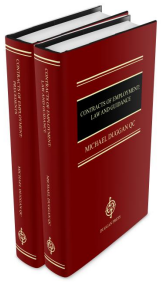

The 2020 Updater is cross referenced with Duggan QC on Employment Contracts 4th Edition.

The Fourth Edition of Contracts of Employment, Law, Guidance and Precedents will be published shortly in two volumes. The first volume is a comprehensive commentary on the law from recruitment to termination whilst the second volume contains precedents which cover all aspects of employment law. **Purchasers are also provided with a digital pdf and word version of the two volumes.**

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- A chapter on recruitment which considers the pitfalls and areas such as offer and acceptance, references, the recruitment process , offers of employment, the latest discrimination issues and the right to work in the UK.
- Section 1 statements.
- Specific employments: Agency workers and the 2010 Regulations; Betting workers, Casual, occasional, temporary staff and the GIG economy, Consultants, Factory and shift workers, Fixed term, Homeworkers/Teleworkers, Managerial Staff, Office staff and the financial sector, Overseas employment, Part-time work, Residential staff, Salespersons, Shop Workers.
- The Manual section provides a commentary as well as a detailed exposition of important areas of law, covering: The Manual, Job titles, Scope of duties and flexibility, Hours of Work including the WTR, Basic Salary, Remuneration and benefits other than salary; Place of Work and Mobility, Preconditions of Employment, Holiday including all the recent cases, Sickness, Parents including flexible working and shared leave, Absences for reasons other than sickness, Conduct and Standards at work including smoking, alcohol, drugs, use of computers and mobile phones, social media, entertaining and relationships at work, Staff development and appraisal, Employee Representation including the ICE Regulations, Public Interest Disclosure, Restrictive Covenants, Disciplinary Procedures, Grievance Procedures, Equal Opportunities covering age, race, sex, harassment, orientation, disability, religion and what needs to be done in the workplace , Health and Safety, Termination including garden leave, Stress at work.
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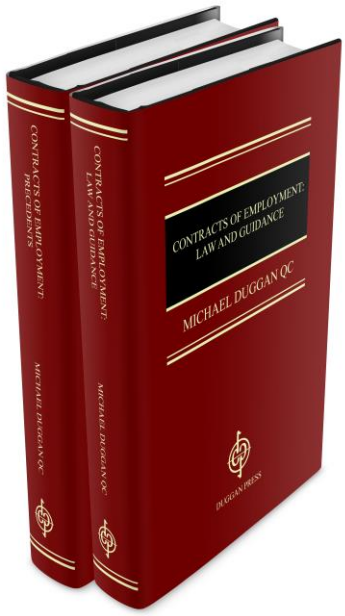
See the ELA Review below.

EMPLOYMENT LAW CUMULATIVE CASE INDEX FOR JANUARY TO JUNE 8th 2020

4th Edition of Contracts.



Cases in this Index are hyperlinked to the full judgment. This index is intended to cover employment law and does not include the ICR personal injury, health and safety, pension, police or immigration cases, but every case in IDS, ICR or IRLR is otherwise covered as well as many unreported cases that do not appear elsewhere.

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BOOK REVIEW EMPLOYMENT LAWYERS ASSOCIATION BRIEFING, June 2020

Book review: Duggan QC on Contracts of Employment
Author:
Rad Kohanzad, 42 Bedford Row
Date:
Monday, June 1, 2020
Topics:
Contracts of employment
This is an impressive two-volume book written to be used as a practical manual for those who need draft employment contracts and policies. It is a drafter's paradise.
The first volume contains the law and statement of principles; the second, the precedents. The first chapter is to be used as a go to, providing a detailed list of terms and conditions and policies that should be considered for the employment relationship. A helpful table allows the reader to locate both the commentary and the precedents for each particular clause.
Chapters on data and recruitment
Given that the book is aimed at non-contentious work, there is a chapter on the use of data for General Data Protection Regulation and Data Protection Act specialists to revel in and a great chapter on recruitment, addressing in detail how to avoid discrimination and how to deal with the tricky subjects of work permits and criminal offences, among many others.
Workers and industries
There is a 200-page chapter dealing with different types of workers and industries, from shiftworkers and zero-hour contactors, through to senior consultants and overseas workers. It really is difficult to conceive of a more comprehensive book on the subject. Both volumes deal with self-employed and agency workers, and there is an early chapter providing a detailed, up-to-date and helpful analysis of the case law on employment status.
Terms and conditions
The remainder of the first volume, more than 900 pages, provides a model terms and conditions manual on almost any contractual term you can think of, from hours of work and mobility clauses through to provisions on dismissal, all with a thorough commentary and an ability to cross-reference to the precedents in the second volume.
Volume 1's detailed exposition of the practical implications of law on the employment relationship, combined with more than 250 precedents (digital copies included) in Volume 2, mean that there has been no contractual or policy stone left unturned by Mr Duggan.
Duggan QC on Contracts of Employment (4th Edition) can be bought by ELA members, with a 20% discount from www.dugganpress.com, by putting in the code ELA20 when ordering.
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AGENCY AND THE AWR 2010 Contracts, Chapter 5.1.			
Kocur v Angard Staffing Solutions Ltd **[2019] EWCA Civ 1185, 2019 WL 03017112** **Lord Justice Underhill (Vice-President of the Court of Appeal, Civil Division)) Lord Justice Lewison and Lady Justice King** An agency worker's entitlement to the "same ... conditions" of work as a permanent employee within the meaning of the Agency Workers Regulations 2010 reg.5(1) did not extend to an entitlement to be offered the same number of hours of work as those performed by a permanent employee. "Duration of working time" in reg.6(1)(b) was intended to refer to terms which set a maximum length for any periods of work in the context of the entire working week. Therefore, reg.5(1) did not apply to a term specifying a 39-hour working week. The EAT decision is considered in Contracts at 5.1.121.	**[2019] I.R.L.R. 933**	**[2020] I.C.R. 170 [2019] 7 WLUK 125 [2020] 1 C.M.L.R. 14 [2019] 11 C.L. 78**	
CITY EAST RECRUITMENT LTD v BRITISH GAS SOCIAL HOUSING LTD **QBD (TCC) (Jonathan Acton Davis QC** In relation to a claim by a recruitment agency in respect of "flipped" workers said to have been introduced to the defendant client, the defendant was not entitled to summary judgment in respect of, or the striking out of certain aspects of, the claim. The dispute between the parties concerns whether and to what extent the Defendant has "flipped" workers introduced by the Claimant and failed to pay for the privilege. The Defendant was required by the contract to inform the Claimant when it used workers. However, it is the Claimant's case that the Defendant has purposely utilised those workers, not paid the Claimant and actively and fraudulently concealed the fact in order to profit from those workers at the Claimant's expense. The claim is said to be technically defective in that it claims a Transfer Fee and Commission as a debt, alternatively as damages. A debt means a sum of money that is owed or due, it is a specific sum. A debt cannot be claimed on the basis of estimated liability. Ms Boase QC added in oral argument that the claim is only an estimate whereas for a debt to exist it must be an identified sum of money. I was initially attracted to that argument. However, the response from Mr Jones QC was in effect that the situation is akin to an investigation under a process like that of taking an account followed by an order for payment of what is found due. He persuaded me that at this stage it would be wrong for the court to say that his approach is unfounded in law. The issue should go off for trial. In my judgment that is the correct course. In any event there is no practical advantage in striking out the claim for debt because the plea is in the alternative: debt or damages. **The issue of agency transfer fees is considered in Contracts at 5.1.73. with worked examples from the Guidance.**			

