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# EMPLOYMENT TRIBUNAL – PROCEDURAL CASES

## 2020 ET Cases

### Admission of evidence

*Sweeney v Merseyside Community Rehabilitation Company Ltd UKEAT/0277/17/JOJ*

S, a registered blind person, was employed by M as a probation officer. Following sickness absence she resigned and brought claims in the ET, including for unfair constructive dismissal, arguing that she had an excessive caseload for 11 weeks before her final sickness absence. During her oral closing submissions, she referred to her caseload, and to a document relevant to it. The tribunal dismissed her claim and refused to consider the document on the basis that, even though it indicated the number of cases that she had at a particular time, it would not have shown how much work needed to be done on them. S appealed against the ET's refusal. The appeal was stayed so that she could apply for reconsideration of the decision. The reconsideration hearing took place and the ET reached the same conclusion. S appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The ET had erred by not admitting the caseload document into evidence and, if the ET had not done so, the EAT would have remitted the matter to the same ET. Given that the ET had already carried out that task at the reconsideration hearing and in the decisions flowing from it, the proper course was to dismiss the appeal.

### Amendment of claim

*Jumbo v Zonal Retail Data Systems UKEAT/0275/19/LA*

J was dismissed by Z for gross misconduct. He brought claims in the ET for unfair dismissal and disability discrimination. He applied to amend his claim to include additional complaints, having taken legal advice, relating to victimisation, holiday pay, direct discrimination and wrongful dismissal. The ET refused the application to amend on the basis that the proposed amendments 'had no link to the facts initially included in the claim form'. J appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The ET had failed to properly identify and weigh the competing factors to demonstrate that it had correctly carried out the legal test. This amounted to an error of law.

3. In relation to the wrongful dismissal claim, the ET erred in law in placing so much weight on the legal advice when the information before it on the scope of that advice was so limited.

4. The matter would be remitted for hearing by an ET whose composition would be determined by the Regional Employment Judge.

## Anonymisation

## Publication of judgment

*L v Q Ltd [2019] EWCA Civ 1417, Court of Appeal*

L brought claims of disability discrimination, harassment and victimisation against Q Ltd, his employer. His solicitors requested that the final hearing should be in private, the judgment anonymised and the judgment should not be placed on the public register. The ET complied with these requests. Q Ltd appealed to the EAT, which allowed the appeal on publication and rejected further anonymisation of the judgment. L appealed to the Court of Appeal.

**Decision**

1. The judgment should be published in anonymised form. Apart from cases involving national security, there was no power to prohibit publication of a judgment. Attempts to prohibit publication were contrary to the public policy of open justice.

2. There should be no further redaction to disguise L's disabilities. Further redaction would fundamentally undermine understanding of the ET judgment.

## Costs

*Brooks v Nottingham University Hospitals NHS Trust UKEAT/0246/18/JOJ*

B made 18 protected disclosures. He complained that he had been subjected to a number of detriments by the respondent as a result of having made those disclosures. The complaint was rejected by the ET because B had not established that any of those detriments were because of the disclosures. The employer applied for costs on the basis that B's allegations were so weak as to have no reasonable prospects of success and B had acted unreasonably in pursuing

them. The ET allowed the application and ordered B to pay the employer's costs, estimated at £170,000. B appealed to the EAT on the grounds of perversity.

**Decision**

1. The appeal was dismissed.

2. The high threshold for a perversity challenge had not been crossed.

## Costs

## Amount

*Kuwait Oil Company (KSC) v Al-Tarkait UKEAT/0210/19/OO*

A was dismissed by K for gross misconduct. He complained of disability discrimination, unfair dismissal and notice pay based on wrongful dismissal. The unfair dismissal claim succeeded. A's basic award was reduced by 80% for contributory conduct. The ET then dealt with rival costs applications. It decided that the costs awarded to K should be limited to the amount of compensation awarded to A and the costs awarded to the A, on the basis that K should not have incurred any costs in excess of that amount, and it was a reasonable level at which to set costs, taking account of A's financial resources. K appealed, arguing that the ET had erred in making the orders limiting the costs recoverable by K.

**Decision**

1. The appeal was dismissed.

2. The order made was sufficiently clear to meet the requirement that it must specify the part of K's costs payable by A.

3. However, orders such as this one were not to be encouraged: a cap consisting of an exact amount would be much better, and an exact amount could easily have been stated here.

## Disclosure order

## Person outside Great Britain

*Sarnoff v YZ UKEAT/0252/19/LA*

S brought claims of sexual assault and harassment against one respondent, and against a further 13 respondents who were associated with him. The tenth respondent entered a response asserting that the ET did not have territorial jurisdiction to determine the dispute against him because he lived and worked in the USA. The ET decided that it did have power to make an order for disclosure against a person outside Great Britain. The tenth respondent appealed on the grounds that the ET had misinterpreted rules 29 and 31 of the 2013 *ET Rules* and had approached the issue of disclosure as though the tenth respondent were a party to the proceedings, even though the issue of territorial jurisdiction had not been determined. Further, the ET had wrongly concluded that it had power to order disclosure against the tenth respondent, despite the latter being outside Great Britain.

**Decision**

1. The appeal was dismissed.

2. The words 'in Great Britain' in rule 31 of the 2013 *ET Rules* must be taken to refer to the location of the employment tribunal making the disclosure order, and not to the location of the person against whom the order is made.

3. The ET had been correct to decide that it had power to order disclosure against the tenth respondent.

## Early conciliation

*Peacock v Murrayfield Lodge Ltd UKEAT/0117/19*

P lodged an early conciliation certificate which stated her employer's address as a location where she had once met a director of the company. This was not the company's registered address nor its normal place of business. ACAS contacted the employer at this address and issued an EC certificate. P's advisers, without knowledge of the first application, then lodged a second form and another EC certificate was issued. ET proceedings were issued and were challenged by the employer. The issue was that if the first EC certificate were used, the proceedings were out of time.

**EAT decision**

1. The claimant had to show that the first certificate was invalid because of the wrong address.

2. The first certificate was valid and the claim was out of time.

3. It is sufficient to give an address where business in relation to the respondent is carried out. There is no requirement that it is the registered or normal office.

## Failure to lodge ET3

*Chelmsford Unisex Hair Salon Ltd v Grunwell UKEAT/0135/19/JOJ*

G, a part-time hairdresser, alleged that she was dismissed when she told C that she was pregnant, and that C did not want to pay her maternity pay. She claimed compensation for discrimination on the ground of pregnancy. C did not file an ET3 response form within the required period. The ET held a remedy hearing at which it awarded compensation for pregnancy discrimination. C appealed to the EAT, arguing that G was not an employee, that its salon was closed because it was loss-making and it had ceased to trade, and that the original paperwork regarding the case was not received until after the date of the remedy hearing.

**Decision**

1. The appeal was dismissed.

2. The grounds of appeal did not disclose any error of law on the part of the ET. Given that C had not applied to the ET for reconsideration, had not provided a draft ET3 and draft grounds of resistance, and had not explained why no action was taken prior to the remedy hearing and why no application for reconsideration was made to the ET, the appeal would be dismissed.

## Joinder of other parties

*Payco Services Ltd v Sinka UKEAT/0134/19/00*

S, an agency worker, claimed that his employment had been terminated. He brought claims in the ET against P, including race discrimination. A case management hearing identified issues to be considered at a preliminary hearing. These included whether S was an employee or worker of P, whether S's engagement had been terminated and, if so, by whom, and whether the person alleged to have racially discriminated against S was an employee or agent of P. At the preliminary hearing the ET decided that it could not determine the issues without joining additional parties as respondents. P appealed, arguing that the ET erred in deciding not to determine the issues before it, but instead to join other respondents before doing so.

**Decision**

1. The appeal succeeded.

2. The ET's decision not to determine the issues had been wrong, without at least considering whether there had been a material change of circumstances since the case management hearing decision and/or that there were other exceptional reasons to depart from it, since the decision was a significant one involving a material change of direction.

3. In relation to the race discrimination claim, the EAT substituted a determination that P was not liable.

## Mental capacity of claimant

*Royal Bank of Scotland plc v AB UKEAT/0187/18/DA*

AB suffered significant injuries at the start of her employment with RBS. Those injuries caused her pain throughout her five-year employment and the pain affected her ability to work. Following a period of absence from work caused by stress, she resigned. She brought a number of claims in the ET, including that she had been unfairly constructively dismissed and that she had suffered disability discrimination. The ET upheld her claims and awarded damages of around £4.5 million on the basis that AB's psychiatric symptoms, giving rise to the need for future care, had been caused by the discrimination. RBS appealed on a number of grounds, including: the ET erred by failing to formally assess AB's capacity to conduct the litigation and to give evidence, and by refusing to reconsider that decision. Further, the ET should have reduced the amount payable to AB to take account of the possibility that her psychiatric condition would have occurred in any event.

**Decision**

1. The appeal was allowed in part.

2. The ET had failed to assess AB's mental capacity during proceedings and in rejecting an application to reconsider its decision. Where there is a legitimate reason to doubt a claimant's capacity to litigate, that issue must be addressed.

3. The ET should have recognised that it had good reason to suspect that AB did not have capacity, because she appeared to be unable to recognise her representative and to answer simple questions.

## Non-attendance at hearing

*Dimitriu v Testerworld Ltd (t/a De Pharmaceutical) UKEAT/0088/19/OO*

D, a Romanian national, was employed and subsequently dismissed by T. She brought claims in the ET including for a failure to pay notice pay, and discrimination based on her sex and nationality. D and her husband, who was her representative but is not legally qualified, attended a preliminary hearing but did not attend the full hearing. This resulted in the ET dismissing her remaining claims. An application for reconsideration was refused. D appealed on a number of grounds including that the ET had erred in concluding that she had made a conscious decision not to attend the hearing, that the ET had failed to consider that there were unforeseen circumstances preventing her attendance, and that the ET should have considered adjourning the hearing.

**Decision**

1. The appeal was dismissed.

2. The ET had considered all relevant information and did not consider impermissible factors. Its conclusions were unarguably open to it to reach on the information provided, and there was no perversity, reliance on impermissible assumptions, or error of law in its conclusions.

## Recording proceedings

*Heal v The Chancellor, Master and Scholars of the University of Oxford UKEAT/0070/19/DA*

H stated in his ET1 that he had a disability. He requested some adjustments, including permission to use a recording device because his conditions made it difficult for him to take contemporaneous notes. The ET ordered that the application should be made at a preliminary hearing. H appealed to the EAT on the grounds that he should not have to make an application, that the tribunal erred in failing to consider the matter before the preliminary hearing and in failing to consider that H would be in contempt of court if he attempted to bring a recording device into the building before permission was granted to do so.

**Decision**

1.The appeal was dismissed.

2. The ET was entitled to deal with the application at a hearing rather than on the papers. There was no error of law in not considering the matter in advance of the hearing although the tribunal had not precluded that course in any event.

The EAT gave the following guidance on when parties might be permitted to make an audio recording of proceedings:

- Permission to record proceedings is unlikely to be granted on a routine or regular basis. Each case will have to be determined on its own facts. However, it seems very unlikely that permission would be granted where the applicant fails to demonstrate that, for reasons related to a disability or medical condition, there is a complete or partial inability to take contemporaneous notes and that such inability would result in a substantial disadvantage.
- The risk that a recording will be used for purposes other than that for which leave is granted can be mitigated by the tribunal issuing strict limitations on other use. If a recording is permitted simply to relieve a person of the burden of taking notes, then that recording will generally have no greater status in proceedings than that of any other set of notes. In particular, Tribunals will no doubt wish to remind parties that the restriction under the *Contempt of Court Act 1981*, s 9(1)(b) on publishing a recording by playing it in the hearing of the public would also apply to the posting of any recording or extract thereof online.
- The ET's notes of evidence would continue to be the conclusive record of the hearing before it, certainly whilst it remains the position that employment tribunal proceedings are not routinely the subject of official digital recording. The fact that a tribunal has consented to a recording being made by a party, and the undisputed content of that recording appears to conflict with the tribunal's written notes of evidence, would not mean that the recording automatically takes precedence. Whether or not it should take precedence in respect of any issue will be a matter for the tribunal to determine having regard to all the circumstances.

## Status

*Watson v Hemingway Design Ltd, in liquidation  UKEAT/0007/19*

W was dismissed by HD shortly before the company became insolvent. He had an insurance policy which would normally have covered the liability of HD, including employment tribunal proceedings. W applied to the ET to invoke third party rights under the Third Parties (Rights against Insurers) Act 2010. Section 2 of that Act allows a claim to be decided by a 'court'. The issue was whether the ET was a 'court' for these purposes. The ET found that it had no jurisdiction. W appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The ET often has to decide questions of general law as incidental matters to an employment issue.

3. The question whether the ET is a 'court' depends upon the statutory context.

4. The aim of the 2010 Act was to deal with claimants having to go to two for a.

5. The way to implement that aim was to treat the ET as a 'court'.

## Striking out

*E & O Laboratories v Miller UKEATS/0007/19/SS*

M brought a claim for unpaid wages against E. She gave evidence at the hearing. Scots practice is for witnesses to remain outside the tribunal room until they give their evidence. E's barrister kept three witnesses in the tribunal room during M's evidence. She overheard conversations between E's representative and the witnesses. M applied to strike out E's defence on the basis of its unreasonable conduct. The application succeeded. The ET judge found that the witnesses were not impartial and the question of the fairness of the hearing arose. E appealed to the EAT.

Decision 1. The appeal was allowed.

2. Notwithstanding Scots practice, the witnesses had been entitled to be present and it was not possible to characterise a state of affairs which was compliant with ET Regulations as unreasonable.

## Striking out

## Diplomatic immunity

*Basfar v Wong UKEAT/0223/19/BA*

B was employed to work in the official diplomatic residence of W, who was a serving diplomat in the UK. B alleged that her employment and treatment bore no relation to her statement of terms and conditions, and amounted to circumstances of modern slavery. She complained of wrongful (constructive) dismissal, failure to pay the national minimum wage, and claimed under the *Working Time Regulations 1998*. W raised the defence of diplomatic immunity, claiming that the ET was bound by the decision of the Court of Appeal in *Reyes v Al-Malki* to conclude that his employment of B did not amount to 'commercial activity'. The ET rejected that defence, holding that the decision of the Court of Appeal was not binding, and that the observations of the majority in the Supreme Court (which decided the appeal on different grounds) were to be preferred. W appealed to the EAT.

**Decision**

1. As far as precedent was concerned, the ET had correctly concluded that it was not bound by the Court of Appeal in *Reyes v Al-Malki.*

2. On the question of whether the ET was right to prefer the observations of the majority in the Supreme Court, it held that the decisions of the Court of Appeal and of the minority in the Supreme Court represented the current state of the law on the issue of 'commercial activity'.

3. The appeal was allowed and the defence of diplomatic immunity succeeded.

## Time limit for claim

*O'Neill v Jaeger Retail Ltd UKEAT/0026/19/RN*

O was dismissed by J during a probation review meeting. She did not know about tribunals and time limits and, by the time that she started discrimination claims in the ET, as a litigant in person, she was two months outside the time limit. The ET, having considered all of the circumstances and evidence, including a letter from O's GP referring to her having 'been through a very very difficult time over the last few months', refused to extend the time limit. O appealed to the EAT on grounds related to the ET's consideration of the reasons why she did not present her claim form sooner than she did, and the ET's conclusion that the delay in presenting the claim was liable to have a significant impact on the ability of witnesses to recall matters and the cogency of their evidence.

**Decision**

1. The appeal was allowed.

2. The ET had not given sufficient weight to the GP's letter that provided information about O's mental health and the impact on her capacity to present her claim within a reasonable time.

3. It was not possible to say that granting the extension would be the only proper outcome that could be reached on reconsideration, so the EAT could not substitute its own decision to that effect. Therefore, the matter would be remitted to a fresh ET to reconsider the question of whether it would be just and equitable to extend time in this case.

## Withdrawal of claim

*Paul v Virgin Care Ltd UKEAT/0104/19/RN*

P was dismissed for misconduct. She brought a number of claims in the ET, including automatically unfair dismissal. P represented herself at a hearing because she could not afford legal representation. She withdrew the automatically unfair dismissal claim and the tribunal made an order dismissing that claim. P appealed to the EAT, arguing that the ET had failed to take care to ensure that she had a free and informed choice when she withdrew the claim and had exerted undue pressure on her.

**Decision**

1. The appeal was dismissed.

2. The withdrawal of the claim had been clear, unambiguous and unequivocal.

3. The ET had acted properly with a view to clarifying and understanding the way in which P was putting her case.

4. P had been given the opportunity to consider whether or not to withdraw that part of her claim.

5. No unfair pressure had been put on her.

## 2019 ET Cases

### ACAS certificate

### More than one claim

*Akhigbe v St Edward Homes Ltd and others UKEAT/0110/18/JOJ*

A brought a whistleblowing claim against S. The claim was struck out on the basis that it had no reasonable prospect of success. He had obtained an ACAS certificate for the claim and he used the same number for a similar claim. The ET rejected the claim. A appealed to the EAT.

