Harvey on Industrial Relations and Employment Law

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

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LEGISLATION

First regulations on minimum service levels

The Strikes (Minimum Service Levels Act 2023 inserted TULR(C)A 1992 ss 234B–234G **Q [474.01]–Q [474.06]** which set out the framework of the new legislative scheme. Section 234B contains the regulation-making powers to set out the details of, and the mandated service levels for, the six services named in sub-s (4). The first three of these measures have now been enacted. These are:

— the Strikes (Minimum Service Levels: NHS Ambulance Services and NHS Patient Transport Service) Regulations 2023 SI 2023/1343 (effective 8 December);

— the Strikes (Minimum Service Levels: Passenger Railway Services) Regulations 2023 SI 2023/1335 (effective 8 December); and

— the Strikes (Minimum Service Levels: Border Security) Regulations 2023 SI 2023/1353 (effective 12 December).

These sets of regulations will be incorporated into Div R in Issue 314.

In addition, the Code of Practice (Reasonable Steps for Trade Unions) Order 2023 SI 2023/1333 brings into force, from 8 December, the COP produced by the Secretary of State to give guidance as to what may constitute 'reasonable steps' under s 234E(1)(b) if the union is not to forfeit its immunity in tort. It will be incorporated into Div S in Issue 314, but in the meantime it can be found at www.gov.uk/government/publications/reasonable-steps-to-be-taken-by-a-trade-union-code-of-practice.

Amendments to the rules relating to equal treatment by occupational pension schemes

The Pensions Act 2004 and Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023 SI 2023/1308 amend the EqA 2010 ss 64, 66, 67 and Sch 9 para 18 in order, according to the Explanatory Note, to preserve rights arising under the TFEU art 157 (equal pay) and the Framework Directive 2000/78/EC (non-discrimination) in respect of certain aspects of occupational pension schemes, and in particular to preserve (post-section 4 of the Retained EU Law (Revocation and Reform) Act 2023) the effects of *Allonby v Accrington and Rossendale College* C-256/01, [2004] IRLR 224, [2004] ICR 1328, ECJ and *Walker v Innospec Ltd* [2017] UKSC 47, [2017] IRLR 928. The regulations are expressed to commence 'immediately before the end of 2023' and the amendments will be made in Div Q in Issue 314.

Flexible working requests to become a day-one right

The Flexible Working (Amendment) Regulations 2023 SI 2023/1328 remove the hitherto-requirement for someone making a request for flexible working to have had 26 weeks' continuous employment, thus making it a day-one right. They do this quite simply by revoking reg 3 of the Flexible Working Regulations 2014 SI 2014/1398 **R [2920]**. This change is to take place on 6 April 2024 and will apply to any request made on or after that date. It will be incorporated into Div R in Issue 314.

Preservation of certain EU-based laws

Given the demise of EU law (substantive and interpretative) at the end of 2023, a question arose as to how to preserve those parts of employment law which evolved from and presupposed the continuing effect of that law. This has been done primarily in two statutory instruments coming into force on 31 December. The first is the Equality Act 2010 (Amendment) Regulations 2023 SI 2023/1425. These make amendments to the EqA 2010 and insert new ss 19A and 60A, and Sch 1 para 5A to continue the effects of TFEU art 157 and five directives in relation to pregnancy/maternity, relevant protected characteristics, access to employment, single sources in equal pay claims and the definition of disability (to extend it to covering effects on working life). The second is the Employment Rights (Amendment, Revocation and Transitional Provisions) Regulations 2023 SI 2023/1426. These primarily concern EU-based developments in the Working Time Regulations 1998 SI 1998/1833; they make substantial amendments to preserve questions around holiday pay and carrying it forward. In addition, however, they enact new provisions relating to holiday entitlements for two new categories – irregular hours workers and part-year workers – and relax the requirements on record-keeping to put the form it is to take more into the employer's discretion. Similarly to the latter, the regulations also amend TUPE reg 13A to expand the circumstances in which an employer faced with small-scale transfers can consult those affected directly. Both of these sets of

regulations have very helpful Explanatory Notes setting out exactly the nature of the rights to be retained (including the relevant EU case law).