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Posted Workers (Agency Workers) Regulations 2020 These Regulations, which are made under section 2(2) of the European Communities Act 1972 (which provision remains in force for the transition period due to the European Union (Withdrawal) Act 2018) and sections 18(8) and 18(9) of the Employment Tribunals Act 1996, implement provisions of Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 (OJ L 173, 9.7.2018) amending **Directive 96/71/EC** of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services (OJ 18, 21/01/1997) ("the Directive" and "the Posted Workers Directive" respectively). These Regulations implement the Directive by modifying the Agency Workers Regulations 2010 ("the 2010 Regulations"). The 2010 Regulations implement (in England and Wales and Scotland and, in relation to some provisions, also Northern Ireland) Council **Directive 2008/104/EC** of 19 November 2008 on temporary agency work (OJ L 327, 5.12.2008, p.9) ("the Agency Workers Directive"). The Agency Workers Directive establishes a general framework for protection of temporary agency workers. Regulation 1 specifies that the Regulations come into force on 30 July 2020 and extend to England and Wales, and Scotland. Regulation 3(1) modifies the 2010 Regulations by requiring a hirer that proposes to post an agency worker for a limited period to a member State to inform the temporary work agency of the location and proposed start date of the posting a reasonable time before the posting is due to commence. Regulation 3(4) modifies the 2010 Regulations to enable a temporary work agency to bring a claim in the Employment Tribunal against the hirer to recover any losses the temporary work agency may suffer as a result of a penalty imposed by a member State for failure to comply with the provisions of the Directive or the Posted Workers Directive. It also prevents a temporary work agency from bringing such a claim if it is pursuing such losses through other civil proceedings. Regulation 4 modifies the Employment Tribunals Act 1996 to enable early conciliation of claims brought pursuant to the modified regulations. Regulation 5 expires the modifications made to the 2010 Regulations and Employment Tribunals Act 1996 on IP completion day (the day on which the transition period for withdrawal by the UK from the European Union is complete), and these two enactments revert to the text that was in force in each respectively without the modifications made by regulations 3 and 4. Regulation 5 also makes a saving provision to allow a temporary work agency to continue to pursue a claim, or conciliate one, after IP completion day, where a breach of regulation 13A of the 2010 Regulations occurs prior to IP completion day. A transposition note is attached to the Explanatory Memorandum which is available alongside the instrument on . A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.			

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CONFIDENTIALITY AND SETTLEMENTS			
Duchy Farm Kennels v Steels **[2020] EWHC 1208 (QB)** **MR JUSTICE CAVANAGH** An employer cannot avoid paying out on a settlement if an employee breaches a confidentiality clause unless the term is a condition of the agreement. After the ex-employee allegedly breached the confidentiality clause in the COT3, the employer stopped staged payments. The employee sued for his payments. The County Court held that the employer was not entitled to cease payments, even if the employee had breached the confidentiality clause, as the confidentiality clause was not a condition of the contract. On appeal It was held that the 'boilerplate' confidentiality clause in the COT3 was not a condition of the contract, so a breach would not have permitted the employer to avoid paying. Cavanagh J noted "It is possible for the parties to a contract to state expressly that a term is a condition, such that any breach of it will absolve the innocent party from any further duty to comply with its obligations under the contract. That did not happen here... There may well be cases in which a confidentiality clause in a COT3 or settlement agreement might be of sufficient importance to achieve the status of a condition. There may be cases where the allegations in question, and/or the identity of the Claimant or Respondent, are so sensitive that the achievement of confidentiality is the very essence of the benefit for the employer from the agreement. In most cases of that nature, however, the agreement will expressly stipulate that the term is a condition."			
GOLDA AJAYI v EBURY PARTNERS LTD **QBD (Comm) (Henshaw J) 31/01/2020** In proceedings relating to the grant of share options, the court implied a term into a confidential employment settlement agreement between the parties which permitted them to refer to it where reasonably necessary in legal proceedings between them. "I would accept that where the parties have express agreed terms of confidentiality, including express exceptions, the court should proceed with caution before finding implied further exceptions. However, a term may be implied provided that it passes the ordinary tests for implication of terms, in particular that (1) it is reasonable and equitable; (2) it is necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it is so obvious that 'it goes without saying'; (4) it is capable of clear expression; and (5) it does not contradict any express term of the contract (*Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 §§ 18 and 21). As noted earlier, Scrutton LJ contemplated in *Tournier* that exceptions might be implied even where there is an express agreement for confidentiality. By extension, the same can be true where such an agreement contains limited exceptions, provided the conditions for implication of a term can be satisfied. In the present case, the express exceptions in the COT 3 agreement did not extend to reliance on the agreement in the context of legal proceedings between the parties to which the agreement was relevant, save to the extent that such reliance might be regarded as disclosure "*required by law*" or to a statutory, regulatory or governmental body." **See Contracts at 1,23-1.26. for the general principles on implication of implied terms.**			

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COMPENSATION			
Mr D Fortheringhame v Barclays Services Ltd **UKEAT/0208/19 BA** **HIS HONOUR JUDGE MARTYN BARKLEM** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE UNFAIR DISMISSAL The Claimant was found to have been unfairly dismissed, and a re-engagement order was made in August 2018 which contained a formula for calculating the sum payable to the Claimant. The Claimant was not re-engaged, and at a subsequent remedy hearing in January he was awarded the sum of £947,585.20, less tax and National Insurance. The ET rejected his claim for interest on the sum which would have been payable under the August 2018 re-engagement Order. The Claimant appealed against that finding. The EAT rejected the appeal. It held that, although the re-engagement order contained an order to pay the Claimant a sum of money, that sum was conditional upon re-engagement having been complied with, or more accurately, "taking place". "Non-compliance" suggests a breach, when in reality an order for re-engagement can legitimately be ignored, on pain of specified consequences. The monetary part of the August 2018 order was, in the words of s115(2) ERA 1996, part of "the terms on which the re-engagement is to take place." As it did not take place, section 117 became engaged. This provides for distinct orders to be made if a claimant is not re-engaged. That order was duly made in January 2019, whereupon the 2018 Award fell away. Interest is not payable on a conditional award, when the condition fails.			
The Presidents of the Employment Tribunals (England & Wales, and Scotland) have issued Presidential Guidance updating the *Vento* bands for damages for injury to feelings. The new bands, for claims issued on or after 6 April 2020, are:- • lower band: £900 to £9,000 • middle band: £9,000 to £27,000 • upper band: £27,000 to £45,000 (with the possibility of the most serious cases exceeding £45,000) These figures take account of the 10% uplift from **Simmons v Castle**. **The Guidance can be downloaded here.**			
Parkview Care Ltd v Mr D Fenn **UKEAT/0112/19/BA** **THE HONOURABLE LORD SUMMERS** **(SITTING ALONE** SUMMARY CONTRACT OF EMPLOYMENT – Incorporation into contract CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term UNFAIR DISMISSAL – Constructive dismissal UNFAIR DISMISSAL – Contributory fault The Employment Appeal Tribunal heard this appeal against the judgment of the Employment Tribunal. It was argued that the Employment Tribunal			