**Decision**

1. The ET had not asked itself about the relationship between the first and the second claim.

2. If the ET had done so, it would have appreciated that it was obvious that both claims related to the same matter. The ET had misdirected itself by requiring a fresh ACAS certificate.

3. The ET decision would not be set aside because the error could not have affected the result of the claim. The second claim was clearly an abuse of process and the ET had been bound to reject it.

### Apparent bias

*Balakumar v Imperial College of Healthcare NHS Trust UKEAT/0252/16*

During an ET hearing the claimant's lawyer applied to admit a number of documents and also for the tribunal panel to recuse itself. She asked for an adjournment. The ET thought that the reason for this was false and commented that there was no need to lie. The claimant appealed to the EAT, alleging bias.

**Decision**

1. The appeal was dismissed.

2. The ET had been considering a relevant issue in the context of a fractious hearing in a room with poor acoustics where the lawyer had been simultaneously combative and softly spoken.

### Appeal

### Time limit for cross-appeal

*Governing Body of Tywyn Primary School v Aplin [2018] ICR D17, EAT*

An ET upheld claims of unfair dismissal and sexual orientation discrimination. The employer appealed to the EAT. The EAT granted an extension of time in which to file an answer. the claimant resisted the appeal and sought to cross-appeal against a finding of the ET that there were non-discriminatory explanations for the approach of agents of the employer. The Registrar of the EAT refused an application by the claimant to extend time for his cross-appeal on the basis that the strict approach to time limits for appealing also applied to cross-appeals. The claimant appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The application for an appeal and a cross-appeal should be treated differently.

3. Although the judicial basis of a cross-appeal might be similar to an appeal, in practical and policy terms they differed.

## Appeals

## Time limit

*Rana v London Borough of Ealing and another [2018] EWCA Civ 2074, Court of Appeal*

The ET sent written reasons to the address of solicitors who no longer represented the claimants, with subsequent delays in the copies being received by the correct recipient. One claimant lost her claim for unfair dismissal and disability discrimination. In theory she was sent the written judgment on 28 April 2015. She wrote to the tribunal five times and made numerous telephone calls before finally receiving the documentation by email on 4 June. She lodged her appeal to the EAT on 15 July, which was 39 days out of time, assuming that the documentation had originally been sent to the correct address. Another claimant met the 42-day deadline but key documents were missing and were lodged out of time. The EAT judge refused to extend the 42-day deadline on the basis that a judgment and written reasons were still sent to a claimant even if they were sent to the wrong address. The claimants appealed to the Court of Appeal.

**Decision**

1. The appeals were allowed.

2. The tribunal had made a mistake as regards a matter of fundamental importance. The guiding principle should be that the party affected by that mistake should not be put in a worse position than if it had done its job properly.

3. One does not ‘send’ something to John Doe by sending it to Richard Roe. One does not ‘send’ a document to a party to litigation by sending it to the representative of another party. It seems to be wrong to say one sends something to someone by sending it to someone else.

## Application for reconsideration

*Modha v Babcocks Airport Ltd UKEAT/0060/19/JOJ*

M complained of unfair dismissal, race discrimination and disability discrimination. The complaints were rejected by the ET. He applied for reconsideration of the decision. The application was rejected on the basis that it was made out of time and had no reasonable prospects of success. M appealed to the EAT, arguing that the ET had overlooked M's application for an extension of time and had not given reasons for its decision when it dismissed the application in one line.

**Decision**

1. The appeal was dismissed.

2. The ET had erred in law in not considering the application for an extension of time and in giving its reasons in the way that it did.

3. Neither error was material because the application for reconsideration did not seek to undermine or contradict the inferences which the ET had, or had not drawn from factual conclusions.

4. The only conclusion which the ET could have reached in relation to the application for consideration was that it did not satisfy the test for granting a reconsideration.

## Application for stay of proceedings

*Wollenberg v Global Gaming Ventures (Leeds) Ltd and another UKEAT/0004/19/LA*

W was summarily dismissed following a breakdown of relations with his employer. He complained of automatic unfair dismissal and brought a private prosecution alleging fraud. He obtained disclosure of documents during the criminal proceedings. He gave an undertaking that he would not use these documents in the employment tribunal. He applied for a stay of the employment tribunal proceedings on the basis that he was unable to disclose the documents. The application was refused and W appealed to the EAT.

**Decision**

1. The appeal was allowed and the matter remitted to the ET.

2. The ET had failed to take account of the unusual problem faced by W. He was subject to an undertaking given to the Crown Court which prevented him from disclosing relevant documents and from explaining the relevance of the documents.

## Associated companies

*SD (Aberdeen) Ltd v Wright (2019) Morning Star, March 1, EAT*

From May 2014 until August 2016 W worked for AMPM, an entity which comprised a number of other entities including SD which traded as AM-PM Leasing and CPL which traded as AM-PM Serviced Apartments. He was dismissed in August 2016. The arrangement between W and the entities was at first on an ad hoc basis but he worked only for CPL and

SD from May 2014. He was paid by CPL but there was no contractual documentation. He complained of unfair dismissal against 19 respondents because he was unsure of the exact identity of the entities for which he had worked. A preliminary hearing was ordered to determine whether he was an employee and the identity of his employer. The ET found that CPL and SD were associated employers. W had worked for CPL from May 2014 until September 2015 and for SD from September 2015 until August 2016. He was an employee because he had received sick pay and holiday pay. He had two years continuous employment. SD appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The ET had been entitled to find that the two companies were associated. There was clear evidence of an extremely close working relationship between the two companies.

3. There had been sufficient material put before the tribunal abut who was effectively in control of both companies.

## Claim form

## Claim not able to be sensibly responded to

*Trustees of the William Jones's Schools Foundation v Parry [2018] ICR 1807, Court of Appeal*

P lodged a claim of unfair dismissal and arrears of wages against T. The claim form stated 'Please see attached' in relation to the details of the claim. P's solicitors attached details of a different case. The ET accepted the claim. T asked the ET to reject the claim as being in a form which could not sensibly be responded to. The ET ruled that an application for reconsideration was only available to a claimant. T appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. Although the ET had been wrong to conclude that the claim could sensibly be responded to, the claims were indisputably claims which the ET had jurisdiction to consider. The ET's error was immaterial and the reconsideration appeal was rendered academic.

## Costs

## Discretion of tribunal

D had a recognised disability. He complained of disability discrimination and harassment. He also argued that his grievance amounted to a protected disclosure and that he had suffered a detriment. The ET dismissed the complaints and allowed the employer's costs application. D appealed to the EAT, arguing that the ET had failed to provide adequate reasons for the decisions which it had reached and that it had erred in law by moving straight from a finding

that parts of the claim had no reasonable prospects of success to the conclusion that costs should be awarded without considering whether it should exercise its discretion to make a costs award.

**Decision**

1. The appeal was allowed in part.

2. The ET had failed to provide adequate reasons in relation to 2 of the 27 complaints raised by D.

3. The ET had been wrong in law by moving straight from the first to the third stages of the exercise it had to undertake and failing to show any appreciation of the discretionary nature of a costs award.

4. The issues would be remitted to the same tribunal.

## Default judgment

## Undefended claim

*Limoine v Sharma UKEAT/0094/19/RN*

L was employed by S as a nanny. She brought an ET claim for arrears of pay. S lodged an employer's contract claim for expenses incurred in respect of expenses incurred on behalf of L. L failed to respond to the employer's claim and the ET entered a default judgment in favour of S. L appealed to the EAT on grounds including the following:

- The decision of the ET to enter a default judgment had been perverse or wrong in law because it had failed to consider whether L should be allowed to participate in the hearing of that claim.

**Decision**

1. The appeal was allowed.

2. Where a claim is undefended, rule 21 of the Employment Tribunal Rules of Procedure 2013 does not permit a judge to enter judgment simply because the claim was undefended without giving any further consideration to the matter.

3. Given that the case involved substantially overlapping claims, the judge had been wrong not to give any consideration as to whether there was a proper basis on which to grant judgment on the employer's claim.

4. The ET should have actively considered whether L should have been allowed to participate.

5. the whole judgment would be quashed and both matters remitted to the same or a fresh ET.

## Deposit orders

*Arthur v Hertfordshire Partnership University NHS Foundation Trust UKEAT/0121/19/LA*

A was dismissed from her employment with H. She argued before the ET that she was dismissed because she had made earlier protected disclosures, while it was the H's case that the reason for the dismissal related to her conduct. The ET considered the public interest disclosures relied on by A and concluded that the claims had little reasonable prospect of success; it therefore struck out the claims and said that, if it had not struck out the claims, it would have ordered deposits of £500 to be paid. A appealed on a number of grounds, including that the ET erred in finding that two of the disclosures could not amount to protected disclosures on the basis that H had already been aware of the information disclosed, and that the ET only provided perfunctory reasons for making the deposit orders.

**Decision**

1. The EAT held that the ET's conclusion to strike out the claims had been reflective of its view of the evidence – as to the likelihood of success – rather than the "no reasonable prospect" test that it was bound to apply, and it had therefore been applying too low a test.

2. As to the making of the deposit orders, the ET's decision would stand. Accordingly, the ET's decision in relation to striking out the claims would be set aside and replaced by the alternative finding that deposit orders should be made.

## Early conciliation

## Email address

*Galloway v Wood Group UK Ltd (2019) Morning Star, April 12, EAT*

G started employment tribunal proceedings and provided ACAS with his union representative's email address for issue of the early conciliation certificate. The address missed out the full stop in the middle. The certificate was sent to the faulty address. It was not delivered but did not bounce back. By the time the error was discovered, and the certificate sent to G's personal email address, the claim was out of time. G argued that time should run when the certificate was actually delivered to him. Alternatively, the tribunal should extend the time limit because it had not been reasonably practicable for him to present his claim in time. The ET rejected these arguments. G appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. No email address had been supplied and the ACAS attempt to send the certificate had not been effective. The claim was not out of time.

## Employment Appeal Tribunal

## Email attachments

*J v K and another (2019) The Times, January 30, Court of Appeal*

Five minutes before the deadline for appealing against a decision of an employment tribunal, J sent an email to the EAT with an attachment containing the relevant documents. The communication failed because the attachment was beyond the capacity of the server. J re-sent the documents in a number of smaller files which were received after the deadline. He was refused an extension of time and appealed, stating that he suffered from serious mental ill-health which affected his ability to communicate. He appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. A guide on the government website stated that the size of attachments should not exceed 10 MB. Apart from that guide, an ordinary layman would reasonably expect that the EAT's server would be able to accept all the necessary documents as an attachment. The guide was only available if the appellant knew of its existence.

3. Unless and until the sever capacity was increased, consideration should be given to drawing attention to the problems rather more emphatically than was done at present.

4. Where mental ill-health had contributed to a would-be applicant failing to lodge an appeal in time, that would always be an important consideration in deciding whether an extension should be granted.

## Evidence

## Protected conversation

*Harrison v Aryman Ltd UKEAT/0085/19/JOJ*

H, an employee of A, resigned and complained of constructive dismissal and sex discrimination. Her claim referred to a letter from A offering to terminate her contract of employment with a settlement agreement. A argued that the letter could not be admitted in evidence because it was a protected conversation within the meaning of section 111A of the *Employment Rights Act*. H argued that it was admissible because the exceptions in section 111A (3) and (4) applied. her claim related to automatic unfair dismissal and A had acted improperly in making the offer. The ET agreed with A at a preliminary hearing. H appealed to the EAT.

**Decision**

1. Where a claim is for automatic unfair dismissal, pre-termination negotiations will not be protected and can be used as evidence.

2. In relation to an allegation of improper conduct, the tribunal must hear evidence and make a finding of fact.

## Issue estoppel

## Res judicata

*Srivatsa v Secretary of State for Health and another [2018] ICR 1660, Court of Appeal*

S, a GP, brought a number of ET claims against SSH and the company running the surgery in which he practised. Two days before an initial hearing he withdrew the claims. SSH applied to have the claim dismissed. S objected to this on the basis that he had been obliged to withdraw for economic reasons and that if there was a costs application, he wished to reactivate his claims. The ET stated that it had no jurisdiction to reactivate a withdrawn claim. S then brought proceedings in the High Court for breach of contract and tortious conspiracy. SSH pleaded issue estoppel. At first instance the judge found that S was estopped. S appealed to the Court of Appeal.

**Decision**

1. The appeal was allowed.

2. It was not competent for rules regulating procedure in the employment tribunal to prescribe the consequences in the High Court.

3. The withdrawal of the claims did not amount to an abandonment of the underlying complaints for all purposes and the court was free to examine the matter afresh.

4. Where there had been no adjudication on the merits, the question was whether by withdrawing the claims the claimant had consented, either expressly or by implication, to concede the issue.

5. S had withdrawn the claims for economic reasons and not because he thought that they would fail on the merits. He was not precluded from continuing with his High Court claim.

## List of issues

*Saha v Capita Plc UKEAT/0080/18/DM*

S, an accountant, told her employers by email that she would not work proposed hours because they were detrimental to her health and safety and breached the Working Time Regulations. She was offered £10,000 to terminate her employment. She lodged a number of claims at the ET and was not represented. The ET set out the matters in the email as two issues in a list of issues. The issues were a protected disclosure detriment claim and a working time detriment claim. Both issues had been pleaded.

**Decision**

An ET is not bound by its list of issues. The core duty of the tribunal is to determine cases in accordance with the law and the evidence.

## Litigants in person

## Striking out

*Mbuisa v Cygnet Healthcare Ltd (2019) UKEAT/0119/18*

M did not have the necessary two years' continuous employment for an unfair dismissal claim. He complained of automatically unfair dismissal on health and safety grounds. It was not clear what he was trying to argue in his pleadings. The ET struck out the claim on the basis that M had not shown that any factor related to his leaving work had health and safety implications. M appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. M was trying to say that because of his health and safety complaints the employer had allowed a situation to arise in which these things could happen. The ET had not engaged with this.

3. The better course of action would be to clearly establish what M was trying to say and to make a deposit order if necessary.

4. Particular care should be taken where a case is badly pleaded by a litigant in person, especially where the claimant's first language is not English or where the litigant comes from a background such that they would not be familiar with having to express complex arguments in written form.

## Mental health issues

*Anderson v Turning Point Eespro [2019] EWCA Civ 815, Court of Appeal*

In 2009 A brought a sex discrimination claim against her employer. The claim was successful. The remedies hearing did not start until 2012. Judgment was given in 2015. A's poor mental health was one reason for the delay. A was unrepresented and expert psychiatric evidence was needed. A appealed on the basis that she had not had a fair trial. She argued that insufficient adjustments had been made to take account of her mental health and that the ET should have sought evidence on what adjustments were necessary to achieve a level playing field.

**Decision**

1. The responsibility to propose adjustments or particular measures rests with a party's representatives rather than with the court.

2. The tribunal can expect a party's interests to be looked after by his or her representatives.

3. There is no need for a 'ground rules' hearing in every case with a disabled claimant and no general need to obtain specific evidence on potential adjustments.

## Postponement of hearing

## Counsel unable to attend

*Lunn and another v Aston Darby Group and another (2018) ICR D11, EAT*

L and another lodged whistleblowing claims and applied for interim relief. They instructed a public access barrister. The ET listed the application for a date on which the barrister had a prior court commitment. The barrister offered alternative dates which have resulted in a short delay. The ET refused a postponement on the basis that barrister' inconvenience did not amount to a special circumstance. The claimants appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. Instructing counsel under the direct access scheme might not be a special circumstance in modern times but it did give rise to special difficulties for the party concerned. Those were difficulties that the overriding objective would suggest were relevant to the ET's consideration of its power to postpone, given that they went to questions of saving expense and ensuring that the parties were on an equal footing.

3. The ET had unduly fettered its discretion. The application for a postponement would be allowed and the interim relief applications relisted as a matter of urgency.

## Remedy hearings

## Debarring orders

*Office Equipment Systems Ltd v Hughes [2018] EWCA Civ 1842, Court of Appeal*

H complained of unfair dismissal, unpaid holiday pay, sex discrimination and breach of contract. The employer failed to respond in time and judgment was given against it. An employment judge found that there was sufficient material to determine remedy without a hearing and refused the employer's request to participate. The employer's appeal against liability was allowed and the matter remitted to the tribunal. The appeal against the order debarring it from making representations on remedy was dismissed.

**Decision**

1. In a case that was sufficiently substantial or complex to require the separate assessment of remedy after judgement on liability, only an exceptional case would justify excluding an employer from participating in an oral hearing. It would be rarer still for a tribunal to refuse to allow an employer to make written representations.

2. The present case was not exceptional and the employer should not have been precluded from making submissions on quantum. An appropriate course would have been to invite the employer to make submissions by a specified date and for the employment judge to consider whether an oral hearing was required.