In the opposite direction, the provisions of the Retained EU law (Revocation and Reform) Act 2023 Sch 1 are brought into force on 31 December by SI 2023/1363; one employment law effect of this is the revocation as from that date of the Posted Workers (Enforcement of Employment Rights) Regulations 2016 SI 2016/539 (see **BI [372.03]**).

These changes will be made in Divs Q and R in Issue 314.

Data protection developments

The principal effect of data protection laws in the employment context has been the ICO Employment Practices Data Protection Code **S [1872]**. This is considered in Div AII. On 12 December the ICO's office removed this (and subsidiary guidance) from its published documentation, at the same time announcing a consultation on new guidance on keeping records and recruitment/selection matters (to close on 5 March). The timing of this is odd because the ICO's position hitherto has been that, although the old Code was produced under the previous legislation, it was still relevant and to remain in force *unless and until* replaced by new guidance. On the other hand, it has not been formally withdrawn.

DIVISION AII CONTRACTS OF EMPLOYMENT

Disciplinary and grievance procedures; ACAS COP uplift; need for writing and application

AII [348]; DI [2768.10]

***SPI Spirits (UK) Ltd v Zabelin [2023] EAT 147* (*6 December 2023, unreported*)**

The claimant succeeded in complaints of whistleblowing detriment and dismissal against the corporate employer and a named manager who, the ET found, had acted as the company's agent. The appeal concerned not liability but two questions of remedy. The ET had awarded substantial compensation on normal principles and had gone on to make a 20% uplift for failure to comply with the ACAS Code of Practice in not dealing properly with the claimant's grievance (TULR(C)A 1992 s 207A **Q [441.01]**).

In relation to calculation generally, the employer argued that it should have been capped at £270,000 because of what it said was a provision in his contract of employment which mentioned this as a maximum figure. The EAT under Judge Auerbach rejected this. If it had been seen as an absolute maximum it would have been void as an attempt to contract out of the protection of the statute (ERA 1996 s 203 **Q [827]**). Short of that, it had been argued that the ET should have followed it as a guide to what would be just and equitable in fixing compensation, but again the EAT held that there was no obligation to do so.

On first coming to the case, that seems to be the major point in the dismissal of the employer's appeal *but* legally the judgment is more significant for the second point – whether the ET had been within its powers to have made the ACAS COP uplift. Here, the judgment hopefully clears up three possibly arguable aspects of that discretion:

(1) *The need for writing.* The COP states that a grievance should be in writing. In *Cadogan Hotel Partners Ltd v Ozog* UKEAT/001/14, [2014] EqLR 691 (see **AII [354]**) it was held that this is mandatory if there is to be a grievance-based uplift. The claimant here argued that that was wrong, because the employer argued that his original grievance in writing had only been a vague one about overdue pay and his reliance on whistleblowing had come later and orally (thus needing a second written grievance). The EAT held that *Ozog* is correct, but still rejected the appeal on the point because the requirement for writing is to be applied liberally in the light of employment realities and the question should be whether there was sufficient *connection* between the original written grievance and how the claims progressed over time. The judgment states:

> 'However, it seems to me that the tribunal was right to conclude that the content of the claimant's email of 4 June 2020 triggered an obligation on the first respondent to follow the grievance provisions of the ACAS Code, and the tribunal did not err in concluding that that was "sufficient" in this case, and that at the 5 June grievance meeting the claimant raised "closely related concerns", such that he did not need to raise a further written grievance, or separately to reduce them to writing. It is plainly right, as a general industrial observation, that a complainant's case in support of a grievance is liable to be filled out as the process unfolds, for example, in the course of a meeting held to discuss it, or by the provision of particulars. What is important is whether there has been a material change of kind in the nature or scope of the complaint, for example by reference to the underlying subject matter, or redress sought, such that fairness requires a new or additional process, or written grievance, in relation to it. That will be a matter for the industrial judgment of the tribunal in each case, in relation to which the EAT should allow it a generous margin of appreciation.'

