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Harvey on Industrial Relations and Employment Law

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DIVISION AI CATEGORIES OF WORKER

Part-time workers; less favourable treatment; 'on the ground that'

AI [146.02]; PI [71.01], PI [1430.01]

Augustine v Data Cars Ltd [2026] UKSC 30

At last, we have the answer. As the text discusses, there has been a longstanding problem concerning the causation requirement in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 reg 5(2) **R [1292]** that the less favourable treatment in question must have been 'on the ground that the worker is a part-time worker'. The issue arose because the corresponding provision of the backing directive said that the treatment must have been 'solely' the cause. Does this limitation apply to the domestic version too?

When the Inner House of the Court of Session considered this in *McMenemy v Capita Business Services Ltd* [2007] CSIH 25, [2007] IRLR 400, it held that 'solely' should indeed be applied by inference. This then led to a split of opinion in the EAT (see **AI [146.02]**), which in turn led to the controversy in the present case, with the EAT and Court of Appeal reluctantly following *McMenemy* and the Supreme Court reversing this and holding that reg 5(2) is to be applied as it stands, being wider than the directive.

Four principal points can be seen Lady Simler's judgment:

(1) There is in fact no actual need for a UK court to apply the wording of the directive in this case, for two reasons: (i) it was generally open to a member state to provide for wider protection, not just the minimum required by the directive; and (ii) in any case, in the Employment Relations Act 1999 s 19 **Q [1120]** the British government had taken a

general power to produce protective regulations for part-timers, independently of the European Communities Act 1972.

(2) A principal reason for not reading in a 'solely' requirement is that the 2000 Regulations should preferably be construed to be in line with discrimination law, where the same phrase ('on the ground that') is widely used and has been consistently interpreted as meaning that the proscribed conduct must have been a significant or effective cause, *not* the sole one, thus covering if necessary cases of multiple causation. The court's decision provides this consistency, at the same time maintaining the intended width of the protection of the Regulations.

(3) The argument that prevailed in the EAT and Court of Appeal in favour of 'solely' was judicial comity. The EAT and two of the three judges in the Court of Appeal thought that *McMenemy* was wrong in principle but had to be applied as a matter of that comity. Of course, the Supreme Court was always able to depart from that precedent, but actually held that this argument was wrong anyway, but in a way that 'exonerated' the Court of Appeal. That court had followed its own previous judgment in *R (Jwanczuk) v Secretary of State for Work and Pensions* [2023] EWCA Civ 1156, [2024] KB 275 which has accepted the need to follow a court of coordinate jurisdiction, *but* this was subsequently reversed and the proposition disapproved by the Supreme Court ([2025] UKSC 42, [2026] AC 699).

(4) Where does that leave *McMenemy*? Its ratio is now wrong as a matter of interpretation, but the Supreme Court's judgment states that on a correct interpretation its *result* on its facts was right.

DIVISION AII CONTRACTS OF EMPLOYMENT

Immigration status; liability on the employer; defective penalty notice

AII [20.02]

Akbars Restaurant (Middlesbrough) Ltd v Secretary of State for the Home Department [2026] UKSC 26

The wide powers of the Secretary of State to enforce correct immigration status for employees by issuing large administrative fines on employers are contained in IANA 2006 s 15. As the text points out, s 15(1) contains four possible infractions by an employer, allowing the Secretary to issue a penalty notice under sub-s (2). Sub-section (6)(a) provides that this must state 'why the Secretary of State thinks the employer is liable to the penalty'. This case concerned the detail (or otherwise) that must be given and the effect of not doing so.

The appellant restaurant was served with a penalty notice for £15,000 in relation to the alleged status of one of its employees. The notice was in generic form, not linked particularly to one of the four possible infractions. When the appellant's lawyers asked for more detail, this was not forthcoming.

The appellant denied that the individual was in fact working illegally, but also challenged the validity of the notice, as it did not specify why it had been issued. It lost at first instance and, as the text states, the Court of Appeal held against it on the basis that there was no obligation on the Secretary to be more specific. In this final appeal, two questions arose: (1) what level of detail needs to be given; and (2) if that had not been given, did that necessarily mean that the notice was invalid? In a judgment given by Lord Sales, the Supreme Court reversed the decision of the Court of Appeal. On the first question, it held that, as a penal provision (some might say a very penal provision) the recipient of a notice has a right to know exactly what is being alleged and under which head of sub-s (1), if only so that they can consider an appeal. In so holding, the court considered the constitutional context, the wording of s 15(6), its context in s 15 as a whole and the rest of the regulations and the parliamentary purpose behind the scheme. This meant that this notice did not comply, but equally importantly, the court went on to consider the next question – did that make it actually invalid? Towards the end of the judgment there is a general discussion of how to apply a procedural provision if it is breached. There is no absolute rule that it must make any resulting order invalid, citing *R v Soneji* [2006] 1 AC 340, but on the facts here the decision was that in order to ensure the purpose of s 15(6), a breach of its requirement *does* invalidate the resulting penalty notice.