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should have paid more heed to the underlying misconduct of the employee, the Claimant, who had lied to the Appellants about his whereabouts and taken time away from work when driving a company car although ostensibly working for the Appellants. However, the Employment Appeal Tribunal was satisfied that the primary cause of the constructive dismissal was the unfairness of the disciplinary meeting and that the Claimant's resignation was primarily due to the handling of his misconduct and not his prior misconduct. The Appellants appeals in this connection were rejected. The Employment Appeal Tribunal was persuaded however that the deduction for contributory fault was perversely low. His dishonesty and misuse of company time was a significant factor. The Employment Appeal Tribunal indicated that it was minded to assess the contributory at 20% but invited submissions in writing before making a final decision. The Employment Appeal Tribunal was also persuaded on a construction of the contractual documentation that the Appellants had agreed to pay an allowance for time spent "sleeping in", when the Claimant was providing care in the course of his employment. The Employment Appeal Tribunal therefore overturned the Employment Tribunal's finding that he was entitled to be paid at his normal hourly rate.			
QH v Varhoven kasatsionen sad na Republika Bulgaria, joined party: Prokuratura na Republika Bulgaria **OPINION OF ADVOCATE GENERAL HOGAN** I propose that the Court should answer to the questions referred by the Rayonen Sad Haskovo (Haskovo District Court, Bulgaria) and the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows: (1) Where national legislation provides that a worker unlawfully dismissed must be reinstated in his or her work, Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation or case-law or practices according to which that worker is not entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement. (2) Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation or case-law or national practices, according to which, once the employment relationship has ended, the right to payment of an allowance for paid leave earned but not taken is denied in a context where the worker was unable to take the leave before the employment relationship ended because of a dismissal established as unlawful by a national court ordering the retroactive restoration of the employment relationship for the period between that unlawful act committed by the employer and the subsequent reinstatement only, except for any period during which that worker was employed by a different employer.			
The Employment Rights (Increase of Limits) Order 2020 • A week's pay, for basic award and statutory redundancy purposes, increases from £525 to £538 for all dismissals on or after 6 April 2020. • The maximum compensatory award increases from £86,444 to £88,519. • Other increases are set out in the Schedule to the Order:			

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	Relevant statutory provision	*Subject of provision*	*Old limit*	*New limit*
1	Section 145E(3) of the 1992 Act	Amount of award for unlawful inducement relating to trade union membership or activities or for unlawful inducement relating to collective bargaining.	£4,193	£4,294
2	Section 156(1) of the 1992 Act(**1**)	Minimum amount of basic award of compensation where dismissal is unfair by virtue of section 152(1) or 153 of the 1992 Act.	£6,408	£6,562
3	Section 176(6A) of the 1992 Act(**2**)	Minimum amount of compensation where individual excluded or expelled from union in contravention of section 174 of the 1992 Act and not admitted or re-admitted by date of tribunal application.	£9,787	£10,022
4	Section 31(1) of the 1996 Act	Limit on amount of guarantee payment payable to an employee in respect of any day.	£29	£30
5	Section 120(1) of the 1996 Act(**3**)	Minimum amount of basic award of compensation where dismissal is unfair by virtue of section 100(1)(a) and (b), 101A(d), 102(1) or 103 of the 1996 Act.	£6,408	£6,562
6	Section 124(1ZA)(a) of the 1996 Act(**4**)	Limit on amount of compensatory award for unfair dismissal.	£86,444	£88,519
7	Section 186(1)(a) and (b) of the 1996 Act	Limit on amount in respect of any one week payable to an employee in respect of a debt to which Part 12 of the 1996 Act applies and which is referable to a period of time.	£525	£538
8	Section 227(1) of the 1996 Act(**5**)	Maximum amount of "a week's pay" for the purpose of calculating a redundancy payment or for various awards including the basic or additional award of compensation for unfair dismissal.	£525	£538

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CONTINUITY			
Mr R O'Sullivan v DSM Demolition Ltd **UKEAT/0257/19/VP** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY JURISDICTIONAL POINTS – CONTINUITY OF EMPLOYMENT The Employment Tribunal dismissed the Claimant's claim of unfair dismissal on the basis that he did not have two years' continuous employment. The dispute turned on the start date. Section 211(1)(a) Employment Rights Act 1996 provides that, for these purposes, a period of continuous employment begins "with the day on which the employee starts work". This means the start date of work under a contract with (subject to provisions which did not apply here) the employer in question. The Respondent's case was that the start date in this case was 2 November 2015; the Claimant's case was that it was 26 October 2015. The Tribunal found that the Claimant had done work on the Respondent's site in the week of 26 October 2015. However, it also properly found that a Statement of Terms had been drawn up with a 2 November 2015 start date, he had been put on payroll with effect from that date, and had begun completing worksheets from that date. The Respondent's client was also not charged for his work in the week of 26 October 2015. Further, he had been paid £100 in cash on site for the week of 26 October 2015, and had not complained to the Respondent about his pay. The Tribunal correctly directed itself as to, and correctly applied, the law. **Koenig v The Mind Gym Limited**, UKEAT/0201/12, considered. In light of the foregoing and other factual findings, the Tribunal had been entitled to conclude that the Claimant had worked in the week of 26 October 2015 under an unofficial arrangement and not under a contract of employment with the Respondent. Its decision was also Meek-compliant. The appeal was dismissed.			

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CONTRACT CLAIMS

Wells and another v Cathay Investments 2 Ltd and another [2019] EWHC 2996 (QB) **His Honour Judge Simpkiss (sitting as a Deputy Judge of the High Court**) The employee Claimants were in material breach of their employment agreements and guilty of gross misconduct. when they shared confidential information with a former shareholder and chairman of the company in order to reverse-engineer a budget to match a representation that he had made before the sale of the company. The Claimants claimed damages for wrongful dismissal and sought declarations that they had not materially breached their employment agreement with the Second Defendant employer. The Second Defendant was a transport and logistics business. The Claimants were senior employees who owned 5% of the company shares. The chairman was the Second Claimant's father and owned 41% of the shares. In 2016 the First Defendant approached the Second Defendant with a view to buying it, and in 2017 the purchase was completed. The Claimants continued working for the Second Defendant under employment agreements which provided that they must not use the Second Defendant's confidential information for their own purposes or disclose it to third parties, and contained covenants restricting soliciting of customers and the provision of services to competitors for 12 months after they left employment. The Claimants retained their shares but entered into option agreements under which they could sell their shares to the First Defendant for a fair value. They also entered into shareholders agreements which provided that if they committed a material breach of their employment agreement they would become a departing shareholder, and they could be required to transfer their shares at nominal value. It also contained covenants restricting them from being involved with a competitor or soliciting customers for 12 months following the date of them ceasing to be a shareholder. They exercised their option to sell their shares, but a share value could not be agreed. The Second Defendant began disciplinary proceedings against the Claimants believing that they had improperly disclosed confidential information to the chairman and been involved in the improper preparation of the 2017 budget, and that the First Claimant had sent confidential information to his personal email without permission and accessed pornography on his work laptop. They were summarily dismissed for gross misconduct. The Second Defendant gave notice to the Claimants that they were in material breach and were required to transfer their shares to the First Defendant at nominal value. The Claimants argued that when the share price could not be agreed the Second Defendant had engaged in a scheme to find a reason to dismiss them for gross misconduct. **The Court found for the Defendants.** (1) The Claimants had shared confidential information with the chairman in order to give him oversight of the 2017 budget so that a representation that he had made pre-acquisition, that the EBITDA would be £1.2 million, was in line with the budget figures. The Claimants had continued to believe that they owed their loyalties to he chairman, and had not taken on board that there was a new regime and that their duties now differed. The Claimants were aware that the 2017 budget was being prepared without transparency and with a view to ensuring that it matched the figure given by the chairman before the purchase, the £1.2 million reported to the	**[2020] IRLR 281** **April 2020**		