(2) *Application to whistleblowing.* There has been case law on *when* the uplift applies (eg in relation to incapability and SOSR dismissals (see **AII [353.01]** ff). Here, however, the point was slightly different. The uplift essentially applies to 'disciplinary' matters. If one were to be uber-logical (if not Uber-logical, which is a different matter) it could be argued (as the employer did here) that if the case turns out to be about dismissal for whistleblowing, then the employee by exercising their legal rights has *done nothing wrong* and so the uplift cannot apply. From the point of view of the policy of the law, this could be seen as a very undesirable result, but it was in fact approved in *Ikejiaku v British*

Institute of Technology Ltd UKEAT/0243/19 (7 May 2020, unreported). However, in the instant case the judgment points out that that case concerned a litigant in person who had not argued the point fully; further, however, it is clear that more fundamentally the EAT here thought that the case is wrong and not to be followed (as it was not here). It was thought to be out of line generally with the important cases of *Holmes v QinetiQ Ltd* [2016] IRLR 664, [2016] ICR 1016, EAT and *Rentplus UK ltd v Coulson* [2022] EAT 81, [2022] ICR 1313. The proper test is why the *employer* thought it was acting against the employee; if that was because of what it perceived to be misconduct, that is enough to trigger the uplift provisions, even if it later turned out that the employee was innocent (or, here, protected as a whistleblower).

(3) *Application to an individual.* Finally, the employer argued that in any event the ET had had no power to apply the uplift to the individual manager as well as the company. The interpretative arguments here were not all one way, but the EAT held that the legislation is in fact cast in such a way as it can so apply, provided the individual was sufficiently *responsible* for the failure to observe the COP. The previous case of *International Petroleum Ltd v Osipov* UKEAT/0058/17 (19 July 2017, unreported) had held that this was possible (see para [167]); the employer argued that it was wrongly decided but the EAT held that it was correct and to be followed.

These are three important points in the continuing development of the interpretation of s 207A.

DIVISION DI UNFAIR DISMISSAL

Constructive dismissal; affirming the breach; period of delay

DI [524]

***Leaney v Loughborough University [2023] EAT 155* (*23 November 2023, unreported*)**

There was reported in last month's **Bulletin 545** the case of *Brooks v Leisure Employment Services Ltd* [2023] EAT 137 (8 November 2023, unreported) which contains a useful review of the law on affirmation of contract in a constructive dismissal case, in particular emphasising the need to look at all the circumstances and not normally to construe the use of the employer's internal procedures as indicating affirmation. The instant case before the EAT under Judge Auerbach cites *Brooks* by analogy in relation to the latter point and also is a good factual example of an 'all circumstances' approach.

The claimant was a university lecturer/teacher for about 40 years; he was also warden of halls of residence. In relation to the latter, the case of one student had caused concern which the university considered in part reflected on him. His attempts to clear this up, over a considerable period of time, were unsatisfactory to him. His head of department finally said that nothing

further could be done. In the light of this, he resigned and claimed constructive unfair dismissal on the basis of loss of trust and confidence over the relevant period. Before the ET, however, a problem of timing arose. Using the 'last straw' concept, the ET dated the last possible incident of this to the head of department's communication which was on 29 June 2020, *but* he did not tender his notice until 28 September. He said that in the meantime there had been negotiations between his solicitor and the university, but the ET said that it had no details of these and in any event the period was so long that it constituted affirmation, especially as he had not expressly said that he was continuing under protest and there was nothing stopping him from resigning in July. His claim was dismissed.