DIVISION CIII WHISTLEBLOWING

Remedies for whistleblowing dismissal; interim relief

CIII [127.02]

Duffy v BXTR 3 Ltd t/a House of Gods [2026] EAT 119 (10 August 2026, unreported)

Interim relief, specifically available in a whistleblowing dismissal case by virtue of the ERA 1996 s 128(1)(a) **Q [752]**, is an emergency measure and as such has always been difficult to interpret; the received wisdom is that the claimant must show a 'pretty good chance' that they will succeed in showing that the whistleblowing was the reason for dismissal. This case, before Recorder Fraser Butlin KC in the EAT, shows that there is an important line to be drawn by an ET where the employer casts doubt on the claim.

The claimant alleged automatically unfair dismissal under the ERA 1996 s 103A and claimed interim relief. However, the employer argued that (1) the alleged protected disclosures had not taken place and (2) in any case, the decision to dismiss was because he had failed his probationary period and had been taken *before* the alleged disclosures. The ET rejected the claim for interim relief because these matters meant that there were significant disputes of fact and credibility, which meant that it could not be said that he had a pretty good chance of success.

The EAT allowed the claimant's appeal and remitted the question for rehearing. The ET had erred by in effect saying that *because* there were significant live issues, *therefore* there could be no order for interim relief. This was wrong in law because, even if there are such issues, the ET must still go on to *evaluate* them, to apply the 'pretty good chance' test. This may be speculative and difficult, but must still be undertaken. One specific point of interest is that the judgment cites the new Presidential Guidance on Interim Relief which came into force in June. This was produced because of an increase in claims for this hitherto rather unusual remedy. The judgment cites in particular para 39 which states:

> 'If an employer identifies an apparently good reason for dismissing the claimant that is unrelated to a protected disclosure, this is usually something the tribunal will need to decide at the final hearing on the basis of full evidence. It is difficult to see how the claimant will show that they have a pretty good chance of success, unless they have clear evidence that this was not the real reason.'

However, *short* of such cogent evidence, the mere existence of factual disputes will not have this effect and the ET must proceed to its consideration of the claim on all the available facts.

DIVISION DI UNFAIR DISMISSAL

Procedural fairness; defects and appeals

DI [1015]

Argence-Lafon v Ark Syndicate Management Ltd [2026] EWCA Civ 1039

Ever since the leading case of *West Midlands Co-operative Society v Tipton* [1986] IRLR 112, [1986] ICR 192, HL it has been settled law that in a case of alleged procedural unfairness an ET must consider the whole of the dismissal process, including an appeal. One aspect of this is that a fair appeal is capable of 'curing' an initial lapse by the employer. However, the operative word here is 'capable', because care must be taken here and this effect is not automatic. In particular, it must be the case that the appeal was sufficiently comprehensive to cover the defect(s) in question, which will be a question of fact for the ET; see *Taylor v UCS Group Ltd* [2006] EWCA Civ 702, [2006] IRLR 613, **DI [1015]**. The instant case before the Court of Appeal, while breaking no new ground, is a good example.

The facts were complicated by claims of whistleblowing, but ultimately the live issue was a finding of ordinary unfair dismissal. The employer appealed and the EAT found for it on the basis that the claimant had had an appeal, which the ET had not taken sufficiently into account. The Court of Appeal reversed this. Unfairness at the dismissal stage had hinged on two matters: (1) springing on to the claimant at the appeal an 'extra' allegation of a general breakdown of trust and confidence in him; and (2) reliance on poor performance which had not been fully investigated. The court's judgment held, applying *Taylor*, that on the facts here a fair appeal might have cured the lack of notice of the trust and confidence allegation (because the claimant knew of this at the appeal stage), but could not do so in relation to the performance issue and lack of proper investigation which had not been remedied. It is also of interest that the judgment starts off by affirming the primacy of the ET on questions of fact, so important here, especially as in this case it had been a *full* tribunal of the EJ and two side members.