3. The decision on remedy was set aside and remitted for reconsideration.

## Reporting restrictions

## Anonymisation orders

*A v Secretary of State for Justice [2018] WLUK 313, EAT*

A had worked for a probation trust as a supervising probation officer in a bail hostel. She had a short relationship with a resident (J) and they had a child (L) who was autistic and suffered from anxiety. J complained to the trust that A had abused her position. She was dismissed. She complained of unfair dismissal and requested a closed hearing because she feared that the publicity would result in the child discovering new facts about J. The ET granted an anonymisation order (AO). At the final hearing this order was replaced with a restricted reporting order which, unlike the AO, would end after the ET reached a decision on the merits. A appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. To make an AO, the restriction on public disclosure could only be imposed if it was necessary in the interests of justice, or protected the human rights of any person, or in certain circumstances related to confidential information.

3. The principles of open justice and freedom of expression were not absolute. The correct approach to them required a proper evaluation of competing rights.

4. L had a right to a private and family life. The need to respect that was all the more pressing for a child who was autistic and suffered from anxiety. There was no public interest in L being identified.

## Reporting restrictions

## Open justice

*A and B v X, Y and Times Newspapers Ltd (2019) Morning Star, June 14, EAT*

Claimants employed by X complained of sexual harassment. Their complaints included allegations against Y, described as a public figure with a well-known family name. The claimants were granted anonymity under section 1 of the Sexual Offences (Amendment) Act 1992. X and Y applied for restricted reporting orders (RRO) and anonymity orders (AO), arguing that granting these orders was necessary to protect the right to privacy under article 8 of the *European Convention on Human Rights*. The ET granted the RRO on the basis that it carried the least infringement of Article 10 (the right to freedom of expression) but refused the AO on the basis that there was no known press or wider public interest and no need to take the case underground. The claimants appealed to the EAT.

**Decision**

1. When carrying out the necessary balancing exercise between the interests of accuser and accused, the ET judge had not fully taken into account the principle of open justice. Instead, she had assumed that the principle would be satisfied because the hearing would take place in open court.

2. The starting point was that the principle of open justice included press reporting of the case, based on the assumption that it would be reported fairly and accurately. The judge had been wrong to place weight on the risk that there might be misreporting.

3. The public interest in open justice had to be considered separately from the Article 10 right to freedom of expression. The ET judge had failed to take that into account.

4. The ET judge had been wrong, as part of the balancing exercise, to take account of the imbalance in the 1992 Act which reflected Parliament's conclusion that protection should be given to alleged victims, but not perpetrators, of sexual offences.

5. The application for an RRO was remitted to a freshly constituted tribunal and the appeal with regard to the refusal of an AO was dismissed.

## Strike out

## Perversity

*Chadwick v Sainsbury's Supermarkets Ltd UKEAT/0052/18/JOJ*

C complained of constructive unfair dismissal. He was unrepresented at the ET. After he had presented his case the ET struck out the claim of its own motion on the basis that it was bound to fail because the last straw doctrine did not apply on the facts. It gave, as the reason for the strike out, the pressure of resources on the ET. This decision was upheld at a reconsideration hearing. C appealed on the basis that the ET had erred in its consideration of the last straw doctrine and that no reasonable tribunal could have reached the conclusion that the threat of disciplinary action against C had been an entirely innocuous act.

**Decision**

The appeal was allowed. The high threshold required to establish perversity on the part of an ET had been crossed. The matter should be reheard from the start, either by the same or a fresh ET.

## Time limit for applications

*Miah v Axis Security Services Ltd [2018] ICR D13, EAT*

M's unfair dismissal claim was received by the ET one day after the expiry of the three-month time limit. The ET judge refused to accept the claim on the basis that it had been reasonably practicable for it to have been presented in time. M appealed to the EAT on the ground that the judge had failed to have regard to the fact that the day before the claim was presented was a non-working day.

**Decision**

1. The appeal was dismissed.

2. Where there could be no receipt by the ET, for example because the office was closed and there was no letterbox, the limitation period might be extended.

3. Where there was a letterbox, the period would not be extended.

4. If a claim presented on the next working day was in time, this would mean that the time limit was automatically extended in such circumstances. That was not what the regulations provided.

## Time limit for claim

*Lowri Beck Services Ltd v Brophy (2019) Morning Star, November 15, EAT*

B, an employee of L, suffered from severe dyslexia. He found it difficult to retain verbal instructions unless they were backed up with an additional explanation or were confirmed in writing. He was dismissed for gross misconduct following a report from a customer about his conduct. He received a letter on July 6 2017 which was dated July 4 and confirmed his dismissal on June 29.

B's brother, who was not legally qualified, thought that B had been dismissed on July 6 because that was the date on which the letter was received. B started the early conciliation process on September 30 and the EC certificate was issued on November 13. B's brother lodged his tribunal claim for unfair dismissal, wrongful dismissal and disability discrimination on December 5. The ET found that time should be extended because of a genuine misunderstanding on the part of B's brother. L appealed to the EAT, arguing that ignorance of the relevant time limits was not enough.

**Decision**

1. The appeal was dismissed.

2. B's brother had not misunderstood the law. His misunderstanding was one of fact.

3. It had not been reasonably practicable for B to lodge his claims in time because he had genuinely misunderstood the date when he was dismissed.

## Time limits

*Lowri Beck Services Ltd v Brophy UKEAT/0277/18/LA*

B, who has dyslexia, was employed by L until he was dismissed for gross misconduct. B's brother, who is not legally qualified, helped him to start proceedings for unfair dismissal, wrongful dismissal and disability discrimination. The claim form was submitted out of time because of a misunderstanding as to the effective date of termination by B and his brother. The ET extended time in relation to the disability claim and the unfair and wrongful dismissal claims, on the basis that B was a vulnerable individual and his brother's mistake arose from a mistake of fact rather than an error of law. L appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. There was no basis to interfere with the decision of the ET.

## Time limits

*Pora v Cape Industrial Services Ltd UKEAT/0253/18/BA*

P was dismissed by C. He instructed solicitors to complain of his unfair dismissal. The solicitors were recommended by Citizens Advice. He was repeatedly assured that all was in hand. No claim was made to the ET until the time limit had expired. P submitted his claim and requested an extension of time on the basis of the solicitors' negligence. The ET ruled that it had been reasonably practicable for him to present his claim in time, and it had no jurisdiction to consider the complaint. P appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The ET had correctly concluded that it was reasonably practicable for P to have presented his claim in time.

## Time limits

## Fees regime

*Wray v Jewish Care (2019) UKEAT/0193/18*

W was dismissed in March 2017. He brought claims for unfair dismissal and breach of contract out of time. He had limited financial means and poor literacy. In April 2017 he entered ACAS early conciliation. At that date he would have been required to pay £250 to lodge the claims. He stated that this was a reason for his late claims. In August 2017 he found out that the fees regime had been declared to be illegal. He did not lodge his claims until September. The ET refused to extend time. He appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. In some pre-July 2017 cases there might be an argument that affordability of the fee was a relevant consideration in time issues.

3. The ET had been entitled to reach its decision on the facts, given that there had been a further delay from August until September.

## Unless order

## Medical evidence

*McCarron v Road Chef Motorways Ltd and Others UKEAT/0268/18/RN*

M was a litigant in person. She was dyslexic. She complained of unfair dismissal and disability discrimination. The employers denied all the complaints, stating that M had been

fairly dismissed for misconduct and that they had nothing which amounted to disability discrimination. The ET issued an Unless Order. This set a time limit for M to provide a further disability impact statement and medical evidence in support of her claimed dyslexia. No medical evidence was provided by the deadline and the ET dismissed the complaints. M appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The ET had erred in law in dismissing the complaint because of non-compliance with the Unless Order.

3. The ET should have decided that by not providing medical evidence, M was not in breach of the Order but merely might not be allowed to present such evidence thereafter.

4. The matter would be remitted to the ET to proceed on the basis that the disability discrimination claim remained live.

## Without prejudice rule

## Unambiguous impropriety

*Martin v McDevitt & Community Legal Services UKEAT/0287/16/RA*

McD suffers from cerebral palsy. He was dismissed for alleged incompetence and complained of disability discrimination. He contacted ACAS for early conciliation. M emailed ACAS stating that McD's claims were spurious and that he would ensure that the local political establishment, local employers and the public were made aware that he was attempting to grossly abuse the protection of the Equality Act and to enrich himself based on a claim which had no basis whatever. This was included in without prejudice communications. The ET found that McD could rely on the email because of the unambiguous impropriety exception to the without prejudice rule. M appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. It was acceptable to draw attention to the fact that an ET hearing was in public.

3. It was also acceptable for M to comment that the claims were spurious.

4. Stating that steps could be taken which might damage McD's future career could go beyond the acceptable limit for unambiguous impropriety. The matter was remitted to the ET for further determination.

## Witness order

## Non-disclosure agreement

*Christie v Paul and others UKEAT/0137/19/BA*

C lodged a number of complaints with the ET, including sex discrimination, harassment, victimisation and automatic unfair dismissal. She applied for a witness order to compel a female colleague to give evidence. The ET refused the application without giving the respondent the opportunity to make representations. C stated that the colleague had previously stated her willingness to attend as a witness but had then refused after entering into a non-disclosure agreement with the employer. C appealed to the EAT, arguing that that the ET had been wrong in law in failing to consider the relevance of the colleague's evidence, the necessity of making a witness order and in failing to have regard to the overriding objective.

**Decision**

1. The appeal was dismissed.

2. The ET had done nothing more than insert a permissible procedural step into its consideration of the application.

3. That procedural step was in accordance with the overriding objective and was consistent with a more general concern to do justice.

4. The step was open to the ET in exercising its case management powers.



## 2018 ET Cases

### Adjournment of hearing

### Disabled claimant

*Leeks v Norfolk and Norwich University Hospitals NHS Foundation Trust [2018] ICR 1257, EAT*

L complained of disability discrimination. The employer applied for an order for L to provide further and better particulars within 20 days and listed a preliminary hearing for a month later. L requested an extension of 11 weeks to comply with the order for particulars and for a further month for a preliminary hearing. Her request was based on her own ill-health and that of her husband. It was supported with letters from a number of doctors.

The request was refused on the basis that there was no full medical report. L renewed her request and sought a telephone case management hearing. At the preliminary hearing in the absence of L, the employment judge struck out the complaint on the basis that the claim had no reasonable prospect of success and L's failure to comply with tribunal orders. He also awarded costs against L on the ground that she had acted unreasonably in bringing and conducting the proceedings. L appealed against the costs order, arguing that the tribunal judge had considered correspondence marked without prejudice save as to costs and had failed to make reasonable adjustments.

**Decision**

1. The appeal was dismissed.

2. The refusal of an adjournment and the decision whether to continue on the absence of a party was a case management decision which fell to be scrutinised on appeal on the same principles as any other appeal.

3. The appeal tribunal was not required to adopt a test of proportionality where adjustments might be necessary to ensure as full a participation as possible for a disabled litigant and decide what was fair.

4. A party asserting that illness precluded compliance with an order or necessitated an adjournment had to produce clear and cogent independent medical evidence.

5. There was no factual basis for the suggestion that the employment judge had considered without prejudice correspondence.

6. The claimant had been given a limited opportunity to deal with the employer's schedule of costs but had not been disadvantaged because she had been able to make submissions about it.

## Adjournment

## Mental health issues

*Shui v University of Manchester and others [2018] ICR 77, EAT*

S had a history of psychotic depression. He was able to pursue litigation and he complained of unfair dismissal and disability discrimination. Before the hearing, an issue arose as to his ability to take part. At a preliminary hearing, the judge referred to a letter from S's doctor which stated that S was unfit to attend the hearing and should apply for a postponement. The respondents stated that if S applied for a postponement, they would apply for a strike out. S chose to proceed. The ET made many adjustments to help S to participate. During cross-examination S became visibly distressed. The tribunal agreed to a submission by the respondents' counsel to proceed without further cross-examination. The claims were dismissed. S appealed to the EAT on the basis that he had been denied a fair hearing.

**Decision**

1. The appeal was dismissed.

2. Where litigants in person had mental health issues, employment tribunals had a responsibility to make allowances and to ensure that such litigants were in a position to make a free and informed choice as to the course of proceedings.

3. S had been aware that he could apply for a postponement but had chosen not to do so.

4. The tribunal had been mindful of its obligations to the claimant. Looked at overall, S's right to a fair trial had not been undermined.

## Costs

## Deposit order

*Tree v South East Coastal Ambulance Service HNS Foundation Trust UKEAT/0043/17/LA*

T complained of disability discrimination. At a preliminary hearing the ET made a deposit order of £1000. T appealed to the EAT.

**Decision**

1. The order was set aside and an order of £500 substituted.

2. When making a deposit order, an ET needed to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claims.

3. It was not apparent that the ET had regard to the way in which T's case was being pursued when reaching its decision on the deposit order.

4. If there was a problem identifying the claim, the deposit order process should not be used as a substitute for case management orders, for example ordering further particulars.

## Early conciliation

*Luton Borough Council v Haque [2018] ICR 1388, EAT*

H was dismissed on June 20, 2016. On July 22 he contacted ACAS. An early conciliation certificate was issued on August 22. On October 18 he brought claims of unfair and wrongful dismissal and discrimination. The ET found that the period from the day after H contacted ACAS (July 23) to the date of issue of the certificate (August 22) was 31 days and not to be counted for limitation purposes. When that was added to the primary limitation period, which ended by September 19, the time for presenting the claim was extended to October 20. LBC appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. A prospective claimant should always have at least one month from the end of the early conciliation period in which to bring a claim. The claim had been presented within the time limit.

## Failure to lodge ET3 in time

*Office Equipment Systems Ltd v Hughes [2018] EWCA Civ 1842, Court of Appeal*

H lodges complaints in the ET. The employer failed to file an ET3. The ET wrote to the employer, stating that judgment might be issued and that the employer could only participate in any hearing to the extent permitted by the judge.

Solicitors for the employer asked the tribunal for permission to take part in the remedy hearing. The tribunal declined the request and stated that the remedy would be decided on paper.

On appeal to the EAT by the employer, that decision was upheld. The employer appealed to the Court of Appeal.

**Decision**

1. The appeal was allowed. The ET's draft decision on remedy was set aside and the case remitted to the ET for consideration of remedy.

2. There was a draft award of compensation of just under £75,000. There was no reason why the company should have been precluded from making submissions on the quantum of the claim following the judgment on liability.

3. An appropriate course would have been to make submissions by a specified date and then for the ET to consider whether an oral hearing was required.

## Litigant in person

## Unduly technical approach

*Aynge v Trickett t/a Sully Club Restaurant (2018) Morning Star June 22, EAT*

On October 15 2016 A's employer told her 'this is your last shift tonight' and 'that's it, we're done'. She submitted an ET1 complaining of unfair dismissal and stating that she had been dismissed on October 15. In her subsequent witness statement she stated that she was told by the employer that she was not dismissed but she was not to work a night shift again. The employer argued that she had conceded that she was not dismissed and that her claim must fail. A was unrepresented. The ET dismissed her claim. A appealed to the EAT.

**Decision**

1. The appeal was allowed and the matter remitted to another tribunal.

2. The employment judge had taken an unduly technical approach and had not taken enough account of the fact that A was representing herself.

3. As A was a litigant in person, she could not be expected to understand the significance of legal niceties.

4. Even if the judge was right that the ET1 could not be interpreted as involving a constructive dismissal on October 15 or a constructive dismissal on October 16, he should at least have considered allowing A to amend her ET1.

## Striking out

*Baber v The Royal Bank of Scotland plc UKEAT/0301/15/JOJ*

In 2013 B complained of unfair dismissal and disability discrimination. The ET made two unless orders were made. The complaints were struck out for non-compliance but then reinstated. The complaints were again struck out after B failed to comply with case management orders which were not unless orders. B appealed to the EAT.

**Decision**

1.The appeal was allowed.

2. The ET had not recognised the draconian nature of a strike out decision and the importance of not too readily exercising the strike out jurisdiction.

3. There had been no recognition of the need to consider whether the sanction of strike out was a proportionate response in the particular circumstances of the case, including reference to the question of whether a fair trial remained possible, or a lesser sanction was available.

## Time limits for appeal

*Haydar v Penine Acute NHS Trust [2018] EWCA Civ 1435*

H brought proceedings against P. The ET upheld his claim for unfair dismissal, with a 50% deduction for contributory conduct, and dismissed his claims of discrimination. H wished to appeal the judgment.

He had until 27 May 2014 to appeal. He lodged a valid notice of appeal on 12 May 2014 but there was no record of the appeal being received by the EAT, and H received no acknowledgment. Five weeks later H realised he had heard nothing. He telephoned the EAT, and was told they had not received the appeal paperwork. H resent the appeal paperwork, and it arrived on 7 July 2014. This was out of time and H applied for an extension.

This was refused and H appealed to the EAT. The appeal was dismissed and H was referred to a booklet called *'The Judgment'* available online. This explains the appeal process, and the strict time limits. The booklet states as follows:

**'**If you have not received an acknowledgment from the EAT within seven days of posting the notice of appeal, you should contact the EAT to confirm they have received your appeal.'