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board, and against a background of severe cash flow problems and accounting irregularities prior to the acquisition of the Second Defendant. The disclosure had been for a purpose totally inconsistent with their duties to the Second Defendant and was a serious breach which went to the heart of the employee/employer relationship (see paragraphs **102, 137, 156** of the judgment). (2) Highly confidential information had been transferred to the Second Claimant's personal email account without consent and in breach of the employment agreement (para.**145**). He had viewed pornography on his work laptop in an open office, which was serious misconduct (para.**147**). (3) The disclosure of confidential information and reverse-engineering OF the 2017 budget was a repudiatory breach of the employment agreements. In consequence, the Claimants were defaulting shareholders. The other breaches, although serious misconduct, were not material breaches or gross misconduct (paras **155, 160**). (4) The Claimants' conduct had undermined the whole basis of trust between employer and employee with the potential for undermining the trust and confidence of the Second Defendant's bank. In acting as such, the Claimants had had no regard to their duties to the Second Defendant but had been motivated by a misplaced loyalty to S and the desire to put off the day when the previous improprieties in the running of the Second Defendant would come to light. The Second Defendant had been entitled to dismiss the Claimants summarily (para.**162**). (5) There were legitimate reasons for imposing restrictive covenants in the shareholders agreement as the Claimants were in a position to do considerable damage to the Second Defendant's business if they chose to compete. The 12-month period was reasonable and the restrictions were not too wide. The restrictions in the employment agreement were the minimum necessary to deal with the risk of key personnel leaving and setting up a competing business. The restrictive covenants were enforceable (paras **176, 180-181, 185**).			
Benyatov v Credit Suisse Securities (Europe) Ltd [2020] EWHC 85 (QB) **Queen's Bench Division** **Roger ter Haar QC** The bank applied to strike out, and/or for summary judgment on, a claim a former employee brought against it for an indemnity and/or damages for breach of duty. Alternatively, it sought a conditional order and/or security for costs. The employer was a bank. The employee worked for it in Romania. He was arrested in 2006 and charged with espionage and organised crime. He left Romania and continued to work for the bank. He was convicted in 2013 and could no longer work as an approved person in UK financial services. He appealed the conviction. The bank sent the employee a letter in 2014 stating that, while it would not arrange any intervention in the proceedings before a final verdict, it was exploring options in case his appeal failed including representations to certain individuals and authorities. On appeal, the conviction was replaced with a lesser one and the sentence was reduced. The bank dismissed the employee for redundancy in 2015 but continued to fund his appeals, which had not yet been exhausted. The employee sought lost earnings of £46 million. He alleged that:	**[2020] IRLR 299**		

• the employment contract contained an implied term that the bank would indemnify him against all loss arising from his duties; • the bank had breached the implied term of mutual trust and confidence through failing to seek intervention in the proceedings after his arrest; • By not seeking intervention, the bank had failed to exercise its contractual discretion rationally; • The 2014 letter was a contractual variation obliging the bank to seek intervention; • The bank owed him tortious duties of care to protect him from economic loss arising from his duties, to advise him of risks in Romania, and to intervene following his arrest. The application to strike out was allowed in part. **(1)** A ruling on the scope of the right to indemnity would be of considerable importance in the law of employment and of agency and there was no clear authority on the limits of that scope; it was not normally appropriate to determine such questions in a summary procedure, ***AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 W.L.R. 1804, [2011] 3 WLUK 371*** applied. The employee's argument as to the scope had more than fanciful prospects of success. The implied indemnity claim would not be struck out, apart from one element where the loss was too remote to be the subject of the indemnity (see paras **147-158** of judgment). The Australian case of ***National Roads and Motorists' Association v Whitlam [2007] NSWCA 81***. Insofar as *Whitlam* which held that the employee in was not entitled to be indemnified against their legal expenses was difficult to reconcile with the relevant English cases of ***Whitlam, Fletcher v Harcot 123 E.R. 1097, [1622] 1 WLUK 29***, ***Adamson v Jarvis 130 E.R. 693, [1827] 2 WLUK 24***, ***Giuseppe Frixione v Biagio Tagliaferro and sons 14 E.R. 459, [1856] 2 WLUK 63***, ***James Seddon, The v Jeffares (1865-67) L.R. 1 A. & E. 62, [1866] 6 WLUK 73*** and ***Famatina Development Corp Ltd, Re [1914] 2 Ch. 271, [1914] 7 WLUK 84***. (2) The use of the implied term as to trust and confidence to attack the bank's post-arrest actions would be a considerable extension of the law contrary to the trend of the relevant authorities, (***Reid v Rush & Tompkins Group [1990] 1 W.L.R. 212, [1989] 3 WLUK 300***, ***Crossley v Faithful & Gould Holdings Ltd [2004] EWCA Civ 293, [2004] 4 All E.R. 447, [2004] 3 WLUK 456***, ***Greenway v Johnson Matthey Plc [2016] EWCA Civ 408, [2016] 1 W.L.R. 4487, [2016] 4 WLUK 667*** and ***James-Bowen v Commissioner of Police of the Metropolis [2018] UKSC 40, [2018] 1 W.L.R. 4021, [2018] 7 WLUK 579***). Examination of the bank's conduct would involve considerations of great sensitivity involving high-level government and diplomatic contacts. The alleged breaches of the implied term would not be allowed to proceed (paras **168-170**). (3) The employee's arguments amounted to selecting various possible courses of action which the bank might have chosen to pursue and alleging that its failure to do so was unreasonable. That was not a permissible approach. There was nothing in the pleaded case to show that the only reasonable option was the particular identified course (paras **186-187**). (4) The employee's argument that the 2014 letter had taken effect as a variation of the employment contract had no reasonable prospects of success. The letter was not in terms which could be regarded as			