The EAT upheld his appeal, remitting the case for reconsideration. The judgment accepts that these are heavily factual matters, on which an ET is not to be reversed lightly, *but* the EAT can intervene if satisfied that the ET had not applied the law properly. That was the case here. While not holding that the ET had relied solely on the elapse of time, it had placed too much emphasis on it, to the exclusion of other factors such as his lengthy of service, the fact that the period in question was over the long vacation and that continuing negotiations during it could be a factor against affirmation. One interesting criticism was that the ET had concentrated too much on the *negatives* here (he had not expressly worked on under protest and there was nothing stopping him from resigning earlier) rather than looking more positively at all the circumstances of the case to explain his conduct. With regard to the continuing negotiations, at [53] the judgment cites *Brooks* :

> 'In oral submissions [counsel for the claimant] said that the parties obviously were not talking about the weather. Those were his words, not ours, but in the view of the judge and industrial members of the present panel, they capture a feature of the facts found in this case that the Tribunal failed to grapple with sufficiently when considering the question of affirmation. As discussed in *Brooks* at [30], where an employee postpones resigning in order to pursue a contractual grievance procedure which might lead to a resolution of their concern, that will generally not amount to an affirmation. Rather, the employee should be treated as continuing to work and draw pay for a limited time while giving the employer the opportunity to put matters right. So, in the present case, some consideration needed to be given to whether, although he did not say in terms that he was working under protest, the claimant could be said to have been working on while he allowed the respondent some opportunity to try to address his concerns in some way through these negotiations, before deciding whether to resign.'

Health incapability; applicability and clarity of an employer ill-health policy

DI [1265.01]

Garcha-Singh v British Airways plc [2023] EAT 97, [2023] ICR 1458

The text at DI [1265.01] states that incapability through ill-health is 'a well-known area for the use of a policy by the employer, to lay down the

ground rules for dealing with a case of ill health' and then refers to longstanding ACAS advice on the matter. Having and sticking to such a policy will often be important evidence in an unfair dismissal case, but the instant case before the EAT under Heather Williams J shows that the policy itself is not always the end of the matter – if an employer acts *inconsistently* with it, that may count against it, *but* it can still be reasonable for the employer to *add to* its terms in its discretion; the touchstone as always will be the ERA 1996 s 98(4) test of reasonableness and the range of reasonable responses test. This will be particularly the case if the extra elements are in fact to the employee's advantage. The facts and decision of the case make this point neatly.

The claimant was a member of cabin crew. BA had an ill-health policy which was set collectively and incorporated into individual contracts. It covered long-term absence and provided for an appeal against a decision to dismiss. The claimant had long periods of illness and unfitness to fly, eventually over two years. The policy was applied to him in a regular manner and the decision was taken to dismiss him with four months' notice. That original terminal date was then extended seven times over nearly a year, to give time to see if he could resume duties. He agreed to all of these and indeed proposed two of them. After the third extension he brought an appeal, which was rejected. After the seventh extension the employer refused a further one and he was terminated. He brought unfair dismissal proceedings on two main grounds: (1) there was no provision in the policy for granting extensions which were therefore in breach of contract and beyond the range of reasonable responses; (2) the employer should have given a further appeal against the refusal of an eighth extension. The ET rejected both of these. As to (1), the policy did not cover extensions, but neither did it preclude them; it was not unfair for the employer to grant these further periods to see if he might be able to return. As to (2), the claimant had had his appeal against the *dismissal*, which was what the procedure required.

The claimant appealed but the EAT rejected his appeal:

(1) A policy cannot be expected to cover every eventuality; the claimant's argument that anything that went beyond the terms of the policy was a breach of contract and unfair was 'unsustainable'. It was possible here for the employer to grant extensions (and indeed to react to other changing circumstances if necessary) in its discretion and act reasonably in so doing, especially as the effect was essentially in the claimant's interests and it was not acting in contravention of the policy. The ET was within its rights to consider that this did not constitute breach of contract and all fell within the range test.

