfer was 3 March (the date of the agreement), at which time no liquidator had been appointed, so that reg 8(7) did not apply, with the result that liability passed to P under the rest of reg 8, with no liability on the fund.

The employees brought proceedings for the fund payments and the ET upheld their claims, holding that: (1) the date of the transfer was 21 March, by which time the liquidator had been appointed; and (2) reg 8(7) can be triggered by a provisional liquidator and on the facts did apply to this pre-pack. The Secretary of State appealed but the EAT dismissed the appeal. On the question of timing, it held that dating a transfer is a question of fact, so that while the date of such a conditional agreement may be a factor (sometimes conclusive), it is an error of law to argue that it *does* determine the date, as the Secretary of State had argued. Here, it was outweighed by other factors of this overall transaction. The ET had permissibly held that it was 21 March. On the question of the applicability of reg 8(7), it held that the appointment of a provisional liquidator is sufficient to trigger it, with no need to await the final winding-up order. That left the question whether a pre-pack as such triggered it. These arrangements have been controversial and the EAT accepted that in EU law (on art 5 of the Acquired Rights Directive behind TUPE) there has been a conflict of approach. As the text points out at **F [167.12]**, in *Federatie Nederlandse Vakvereniging v Small-steps BV* C-126/16, [2017] IRLR 852 the ECJ held that such an arrangement did not come within art 5 because the aim was not primarily a creditors' liquidation but rather to keep the business going in some form. However, in *Federatie Nederlandse Vakbeweging v Heiploeg Seafood International BV* C-237/20, [2023] IRLR 405 the ECJ held to the contrary, so that an element of keeping the business going did not negate art 5. In the instant case, the EAT preferred the *Seafood* approach and held (applying its tests) that reg 8(7) did apply here because the insolvency was inevitable, a statutory procedure had been entered into, it had aimed to satisfy creditors as far as possible while preserving jobs as far as possible, and with the transfer happening during this process.

The judgment contains a detailed explanation of the purpose and effect of art 5 and reg 8(7). With regard to pre-packs generally, the judgment emphasises the business case for them and their acceptance, as being in effect the least worst outcome in a case like this, in at least having a chance of some continuance of the enterprise and the preservation of at least some jobs. At [30] it states:

> 'The mischief being addressed is that insolvent businesses are unlikely to be taken over unless they are attractive enough to a buyer, and that may entail not having to take on responsibility for all former employees (regulation 8(7) of TUPE), or being able to alter terms and conditions and the state stepping in to provide certain payments (regulation 8(6) and regulation 9 of TUPE). The purpose of regulation 8(7), seen in this light, is to relieve the transferee of obligations towards a transferor's

employees, in situations in which the transferor is insolvent, in order to facilitate the potential for retention of at least some jobs. To that extent, it remains a measure safeguarding employment, although employees do not have the benefit of all aspects of protection which may arise under TUPE.'

In more homely terms, half a loaf is better than none.

DIVISION PI PRACTICE AND PROCEDURE

Bias; aggressive or inappropriate approach by the tribunal

PI [921]

Ahmed v Department of Work and Pensions [2025] EAT 118, [2025] IRLR 895

The text at **PI [921.04]** refers to the fine line that must be drawn between plain language by the ET about a party and language that crosses that line into apparent bias. This decision of the EAT under Judge Stout is a good example of this, and also the more general point that the ET must be slow to equate objectionable behaviour by a party at a hearing with what may or may not have been their behaviour at work which is at issue substantively.

This case had already been to the EAT once before and was remitted. The claimant was raising questions of bias by the ET. The EAT judge permitted him to put his allegations in writing and allowed the members to respond likewise. One of the side members gave her opinion of the claimant as 'a very difficult and thoroughly unpleasant individual' with an 'appalling attitude'. Her verbatim notes also referred to him as challenging any authority or instructions or requests from management, on the basis of a suspected conspiracy against his religion. On reconsideration, these remarks were toned down somewhat. When it came to arrangements for a new hearing, the EJ in fact recused himself because of the previous hearing. The REJ took over the arrangements and directed a hearing before a new EJ but the same side members. The claimant appealed against this and the EAT allowed the appeal. It held that the fact that the EJ had recused himself had not been given sufficient weight in deciding what a fair-minded and informed observer would make of the side member's comments. She had used intemperate language which crossed over into showing animosity, and the toning down of her original verbatim comments had suggested trying to hide her real opinion. Moreover (and potentially more important legally) her first comments suggested that she was in danger of transferring her views of his conduct of the hearing on to any consideration of how he had previously behaved at work, an error isolated particularly in *Laing v Bury and Bolton CAB* [2022] EAT 85 (1 June 2022, unreported) which is discussed in this context at **PI [921.04]**. The EAT ordered a new hearing before a wholly new ET.