H appealed to the Court of Appeal.

**Decision**

1.The appeal was dismissed.

2. H had not sought to obtain a copy of the booklet. He had made several appeals previously to the EAT, and was conversant with the process. The loss of the paperwork was a good reason for an initial delay, but there came a point where the onus was on the litigant to take the initiative and check that the package had been received.

## Wrongly addressed correspondence

*Rana v London Borough of Ealing [2018] EWCA Civ 2074, Court of Appeal*

ET documents and judgment were sent to R's solicitors by mistake – the solicitors had come off the record. R eventually obtained the documents but her appeal to the EAT was out of time. The EAT refused to extend the time limit. R appealed to the Court of Appeal.

**Decision**

1. The appeal was allowed.

2. Justice required that where a judgment was mis-sent, the party affected should not be unfairly prejudiced. Discretion should be exercised to allow them the same period from the date that they were eventually sent a copy of the judgment.

3. There was no question of culpable delay on R's part in obtaining a copy of the documents once she was alerted to the fact that they had been mis-sent.

## 2017 ET Cases

### Adjournment

### Mental health issues

*Shui v University of Manchester and others UKEAT/0230/16/DA*

S was a litigant in person. He suffered from mental health issues but did not lack capacity. He complained of disability discrimination, victimisation and unfair dismissal. During the ET hearing, he broke down. He had been advised of his right to apply for an adjournment but the tribunal did not expressly remind him of his right to apply for an adjournment or postponement. The claims were dismissed. S appealed to the EAT, arguing that he had been denied a fair hearing. He argued that the ET had failed to proactively adjourn the proceedings at the start of the hearing or to raise the possibility of S applying for an adjournment. He also argued that the hearing should have been adjourned to give him time to recover.

**Decision**

1. The appeal was dismissed.

2. S had been aware of his right to seek an adjournment at the start of the hearing but he had not done so.

3. The ET had made all appropriate reasonable adjustments and S had been able to present his case until he broke down in cross-examination.

4. Viewed overall, the hearing had been fair.

### Conciliation

### Scope of COT3

*Department of Work and Pensions v Brindley (2017) Morning Star, March 3, EAT*

B complained of disability discrimination on the basis that her employer had refused to allocate her a parking space after a reorganisation, and this had exacerbated her disability. In April 2014 B was issued with a final warning for sickness absence and in November 2014

another for attendance. In December 2014 B signed a COT3 form which settled her claim and all other relevant claims arising from the facts of the proceedings up to and including the date of the COT3.

B brought another claim arguing that, by giving her another final written warning in November 2014, the employer had again discriminated against her by reason of her disability. The employer argued that this fresh claim was barred by the COT3.

The ET found that the fresh claim could proceed. The new circumstances referred to in the claim were not part of the COT3 settlement. The fresh claim was a separate claim about a different warning in a different time frame.

The employer appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The COT3 agreement only covered the specific factual matrix of the proceedings of the original claim and not a later one, even if the facts were similar.

## Costs

*Herry v Dudley Metropolitan Council and another [2017] ICR 610, EAT*

H, a teacher at a community school, complained of race, sex and disability discrimination based on dyslexia and stress. All the complaints were dismissed. In relation to disability, the employment judge found that H had worked effectively as a teacher for more than two years before taking a long period of sick leave. This indicated that he had developed coping strategies to reduce the effect of any impairment. While stress might have occasionally exacerbated his dyslexia, he had failed to show that either the dyslexia or the stress had a substantial adverse effect on his ability to carry out normal day-to-day activities.

The respondent applied for costs. The tribunal found that H had proceeded with his complaints despite costs warnings from his union and two legal advice centres that his claims had no reasonable prospects of success. The tribunal took account of H's means and found that although he was impecunious and unable to work, his future earnings prospects were good. He was ordered to pay the whole of the costs which amounted to £110,000. The respondents served a statutory demand on H as a precursor to bankruptcy proceedings. H appealed to the EAT.

**Decision**

1. The appeal against the costs order was allowed. The ET had been justified in making the order on the basis that H had acted unreasonably and the respondents had acted reasonably. However, the ET failed to explain sufficiently why its award was reasonable and proportionate, or to consider whether it should award a proportion of the costs or cap the amount payable, having regard to H's ability to pay. The matter would be remitted to the ET to consider the issues.

2. The appeal against the disability finding was dismissed. The employment judge had found that H's stress resulted from his unhappiness about what he perceived to have been unfair treatment against him. There was little or no evidence that his stress had any effect on his ability to carry out normal day-to-day activities.

3. It would not assist the respondents to bring bankruptcy proceedings. The trustee in bankruptcy would not be able to make any significant payment in respect of costs. H would be discharged from bankruptcy after one year and the discharge would release him from the award. A party who applies for costs and relies on a party's future earning ability to be taken into account, should state that there is an intention to bring bankruptcy proceedings. Bankruptcy might result in the debt being extinguished before any future earning capacity could be brought to bear.

# Costs

## Possible deterrence

*Smolarek v Tewin Bury Farm Hotel Ltd UKEAT/0031/17/DM*

The ET ordered S to pay £5200 costs towards the respondent's costs of £29,000. It found that S had unreasonably pursued claims with no reasonable prospect of success. The amount of costs was based on S's ability to pay and that it would cause her to consider carefully before bringing any further claims. S appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The award of costs had been partly based on deterrence. This was an improper consideration.

3. The real issue was the appropriate level of award without any consideration of deterrence. The issues were remitted to the tribunal for further consideration.

## Deposit order

*Hemdan v Ishmail and another [2017] IRLR 228, EAT*

H alleged that she was brought to the UK from Egypt by the respondents and was employed by them in circumstances amounting to slavery. She complained of race discrimination. The respondents were prosecuted in the criminal courts and were acquitted. The respondents applied for deposit orders. H stated that she had been recognised by the Home Office as a victim of trafficking, that she was unable to work because of illness, that her income was £125 a week employment support allowance and that if she was ordered to pay deposit orders she would not be able to continue with her claim. The ET ordered a payment of £75 for each of her allegations. The employment judge stated that it was not an inappropriate use of the power to make a deposit order which a claimant would find it difficult but not impossible to pay. H appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. H would be ordered to pay £1 per allegation.

3. The purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims. The purpose is emphatically not to make it difficult to access justice or to effect a strike out through the back door.

4. An order to pay a deposit must be one which is capable of being complied with. A party without the means or ability to pay should not be ordered to pay a sum he or she is unlikely to be able to raise.

5. In the present case the amount of the order was set at so high a level as to impede the claimant's access to justice.

## Details of claim

## Document attached in error

*Trustees of the William Jones's Schools Foundation v Parry [2016] ICR 1140, EAT*

P completed an ET1 form for a complaint of unfair dismissal. Her solicitor mistakenly attached a document related to a different case. The employment judge accepted the claim. The respondent argued that the claim should be rejected as not meeting the minimum standards of a valid claim and was not in a form which could be sensibly responded to. A second employment judge refused to reconsider the decision not to reject the claim because that decision was not a 'judgment'. The respondent appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. It was clear that the claimant was seeking relief which the tribunal had power to give and there was nothing to indicate that she was not entitled to it. An employment judge would be bound to conclude that the claim should not be rejected.

3. Although the ET1 was clearly in a form that could not sensibly be responded to, that was immaterial.

## Disclosure

## Application for order against third party

*Birmingham City Council v Bagshaw and others [2017] ICR 263, EAT*

B and others were eight women who claimed equal pay. An employment judge ordered them to serve a schedule with the specific information relevant to each claimant. The claimants' solicitors were unable to obtain all the information which they needed and they made an

application for disclosure by B of all judgments and orders made in equal pay cases brought against it. The judge made the order and B appealed to the EAT.

**Decision**

1. A court can make an order for disclosure by a third party provided that the documents were likely to support or adversely affect either party.

2. The judge had been entitled to conclude that disclosure at an early stage would be likely to be conducive of more focussed and effective case management.

3. The judge's order for redaction to preserve anonymity meant that there were no adverse consequences of any failure to make a distinction between interlocutory judgments and orders. Interlocutory orders were not in the public domain.

## Early conciliation

*Commissioners for HM Revenue & Customs v Serra Garau UKEAT/0348/16/LA*

G's date of termination of employment was December 30, 2015. On October 12, 2015 (before termination) he started the early conciliation procedure through ACAS. The early conciliation certificate was issued on November 4, 2015. On March 28, 2016, G contacted ACAS for a second time. On April 25, 2016, ACAS issued a second certificate. On May 25, 2016, G lodged a claim for disability discrimination and unfair dismissal. The issue was whether the claims were out of time. The ET stated that the clock had stopped running the second conciliation period and the claims were in time within the spirit of the legislation. The employers appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The first limitation clock could not stop under the first certificate because it had never started.

3. The second certificate was a purely voluntary exercise with no impact on the running of time.

## Early conciliation

*Adams v British Telecommunications plc [2017] ICR 382, EAT*

A complained on February 16 2015 of unfair dismissal and race discrimination. She had obtained an early conciliation certificate on January 18 2015. Her claim was rejected on February 17 because the number of the early conciliation certificate was incomplete. On February 19, two days after the expiry of the time limit, A's solicitor presented new claims with the correct number. The ET judge rejected the claims on the basis that it was reasonably practicable for the claims to have been presented in time. A appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The ET had been wrong to treat the fact that A had presented a claim in time as meaning that a second claim could reasonably practicably have been presented in time.

3. The focus should have been on the second claim and whether there was any impediment to timely presentation of that claim.

4. The critical factor was prejudice. A would be deprived of any avenue for making her complaints because of a minor error in the first claim, which caused no prejudice to the respondent.

## Early conciliation certificate

*Savage v JC 1991 LLP and others (2017) Morning Star, August 18*

S was dismissed for alleged gross misconduct. During her employment, the name of her employer changed several times without her knowledge. She complained of unfair dismissal and entered three names for her former employer on the ET1. Her early conciliation certificate only related to two names. The ET rejected her claim against the third name on the ET1 on the basis that she had not obtained an EC certificate in relation to the third name. She appealed on the basis that the third name was not required.

**Decision**

1. The appeal was allowed.

2. The two EC certificates applied to three employers because two were the same entity.

3. Noting the uncertainty as to the name of S's former employer, caused in large part by the former employer, S had tried to deal with that uncertainty by naming three respondents.

## Early conciliation procedure

*Compass Group UK & Ireland Ltd v Morgan [2017] IRLR 924, EAT*

M brought proceedings against C, her employer, alleging that she had been told to work in an alternative location in a less senior role. She entered into early conciliation (EC) in November 2014. The EC certificate was issued in January 2015 and she resigned in March 2015. She lodged an ET1 in March 2015 alleging constructive unfair dismissal. The employer argued that the claim was not properly constituted because the requirement to undergo early conciliation had not been fulfilled because M had not been dismissed at the time of conciliation. The employment tribunal found that an EC could cover future events and on the facts of the case, the proceedings related to a sequence of events which were in issue between the parties at the time of the EC process. The employer appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. An EC certificate obtained by a prospective claimant could cover future events.

3. The words 'relating to any matter' in section 18A(1) of the *Employment Tribunals Act 1996* were ordinary English words which had their ordinary meaning.

4. Provided that there were matters between the parties whose names and addresses were notified, and they were related to the proceedings instituted, that fulfilled the requirements of the section.

5. There had been a connection between the factual matters complained about in the claim form and matters that were in dispute at the time of the EC process.

# Fees

## Supreme Court decision

*R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51*

The Fees Order of 2013 required an issue fee to be paid when a claim form is presented to an employment tribunal, and a hearing fee before hearing of the claim. The stated aims of the Order were to transfer part of the cost burden of tribunals from the taxpayer to tribunal users, to deter unmeritorious claims and to encourage earlier settlements. UNISON applied for judicial review on the basis that the making of the Fees Order was not a lawful exercise of the Lord Chancellor's powers because the fees interfered unjustifiably with the right of access to justice, frustrated the operation of Parliamentary legislation granting employment rights and discriminated unlawfully against women and other protected groups.

**Decision**

1. The appeal was allowed.

2. The Fees Order was unlawful under domestic and EU law because it had the effect of preventing access to justice. It must be quashed.

3. The Order was unlawful if there was a real risk that persons would effectively be prevented from having access to justice or if the degree of intrusion into access to justice was greater than was justified by the purposes of the Order.

4. Court fees for small claims are related to the value of the claim. ET fees bear no relation to the amount sought and can be expected to act as a deterrent to claims for modest amounts or non-monetary remedies.

5. The effect of the Order was a dramatic and persistent fall in the number of lower value claims and non-monetary claims. Examples of the impact of fees on hypothetical claimants indicated that they would have to restrict expenditure which was ordinary and reasonable for maintaining living standards.

6. The Order was also unlawful because it contravened the EU law guarantee of an effective remedy before a tribunal and imposed disproportionate limitations on the enforcement of EU employment rights.

7. The Order was indirectly discriminatory because the higher fees for Type B claims (discrimination) put women at a particular disadvantage.

8. Meritorious and unmeritorious claims might be deterred by the higher price and there was no correlation between the higher fee and the merits of the case or incentives to settle.

## Jurisdiction

## Diplomatic immunity

*Reyes v Al-Malki and another [2017] UKSC, Supreme Court*

Mr and Mrs A employed R as a domestic servant in 2011. Mr A was a member of the diplomatic staff at the Saudi Arabian embassy in London. R started proceedings in the employment tribunal, alleging that Mr and Mrs A had mistreated her during her employment and that she was a victim of trafficking. The Court of Appeal ruled that the ET lacked jurisdiction because Mr A was entitled to diplomatic immunity and Mrs A also benefited from immunity as a member of his family. R appealed to the Supreme Court.

**Decision**

1. The appeal was allowed.

2. Diplomatic immunity is not an immunity from liability. It is immunity from the courts of the state which hosts the diplomat.

3. R's claim form had been validly served: it merely conveyed information.

4. Mr and Mrs A left the UK in 2011. The only relevant immunity was residual immunity in respect of official acts. The employment of R was not an act in the exercise of the diplomatic functions of the Saudi mission.

5. The matter was remitted to the ET for determination at trial.

## Jurisdiction

## State immunity

*Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62, Supreme Court*

B is a Moroccan national who was employed by Sudan at its London embassy. J is a Moroccan national who was employed by Libya at its London embassy. Both were dismissed and brought claims in the ET. The claims were dismissed by the ET on the basis that Libya and Sudan were entitled to state immunity. J and B appealed to the EAT which allowed the appeals on the basis that the relevant sections of the State Immunity Act 1978 were incompatible with article 47 of the *EU Charter of Fundamental Rights and Freedoms* which reflects the right in EU law to a remedy before a tribunal. The Court of Appeal affirmed this judgment and declared that the relevant sections of the 1978 Act were incompatible with

article 6 of the *European Convention on Human Rights* (the right of access to a court). The Secretary of State appealed to the Supreme Court.

**Decision**

1. The appeal was dismissed.

2. The relevant provisions of the 1978 Act were not consistent with international law. In customary international law, a foreign state is immune where a claim is based on sovereign acts. The employment of purely domestic staff in an embassy is a private act rather than an inherently sovereign act.

3. EU law prevails over English law in the event of a conflict.

## Multiple claimants

## One claim form

*Farah and others v Birmingham City Council (2017) Morning Star, August11, EAT*

Five equal pay claimants sought to include their claims on one claim form. The fee for lodging a claim form containing multiple claims is much lower than the fee for an individual claim form. The employers argued that Rule 9 of the *Employment Tribunal Rules* of Procedure applied. This states that two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. The argument was that female claimants who were doing different jobs could not lodge one claim form, and that claims brought by men were not based on the same set of facts. The employment tribunal found that the claim form was irregular but decided to waive the irregularity. The employer appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. To establish whether claims are based on the same set of facts, tribunals must first identify the complaints being made by two or more claimants, second, whether they are based on the same set of facts, and third whether the facts are the same.

3. In this case, the claims were not based on the same set of facts. But tribunals have a discretion to waive an irregularity.

NOTE: the fees issue was central to this decision and the effect of the removal of tribunal fees remains to be seen.

## Non-payment of fee

## Rejection of claim

*Baisley v South Lanarkshire Council [2017] ICR 165, EAT Scotland*

B lodged a claim of unfair dismissal followed by a fee remission application. The remission application was refused and an appeal notice against the refusal was not received by the tribunal service. The claim was rejected by the tribunal service for failure to pay the fee. Five days later, B presented a second claim with the correct fee. This was out of time and B sought a time extension. An employment judge found that the rejection of the claim had been competent because it had been dealt with by 'the tribunal' acting administratively and B could not be relieved from the consequences of non-compliance with the 2013 Employment Tribunal Rules. The tribunal refused to extend the time limit on the basis that B's solicitors had been at fault. B appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The rejection of the first claim had been a judicial act performed in the name of the tribunal through its administrative office.