(2) The ET had been correct that the refusal of an eighth extension was not a 'dismissal' and so did not require a second appeal. Again ,there was no breach of contract.

This dealt with the appeal, but under each heading the judgment adds an important second ground. An emphasis on whether the employer was in *contractual* breach of the policy could give rise to a well-known canard in

employment law, namely that the employer was in breach and therefore it was unfair. Of course, the two actions (breach of contract and unfair dismissal) are legally separate and, while a breach may be evidence of unfair conduct, it is not determinative. Under both (1) and (2) the EAT adds that even if there had been breaches of contract that would not have invalidated the ET's decision because ultimately it had applied the correct statutory test of reasonableness and the range of reasonable responses.

DIVISION E REDUNDANCY

Notification to Secretary of State; nature of the obligation; collective, not individual, protection

E [2906]

MO v SM* (*as liquidator of G GmbH*) *C-134/22, [2023] ICR 1311, ECJ

This (post-Brexit) ECJ case explored the relationship between the law on collective redundancies requiring consultation with unions or workers on the one hand and the separate obligation to inform a competent authority of impending collective redundancies on the other. In it, an individual redundant worker (who presumably had run out of other options) was attempting to challenge the legality of his dismissal for breach of the *latter* legal obligation. It came from Germany and the facts reflect differences in industrial relations and law there (especially in relation to consultation with works councils and the possibility of a dismissal being declared ineffective). Subject to that, it makes interesting reading.

A German court had initiated insolvency proceedings in respect of a company and appointed the defendant as insolvency administrator who performed the function of employer for the duration of the proceedings. It was decided that the company would cease all business operations and that there would be redundancies. The procedure for consultation with the works council, acting as the workers' representative, was initiated. The information required by Directive 98/59/EC was communicated to the works council in writing but not forwarded to the competent public authority. The works council did not see a way in which the redundancies could be avoided and the projected collective redundancy was notified to the competent authority. The applicant worker was informed that his contract of employment would be terminated. He brought an action before a labour court for a finding of non-termination of his employment on the basis that a copy of the communication sent to the works council had not been forwarded to the competent public authority. The German Federal Labour Court referred a question for a preliminary ruling to the ECJ asking, in essence, whether art 2(3) of the directive meant that the employer's obligation to forward to the competent public authority a copy of, at least, the elements of the required written communication was intended to confer *individual* protection on the workers affected by collective redundancies.

The ECJ held that there was no such intention in the directive. It was accepted that the directive was not clear on the point in its own terms and so

the court looked at the context. It decided that the purpose of informing a competent public authority is a limited one, to inform the authority of the nature and scale of the impending redundancies in order for it to anticipate the possible adverse results generally. It does not involve the authority in any *active* role in the consultation of unions or workers. There is thus no role for the authority in deciding on individual workers' rights; any extra protection that this public obligation gives is collective, not individual. This seems to be very much in line with UK legislation which deals with the two legal obligations separately – collective consultation in TULR(C)A 1992 s 188 and the obligation to inform the Secretary of State in s 193. The two sections share a similar 'special circumstances' defence, but other than that there are no obvious interactions.

DIVISION L EQUAL OPPORTUNITIES

Burden of proof and drawing of inferences; interaction with the requirement of similar circumstances

L [796], L [808.02]

Virgin Active Ltd v Hughes [2023] EAT 130, [2024] IRLR 4

Section 23 of the Equality Act 2010 **Q [1476]** states that when applying the principal heads of discrimination 'there must be no difference between the circumstances relating to each case'. It is natural to think of this as applying to the substantive decision to be taken on the facts, but it is also the case (as stated at **L [808.02]**) that this may be equally relevant at the earlier stage of deciding whether the burden of proof has been reversed under s 136. This decision of Judge Tayler in the EAT is of significance for its analysis of the application of s 23 in that context, on which there has hitherto been little authority. The decision itself was that: (a) the claimant won on automatically unfair dismissal through whistleblowing; but (b) the employer's appeal on direct race discrimination was allowed because the ET had applied the reversed burden too readily, without sufficient consideration of similarities or dissimilarities.