DIVISION L EQUALITY

Religion and belief; protected belief; contributory fault

L [207]

***University of Bristol v Miller [2026] EAT 84* (*4 August 2026, unreported*)**

The key holding in this case before the EAT under Lord Fairley P is that anti-Zionist beliefs qualified as protected for the purpose of religion/belief discrimination. The claimant was a professor of political sociology. When complaints were made about public comments by him in February 2021 that political Zionism is inherently racist, imperialistic and colonial, the university instituted disciplinary proceedings which considered these comments and also that he had criticised individual student Jewish societies. The decision was taken to dismiss him summarily; his appeal failed. He claimed belief discrimination as well as unfair and wrongful dismissal. The ET upheld these claims, applying the *Grainger* criteria to his beliefs and finding that these protected beliefs were the reason for his dismissal. However, they reduced compensation for two reasons: (1) a reduction of 50% for contributory fault based on his attacks on the student societies; and (2) a 30% *Polkey* reduction for the likelihood that he would have been fairly dismissed by October 2023 because of subsequent posts by him in August 2023 attacking Jews more widely for their disproportionate positions of power.

The university appealed but the EAT upheld the ET's decision on the finding of protected belief and contributory fault (the university having argued that it should be 100%). The correct legal principles had been applied and their application to the facts was for the ET. However, the case was remitted on one point only, namely the 30% *Polkey* reduction, not because it was in itself improper here, but because the ET had not explained its decision sufficiently clearly and any evidence on which it had been made.

DIVISION M TRADE UNIONS

Certification Officer; union rules; power to strike out

M [4004.01]

***Bhogal v National Education Union [2026] EAT 124* (*26 August 2026, unreported*)**

Where a complaint is presented to the Certification Officer (CO), the TULR(C)A 1992 s 256ZA **Q [500.01]** allows the CO to strike that claim out, on grounds similar to those applying to ETs, including that the claim has no reasonable prospect of success. The text at **M [4004.01]** makes the point that recently the CO has been using this power increasingly, to end a complaint without a hearing. This development was not actually disapproved in *Chandra v University and College Union* [2025] EAT 70, [2025] IRLR 594, [2025] ICR 1431, but it was held there that she had used the power wrongfully. The instant case perhaps goes further, in potentially limiting the 'no reasonable prospect' element.

The claimant union member was disciplined by his union and complained to the CO that this had been done unlawfully. The point related to the union officers who had the right under the rules to initiate such proceedings. This depended on the interpretation to be given to the relevant rule, which was of some complexity. The CO struck out the claim, in spite of the claimant's arguments that (1) there was an ambiguity in the rule and (2) she had not been in possession of all the facts that could have emerged at a hearing. Judge Joffee in the EAT allowed the claimant's appeal. Having considered the interpretation of union rules generally, the judgment then cites the passage from Eady J in *Embery v Fire Brigades Union* [2023] EAT 134 (25 October 2023, unreported) set out at **M [4004]** and holds that the CO had applied her power wrongfully on both of the above grounds, each of which was independently an error of law and thus correctable on appeal.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time, just and equitable; relevant factors

PI [281]

Johnson and Johnson Medical Ltd v Fayokun [2026] EAT 118 (4 August 2026, unreported)

This was a case of race discrimination on unusual facts. The allegation was that the claimant had suffered discrimination through the employer applying to her a 'cultural profiling' system to take into account her ethnic background in assessing her work. The ET found for her and the EAT upheld that decision, making the significant point that although the employer may have thought it had good reasons for using such a device, if so that only constituted a benign motive, not a non-discriminatory reason, and motive as such is irrelevant here if discrimination is shown.

This takes up most of the judgment, but there was another procedural aspect to the appeal. For the case to be heard at all, the ET had had to extend the time limit (on discrimination law's just and equitable test). Here, the EAT allowed the employer's appeal and remitted the case for reconsideration. The problem was that the ET had granted the extension on two grounds – the merits of the claimant's case and the lack of prejudice to the respondent. In the appeal, the claimant argued that these are two such strong factors that if they coincide, that should be enough for an extension. However, Pilgerstorfer DHCJ held that that was a mistake of law; they are among the relevant factors and may carry much weight but the other factors still need to be taken into account. The ET here had not considered how far out of time the claim was, why it was presented late and the presence or absence of a good reason. At [84] the judgment states:

> 'In argument [counsel] for the Claimant, submitted that where a claim is adjudicated as meritorious at a final hearing, and where the respondent is found not to have suffered prejudice in meeting the claim, those factors will constitute paramount factors in the exercise of the discretion. I do not consider that this proposition should be endorsed as a matter of generality. The authorities I have cited above are clear that it is for the Tribunal at first instance to consider all the relevant circumstances and weigh them appropriately … it does not follow from the fact that a case is well-founded that an extension of time will be given. The same can be said for the absence of prejudice. Whilst the two factors in combination are likely to provide a promising basis for the exercise of the discretion, all relevant factors still have to be balanced. To accept [counsel's] submission as a general proposition would be to fetter the wide discretion that is for the Tribunal to exercise in accordance with the principles above.'