3. The employment judge had failed to address the balance of prejudice between the parties. Balancing the prejudice to the claimant of losing the ability to litigate an important matter, against that to the respondent who would be left in no worse position than if the remission appeal had been receive in time, the balance was clearly in favour of B. B would be allowed 28 days to resolve the matter.

4. B and his solicitors had wrongly but genuinely understood that the appeal had been lodged in time. On discovering that it had not, they had lodged a new claim promptly. If the employment judge had considered the question of reasonableness, the balance of prejudice would have favoured B.

## Range of reasonable responses

## Remitted hearing

*Ham v The Governing Body of Beardwood Humanities College [2017] EWCA Civ 1629, Court of Appeal*

H was dismissed for misconduct. Her complaint of unfair dismissal was upheld by the ET. The employer's appeal to the EAT was allowed and the matter was remitted to the ET, which this time found that H had been fairly dismissed. She appealed against the remitted decision and her appeal was dismissed by the EAT. She then appealed to the Court of Appeal, arguing that the ET had erred in law by finding the dismissal fair, given that it had found that she would not have been dismissed if she had been made aware of the likely consequences of her actions, or warned. Further, the ET had not made any reduction in her compensation award and had also found that with any appropriate warnings or performance management procedures in place, H would have remained in post until the closure of the College.

**Decision**

1. The appeal was dismissed.

2. There were no grounds to set aside the decision of the ET at the remitted hearing. The decision to dismiss had been within the range of reasonable responses, but at the extreme end of that range.

## Strike out

*Ahir v British Airways Plc [2017] EWCA Civ 1392, Court of Appeal*

A was dismissed after an anonymous letter was sent to BA, his employer. The letter stated that there were discrepancies in A's CV. A complained that his dismissal was an act of victimisation related to previous complaints, including a complaint of racial harassment. A's case, essentially, was that BA had sent itself the letter with the aim of triggering an investigation. This could not be proved by A, nor was there evidence of BA sending itself the letter. The ET struck out the claim as having no reasonable prospect of success. This decision was upheld by the EAT. A appealed to the Court of Appeal.

**Decision**

1. The appeal was dismissed.

2. There was no reasonable prospect of an ET accepting the basis of A's claim.

3. This was because of its inherent implausibility. In a case where there was on the face of it a straightforward and well-documented innocent explanation for what occurred, a case could not be allowed to proceed on the basis of a mere assertion that that explanation was not the true explanation, without the claimant being able to advance some basis for the assertion.

## Striking out

*Kwele-Siakam v The Co-operative Group Ltd UKEAT/0039/17/LA*

KS complained of race discrimination. His claim was struck out by the ET on the basis that, on the evidence heard by the judge and the documents produced, there was no reasonable prospect of success. They were lacking in substance and there was no evidence that any tribunal could find as amounting to race discrimination. KS appealed, arguing that the ET had erred in determining the strike out application in a way which was a full hearing. KS had given evidence and was cross-examined for two days. The ET judge had reached his conclusion without hearing evidence from the employer or allowing KS to test that evidence. The ET had conducted a mini-trial without the expected balance of a full hearing.

**Decision**

1. The appeal was allowed.

2. The ET had been wrong to proceed on the basis that the facts before the tribunal were largely not disputed.

## Striking out

## Core issues of fact

*Mechkarov v Citibank NA [2016] ICR 1121, EAT*

M, a Bulgarian national employed by C in London, complained of race discrimination. At a preliminary hearing an employment judge heard oral evidence from M and two witnesses. Without seeing any contemporaneous documents, the judge struck out the claim on the basis that it had no reasonable prospect of success. M appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. A discrimination claim should only be struck out in the clearest case as having no reasonable prospect of success, taking the claimant's case at its highest.

3. If a claimant's case was conclusively disproved by, or was totally and inexplicably inconsistent with, undisputed contemporaneous documents, it might be struck out.

4. Where there were core issues of fact which turned on oral evidence, they should not be decided without an oral hearing, but the tribunal should not conduct an impromptu mini-trial of such facts.

5. By determining the application to strike out on the basis of oral evidence, the employment judge had impermissibly conducted a mini-trial and had done so without the production of contemporaneous documents.

6. The case would be remitted to another employment judge

## Time limit

*Paczkowski v Sieradzka (2017) ICR 62, EAT*

P was dismissed after two months employment. She was advised by the Citizens Advice Bureau, Acas, and her trade union that she could not bring a claim for unfair dismissal because she did not have two years continuous employment. She was later advised by a lawyer that she could bring an unfair dismissal claim without two years continuity of employment if the claim was that she had been dismissed for asserting a statutory right. She then brought a claim of unfair dismissal for asserting her right to have a written statement of employment. The three-month limit for bringing the claim had expired. The employment tribunal ruled that the claim could proceed out of time because P's ignorance of her right had been reasonable in the circumstances, she had acted promptly in seeking advice after her dismissal and the claim had been lodged within a reasonable period once the possibility of a claim had been brought to her attention. The employer appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. A claimant's ignorance of the right to bring a claim did not mean that it was not reasonably practicable to bring a claim within the time limit. When P was aware of the facts, she could be expected to take reasonable steps to obtain advice.

3. Where a claimant consulted a skilled adviser she could not claim to be in reasonable ignorance even if wrongly advised.

4. The tribunal had failed to make specific findings as to the status of the advisers, the context in which the advice was given, the information provided by the claimant and the questions asked. The case would be remitted for further consideration.

## Time limit

*Tesco Stores Ltd v Kayani (2016) Morning Star, December 2, EAT*

K, a Pakistani national, was dismissed on February 12, 2015. The time limit for her employment tribunal claim expired on May 11. She tried to lodge a number of claims on June 2. The claims were rejected because she did not have an ACAS Early Conciliation (EC) certificate. The claims were finally accepted on September 1. The ET accepted that K had been more pre-occupied with giving birth on May 11 than with an ET claim. Four days after the birth, she and her husband were evicted from their rental property. The ET found that, as a result of these factors, K could not have been expected to submit her claims within the three-month period, but that she had lodged them within a reasonable time after that. Tesco appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. ET judges must consider two things – was it reasonably practicable to present the claim within three months and, if not, to consider whether the claim was presented within a reasonable period after that. It was unclear whether the ET judge had understood the distinction between these two limbs.

3. K did not have the funds to pay the tribunal fee and her solicitor had failed to advise her about the possibility of obtaining remission of the fee.

4. The ET had regarded the requirement to state the EC certificate number on a claim form as 'technical'. The authorities made it clear that it was an essential requirement.

## Time limit

*Fairlead Maritime Ltd v Parsoya (2016) Morning Star, December 9, EAT*

F, a naval architecture company, employed P, an Indian national, as a naval architect. The job advertisement stated that his salary would be between £30,000 and £40,000 p.a. He was paid £25,000 until June 2013, when his salary was increased to £30,000.

P's contract stated that his salary would be regularly reviewed to reflect his immigration/visa status. The increase in his pay did not reflect the amount which he would have earned if he had been fully paid from the start of his employment. P left the company in July 2014 and complained of indirect race discrimination. On behalf of the company it was argued that the

claim was out of time because it only related to the period when he was paid less than £30,000, which ended in June 2013.

The ET found that P's salary depended on his immigration/visa status. This was a provision, criterion or practice (PCP) which put people of Indian nationality at a particular disadvantage. P had suffered unjustified indirect race discrimination by being paid less than the advertised salary. The employer had carried out various reviews at which separate decisions were taken not to pay him what he was owed. Time did not run until his employment came to an end. In any event, it would have been just and equitable to extend time. P had done everything that he could to resolve the matter before resorting to litigation. P's delay in seeking legal advice was understandable, given the small world of naval architecture. F appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The company's failure to make good the shortfall in P's pay was a continuation of a discriminatory policy of not paying full salary to those for whom employability was an issue.

## Time limits

*Grant v Asda UKEAT/0231/16/BA*

The claimant claimed, out of time, unfair dismissal and discrimination. His ET1 was sent to the depot where he worked but when he enquired as to whether a response had been received by the ET, there had been none. The ET1 was then re-sent by the ET, after the 28 days for a response had elapsed, to the respondent's head office and the 28 days for the response to be received was started again (the respondent did not apply for an extension of time, presumably because the clock had started again and so there was no need). The respondent then lodged an ET3 within this new 28-day period.

The claimant appealed against the decision to re-start the clock. While this appeal was proceeding in the EAT, he withdrew his unfair dismissal claim at a preliminary hearing attended by the respondent (despite no in-time ET3 having been lodged), because he did not have two years' service and the discrimination claims were struck out as being out of time.

The claimant claimed at the EAT that he was prejudiced by the respondent's involvement in the preliminary hearing and submitted that the decision might well have been different if the ET had not taken account of the arguments advanced by the respondent at that hearing. He accepted that tribunals could permit participation by respondents at such hearings even if no in-time ET3 had been lodged, but submitted that fairness and justice dictated that this would not have been permitted on the facts of this case.

**Decision**

1.The appeal was dismissed.

2. The ET had been wrong to re-send a claim form to the respondent and re-start the 28-day time limit for an ET3 to be lodged. That procedural irregularity notwithstanding, the outcome would not have been different in this particular case, and the appeal was academic. In any

event, an extension of time for serving the ET3 would and should be granted and the EAT exercised power under section 35 *Employment Tribunals Act 1996* to make an Order extending time and regularising the ET3.

## Withdrawal of claim

## Medical evidence

*Campbell v OCS Group UK Ltd and another [2017] ICR D19, EAT*

C, a claimant in person, withdrew her claim on the first day of the hearing on medical advice. The ET dismissed the claim. Two days later C asked the judge to reconsider the decision to dismiss. The judge ruled that there was no reasonable prospect of the tribunal revoking its judgment. C appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. C had produced medical evidence showing that she was under stress and unwell. She withdrew on medical advice and not on the merits of the claim. Within a very short time she had second thoughts. It might be that if she had been legally represented she would have applied to adjourn.

# 2016 ET Cases

## Composition

## Bias

*Bhardwaj v FDA and others [2016] IRLR 789, CA*

B was a barrister employed by the CPS. She started proceedings against her employer. The FDA, her union, refused to support her claim. After the claim was settled she started proceedings against the union, complaining of its lack of support. She then issued proceedings against the FCA and four of its officers, alleging race discrimination. One of the officers was a lay member of the London South ET. The proceedings were transferred to London Central to avoid the perception of bias.

Two other officers were offered appointments as lay members at London South and London Central. This was raised at the hearing of Ms B's claim but she made no objection. Her claims were dismissed. She appealed to the EAT on the basis that her assent to the continued hearing had not validly waived her right to allege apparent bias. The EAT dismissed the appeal. B appealed to the Court of Appeal.

**Decision**

1. The appeal was dismissed.

2. The waiver had been valid and irrevocable. She had made a free and unpressured decision. She had been given the essential facts which she needed to now in order to make an informed decision.

## Costs

*Riley v Secretary of State for Justice and others [2016] ICR 172, EAT*

An ET consisting of an employment judge and two lay members dismissed claims of unfair dismissal and victimisation. The judge sitting alone awarded costs to the respondent. The respondent appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The basis of the application for costs related to a considerable extent to what had happened in front of the panel of three.

3. The application for costs would be remitted to the panel which had determined the substantive issues.

## Costs

## Risk warning

*Hussain v Nottinghamshire Healthcare NHS Trust (2016) Moring Star, October 28, EAT*

During the hearing of a claim by H, the tribunal judge warned him that the apparent weaknesses in his case were such that a costs award might be made against him. After the case was adjourned, H lodged a complaint that the tribunal was biased. This was rejected. On the determination of the employer's application for £100,000 costs, the tribunal noted that the employer had written to H three times pointing out the weaknesses in his claims and putting him on notice that it would seek costs against him. It awarded costs of 85 per cent of the total claimed. H appealed to the EAT.

**Decision**

1. Tribunals have to give guidance to parties as to how their case might be viewed and the risks they might be taking if they continue down a particular path.

2. The tribunal had not made up its mind early on. It had simply warned H of the risks.

3. The tribunal had not adequately explained why it had made an order for 85% of the costs. This point was remitted to the same tribunal.

## Early conciliation

*Science Warehouse Ltd v Mills [2016] ICR 252, EAT*

M resigned from her employment while on maternity leave. She submitted details of prospective claims under the *Equality Act 2010* to ACAS and an early conciliation certificate was issued. M then presented a claim form to the ET complaining of discrimination. The employer's response alleged misconduct and stated that if she had not resigned, she would have been subject to an investigation. M then applied to amend her claim to add a complaint of victimisation. The employer opposed the amendment on the ground that M had not complied with the early conciliation procedure in relation to the proposed additional claim. An employment judge allowed the amendment on the basis that an early conciliation certificate was not a prerequisite of an amendment application. The employer appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The early conciliation process did not require a prospective claimant to set out each proposed claim formally.

3. The ET, on an application to amend, could exercise its case management powers without requiring a further application to ACAS.

4. The ET's discretion had been exercised with proper regard to the relevant factors.

## Early conciliation

*Drake International Systems Ltd and others v Blue Arrow Ltd [2016] ICR 445, EAT*

B obtained an early conciliation certificate from ACAS which named the parent company of a number of wholly owned subsidiaries as a prospective respondent. It then issued a claim against the parent company in which it stated that it had been unable to ascertain which companies had employed transferring employees and that it reserved the right to add further respondents to the claim. The parent company responded that it was not a transferor because all the transferring employees had been employed by one of the four subsidiaries and that the claimant was out of time to bring a claim against the subsidiaries. It applied for the claim to be dismissed. The claimant applied to amend the proceedings by substituting the subsidiaries as respondents. The ET dismissed the parent company from the proceedings and exercised its discretion to grant an amendment naming the subsidiaries as respondents. The subsidiaries appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The decision to allow the substitution of respondents was a case management decision.

3. The link between the parent company and the substituted respondents was close enough for the employment judge to permit the substitution.

## Early conciliation

## Adding respondents

*Mist v Derby Community Health Services NHS Trust (2016) Morning Star, March 18, EAT*

M was employed by the first respondent from October 2010, until her resignation in July 2014. She lodged a tribunal claim against the first respondent, raising various allegations, including constructive unfair dismissal, automatically unfair dismissal and failure to inform and consult under TUPE. Although her ET1 referred extensively to an alleged TUPE transfer to the second respondent, the second respondent was not named as such in the ET1.

M subsequently applied to join the second respondent to the proceedings, but the second respondent responded by alleging that her claim was out of time and further that, because she was not employed by the first respondent immediately before the transfer, no liabilities transferred to the second respondent. The ET concluded that there had been a relevant transfer, that liability had transferred to the second respondent, but that – having first considered relative hardship – M's complaints against the second respondent should be struck out, because they were brought out of time.

M appealed, broadly on the grounds that the tribunal had given undue prominence to the limitation period at the expense of M's right to a remedy and had failed properly to assess the balance of hardship. The second respondent cross-appealed, alleging that the tribunal had no jurisdiction to hear the case against the second respondent in circumstances where M had not first obtained a relevant ACAS conciliation certificate, that the tribunal had erred in law in assuming liabilities transferred under TUPE and further that it had erroneously failed to acknowledge that information and consultation liabilities were joint and several between transferor and transferee.

**Decision**

The EAT allowed the appeal.

Neither expiry of a limitation period, nor failure to explain delay, should be determinative. Instead, the paramount consideration should be the relative injustice and hardship of each party inherent in adding, or refusing to add, a claim out of time.

The EAT allowed the cross-appeal in part. It rejected the second respondent's procedural arguments relating to pre-claim conciliation. Any appeal on this point should have been raised earlier; and in any event, joining a new party to a valid claim (where a relevant conciliation certificate had already been obtained) did not impose any further conciliation obligations on the claimant.

The EAT allowed the second respondent's TUPE-related appeals. The tribunal had erred in assuming liabilities transferred and in its understanding of information and consultation liabilities. These matters went to the tribunal's discretion on the question of joining the second respondent.

## Early conciliation (EC)

*Mist v Derby Community NHS Trust UKEAT/0170/15*

A respondent objected that a claimant had not complied with the early conciliation requirement because, having correctly cited the respondent in the ET1, she had mis-cited it in the EC notification.

**Decision**

1. The EAT disagreed.

2. EC risked giving rise to the kind of technical argument which beset the abandoned statutory discipline and grievance pre-action requirements.

3. At the stage of EC, the requirement is only to identify the potential respondent and the aim of this is to give enough information to allow ACAS to contact that body.

4. An ET judge has power not to reject a claim if an error is minor and it would not be in the interests of justice to reject the claim.

## EAT documentation

*Majekodunmi v City Facilities Management UK Ltd and others [2016] ICR D5*

M appealed to the EAT following an ET decision to strike out her claim of race discrimination. She later obtained a certificate of correction amending her name. She emailed the EAT, attaching pdfs of the tribunal judgment and a notice of appeal. By a further email the ET1 and ET3 were submitted as a zip file via a link to Dropbox. The EAT requested that these documents be re-sent as attachments to the email. EAT guidance stated that a document was not validly lodged by sending the EAT a link to its location.