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contractual offers capable of acceptance, and consideration could not clearly be discerned (paras **192-202**). (5) The law imposed a limited duty of care on banks to protect employees against economic loss. The issue for the instant court was whether there was an arguable case that it was fair, just and reasonable to impose the relevant duties, ***Caparo Industries Plc v Dickman*** ***[1990] 2 A.C. 605, [1990] 2 WLUK 128*** applied. The employee had more than fanciful prospects of establishing that *Reid v Rush & Tompkins Group plc* did not bind the court to hold that no duty existed. The advantages and disadvantages to bank and employee were matters relevant to deciding whether it was fair to impose the duties and were matters best assessed by a judge who had heard evidence. (6) The allegations of duties to perform an adequate risk assessment and to advise the employee of risks would not be struck out (paras **212-232, 239**). However, there was greater merit in the proposition that the duties alleged once criminal proceedings commenced were invidious and unworkable. A duty would not be imposed where it could create conflict between the interests of bank and employee. Further, the steps that it was said should have been taken were of great political sensitivity; a court could not sensibly investigate allegations that the bank had a duty to intervene in the prosecution system of a sovereign nation. It would not be fair to impose such a duty; such allegations would be struck out (paras **233-238**). (7) There was no part of the claim not otherwise falling to be struck out which should be struck out for difficulties of causation. However, the claims relating to the bank's actions post-arrest had considerable difficulties as to causation (paras **245-246**). (8) Under CPR PD 24 para.4 and para.5.2, the court could make a conditional order requiring a claimant to pay money into court where it considered it improbable that the claim would succeed. A conditional order would only apply to the claims not struck out. There was a conflict between deciding that a claim had realistic prospects of success and considering it improbable that it would succeed. No conditional order would be made (paras **264, 268-270**). (9) There had been unexplained delay in the bank's application for security. The court would therefore only consider ordering security in respect of costs not yet spent, estimated at £1.8 million. The amount of security sought was 50%. The bank had not shown on the evidence that there was a risk of non-enforcement of a costs award of £900,000 (paras **282-286**). **See Contracts at 1.27. on the duty of the employer.**			

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CONTRACTS OF EMPLOYMENT

Barrasso v New Look Retailers Ltd **UKEAT/0079/19/RN** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** JURISDICTIONAL POINTS - excluded employments – employee shareholder - Section 205A Employment Rights Act 1996 In September 2015, the Claimant had entered into a section 205A employee shareholder agreement. It was agreed that this had met the requirements provided such that the Claimant thereby became an employee shareholder and was thus excluded from the statutory right to claim unfair dismissal or a redundancy payment. At the same time, however, the parties entered into a separate agreement ("the September 2015 deed") which gave him a contractual means of seeking equivalent remedies should he subsequently consider he had been unfairly dismissed or was entitled to a redundancy payment. In March 2017, the Claimant entered into a new service agreement with the Respondent, which included a "whole agreement" clause (clause 27.5) stating that it superseded all previous agreements between the parties dealing with the same matters, save for the contractual "reinstatement" of rights in the September 2015 deed. In February 2018, the Claimant was dismissed in circumstances that he regarded as unfair. The Respondent paid him a statutory redundancy payment and, in replying to his pre-action correspondence, did not seek to rely on the section 205A agreement until it entered its response in the ET proceedings. At a Preliminary Hearing, the ET found that the Claimant was an employee shareholder for the purposes of section 205A Employment Rights Act 1996 and was thus excluded from the right to claim unfair dismissal. The Claimant appealed. Held: dismissing the appeal The Claimant argued that section 205A must be construed purposively, in accordance with the restrictions on contracting out of statutory rights (under section 203) and consistently with his rights under the ECHR and other international instruments laying down a right not to be unjustifiably dismissed. Adopting that approach, he contended that the ET had erred in failing to require that the parties had affirmed the conditions laid down for section 205A to apply as at the date of the statutory contravention in issue (here, dismissal). He further argued that the March 2017 service agreement had superseded the section 205A agreement, evincing the parties' intention that the Claimant's statutory rights were reinstated. It was not accepted that the Claimant's construction arguments were assisted by reference to section 203 ERA or by the provisions of the ECHR or other international instruments. A section 205A agreement did not fall to be considered under section 203; the Claimant had not demonstrated that any article under the ECHR was engaged; and UK law provided for protection from unjustified dismissal but the Claimant had contracted out of that protection (something not prohibited by any of the international provisions relied on). A purposive construction of section 205A meant no more than interpreting the exemption from statutory protection narrowly and ensuring strict compliance with the pre-conditions for employee shareholder status. In this case, it was common ground these were met when the Claimant entered into the section 205A agreement and the ET did not err in failing to require that the conditions laid down by section	**[2019] I.R.L.R. 1042**	**[2020] I.C.R. 448** **[2019] 8 WLUK 137**	

205A were re-affirmed by the parties at the date of dismissal. As for the effect of the March 2017 service agreement, although section 205A did not state how employee shareholder status might be lost, this might arise as a result of some subsequent inconsistent agreement between the parties. The question thus became one of construction of the March 2017 service agreement. In this regard, the ET had permissibly found that the factual background (the context in which it was construing the agreement) was not as the Claimant had contended: rather, the facts suggested that the parties' intention was that the only "reinstatement" of rights was by contract – as provided in the September 2015 deed. That position was not undermined by the parties' subsequent failure to reference the section 205A agreement when the Claimant was dismissed (something the ET had found arose from inadvertent error and was not reflective of any intention that the section 205A agreement no longer applied). The March 2017 service agreement did not supersede the section 205A agreement because it did not deal with the same matters. In any event, the express reservation in respect of the September 2015 deed made clear that the parties intended the Claimant's contractual rights to complain of unfair dismissal and redundancy would continue, something that was only consistent with the Claimant continuing to be an employee shareholder and thus excluded from the ability to pursue such claims under the statute. **For a detailed exposition of employee shareholder agreements see Contracts at 1.114.**			
Corsham v Police and Crime Commissioner for Essex **[2019] EWHC 1776 (Ch)** **MR JUSTICE MORGAN** Police authorities being the administrators of police pension schemes, should know about the provisions in the Finance Act 2004 regarding taxation of pensions, and about the adverse tax consequences arising where police officers were re-employed into civilian roles within one month of retirement. The police authority was liable for negligent misstatement where it had informed retiring officers that they would receive a tax free lump sum despite knowing about offers to re-employ them straight after retirement. Although the relationship between police officers and their chief constable was quasi-contractual, the latter owed no duty of care in tort, as the principle in Scally v Southern Health and Social Services Board [1992] 1 A.C. 294, [1991] 10 WLUK 314 did not apply to such a relationship. The Pensions Ombudsman's dismissed complaints of breach of duty in relation to their pensions. The officers were entitled to retire after 30 years' service and did so in 2010/11. The normal minimum retirement age was 55, but the officers were under 55 at the time. Taking pension benefits before reaching 55 ordinarily produced adverse tax consequences, but the Finance Act 2004 enabled avoidance of the consequences in certain circumstances. For the officers to benefit from those provisions, it was critical that they did not take employment within one month of retirement. The main issues were the state the employees' knowledge about the one-month rule and the adverse tax consequences, and the application of **Scally v Southern Health and Social Services Board** [1992] 1 A.C. 294, [1991] 10 WLUK 314, where a term was implied into a contract of employment, requiring the employer to take reasonable steps to inform the employee of a valuable right conferred by the contract of which the employee could not be expected to be aware.		**[2020] I.C.R. 268** **[2019] 7 WLUK 129**	