Early conciliation; same name on EC certificate and ET1; mistake

PI [289.23]

Bickley v John Lewis plc [2026] EAT 59, [2026] ICR 739

What's in a name? An ET1 in any other name would smell as sweet. That seems to be the ratio of this short but important decision of Pilgerstorfer DHCJ in the EAT. It concerned the requirement in (now) ET Rules SI 2024/1155 r 13(1)(e) **R [3609]** that the names on the EC certificate and the subsequent ET1 be the same if the claim is not to be struck out.

The claimant commenced proceedings relating to gender reassignment discrimination. However, in between obtaining the EC certificate and entering the ET1 they changed their name by deed poll, with the effect that different names appeared. The ET legal officer rejected the claim. The claimant appealed and this was supported by the respondent. Granting the appeal by consent, the EAT held that the officer had not considered properly r 13(3) which allows the claim to proceed if the claimant has 'made an error in relation to' the EC number and it would not be in the interests of justice to reject the claim. As a matter of interpretation, 'error' here is not confined to a simple mistake and can cover a case such as this, where the claimant should have made clear the name change in the ET1. As a side point, the judgment also says that in any event this result could have been reached under r 6 **R [3603]** ('Irregularities and non-compliance').

The error here occurred in the course of the nature of the claim itself (gender reassignment), but presumably the ratio could apply to a name change for any reason.

Decisions by consent; change of mind

PI [1157.01]

Edward v North London NHS Foundation Trust [2026] EAT 116 (5 August 2026, unreported)

Consent orders are governed by r 62 of the ET Rules of Procedure SI 2024/1155 **R [3659]**. This case before Judge Auerbach in the EAT considers the position where consent is initially given but then the claimant has second thoughts. The claim for victimisation was made out. Before a remedy hearing, the respondent submitted a proposed consent order offering the claimant an enhanced amount. The claimant said that he 'reluctantly' agreed. Instead of a consent order, the ET dismissed the case on withdrawal. However, the claimant then told the ET and the respondent that he no longer agreed and wanted the remedy hearing to proceed. The ET then made a r 62 consent order to prevent this happening. The claimant appealed against this and the EAT agreed with him – a consent order can only be made if the consent in question still exists at the time the order is made; where the ET knows at that time that consent no longer exists, no such order can be made. Note, however, that the EAT accepted one gloss on this that might be important in other circumstances – an order can still be properly made if there has been no communication from the relevant party sufficient to put the EJ on notice that consent may no longer exist.

EAT; respondent's answer; extending the time limit

PI [1466]

Lau v Dragon Cat Ltd [2026] EAT 65, [2026] ICR 748

There was reported in **Bulletin 576** the decision of Judge Tayler in *Costco Wholesale UK Ltd v Nash* [2026] EAT 85, [2026] IRLR 611 which considered the approach to be taken to whether to grant an extension of time for a late respondent's response to ET proceedings. It held that it was inherent in the leading case of *Kwik Save Stores Ltd v Swann* [1997] ICR 49, EAT that the strict approach to time limits on the claimant to commence an ET application does not have to apply to an extension for the respondent, which can be looked at much more in the round. In the instant case, the same judge has applied a similar approach to appeals to the EAT.

The claimant won partially before the ET against three respondents and brought an appeal to the EAT in relation to the unsuccessful grounds. Due to an administrative error, an order to lodge a response was sent only to the first respondent, which by that time had gone into voluntary liquidation. When this was realised, the order was sent to the other two, who lodged a reply 16 days out of time. An extension was granted by the Registrar and the claimant appealed against that. The EAT rejected the appeal and upheld the extension. The judgment points out that: (1) while the EAT Practice Direction para 9.1.2 **PI [1909]** sets out the time limit for a reply (28 days unless otherwise directed), it does not indicate the approach to be taken when considering an extension; and (2) there has been very little authority on this point. The principal pronouncement was by Judge Burke in the unreported case of *Slingsby v Griffith Smith Solicitors* UKEAT/619/07 (10 February 2009) which is considered at **PI [1466]**. Having cited the relevant passage drawing this distinction between extensions for appeals and replies, the judgment in the instant case agrees completely with *Slingsby*. On the facts here, the extension was correctly granted in the light of the initial administrative error, the short delay, the lack of prejudice to the claimant and the factor that there were potential arguments in the case that needed to be considered.

REFERENCE UPDATE

Bulletin	Case	Reference
574	*National Crime Agency v DP*	[2026] ICR 756, EAT
575	*Harkins v Marks and Spencer plc*	[2026] IRLR 583, EAT
575	*Komeng v National Highways Ltd*	[2026] IRLR 585, EAT
575	*Tedd v Surrey County Council*	[2026] IRLR 597, EAT
576	*Leedham v Royal Mail Group Ltd*	[2026] IRLR 606, EAT
576	*Costco Wholesale UK Ltd*	[2026] IRLR 611, EAT

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