The documents were then resubmitted in accordance with the guidance. The appeal was rejected because by then it was 10 days over the time limit. A second notice of appeal sent within 42 days of the corrected judgment was rejected on the ground that the corrected judgment did not give rise to a second appeal.

**Decision**

1. Sending a link to where a required document was located was neither serving nor attaching that document.

2. A corrected judgment did not give rise to a new ground of appeal. The correction had been solely for the purpose of correcting a typographical error.

## Evidence

## Without prejudice

*Faithorn Farrell Timms plc v Bailey UKEAT/0025/16/RN*

F resigned following the breakdown of termination negotiations with her employer. She complained of constructive dismissal and sex discrimination. The employer argued that a number of communications were ‘without prejudice’ and inadmissible as evidence in the ET.

Section 111A of the *Employment Rights Act 1996* provides that confidential discussions regarding ending the employment relationship are privileged and inadmissible as evidence in proceedings for unfair dismissal, with the exception of automatically unfair dismissal claims. This does not apply to other types of claim, for example discrimination. The ET ruled that the without prejudice rule was restricted to the details of offers made or discussions held and not to the simple fact of offers or discussions having occurred. The employer appealed to the EAT.

**Decision**

1. The appeal was allowed in part.

2. Section 111A extends to any discussions held with a view to terminating employment on agreed terms.

3. The ET should have separated out the claims.

4. Privilege is removed where improper behaviour is found.

5. If no improper behaviour is found, section 111A privilege cannot be waived.

## Fees

*Software Box Ltd v Gannon [2016] ICR 148, EAT*

G lodged a claim for unfair dismissal. On the same day she made a separate application for remission of the issue fee. This was not received by the ET Central Processing Unit. A second application for remission was rejected. The ET sent her a notice stating that the claim would be rejected if payment was not made by March 11, 2014. The notice was addressed to a legal representative who was no longer instructed and G did not receive it. When she became aware that her claim had been rejected, she issued a fresh claim out of time and paid the fee. The ET found that the first claim had not been validly presented. Having regard to the ill-health of G and the complexities of the fee-paying system, it had not been reasonably practicable for the second claim to have been lodged in time, and time would be extended. The employer appealed to the EAT.

**Decision**

1. The appeal was allowed and the matter emitted for further consideration.

2. The ET judge had failed to make specific findings as to the reasonableness of G's understanding.

## Interpreter

*Hak v St Christopher's Fellowship [2016] ICR 411, EAT*

H was a Khmer-speaking Cambodian employed as a night worker in a children's residential home. He was dismissed for using racist language. He complained of unfair dismissal and race discrimination. H requested the services of an interpreter at the hearing. None was

available and H consented to proceed without an interpreter. His claims were struck out on the basis that they had no reasonable prospect of success and he appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The employment judge had been entitled to conclude that H's understanding was such that he was able to make the choice to proceed.

3. There had been no unfairness in the hearing which could amount to a material procedural irregularity.

## Jurisdiction

*ESS Support Services LLP v Pabani & Compass Group plc (2016) Morning Star, April 29*

P, a British citizen living in Britain, was offered a job with ESS, a limited liability partnership based in Kazakhstan. ESS was a wholly-owned subsidiary of Compass, a Dutch company owned through a chain of companies by Compass Group International plc. P's contracts stated that Kazakhstan would be his host country and Britain his home country. P was effectively based in Kazakhstan. In 2013 he was dismissed and complained of unfair dismissal. The ET found that the various employment contracts contradicted each other and there had been a contractual disguise. P was employed by ESS and there was a sufficiently strong connection with Britain for the ET to have jurisdiction. He did not have a contract with Compass. ESS appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The ET had fundamentally misconstrued the contracts.

3. Kazakh law applied.

4. 'Sufficiently' for the purposes of jurisdiction meant 'sufficient to displace that which would otherwise be the position'.

## Jurisdiction

## Sufficiently close connection

*Jeffery v The British Council (2016) Morning Star, October 14, EAT*

J, a UK citizen, was employed by BC abroad for many years. His contract stated that it was governed by British law, his salary was paid in sterling, he was entitled to membership of the Civil Service Pension Scheme and his employment was pensionable. His salary was subject to a notional deduction for UK income tax. The teaching centre for which he was responsible was closed. He resigned and brought a number of claims in the employment tribunal. The employer argued that the tribunal had no jurisdiction to hear the claims. The tribunal

dismissed the claims on the basis that J's place of employment was abroad. J appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. J had shown a sufficiently close connection with Great Britain and British law. There was a quite exceptional degree of connection.

3. The tribunal judge had failed to carry out in nay structured way the exercise of looking at the factors as a whole.

## Procedure

## Disabled claimant

*Galo v Bombardier Aerospace UK [2016] IRLR 703, Northern Ireland Court of Appeal*

G suffered from Asperger's syndrome. He was dismissed for gross misconduct and complained of unfair dismissal and disability discrimination. He was not represented throughout the proceedings and failed to provide information as required by the tribunal. All his claims were struck out or dismissed. He appealed to the NICA.

**Decision**

1. The appeal was allowed.

2. The requirements of procedural fairness had not been met.

3. The case should have been recognised as one involving a person with a mental health disability. Inquiries should have been made as to whether reasonable adjustments were necessary.

4. There were clear indication of observed agitation and frustration on G's part. These should have put the tribunal on notice of the need to investigate the precise nature and diagnosis of his condition.

## Restricted reporting order

## Right to private life

*Fallows and others v News Group Newspapers Ltd [2016] ICR 801, EAT*

F complained of unfair dismissal and sex discrimination, including sexual misconduct. The employer applied for a restricted reporting and anonymity order. This was refused and the employer appealed. The respondent newspaper group intervened because it wished to report the proceedings without restriction. The employment judge made an order restricting reporting pending the appeal. The claimant's claims were settled and withdrawn. The newspaper group argued that the restricted reporting order no longer had effect. The employment judge revoked the order. The claimant and the employer appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. Anyone with a legitimate interest was entitled to apply for the discharge of a restricted reporting order. There was no time limit for this.

2. The question for the employment judge was whether there was a sufficient public interest in maintaining the open justice principle and right to freedom of expression to justify the resulting curtailment of the right to private and family life. The judge had been entitled to conclude that no privacy order was justified.

## Settlement agreement

## Power to set aside

*Glasgow City Council v Dahhan (2016) Morning Star, November 18, EAT*

D's claims of race discrimination were settled before they were heard. The claims were dismissed. D then informed the ET that he had lacked capacity to instruct his solicitor and to make decisions at the time the settlement was agreed. He asked for the ET judgment to be reconsidered. The ET set the judgment aside. The employer appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. Tribunals have the power to ensure that purported settlement agreements are valid. They can set aside agreements involving an absence of consent by one of the parties because of misrepresentation, economic duress or mistake.

3. This power includes the power to set aside an agreement on the ground of invalidity if one of the parties did not have the requisite capacity to enter into it at the time of signing.

## Time limit

## Extension of termination date

*Wallace v Ladbrokes Betting and Gaming Ltd UKEAT/0168/15/JOJ*

W resigned in writing from her job. The resignation letter was unambiguous and unequivocal. She complained of unfair constructive dismissal. The ET ruled that the claim was out of time. W appealed, arguing that correspondence and discussions with her employer meant that the employer had agreed to extend her notice period for 3 weeks, which meant that the claim was in time.

**Decision**

1. The appeal was dismissed.

2. Once W had unequivocally resigned, she could not unilaterally withdraw or extend her notice period. There had been no agreement to withdraw the notice of termination.

## Time limits for claims

## Discretion of tribunal

*Rathakrishnan v Pizza Express Restaurants (2015) UKEAT/0073/15/DA*

R, a diabetic employed by P, was dismissed for breaches of food safety procedures. He complained of disability discrimination. This complaint was brought 17 days outside the three-month time limit. He applied for an extension of time on the basis that the claim was late because he feared being victimised because he was still employed by P. The ET refused to extend the time limit. R appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. A multi-factor approach was required in the ET exercising its discretion to extend time limits.

3. In the present case, considerations of the balance of prejudice caused and the potential merits of the claim were relevant factors. The ET had not taken these factors into account.

## Time limits for claims

## General principles

*O'Connor v Bar Standards Board (2016) The Times, October 7, CA*

B, a black practising barrister, was subjected to disciplinary proceedings by the Bar Standards Board (BSB). A disciplinary tribunal found five charges proved against her. She successfully appealed to the Visitors to the Inns of Court. She issued proceedings against the BSB on the basis that it had infringed her right to a fair trial by discriminating against her in grounds of race. The defence of the BSB was that the proceedings were time-barred in that they had been brought more than one year after the act complained of. At first instance, the defence succeeded. B appealed to the Court of Appeal.

**Decision**

1. The appeal was dismissed.

2. It was incumbent on a party, especially when that party was a legal professional, who wished the court to grant an extension of time to make that clear to the court and the other parties and to set out the grounds on which the extension was sought. It was not for the court to consider whether to extend time on its own initiative.

## Wasted costs order

*Isteed v London Borough of Redbridge (2016) UKEAT/0442/14/DA*

A claimant complained of unfair dismissal and age discrimination. His solicitors lodged the claim out of time. Following a protracted series of hearings, the ET dismissed the claims on the basis that it had no jurisdiction. The respondent applied for a £35,000 wasted costs order against the solicitors. The ET made the order and the solicitors appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The ET had failed to adequately deal with causation and the justice of the order.

3. Given the fluid and changing nature of the original application, the solicitors had not had proper or adequate notice of its basis.

4. The comments and conduct of the ET judge gave rise to the appearance of bias.

# 2015 ET Cases

## Anonymity order

*Anakaa v Firstsource Solutions Ltd [2014] IRLR 941, Northern Ireland Court of Appeal*

Statute reference: Human Rights Act 1998, s.6

A complained of disability discrimination. He applied for a restricted reporting order on the basis that his teenage daughter shared his unusual surname and that the evidence in the matter might cause her embarrassment. The industrial tribunal granted interim reporting orders until its decision had been issued. It refused to grant permanent anonymity. A appealed to the NICA.

**Decision**

1. The appeal was dismissed.

2. The interest of the public in knowing what is alleged in tribunals and what decisions tribunals reach is a substantial one.

3. The tribunal had been correct to conclude that it could have made an order to protect A's daughter but it had also been correct to conclude that anonymisation was not required.

## Anonymity order

*BBC v Roden [2015] IRLR 627, EAT*

Statute reference: European Convention on Human Rights, Arts.6,8,10

Allegations of serious sexual assaults were made against a claimant. These were not directly in issue but would be brought as evidence. The ET granted an anonymity order. The respondent applied to have the order varied or set aside. The application was refused. The respondent appealed to the EAT.

**Decision**

1. The appeal was allowed and the order was set aside.

2. The default position in the public interest is that judgments of tribunals should be published in full, including the names of parties. That principle promotes confidence in the administration of justice and the rule of law.

3. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle.

4. Withholding a party's name is an obvious derogation from this principle which requires cogent justification for its restriction.

5. The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear.

## Chair sitting alone

*Birring v Rogers and another (trading as Charity Links) [2015] ICR 1001, EAR*

An ET judge sitting alone dismissed a claim of unfair dismissal and a claim under section 146, *Trade Union and Labour Relations (Consolidation) Act 1992*, of detriment suffered because of trade union activities. The claimant appealed to the EAT.

**Decision**

1. A complaint under section 146 could not be heard by a judge sitting alone.

2. Where a claim which can be heard by a judge sitting alone is combined with one which cannot, the ET judge must consider whether both claims should be heard by a full tribunal or whether there should be a split hearing.

## Closed material procedure

*Kiani v Secretary of State for the Home Department [2015] IRLR 837, Court of Appeal*

Statute reference: Employment Tribunals Rules of Procedure 2004, Sched.1, r.54(2)

K was a British Pakistani Muslim employed as an immigration officer by S. He was suspended, had his security clearance withdrawn and was dismissed without explanation. He complained of race discrimination and unfair dismissal. The employer argued that decisions had been taken for reasons of national security and that K had been dismissed because he no longer had security clearance. The ET ruled that K and his representatives would be excluded from secret parts of the hearings, that secret material would not be disclosed to K and that a special advocate should be appointed. K applied for the gist of the secret evidence to be

disclosed to him. The ET refused. K appealed to the EAT, which dismissed his application. K appealed to the Court of Appeal.

**Decision**

1. The appeal was dismissed.

2. EU law did not require that an excluded person always had to be provided with a core minimum of relevant material about secret material.

3. The court had to strike an appropriate balance between the requirements flowing from state security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary.

4. The ET had taken account of the closed material sufficiently to enable it to reach the conclusion that it had formed the very essence of the case.

## Costs

*Flint v Coventry University [2015] ICR Digest, D1, EAT*

Statute reference: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch.1, r 41

F was refused an adjournment and withdrew his ET claim. The tribunal dismissed the claim and ordered him to pay £9000 costs, having considered his ability to pay. F appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The means of a party to pay costs should be considered at two stages: first, if an award should be made, and second, the amount of the award.

3. It was not mandatory for a tribunal to consider means.

4. The tribunal had failed to take into account relevant matters which went to the ability to pay. Alternatively, it had taken into account irrelevant matters or simply reached a perverse conclusion on the evidence before it.

5. The case would be remitted to the tribunal.

## Costs

*Oni v Unison [2015] ICR Digest D17, EAT*

Statute reference: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Sch 1, r 76

O's claims to the ET were dismissed. The ET ruled that, by pursuing her claims after a deposit order had been made, she had acted unreasonably and was ordered to pay the whole of the respondent's costs as assessed by the county court. O appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The ET had not considered whether, despite O's unreasonable behaviour, it was appropriate and proportionate to make the costs order sought, leaving aside means, but by reference to all the circumstances of the case.

3. Costs orders warranted detailed and reasoned consideration.

4. Costs were compensatory and not punitive.

5. The fact that a party was unrepresented was a relevant consideration.

6. The means of a party might be considered twice: in whether to make an award and in deciding how much was to be awarded.

7. The tribunal had a broad discretion in making an award of costs but it had to be exercised judicially and reasons ought to be given.

## Costs

## Payment of fees

*Old v Palace Fields Primary Academy (2014) Morning Star, December 19, EAT*

O was employed by P as a teacher. In 2012 she became aware of an insulting image of a special needs pupil, written by another pupil. Evidence was given that she called a number of pupils to look at the image. She was dismissed for gross misconduct. She complained of unfair dismissal. The ET rejected the complaint. She appealed to the EAT.

**Decision**

Her appeal to the EAT succeeded on the issue of procedural unfairness. The EAT did not make an order for the repayment of the £400 issue fee and ordered the school to pay half the £1200 hearing fee. This was because it had a wide discretion as to whether or not to order payment of the fees, and because O had been partly successful, in that the matter had been remitted to the ET.

Note: Rule 76 of the Employment Tribunal Rules states that a party may be ordered to pay costs where the receiving party had paid a tribunal fee for a claim and has wholly or partly won the claim.

## Costs

## Wasted costs

*Hafiz & Haque Solicitors v Mullick and another [2015] ICR 1085, EAT*

Statute reference: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Sch I, r 80(I)

A claimant's claims of race discrimination and unfair dismissal were dismissed. The employers applied for a wasted costs order against the claimant's solicitors on the basis that the claimant's schedule of loss, prepared by his solicitors, had been greatly exaggerated and had not disclosed that the claimant had found a new job with increased pay. The ET found that the raising of the claimant's expectations amounted to an improper, unreasonable or negligent act which had led the claimant to refuse a reasonable offer of settlement. The solicitors appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. A tribunal had to be satisfied that the representative had been guilty of an improper, unreasonable or negligent act or omission and that costs were incurred as a result of that act.

3. By concluding that the probable reason for rejecting the offer of settlement was that the claimant had been misled by his solicitors, the judge had failed to apply a no room for doubt approach and had speculated to an impermissible extent.

## Dismissal of claim

*Drysdale v Department of Transport (Maritime and Coastguard Agency) [2015] ICR Digest, D2, CA*

Statute reference: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, reg 3

D complained of unfair constructive dismissal. His case was presented by his wife as lay representative. On the second day of the hearing she withdrew the claim. The tribunal dismissed the claim and made a costs order. D's appeal to the EAT was dismissed. He appealed to the Court of Appeal against the dismissal.

**Decision**

1. The appeal was dismissed.

2. The sole ground of appeal was whether the tribunal had failed to take adequate steps to ensure that the claimant had taken a properly considered decision to withdraw the claim, given that neither the claimant nor his wife were legally qualified.

3. The evidence of what happened at the hearing did not justify the conclusion that the tribunal should have realised that the decision to withdraw was taken in the heat of the moment, the result of a combination of frustration, anger, tiredness and diabetes.

4. There were no grounds for holding that the tribunal failed to take adequate steps to ensure that a properly considered decision had been taken to withdraw the claim.