The appeal was allowed. The ombudsman had not made the findings of fact necessary to enable disposal of the appeals. He did not conduct a hearing, so there was no oral evidence, cross-examination, or much evidence by way of witness statements. There needed to be a more thorough exploration of the facts potentially relevant to liability, particularly the state of the police authorities' knowledge at the critical times. As the matter had already run for a long time and the parties had argued their cases fully, the court would make the necessary findings of fact. Somerset and Avon (S&A) professed not to know about the one-month rule, but should have known about it. The Act made significant changes to the tax treatment of pensions, which had been widely publicised. HMRC circulated various publications and guidance to help scheme administrators know and understand the law. S&A knew the retirement dates of its officers and knew of the offer to re-employ them within one month, yet it still sent written confirmation to them that their lump sums would be tax free when it should have appreciated that they would not be. Those sums, if paid, would have been unauthorised payments. Scheme administrators had specific statutory duties to notify HMRC of the making of unauthorised payments and would have been liable for scheme sanction charges. S&A had assumed a responsibility not to make statements that it should have foreseen would be highly misleading, and which were misleading. Nowhere in the letter was a disclaimer of responsibility for the information given. The relationship between S&A and the officers was sufficiently proximate to justify imposing liability on S&A for its negligent misstatements, **Customs and Excise Commissioners v Barclays Bank Plc** [2006] UKHL 28, [2007] 1 A.C. 181, [2006] 6 WLUK 476 applied. S&A was not entitled to assume that the officers would seek independent advice, and the officers' failure to do so was not unreasonable. The officers had also acted reasonably in relying on the statements. Had they been given the correct information, they would have postponed the date of their re-employment to avoid the tax liability. S&A was liable for their loss. As to Essex, the ombudsman had made no findings about the state of Essex's knowledge. That element of the case was remitted to him to do so The officers accepted that they had no contract of employment with their chief constables and that Scally could not directly apply to their situation. There was no right arising under the officers' quasi-employment by the chief constables of which they were unaware. Even assuming that their pension benefits could be said to have arisen under their quasi employment, they were aware of those rights. The thing that was adverse to them was the tax consequences upon their re-employment by S&A and Essex. It would be a major and unjustified extension of the decision in Scally to hold that the chief constables had a duty to warn the officers about those consequences. They were not responsible for administering the pension scheme or for the re-employment: James-Bowen v Commissioner of Police of the Metropolis [2018] UKSC 40, [2018] 1 W.L.R. 4021, [2018] 7 WLUK 579 **For a consideration of Scally in the context of pensions see Contracts at F62.**			
Royal Opera House Covent Garden Foundation v Goldscheider **[2019] EWCA Civ 711** **THE PRESIDENT OF THE QUEEN'S BENCH DIVISION** **(SIR BRIAN LEVESON, LORD JUSTICE MCCOMBE and LORD JUSTICE BEAN**		**[2020] ICR 1**	

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The Claimant was employed as a viola player in the Defendant's orchestra. The Defendant provided the Claimant with earplugs with 9dB filters, and, hanging at the entrance to the orchestra pit, were earplugs which provided up to 28dB of attenuation. At a rehearsal, the Claimant was placed immediately in front of the brass section, with hardly any space between himself and that section. Even using the 28dB earplugs, the Claimant found the noise from the brass section excruciatingly loud and painful. Following the rehearsal, the Claimant's audiometry demonstrated a high frequency hearing loss in his right ear and a change in his hearing, and because of a resulting sensitivity to noise the Claimant was no longer able to play in an orchestra. Following the rehearsal and concerns expressed by members of the orchestra, the layout of the orchestra pit was rearranged and the noise levels significantly reduced. The Claimant brought a claim against the Defendant for, inter alia, breach of statutory duty, pursuant to the Control of Noise at Work Regulations 2005, for hearing loss suffered as a result of exposure to excessive noise levels at the rehearsal. The judge found that the Defendant was in breach of regulation 6(1) and (2) of the Regulations, as the Claimant had been exposed to noise levels in excess of the upper exposure action value of 85dB(A) by a factor of four and the only measure introduced by the employer to reduce the Claimant's exposure was the provision of personal hearing protectors, a measure specifically excluded when considering an employer's duty under regulation 6(2). The judge found that the Defendant was also in breach of regulation 7(3) , in failing to ensure that the orchestra pit was designated as a hearing protection zone, identified by means of the specified sign indicating that hearing protection had to be worn, and to require members of the orchestra to wear hearing protection in that area at all times. Upholding the Claimant's claim, the judge further found that the noise levels at the rehearsal were within the range identified as causing acoustic shock and that it was that exposure that had resulted in the Claimant sustaining acoustic shock, leading to the injury he sustained and the symptoms he developed and continued to suffer. The CA dismissed the appeal. Regulation 6(1) of the Control of Noise at Work Regulations 2005 imposed a duty on the Defendant to reduce the risk from exposure to noise to as low a level as was reasonably practicable, and, by regulation 6(2) , once noise levels were likely to be above the upper exposure action value of 85dB(A), the Defendant came under a duty to reduce noise exposure to as low a level as reasonably practicable by means of a programme of organisational and technical measures excluding the provision of hearing protectors. It was beyond dispute that at the relevant rehearsal the Claimant had been exposed to noise at least quadruple the upper exposure action value and that the Defendant was well aware that exposure to noise above 85dB(A) was likely, but the Defendant had failed to show that it had taken all reasonably practicable steps, particularly given that the pit had been subsequently reconfigured, with the brass instruments being split up, producing a reduction in noise level with no evidence that there had been an unacceptable, or indeed any, reduction in artistic standards. While it was not foreseen by anyone, and perhaps was not reasonably foreseeable, that exposure to such noise levels would cause sudden injury, it was foreseeable that, if the upper exposure action value of 85dB(A) was exceeded by a factor of four, musicians would suffer injury to their hearing, and the fact that the foreseeable risk was of long-term rather than traumatic injury was irrelevant, since the Regulations were enacted in order to protect employees against the risk of injury to their hearing caused by excessive noise at work; and that,			

accordingly, the Defendant was in breach of its duty under regulation 6(1) and (2). (2) Since the musicians were likely to be exposed to noise at or above the upper exposure action value, regulation 7(3)(a) and (b) of the 2005 Regulations were categorical in requiring the orchestra pit to be designated a hearing protection zone with appropriate signage displayed, but the duty imposed by regulation 7(3)(c) to ensure the wearing of personal hearing protectors by musicians entering the area was qualified by the words "so far as is reasonably practicable"; that "reasonably practicable" was not the same as "physically practicable", and, since the evidence was that it was not practicable to wear earplugs 100% of the time if a musician wanted to perform at the highest levels, it was not reasonably practicable for players in the orchestra pit to perform if they were to be required to wear personal hearing protectors at all times; and that, accordingly, the judge had erred in finding a breach of regulation 7(3)(c) and a consequential breach of regulation 10(1). (3) Although the Claimant had established an inherent risk in the activity he was carrying out at the rehearsal, namely the excessive exposure to noise, and the Defendant's failure to take the steps necessary to reduce that exposure to the lowest level reasonably practicable, it was still open to the Defendant to show that that breach was not causative of the injury. However, there was no doubt that the Claimant suffered from the symptoms of which he complained and that they arose immediately after the relevant rehearsal. Whilst neither medical expert had been able to say that the condition that he observed in the Claimant met precisely all the customary criteria for those of the condition that he diagnosed, it was not the label that mattered but rather the connection of the undisputed symptoms with breach of the 2005 Regulations. In any event, it was precisely the type of dispute between experts that a trial judge was best placed to assess, and the judge had been entitled to make the findings she did; and that common sense dictated that the failure to reduce exposure to as low a level as reasonably practicable, by the stipulated measures in the Regulations, was the factual cause of the Claimant's injury.			
Ryan Ostilly v Meridian Global VAT Services (UK) Ltd **UKEAT/0017/20/OO** **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** SUMMARY CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term CONTRACT OF EMPLOYMENT – Damages for breach of contract UNFAIR DISMISSAL – Constructive dismissal The claimant brought a claim for breach of contract relying on non-payment of a bonus he said was due to him; and for unfair (constructive) dismissal, relying on his resignation in response to a repudiatory breach of his contract of employment. The respondent denied any breach and asserted that the claimant had affirmed his contract and had resigned, but not in response to any breach. The employment judge had not erred in construing the bonus clause conferring a discretion to pay up to 20 per cent of salary each year. The clause did not, on its true construction, exclude the financial position and performance of the employer from the scope of permissible considerations relevant to the exercise of the employer's discretion. The judge correctly so decided. The judge (as the respondent accepted) erred when assessing how close the claimant came to achieving the level of profit he had forecast for the year 2017, in respect			