The learned editor of the IRLR in his commentary says that he included the case because of this analysis, which is summed up in two passages from the judgment :

> 'In many direct discrimination claims the claimant does not rely on a comparison between his treatment and that of another person. The claimant relies on other types of evidence from which it is contended that an inference of discrimination should be drawn, the comparison being with how the claimant would have been treated had he had some other protected characteristic … In other cases, the claimant compares his treatment with that of one or more other people. There are two ways in which such a comparison may be relevant. If there are no material differences between the circumstances of the claimant and the person with whom the comparison is made (the person is usually referred to as an actual comparator), this provides significant evidence that there

could have been discrimination. However, because there must be no material difference in circumstances between a claimant and a comparator for the purpose of section 23 EQA it is rare that a claimant can point to an actual comparator. The second situation in which a comparison with the treatment of another person may provide evidence of discrimination is where the circumstances are similar, but not sufficiently alike for the person to be an actual comparator. The treatment of such a person may provide evidence that supports the drawing of an inference of discrimination, sometimes by helping to consider how a hypothetical person whose circumstances did not materially differ to those of the claimant would have been treated (generally referred to as a hypothetical comparator). Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ to those of the claimant. That distinction is not always sufficiently considered when applying the burden of proof provisions …'; and

'Accordingly, where a claimant compares his treatment with that of another person, it is important to consider whether that other person is an actual comparator or not. To do this the employment tribunal must consider whether there are material differences between the claimant and the person with whom the claimant compares his treatment. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination.'

DIVISION PIII JURISDICTION

State immunity; effect on employment cases

PIII [182], PIII [190], PIII [191], PIII [198]

***Royal Embassy of Saudi Arabia* (*Cultural Bureau*) *v Alhayali [2023] EAT 149* (*5 December 2023, unreported*)**

***Kingdom of Spain v Lorenzo [2023] EAT 153* (*12 December 2023, unreported*)**

These two cases (before, respectively Bourne J and Ellenbogen J in the EAT) concerned state immunity. In the *Saudi Arabia* case the ET had found that the state could not rely on that immunity in the case of an employee engaged in its Academic and Cultural Department, but the EAT reversed that decision. In the *Kingdom of Spain* case the ET found that the state could not rely on the immunity in the case of a Spanish national employed by the Ambassador as a social secretary, and this was upheld by the EAT. As it happens, each case, though dealing with relatively settled law, is notable for three specific points of some interest in this difficult area.

In *Saudi Arabia,* these points were as follows:

(1) Had the state submitted to jurisdiction? Initially, it had seemed to do so through its then-solicitors, at least in respect of some of the claimant's

claims. However, it then sought to withdraw this by the issuing of a stamped but not signed certificate to that effect, denying that the solicitors had had the authority to waive immunity. The ET considered this but held that it was not sufficient and so held that it had jurisdiction. The EAT allowed the state's appeal on this point. A certificate such as this is not per se enough, *but* the ET had erred in giving it *no* weight. In such circumstances, what is needed is a fuller consideration of the facts and what may or may not have been authorised. This is consistent with the decision of the Court of Appeal in *Republic of Yemen v Aziz* [2005] EWCA Civ 745, [2005] ICR 1391 which is considered at **PIII [199]** and was cited in the judgment in the instant case.

(2) Did the ET apply the *Benkharbouche* principles properly (see **PIII [190]** ff)? The ET had held that these pointed to no immunity, but the EAT again reversed this on two bases: (i) the ET had insufficiently explained its reasoning, but also (ii) in any event it had applied to her work a test of 'ancillary and supportive' rather than the correct 'sufficiently close' test. Adopting the latter, the only outcome was that the test for immunity was satisfied, given that for at least some of the time she was participating in the public service of the Embassy, not merely in its private administration.