## Dismissal of claim

*Brindle v Fylde Motor Co Ltd [2015] ICR Digest, D4, EAT*

Statute reference: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch.1, r 27

B failed to attend the hearing of her unfair constructive dismissal claim. The employment judge dismissed the claim based on the ET1 and the respondent's documents. A bundle of documents, which included the claimant's witness statement, was not adduced. The claimant appealed to the EAT, arguing that the judge had not considered the bundle, which he knew existed.

**Decision**

1. The appeal was dismissed.

2. The employment judge was not obliged to consider material which neither party had made available to him. Neither party had provided the bundle to the judge.

## Early conciliation

*Ellis v Brighton and Hove Golf Club ET 2301658/2014*

E was suspended in January 2014. She was given a final warning in April 2014 and warned of possible redundancy. On May 22 she lodged an ACAS early conciliation notice. On June 16 her appeal against the final warning was dismissed. On June 22 an early conciliation certificate was issued. On June 24 she was dismissed. On September 8 she started proceedings for unfair dismissal. The employer applied to have the claim struck out on the basis that her certificate could not cover later proceedings.

**Decision**

1. The application was refused.

2. The application to ACAS is limited to names and addresses of parties. There is no reference to the nature of the complaint.

3. E had been advised by ACAS that there was no need to submit a fresh notification.

## Early conciliation

*Joseph v Royal College of Surgeons of England ET 2202074/2014*

J complained of discriminatory harassment. He was dismissed with effect from August 7. On October 22 he lodged claims of unfair dismissal, age and race discrimination. His notifications to, and discussions with, ACAS, did not mention discrimination. The employer argued that the claims should be struck out because they had not been subject to early conciliation.

**Decision**

1. The application to strike out would not be granted.

2. The statutory requirement was limited to the details of the potential parties.

3. A narrow interpretation would frustrate the aims of the scheme by requiring conciliation officers to give evidence in tribunals as to what had and had not been raised with them.

## Early conciliation

*Cranwell v Cullen UKEATPAS/0046/14*

C complained of sexual harassment. When early conciliation became an issue, she could not face her alleged abuser and did not approach ACAS. She argued that she had an exemption. The ET judge struck out her claim for lack of an early conciliation certificate. C appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The list of exemptions in regulation 3(1) of the 2014 regulations is exhaustive.

3. A claimant does not have to confront an alleged persecutor.

4. In similar circumstances a claimant should explain the situation to the conciliation officer. No claimant can be forced to conciliate.

5. A litigant in person could easily make the mistake of thinking that they had to enter into conciliation and deal with the alleged harasser.

## Employment Appeal Tribunal procedure

*Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960, EAT*

W was employed by N as a staff nurse. She complained of stress caused by bullying and harassment by colleagues. From February 2007 until May 2008 she was on sick leave. She then returned to work on a temporary assignment in a different department until May 2011. She then went on long term sick leave suffering from stress, panic attacks and depression. In June 2012 she was dismissed on grounds of incapacity. She complained of disability discrimination. The ET found that she had been disabled from February 2007 until May 2008 and after July 2011 but there had not been less favourable treatment or a failure to make reasonable adjustments. W appealed to the EAT on the basis that the ET had failed to consider whether she should have been treated as disabled from May 2008 until July 2011, because of the likelihood of her disability recurring. N cross-appealed against the ET's apparent finding that stress alone could amount to a disability.

**Decision**

1. Where a potential applicant believed that there had been a material omission by the ET to deal with a significant issue or to give adequate reasons, the proper course was not to lodge a notice of appeal but to go back to the ET and ask that the omission be repaired. It was the duty of advocates to adopt that course.

2. The cross-appeal was dismissed. The issue on the cross-appeal did not qualify as a decision and did not raise an issue of general interest. There was no jurisdiction to entertain it.

## Employment Appeal Tribunal procedure

*Martineau and another v Ministry of Justice [2015] ICR 1122, EAT*

Statute reference: Employment Tribunals Act 1996, s.21(1); Employment Appeal Tribunal Rules 1993, r.3(7)

Part-time fee-paid immigration judges brought claims under the part-time workers regulations. A lead case was selected and the other claims were stayed. The lead case was dismissed. Two judges, whose claims had been stayed, appealed to the EAT.

**Decision**

1. There was no reason why the EAT should decline to hear the appeal. The sensible course was to do so rather than requiring the appellants to apply for a lift of the stays, obtain a decision and then appeal.

2. The appeal was allowed and the matter referred to the same tribunal to consider the issue of less favourable treatment.

## Fees

*Look Ahead Housing and Care Ltd v Chetty and Eduah (2015) Morning Star, January 23, EAT*

C and E were workers at a charity which provided residential facilities for people suffering with mental health problems. They were dismissed for breaches of procedure and complained of race discrimination. Their claims succeeded and the employer appealed to the EAT.

**Decision**

1. The appeal succeeded in part.

2. C and E would not be ordered to pay part of the employer's fee for bringing the appeal. The employer could have asked the tribunal to reconsider the position or could have approached C before bringing an appeal.

3. When an appeal is rejected entirely, the appellant will not be able to recover their fees.

4. If an appeal is partly successful, the amount which will be recovered depends upon the particular facts.

## Fees

*R (on the application of Unison) v Lord Chancellor (No.3) [2015] IRLR 911, CA*

Unison's challenge to the introduction of employment tribunal and EAT fees failed.

- It is not objectionable in principle for the state to charge a fee for access to the courts.
- There should be a proper balance between the right to charge such a fee and the right of a claimant to bring a claim before a court.
- The focus is on what a claimant can afford to pay.
- The effect of introducing fees had been to deter a very large number of potential claimants.
- There was no reason in principle why well-constructed cases of notional individuals could not have been used to assist in providing that the fees would have been realistically unaffordable for at least some typical claimants.
- There was no indirect discrimination. The disproportion had been justified. It was legitimate to fix the fees by reference to the service provided.
- There had not been a breach of the public sector equality duty. The introduction of fees might have had a greater impact on people with protected characteristics, but this impact was likely to have been cancelled out by the availability of remission.
- The new regime would not deter claimants with good, or in any event arguable, claims from bringing them to the tribunal if they could not be resolved otherwise.

## Hearing

## Member alleged to have fallen asleep

*Elys v Marks and Spencer plc and Others [2014] ICR 1091, EAT*

E complained of unfair dismissal and discrimination. Her complaints were dismissed and she applied for a review, alleging that a lay member appeared to have fallen asleep. The ET refused the application. It stated that it should itself decide whether there had been a procedural irregularity and it accepted the member's explanation that he had been taking medication and had been alert except for a few seconds. E appealed to the EAT.

**Decision**

1.The appeal was dismissed.

2. Having regard to all the material evidence, including the medical evidence, any observer would conclude that there had been no improper risk of inattention and no procedural irregularity sufficient to vitiate the decision.

## Order to dismiss or strike out

*Harris v Academies Enterprise Trust [2015] IRLR 208, EAT*

Statute reference: Employment Tribunals Rules of Procedure 2013, Sched 1, r.37

H suffered from anxiety and depression. He complained of discrimination, harassment and victimisation on the part of AET and its employees. The respondents, through their solicitor, failed to comply on time with directions to serve 13 witness statements. H asked the ET to make an unless order and to strike out the ET3. The ET refused to make the order on the basis that the fault had been that of the solicitors, that there could be a fair trial and it would, on balance, cause the respondents greater prejudice to be at risk of unjustified stigma than the prejudice would be to the claimant if strike-out was refused. H appealed to the EAT.

**Decision**

1. An exercise of discretion cannot readily be challenged on appeal.

2. The CPR do not apply to employment tribunals.

3. The fault had been that of a solicitor who had lost control of the action.

4. The appeal was dismissed.

## Reasons

*Eyitene v Wirral Metropolitan Borough Council [2014] EWCA Civ 1243*

E complained of race and disability discrimination. His complaints were dismissed. He appealed to the EAT, submitting that it was wrong in principle that the lay members of the ET did not see and could not have approved the written reasons and that therefore the decision had not been a properly made decision of the whole tribunal. The EAT dismissed the appeal, stating that the practice was for the employment judge to consult lay members and to agree findings and reasons before the judgment and reasons were given. The fact that lay members did not receive a copy of the written reasons did not provide any support for the proposition that they did not associate themselves with the judgment and reasons. E appealed to the Court of Appeal.

**Decision**

1. The appeal was dismissed.

2. Although it was the practice in some tribunals for all members to approve a written decision in draft before it was finalised, this procedure was not necessary.

3. What mattered was that the decision and reasons should truly record the conclusions and reasoning of all the members of the tribunal.

## Remission of fees

*Deangate Ltd v Hatley and Others*

Statute reference: Employment Tribunals and Employment Appeal Tribunal Fees Order 2013

Three claimants presented claims of unfair dismissal one day before the expiry of the time limit, adding under the heading 'Additional information': 'I have sent my application for fee remission by post'. The claimants supplied the relevant information to the ET within seven days in accordance with the guidance on the tribunal website. The ET accepted the claims and the respondent appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The fact that each claimant made a choice between fee payment and application for remission when submitting his claim was sufficient to be an 'application'. It followed that the "application" accompanied the claim.

## *Res judicata*

*Nayif v High Commission of Brunei Darussalam [2015] IRLR 134, CA*

N was employed by HC as a chauffeur. He complained of race discrimination to an employment tribunal. He sought compensation for psychiatric injury. The complaints were dismissed as being out of time. The tribunal did not in any way engage with the substantive merits of the claim. N then issued proceedings in the High Court in respect of the same psychiatric injury. HC applied to the High Court for the claim to be struck out, arguing issue estoppel. The High Court struck out the claim. N appealed to the Court of Appeal.

**Decision**

1. The appeal was allowed.

2. The employment tribunal hearing had not been enough to have brought the principle of *res judicata* into play.

3. There had been no actual adjudication of any issue. The tribunal hearing had been on the question of jurisdiction.

## Restricted reporting order

*EF and another v AB and others [2015] IRLR 619, EAT*

Statute reference: European Convention on Human Rights, Arts. 8,10

This case involved allegations of a sexual nature. The issue was whether the ET should have issued an extended restricted reporting order to cover the claimant and his wife. The ET ruled that the order should not be made permanent because the interests of employees at the claimant's company, in knowing the full story, outweighed the claimant's Article 8 rights to respect for family and private life. The claimant appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The ET had not properly carried out the assessment of the comparative importance of Article 8 and Article 10 (the right to freedom of expression).

3. The matters taken into account by the ET were not properly categorised as matters of public interest. It had referred to "the general human interest in sex and money involving relatively rich people".

4. All sexual conduct had taken place in circumstances in which there had been a reasonable expectation of privacy.

## Rules of evidence

*East of England Ambulance Service NHS Trust v Sanders (2015) Morning Star, March 6*

S complained of disability discrimination. The issue of whether she was disabled was heard on the first day of what was set down for a six-day hearing. S gave evidence about her medication. The ET did some research on the Internet in relation to her medication. The employer applied to the ET for it to reuse itself on the basis that it had exceeded its role by investigating evidence which neither party had asked it to do. The ET refused to recuse itself. The employer appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. Although tribunals are allowed to regulate their own procedures and to conduct hearings in any way they think is fair, they cannot investigate evidence nor make enquiries about evidence which was not volunteered by either party to the case.

## Striking out

*Harris v Academies Enterprise Trust and Others [2015] ICR 617, EAT*

Statute reference: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Sch.1, rr. 2, 37(1)

H was a teacher who suffered from anxiety and depression. He brought claims of public interest disclosure and disability discrimination against his employer. The ET gave directions for the exchange of witness statements by 12 days before the hearing. The respondents failed to deliver all 13 witness statements before the hearing. H applied for the response to be struck out. The application was refused. The ET stated that, although the conduct of the case by the respondents' solicitors had been unreasonable, intentional and contumelious, there was no evidence that the solicitor had been acting on instructions. As a strike-out would probably result in a judgment against the respondents, the prejudice to them outweighed the prejudice to the claimant. H appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The power to strike out was not to be too readily exercised.

3. A strike out had to be a proportionate response to unreasonable conduct which had either taken the form of deliberate and persistent disregard of required procedural steps or made a fair trial impossible.

4. In many cases an unless order would be granted before there was a strike out.

5. The ET judge had correctly applied the law.

## Taxable payments

*Moorthy v HM Revenue and Customs (2014) Morning Star, February 13, First-Tier Tax Tribunal*

M complained of unfair dismissal and age discrimination. The claim was settled for an ex gratia payment of £200,000. The agreement did not stipulate that part of the payment was to compensate M for injury to feelings. When he completed his tax return, M claimed that the payment was not taxable because it had been made to settle a discrimination claim. HMRC argued that it was taxable as a termination payment and that only £30,000 was exempt. It added a further £30,000 to cover compensation for injury to feelings.

**Decision**

The payment had been made on termination of employment and the whole payment, less £30,000, was liable to tax.

## Territorial jurisdiction

*R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2015] EWHC 1953, Administrative Court*

H was an Afghan national who had worked for the British forces in Afghanistan. He sought to complain of race discrimination.

**Decision**

1. H was neither a peripatetic nor an expatriate employee. He could only qualify if he had a sufficiently close connection with British employment law.

2. He had no such connection. It was difficult to see how that could be the case with a foreign national working in a foreign country, albeit on behalf of the British government.

## Territorial jurisdiction

*Olsen v Gearbulk Ltd [2015] IRLR 818, EAT*

O was a Danish national employed by a Bermudan global company. His employment contract was governed by Bermudan law. He was based in Switzerland but carried out much of his

work in Britain. He organised his work in Britain so as not to exceed 90 days a year to avoid British tax. His rented accommodation in Britain was not in his name. He had declined a contract governed by British law. The ET found that he could not complain of unfair dismissal. He appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. 'Close connection' is a question of fact for the ET and can only be challenged on appeal if the decision was perverse.

## Time limits

*Higgins v Home Office and another [2015] ICR Digest D19, EAT*

Statute reference: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Sch.1, r 12(1) (b)

The ET rejected a claim of constructive unfair dismissal brought six years after the date of termination of employment by H, who had a history of mental illness. The ET stated that this was an abuse of process: the claim had been brought outside the time limits, the remedies sought were not those which a tribunal could award and H did not appear to be claiming unfair dismissal. H appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The procedure had been carried out without a hearing and without representations from the claimant.

3. The overriding objective required the ET to have regard to any disability which it knew of.

4. The ET judge had taken into account wholly mistaken factors.

## Written reasons incorrectly addressed

*Carroll v Mayor's Office for Policing and Crime [2015] ICR 835, EAT*

Statute reference: Employment Appeal Tribunal Rules 1993, r 3

C and a colleague complained of unfair dismissal. The claims were rejected by the ET which sent written reasons on August 15, 2013. These did not reach the claimant because they were incorrectly addressed. In October 2013 the claimant's solicitor told the ET that the written reasons had not been received. A further copy was sent on January 22, 2014. On March 3, 2014, the claimant lodged an appeal to the EAT. This was rejected on the ground that the documentation was incomplete. A further appeal was lodged on March 11, 2014. This was rejected as being out of time. C appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. Written reasons were 'sent' when they were physically sent out, even if incorrectly addressed.

3. While the delay might have been capable of being regarded as reasonable up to October 2013, after that C and his legal advisers had failed to act with extreme diligence. It would not be right to exercise the discretion to extend time in his favour.

## 2014 ET Cases

### Costs

### In-house lawyers

*Ladak v DRC Locums Ltd [2014] IRLR 851, EAT*

Statute reference: Employment Tribunal Rules of Procedure 2004, rule 38(3)

L complained of unfair dismissal. His claim was struck out and the issue for the ET was whether he should be ordered to pay the employer's costs in respect of in-house lawyers. The ET made a costs order. L appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. Legal costs incurred in litigation by the use of in-house lawyers are as much recoverable as are the costs incurred by employing independent solicitors.

3. It is a normal and permissible use of language to describe the costs of an in-house legal department as a charge or expense upon the employer.

### Costs

### Insurance policy

*Mardner v Gardner and others UKEAT/0483/13/DA*

M was employed by G and others who were a team of volunteers which managed a charity. M was dismissed and complained of unfair dismissal. The matter was settled by a consent order and M applied for costs. The ET refused the application on the basis that G and others were volunteers and M had been funded by an insurer and was not personally out of pocket. M appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The fact that G and others were volunteers was a matter within the discretion of the ET judge.

3. The fact that M had taken out an insurance policy was irrelevant. The rules did not identify the means of the receiving party as a potentially relevant question.

4. It would be wrong if the respondents avoided the costs consequences of their unreasonable conduct because M had taken out the policy.

5. M was also awarded his appeal fee of £1600.

## Deposit order

*Stadnik-Borowiec v Southern Health and Social Care Trust [2014] NICA 53 (Court of Appeal in Northern Ireland)*

Statute reference: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005, rule 20

S-B was employed by SH. Her employment was terminated for gross misconduct. She brought proceedings in the industrial tribunal based on a number of grounds. She was ordered to pay a deposit of £500 as a condition of being permitted to take part in the proceedings She borrowed the money to pay the deposit. S-B then brought further proceedings with the same allegations but adding 15 additional respondents. The industrial tribunal then ordered her to pay £200 in respect of each respondent, totalling £3,000. S-B appealed to the Court of Appeal in Northern Ireland.