of the part of the respondent's business for which he was responsible. She mistook the turnover figure the claimant had forecast (€3.25 million) for the profit figure (€1.79 million). The actual profit in 2017 was €1.68 million. The claimant had therefore fallen €110,000 short of his profit target, i.e. he had achieved about 94.5 per cent of his target, not 51.6 per cent as the judge found. Although the respondent did not make the same error when considering whether to pay bonus, the judge's error was material to her conclusion that the respondent's exercise of its discretion not to pay any bonus in 2018 was rational and lawful, not perverse. The judge found that if, contrary to her primary decision, the decision not to pay bonus was a breach of contract, the claimant was entitled to a maximum of £19,500 (20 per cent of salary) but would have resigned unless paid a sum close to £55,000, which he was demanding and believed he was entitled to. She reasoned that his unfair dismissal claim must therefore fail anyway because he would not have resigned in response to a breach of contract. That finding was not justified on the pleadings and the evidence and (applying the principles in Chen v. Ng [2017] UKPC 27) was procedurally unfair. The respondent had not relied on the judge's proposition; it was contrary to the claimant's case and was not properly put to the claimant during his evidence, either by the respondent or the judge. Nor was it an obvious and permissible inference from the documents and evidence as a whole. The claims for breach of contract and unfair dismissal would therefore be remitted for redetermination in the light of the EAT's judgment. It was appropriate to remit the issues to a different employment judge in view of the finding of procedural unfairness, but it was not necessary for all the evidence to be heard again.			
<u>Ryan Ostilly v Meridian Global VAT Services (UK) Ltd</u> **UKEAT/0017/20/OO** **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** SUMMARY CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term CONTRACT OF EMPLOYMENT – Damages for breach of contract UNFAIR DISMISSAL – Constructive dismissal The claimant brought a claim for breach of contract relying on non-payment of a bonus he said was due to him; and for unfair (constructive) dismissal, relying on his resignation in response to a repudiatory breach of his contract of employment. The respondent denied any breach and asserted that the claimant had affirmed his contract and had resigned, but not in response to any breach. The employment judge had not erred in construing the bonus clause conferring a discretion to pay up to 20 per cent of salary each year. The clause did not, on its true construction, exclude the financial position and performance of the employer from the scope of permissible considerations relevant to the exercise of the employer's discretion. The judge correctly so decided. The judge (as the respondent accepted) erred when assessing how close the claimant came to achieving the level of profit he had forecast for the year 2017, in respect of the part of the respondent's business for which he was responsible. She mistook the turnover figure the claimant had forecast (€3.25 million) for the profit figure (€1.79 million). The actual profit in 2017 was €1.68 million. The claimant had therefore fallen €110,000 short of his profit target, i.e. he had achieved about 94.5 per cent of his target, not 51.6 per cent as the judge found. Although the			

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COSTS			
Brooks v Nottingham University Hospitals NHS Trust **UKEAT/0246/18/JOJ** **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT) (SITTING ALONE)** SUMMARY COSTS The Respondent made a successful application for costs following the Tribunal's dismissal of the Claimant's complaints of whistleblowing detriment. The Claimant appealed against the Tribunal's Costs Judgment, arguing that its conclusions were perverse. In particular, it was said to be perverse to award costs on the basis that the claim had been unreasonably pursued in light of the Tribunal's own findings that there had been protected disclosures and detriments and that "many" of his claims had no reasonable prospects of success, thereby implying that at least some of them did. Held: Appeal dismissed. The Claimant had failed to demonstrate that the matters relied upon crossed the high threshold of perversity. On a proper reading of the Costs Judgment with the Liability Judgment, it was apparent that the Tribunal was entitled to reach the conclusion that the Claimant's claim had no reasonable prospect of success.			**IDS Emp. L. Brief 2020, 1122, 7-9**
Ms J Moss v Bupa Insurance Services Ltd **UKEAT/0202/18/BA** **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT) (SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE - Costs The Claimant contended that the ET's decision on costs was inadequately reasoned as it simply referred to the absence of unreasonable conduct on the part of the Respondent. Held, dismissing the appeal: that the Claimant's appeal was rendered academic by the fact that the ET had exercised its discretion not to award costs in any event, and that part of the decision was not challenged. In any event, the reasons given, though brief, were adequate in circumstances where it was clear from the terms of the Liability Judgment and other documents presented to the Tribunal that there was no unreasonable conduct on the part of the Respondent. "The application made by the Claimant for costs was on the grounds that there had been unreasonable conduct on the part of the Respondent. In dealing with such an application, the Tribunal is required to deal with the matter in three stages: the first is to determine whether there was unreasonable conduct such as would open the door to the exercise of discretion; the second is to consider whether costs should be awarded in the exercise of that discretion; the third and final stage is, if the applicant succeeds in the first two stages, to assess what those costs would actually be. 23. In the present case, the Tribunal's clear conclusion was that even if the Respondent had been found to have acted unreasonably, it would not have exercised its discretion to award costs. There is no appeal against that part of the Costs Judgment."			