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EAT; precedents binding on the EAT; Scottish and Northern Irish decisions

PI [1430.02]

Jwanczuk, R (on the application of) v Secretary of State for Work and Pensions [2025] UKSC 42

It will be recalled that recently the EAT and Court of Appeal in *Augustine v Data Cars Ltd* [2025] EWCA Civ 658, [2025] IRLR 624 (see **AI [146.02]**) applied an earlier decision of the Scottish Court of Session (IH) on an important point of the law on part-time workers, even though the majority thought it wrongly decided, that factor being outweighed by the need for consistency between jurisdictions applying the same statutory regime. In doing so, the Court of Appeal took a relatively strict approach, accepting that although they were not legally bound to do so, they should only depart from a decision of the Court of Session if either they were convinced it was 'clearly wrong' or there were compelling reasons to do so in an 'exceptional case'.

In considering this case in relation to precedent in employment cases generally, at **PI [1430.02]** the text points out that the Court of Appeal followed its previous decision in the instant case which took a similarly strict view, but noting that it was subject to further appeal to the Supreme Court. This has now happened and, essentially, the Supreme Court have held that the Court of Appeal had erected too high a hurdle. The position is more subtle than that.

The instant case concerned social security, not employment law, and a previous decision of the NI Court of Appeal, not the Court of Session. However, the Supreme Court considered the whole matter generally. The judgment starts from the position that fundamentally this is not an area of the law on precedent with definite rules, but rather a question of practicality and good sense. Legally, the problem with the Court of Appeal's approach was that it had followed a well-known older authority on revenue law, where the arguments for comity and consistency across jurisdictions are particularly strong. Outside that, however, there is more of a spectrum, with criminal cases at the opposite end and a middle ground for other civil cases, including employment cases. The judgment at [92]–[96] sets out six propositions as to the approach to be taken, clearly stating that it should not simply be assumed that the revenue law precedents should be applied elsewhere. Instead, a court disagreeing with a previous decision of a court in another jurisdiction should ask itself: (1) how convincing is the reasoning there? and (2) would practical problems arise if it did not follow the other case? In the instant case, the outcome was that the Court of Appeal should have departed from the NI decision they thought wrong. At [100] and [101] this is summed up as follows:

> 'In other areas of the law, it appears to us that the best approach, as a matter of pragmatic good sense, is generally for the appellate courts of the United Kingdom to treat each other's decisions on the interpretation of legislation with great respect, since it is undesirable that there

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should be conflicting decisions on the construction of provisions which are intended to apply in the same way in more than one jurisdiction. As we have indicated, it may be appropriate to attach particular weight to another court's view of the meaning of statutory language where it is difficult to say with any confidence that one interpretation is correct and another is wrong. Somewhat less weight may attach to another court's interpretation of a similar but different provision.

However, appellate courts should not regard themselves as being under an obligation to follow decisions which they consider to be wrong. They do not require to identify some other compelling reason for departing from a wrong decision. They do not have to identify exceptional circumstances. It is better that they should explain clearly why they consider the decision to be incorrect, give what they consider to be the correct decision, and grant leave to appeal to this court so that the difference of views can be resolved without undue delay.'

Augustine is mentioned in the judgment, but no opinion is expressed as to its correctness. However, the judgment as a whole does give grist to Bean LJ's mill when he called there for a further appeal to resolve the part-time workers point.

REFERENCE UPDATE

Bulletin	Case	Reference
560	*Impact Recruitment Services Ltd v Korpysa*	[2025] ICR 1161, EAT
560	*Higgs v Farmor's School*	[2025] ICR 1172, CA
561	*Moustache v Chelsea and Westminster Hospitals NHS Foundation Trust*	[2025] ICR 1231, CA
561	*Hewston v OFSTED*	[2025] ICR 1270, CA
562	*Sullivan v Isle of Wight Council*	[2025] ICR 1299, CA
563	*ABC v Huntercombe (No 12) Ltd*	[2025] ICR 1336, KB
563	*Melki v Bouygues E & S Contracting UK Ltd*	[2025] ICR 1384, CA
563	*Augustine v Data Cars Ltd*	[2025] ICR 1404, CA
567	*Royal Embassy of Sudi Arabia (Cultural Bureau) v Alhydi*	[2025] IRLR 918, CA
567	*GL v AB SpA (Berrida)*	[2025] IRLR 939, ECJ

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Bulletin	Case	Reference
568	*X v Y*	[2025] IRLR 889, 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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