**Decision**

1. The appeal was allowed and the deposit orders quashed.

2. A £200 deposit order would be substituted for the first order.

3. The first order had not referred to SB's financial resources and had not stated how this should be apportioned between the claims.

4. The second order totalled six times the maximum deposit payable. The first order had not been taken into account.

# Employment Appeal Tribunal

## Costs

*Horizon Security Services Ltd v Ndeze and another [2014] IRLR 854, EAT*

Statute reference: Employment Appeal Tribunal Rules 1993, rule 34A(2A)

N brought proceedings against PCS. PCS argued that N's employment had TUPE transferred to H. The ET found that there had been a TUPE transfer. H appealed to the EAT and paid £1600 in fees. The EAT upheld the appeal. H applied for an order for costs.

**Decision**

1. PCS was ordered to pay £1600 in costs to H.

2. The EAT is generally a no-costs jurisdiction.

3. Where an appeal has been allowed, the EAT has a discretion to order the payment of a sum no greater than the fees incurred by the appellant.

4. The general expectation must be that a successful applicant will be entitled to recover the sums paid from a respondent which actively sought to resist the appeal.

## Review of decision

*Crown Prosecution Service v Fraser [2014] Eq.L.R. 535, EAT*

Statute reference: Equality Act 2010, s.29, Sched.3

F, who was unrepresented, suffered from a severe mental impairment. His claim of disability discrimination succeeded. Before the remedies hearing F wrote a number of bizarre letters to the ET. F was awarded a small sum for injury to feelings but no award was made in respect of personal injury in the absence of medical evidence. F applied for a review of the decision. This was allowed on the basis that F had not been able to conduct the proceedings in a rational manner. The employer appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The ET had been entitled to conclude that F's impairment might have influenced his ability to conduct the proceedings in a rational manner.

3. The Equal Treatment Bench Book provided helpful information for judges about the problems experienced by litigants with mental disabilities.

## Strike out

## Unless order

*Mace v Ponders End International Ltd [2014] IRLR 697, EAT*

Statute reference: Employment Tribunals Rules of Procedure 2004, rule 13(2)

M brought proceedings for unfair dismissal. The ET ordered him to provide disclosure of all relevant documents and unless he did so, his claim would be struck out. The deadline for this order passed and the claim was struck out. M appealed to the EAT.

**Decision**

1. The appeal was allowed.

2. The unless order had been unclear, ambiguous and incapable of taking effect.

3. The party who has to comply with the unless order should be in no doubt what is necessary for compliance. This is all the more important where many persons are unfamiliar and may misunderstand legal processes and terminology.

4. The normal meaning of disclosure would have been the provision of a list. To a lay person the order would simply have been unclear.

## Withdrawal of claim

*Drysdale v Department of Transport [2014] IRLR 892, CA*

Statute reference: Employment Tribunals Rules of Procedure, rule 25

D complained of unfair dismissal. He was represented at the ET by his wife. She became upset when she was told that the case would be postponed as part-heard. She made an oral application to withdraw the claim. Counsel for the respondent made an oral application for the claim to be dismissed. This was granted and an order was made for D to contribute to the respondent's costs. D appealed to the EAT which dismissed the appeal. D then appealed to the Court of Appeal.

**Decision**

1. The appeal was dismissed.

2. The ET had not failed to take adequate steps to ensure that D had taken a properly considered decision to withdraw his claim.

3. The ET did not have a duty to enquire into the health of D's representative. She had authority to withdraw the claim and the ET was entitled to determine the question of dismissal without a written application.

4. The determination of the appropriate level of assistance or intervention in relation to litigants is a matter for the judgment of the tribunal.



# 2013 ET Cases

## Case management

## Selection of complaints

*Mckinson v Hackney Community College [2011] Eq LR 1114, EAT*

M complained of unfair dismissal, victimisation and race discrimination. At a case management hearing, M was ordered to identify no more than three incidents of victimisation, no more than six instances of discrimination and details of every protected act relied on for the victimisation claim. M submitted that the order effectively struck out a part of his claim and was contrary to natural justice.

**Decision**

1. The judge had been entitled to ask M to identify the exact nature of his complaints. It was in M's and H's interests to do so. The claim form was in narrative form and was very long.

2. The judge had been wrong to limit the number of instances of discrimination and victimisation which could be considered. There was no power to require a claimant to self-select which of a number of complaints which he would pursue at a final hearing.

# Compensation

## Death in service benefit

*Fox v British Airways plc [2013] ICR 51, EAT*

F's son died three weeks after he had been dismissed by BA because he was physically unfit for work. Under BA's pension scheme, if he died when employed, he would have received a death in service benefit of three times his salary. F claimed unfair dismissal on behalf of the deceased. The employment tribunal found that the claim for compensation did not include the death in service benefit, which was a loss suffered by the beneficiaries and not by the deceased. F appealed to the EAT.

**Decision**

1. When F was dismissed he lost his contractual entitlement to the benefit of having a sum paid to others on his death. This was a loss of substance on which a money value could be placed even though F could never enjoy the benefit himself.

2. The proper compensation for a death in service benefit would be a sum which, at the point of loss, would secure payment on death of the sum agreed to be payable.

3. Given that in the present case such a policy would have had to pay out within 25 days, the cost would not have been less than the sum itself.

# Costs

## Apparent bias

*Oni v NHS Leicester City [2013] ICR 91, EAT*

O complained of constructive unfair dismissal, race discrimination and victimisation. The tribunal dismissed the complaints. It stated that it had serious concerns about the genuineness of her complaints and criticised her conduct of the proceedings as unreasonable. It ordered costs against her and stated that she had the means to pay. The amount was expected to be substantial. X appealed to the EAT, arguing that the tribunal should have recused itself on the grounds of apparent bias because its remarks on liability were closely related to the question of costs and the tribunal was not justified in concluding that O had the means to pay costs without any enquiry.

**Decision**

1. It was in the interests of justice that the tribunal which dealt with liability should also deal with costs.

2. The mere fact that the tribunal expressed itself in terms adverse to a claimant while giving reasons for the liability judgment was not a ground for recusal.

3. The tribunal should not have expressed itself in a way which suggested that it had already made up its mind, prior to hearing argument, on issues which only arose if an application for costs was made.

4. A fair-minded and informed observer would have concluded that there was a real possibility that the tribunal had pre-judged the question of costs.

5. The tribunal's finding that O had the means to pay an award of costs could not stand. The tribunal had material before it that she only had a state pension and it did not state that it might make any contrary finding.

6. The appeal was allowed.

## Disability Discrimination: duty to make reasonable adjustments

## Pre-hearing negotiations

*Gallop v Newport City Council [2013] IRLR 23, EAT*

G, an employee of NCC, complained to his employer of stress-related symptoms. He was referred to the employer's occupational health advisers who advised the employer that G was suffering from a stress-related illness directly related to his work. G raised a grievance, informing the employer that he had been diagnosed with depression. An OH doctor stated that the Disability Discrimination Act (DDA) did not apply to G. Unsuccessful attempts were made to reach a compromise agreement. NCC dismissed G for gross misconduct. He complained of unfair dismissal and disability discrimination.

The employment tribunal dismissed the disability discrimination complaint on the basis that NCC had not had the necessary knowledge of G's disability during his employment. It found that G had been unfairly dismissed and took the failure to reach a compromise agreement into account in assessing the amount of the compensation award. G appealed to the EAT.

**Decision**

1. NCC had been entitled to rely on advice from OH that G did not come within the scope of the DDA. The conclusion that NCC did not have the necessary knowledge was a permissible finding.

2. It had been manifestly unfair for the tribunal to have taken into account the failure to reach a compromise agreement in assessing the award for unfair dismissal. Employment tribunals must not enquire into pre-hearing negotiations between the parties before them where no agreement is reached and where there has been no clear and unequivocal waiver of privilege by the parties.

# Evidence

## Covert recordings

*Vaughan v London Borough of Lewisham (2013) Morning Star, May 31, EAT*

V brought nine claims against her employer and colleagues. These included claims of discrimination, harassment, victimisation, unfair dismissal and whistleblowing. The tribunal considered, at a pre-hearing review, whether she should be allowed to bring in evidence 39 hours of covert recordings which she had made of conversations between herself and her managers or colleagues. The tribunal refused the application, stating that because V would only agree to the recordings being independently transcribed subject to certain conditions which were unacceptable because there was a risk that the recordings had been tampered with. Further, V had not given specific reasons about the relevance of the recordings. The time and cost involved in considering the recordings would be disproportionate. V appealed to the EAT.

**Decision**

1. It was not possible to decide whether the tapes were relevant without hearing them or reading the transcripts.

2. Although the practice of making secret recordings was very distasteful, it was clear from case law that covert recordings could not be refused in evidence simply because the way in which they were taken might be felt to be discreditable.

3. If V made a more focused application to the tribunal, producing the tapes and transcripts on which she wanted to rely, with an explanation of why they were relevant, she might get a different result.

# Evidence

## Judicial proceedings immunity

*Singh v Reading Borough Council [2013] IRLR 444, EAT*

S complained of race discrimination. Witness statements were exchanged before the hearing. S stated that one of the witness statements was false. She resigned and complained of constructive unfair dismissal on the basis of this alleged falsity. The tribunal ruled that the contents of the witness statement attracted absolute judicial proceedings immunity and the allegation could not be relied upon in support of the complaint of constructive dismissal. S appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. Parties to legal proceedings, their advocates and the judge are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said and done falsely and maliciously.

3. The public policy ground underlying this immunity is the protection of the judicial process.

4. Untruthful persons can be prosecuted for perjury or committed for contempt of court.

5. Judicial proceedings immunity applies to witness statements.

# Evidence

## Spent conviction

*A v B [2013] IRLR 434, EAT*

A, a man of British-Asian ethnicity, was convicted of kerb crawling in 2006. His conviction became spent in 2011. In 2011 he was dismissed by his employer on the basis that he had given female colleagues scores according to sexual characteristics. He complained of unfair dismissal and race discrimination. At the tribunal hearing, the employer sought to bring evidence of the kerb crawling conviction. The tribunal allowed this evidence to be brought. A appealed to the EAT.

**Decision**

1. The appeal was dismissed.

2. The evidence of the conviction was so important that the employer could not have a fair trial without it having been admitted.

3. The general rule, that spent convictions cannot be admitted in evidence, is subject to a number of exceptions. The critical question is whether justice can be done by admitting evidence of the conviction.

4. Article 8 of the European Convention on Human Rights allows the admission of evidence of spent convictions where not admitting it would prevent a party to litigation from having a fair hearing.

# Re-engagement

## Facts available at date order made

*Rembiszewski v Atkins Ltd (2013) Morning Star, January 25, EAT*

R complained of unfair dismissal on the basis that a redundancy scoring exercise had been unfairly applied to him because he had made a protected disclosure. His complaint was upheld and he applied for re-engagement at a remedies hearing in October 2010. The tribunal received further evidence from R and his employer and ruled in January 2011 that re-engagement would not be practicable because the employer did not have any suitable work for him. R appealed to the EAT. The employer submitted a cross-appeal arguing that re-engagement would not work because of a loss of trust and confidence.

**Decision**

1. The appeal was allowed.

2. The practicability of reinstatement or re-engagement is to be determined at the date it is to take effect. The tribunal had only referred to evidence given at the hearing in October 2010 and it seemed that it had not taken into account written evidence and submissions sent after that date.

## Strike-out powers

*Eastman v Tesco Stores Ltd UKEAT/0143/12*

E worked for Tesco as a customer assistant. She was granted a four-year career break. She understood that she could return to her job at the end of the break. Tesco refused to allow her to return. She complained of unfair dismissal.

At a pre-hearing review, the employment judge heard evidence from both parties. He found that there had been no agreement as to E's return and struck out the case on the basis that it had no reasonable chance of success. E appealed to the EAT, arguing that where the central facts are in dispute, the claim should be decided at a full hearing.

**Decision**

The employment judge was entitled to resolve a central, factual dispute at a pre-hearing review, having heard the evidence. He was entitled to find that there was no reasonable chance of success. The appeal was dismissed.

## Unfair dismissal

## Disciplinary procedure

*Davies v Sandwell Metropolitan Borough Council UKEAT/0416/10/DA*

D was a teacher. She was suspended following a number of incidents of inappropriate conduct during lessons. She was given a final written warning based on a single allegation of inappropriate conduct. At the disciplinary hearing, D sought to bring evidence which fundamentally undermined the single allegation. The hearing committee refused to admit this evidence because it had not been produced seven days before the hearing. D wished to appeal against the final written warning by way of a rehearing. She was advised by her union not to proceed because of the risk that she could be dismissed. D was suspended again following further complaints. A disciplinary hearing upheld five of the complaints and dismissed her for misconduct, taking into account the final written warning. D complained of unfair dismissal. Her complaint was rejected. The employment tribunal found as follows:

- D had been offered an appeal by way of rehearing.
- The employer had been entitled to proceed on the basis that there was an extant final written warning.
- The decision to dismiss had been within the range of reasonable responses.

D appealed to the EAT.

**Decision**

1. The employment tribunal had misdirected itself in its approach to the question of an appeal not being launched against the final written warning.

2. The tribunal should not have had regard to the fact that there was no appeal against the final warning when considering whether or not the dismissal had been fair.

3. The matter should be remitted to the same tribunal to consider the question of fairness or unfairness by reference to the criticisms it had made of procedural defects in the final written warning hearing, but disregarding the fact that there had been no appeal.

## Witness Statements

## Race Discrimination

*Parmar v East Leicester Medical Practice [2011] IRLR 641, EAT*

P was an employee of EL. He brought proceedings against his employer for race discrimination and unfair dismissal. The proceedings were dismissed. EL had served a number of witness statements. P then brought proceedings, alleging victimisation, on the basis that the statements contained false statements which had been inserted because he had brought proceedings. The employment tribunal ruled that the statements were covered by judicial proceedings immunity. P appealed, arguing that judicial proceedings immunity did not apply to victimisation claims.

**Decision**

1. The appeal was dismissed.
2. Judicial proceedings immunity was absolute. As a matter of public policy, witnesses must be able to give evidence without fear of subsequent legal proceedings or harassment. The principle applied to common law matters and to complaints of discrimination, including victimisation. It was not a breach of article 6 of the European Convention.
3. A witness who gave false evidence could be prosecuted for perjury or sued for malicious prosecution.



# 2012 ET Cases

## Mitigation of loss

*F & G Cleaners Ltd v Saddington and Others [2012] IRLR 892, EAT*

S and O were employed by A Ltd as window cleaners. Their work included contract work for the London Borough of Redbridge. In 2008 Redbridge awarded the contract to F & G. A Ltd told S and O that their work would transfer under TUPE. F & G decided that TUPE did not

apply and refused to continue to employ S and O on their current terms and conditions. It offered them work on a self-employed basis.

S and O refused this offer and complained of unfair dismissal.

At first instance, their claim succeeded. The Employment tribunal ruled as follows:

- TUPE applied to the transfer.
- F & G's refusal to continue their employment amounted to a dismissal.
- Because the transfer was the principal reason for the dismissal, S and O had been unfairly dismissed.
- They had not failed to mitigate their loss by refusing to accept the offer of self-employment.

F & G appealed to the EAT. The appeal was dismissed. The EAT stated that S and employment transferred to F & G at the date of transfer and they had not been dismissed until they refused the offer of self-employment. The dismissal took effect after the refusal of the offer and the duty to mitigate did not arise.

## Sex Discrimination

*Bullimore v Pothecary Witham Weld [2011] IRLR 18, EAT*

B was a solicitor employed by PWW. Her employment was terminated and she complained to an employment tribunal of sex discrimination and unfair dismissal. The claims were settled. B was then offered a position with S, another firm of solicitors, subject to satisfactory references. PWW supplied a reference which criticised B. S then required her to undergo a probationary period. She refused this, on the basis that S was attempting to change the terms of the original offer. B then complained of victimisation. She alleged that she had been given a bad reference because of her previous complaint of sex discrimination. The employment tribunal upheld this claim. It refused to award B compensation for loss of earnings on the basis that the loss was too remote. S's effective withdrawal of the offer of employment was unlawful discrimination and broke the chain of causation. B appealed to the EAT.

**Decision**

1. The tribunal had been wrong not to award compensation for loss of earnings.

2. Where an employer gives an adverse reference for an illegitimate reason, which results in a future employer deciding not to make a job offer, it is hard to see why that consequence should be too remote.

3. The reaction of S to the adverse reference had been evidently foreseeable. Such a reaction was a direct and natural consequence of the supply of the information.

4. The tribunal's award of £7,500 compensation for injury to feelings, on the basis of the Vento guidelines, would be upheld.