(3) Did the ET apply s 5 of the State Immunity Act 1978 properly? That section removes from immunity actions for personal injury. In relation to her claim for discrimination causing psychiatric injury, the ET held that this applied. The state argued that the section should only apply to physical injury. Its problem was the decision to the contrary in *Ogbonna v Federal Republic of Nigeria* UKEAT/0585/10, [2012] ICR 32, considered at **PIII [198]**. It was argued that that case was wrongly decided, but the EAT held that it was correct and applied here. This aspect of the ET's decision was upheld, but that alone did not avail the claimant.

In the *Kingdom of Spain* case, these points were:

(1) Can a state benefit from *diplomatic* immunity applicable to one of its officials? The claimant's contract was with the Ambassador. Did this benefit the state itself? The ET held that it did not. The EAT, in a lengthy consideration of the position, agreed – state and diplomatic are two separate forms of immunity and cannot be cross-applied.

(2) Did the ET apply the *Benkharbouche* principles properly? The issue this time was not the test to be applied, but whether the ET had taken into account all the relevant factors. The EAT agreed with the state that it could have put more emphasis on other factors (including the bases for her discrimination claims) *but* held that on the facts even if it had done so it would still have come to the same decision that she was not engaged in the diplomatic and political operations of the mission. The decision was therefore not perverse.

(3) Should s 4(2)(a) of the State Immunity Act 1978 be disapplied? This overrides the normal position under s 4(1) that state immunity does not

apply to contracts of employment if 'at the time when the proceedings are brought the individual is a national of the state concerned'. The twist in the plot here was that, although the claimant was 'locally sourced' as someone living in London and speaking Spanish, she in fact had dual British/Spanish nationality and held a Spanish passport. Did this debar her? The ET held not (in its rather nice phrase, she 'happened to be' part Spanish) but the state of course sought to rely on s 4(2)(a). This led to a complex argument as to whether, as the ET held, that paragraph should be disapplied. In *Benkharbouche* the Supreme Court had held that s 4(2)(b) (individual neither a UK national nor habitually resident here) and s 16(1) had to be so disapplied, and this had led to the State Immunity Act 1978 (Remedial) Order 2023 SI 2023/112 to enact this legislatively. The state argued that that meant that s 4(2)(a) was intended to remain in force, *but* the EAT held the opposite: s 4(2)(a) was not in contention before the Supreme Court and did not have to be addressed by the 2023 Order. In principle, the matter now having arisen, the same arguments as in *Benkharbouche* now applied and the ET had been correct that it should be disapplied. The claimant's split nationality therefore did not defeat her Equality Act claims.

REFERENCE UPDATE

Bulletin	Case	Reference
536	*Glover v Lacoste UK Ltd*	[2023] ICR 1243, EAT
539	*The Royal Parks Ltd v Boohene*	[2024] IRLR 18, EAT
540	*Manning v Walker Cripps Investment Management Ltd*	[2023] ICR 1265, EAT
541	*Kealy v Westfield Community Development Association*	[2023] ICR 1295, EAT
541	*Easy Jet v Easy Jet European Works Council*	[2023] ICR 1395, CA
541	*R (ASLEF) v Secretary of State for Business and Trade*	[2023] ICR 1405, Admin
543	*Greater Glasgow Health Board v Mullen*	[2024] IRLR 31, EAT
543	*McFarlane v Commissioner of Police for the Metropolis*	[2024] IRLR 34, EAT
544	*Chief Constable of the Police Service of Northern Ireland v Agnew*	[2024] IRLR 56, SC

Bulletin	Case	Reference
544	*Gagliardi v Evolution Capital Management LLC*	[2023] ICR 1377, KBD
544	*Habib v Dave Whelan Sports Ltd*	[2023] ICR 1488, EAT

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