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DATA **Contracts, Chapter 2 for a complete run down of the GDPR and data protection issues.**			
The ICO amended its guidance on timescales for complying with DSARS when clarification is sought The Information Commissioner's Office has amended its ***General Data Protection* Regulation*: Right of access*** guidance on the timescale for compliance with a data subject access request (DSAR), when the controller requests clarification from the data subject. The start of the one-month time period for compliance is no longer paused until the controller receives the requested information. Likewise, the extended timescale (of up to two further months) for responding to complex or multiple DSARs is no longer paused (*Article 12(3), GDPR*). The new timescale will start to run from date of receipt of the DSAR or, if later, upon receipt of proof of identification (*Article 12(6), GDPR*). "If you process a large amount of information about an individual, you may ask them to specify the information or processing activities their request relates to before responding to the request. However, this does not affect the timescale for responding - you must still respond to their request within one month. You may be able to extend the time limit by two months if the request is complex or the individual has made a number of requests"			

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DETRIMENT

Castano v London General Transport Services Ltd **UKEAT/0150/19/DA** **THE HONOURABLE MRS JUSTICE EADY DBE** **(SITTING ALONE)** SUMMARY Victimisation – detriment – health and safety – section 44 Employment Rights Act 1996 Unfair dismissal – automatically unfair dismissal – section 100 Employment Rights Act 1996 The Claimant was a bus operator, operating out of the Putney bus garage, who claimed he had suffered detriment and automatic unfair dismissal on health and safety grounds under Sections44 and 100 Employment Rights Act 1996 ("the ERA"). These claims were struck out by the ET as having no reasonable prospect of success. The Claimant appealed against that decision on three grounds: (1) whether the ET erred in concluding that the Claimant was not someone designated by the employer, for the purposes of Sections 44(1)(a) and 100(1)(a) ERA, to carry out health and safety-connected activities; (2) in the alternative, whether the ET ought to have treated the Claimant as being an employee at a place where there was no representative or safety committee for the purpose of Sections 44(1)(c)(i) and 100(1)(c)(i) ERA; (3) in the further alternative, whether the Claimant could rely on Sections 44(1)(c)(ii) and 100(1)(c)(ii) ERA, as it had not been practicable for him to access the health and safety officer at the Putney bus garage. Held: dismissing the appeal Ground (1): the Claimant relied on the fact that he had health and safety responsibilities as a PCV licensed driver and under his contract of the employment; he contended that the Vehicle Drivers (Certificates of Professional Competence) Regulations 2007 (which implemented EU Directive 2003/59) meant that he was effectively mandated to carry out health and safety responsibilities and this was sufficient to mean that he was "designated" for the purpose of subsection (1)(a). Neither Directive 2003/59 nor the 2007 Regulations (which were concerned with drivers' qualifications and periodic training) gave any support for the suggestion that the Claimant was thereby "designated" to carry out health and safety functions in the workplace for the purposes of Sections 44(1)(a) and 100(1)(a) ERA. As for his more general health and safety obligations as a PCV licence-holder and/or under his contract of employment, these were no more than might UKEAT/0150/19/DA arise for many employees (including the Respondent's other drivers); it did not meet the specific requirement that the Claimant had been "designated" for the purpose of this protection. Ground (2): the Claimant argued that his "place of work" for the purposes of Sections 44(1)(c)(i) and 100(1)(c)(i) was his bus, not the bus garage from which he operated. That, however, was plainly unarguable, not least as his contract specified that his place of work was Putney bus garage. The fact that his job function required him to leave that place of work did not change that position. As there was already a designated health and safety representative at the Putney bus garage, the Claimant did not fall within this protection. Ground (3): the argument pursued under this ground did not appear in the Claimant's pleaded case below and did not seem to have been pursued before the ET. Even if the Claimant was permitted to take the point, however, it was impossible to see how his claim could be put under Sections 44(1)(c)(ii) and 100(1)(c)(ii) ERA: his case was put on the basis that he had been able to raise his health and safety concerns with the	**[2020] IRLR 417** **JUNE 2020**		

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Respondent's managers and there was no suggestion that it had not similarly been practicable for him to raise those matters with the designated health and safety representative at his place of work. Generally, there was no error of law or approach in the ET's reasoning and it had permissibly concluded that the Claimant's health and safety detriment and dismissal claims had no reasonable prospect of success.			

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DISCIPLINARY MATTERS Contracts, Contracts Chapter R on Disciplinary Procedures			
Schulze Allen v Royal College of Veterinary Surgeons [2019] UKPC 34 Privy Council (Lord Wilson, Lord Carnwath, Lord Lloyd-Jones Professional misconduct, Disciplinary proceedings The Royal College brought four charges against Dr Schulze Allen. The first charge was that he was unfit to practise veterinary surgery because he had been "convicted … of petty theft" in California. Although it does not spell out the underlying assumption that his conviction was of a "criminal offence", this charge must have been brought under section 16(1)(a), of which it is a requirement. The second to fourth charges, brought under section 16(1)(b), were that Dr Schulze Allen had been guilty of disgraceful conduct in a professional respect because he had made three different representations to the Royal College which were dishonest or which he ought to have known were false. For the first, third and fourth charges to be made out, the Committee had to be, and now the Board has to be, sure beyond a reasonable doubt that Dr Schulze Allen's infraction for petty theft was a "*criminal*" offence under Californian law. The suggestion of the law of California appears to be that a felony is always a crime and that an infraction is always a public offence. The Board therefore held on the evidence that the Royal College has not discharged the burden of proving beyond reasonable doubt that Dr Schulze Allen was convicted of a criminal offence under Californian law. " The Committee in part based their decision on sanction on the view that Dr Schulze Allen's "dishonest conduct" was "repeated … on three separate occasions" and that the facts forming the basis of the third charge were "a clear attempt to deliberately misrepresent the fact that he had a conviction for a criminal offence". But Dr Schulze Allen's appeal is today allowed in respect of three of the four charges, including the third charge. If they had concluded that those three charges could not be upheld, the Committee might have imposed a less extreme sanction on Dr Schulze Allen than the removal of his name from the register. The Board therefore sets aside the sanction which the Committee imposed on him and remits to them the task of identifying the appropriate sanction in relation to the second charge."	**[2020] IRLR 136** **February**		
Sanusi v General Medical Council **[2019] EWCA Civ 1172** **Lord Justice David Richards Lady Justice Simler and Mrs Justice Theis** Where a doctor chose not to attend a fitness to practise hearing before the Medical Practitioners Tribunal, there was no general obligation on the tribunal to adjourn or provide the doctor with the opportunity to make submissions in mitigation of sanction once adverse findings had been made against him or her. The guidance given in **Adeogba v General Medical Council** [2016] EWCA Civ 162, [2016] 1 W.L.R. 3867, [2016] 3 WLUK 528 on the approach to proceeding in the absence of a registrant applied with equal, if not greater, force to adjournments part way through a hearing, including immediately before consideration of sanction.		**[2020] I.C.R. 311** **[2019] 1 W.L.R. 6273** **[2019] 7 WLUK 260** **[2020] 1 C.L. 100**	
Idu v East Suffolk and North Essex NHS Foundation Trust **Court of Appeal (Civil Division) [2019] EWCA Civ 1649** [2019] EWCA Civ 1649 The Claimant was a consultant surgeon employed by Trust. Following a		**[2020] I.C.R. 683** **[2019] 10**	

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number of concerns about her conduct, the trust undertook a disciplinary investigation. A panel hearing, chaired by an associate medical director and comprising two non-medical employees of the trust, considered seven allegations of misconduct. These included allegations that the Claimant continued to hold herself out as a clinical lead after being told not to do so; that she had refused to co-operate in attempts to create an up-to-date job plan; that she had refused to undertake strike cover; that she had refused, without adequate explanation, to adhere to the trust's policy to maintain an 18-week waiting target; and that she had made inappropriate and derogatory comments in communications with colleagues. The panel concluded that there was a clear pattern showing the Claimant's refusal to accept management's authority or to accept criticism of her behaviour or to comply with reasonable standards and expectations, and she was dismissed for gross misconduct. An internal appeal was unsuccessful. The Claimant brought proceedings in the employment tribunal for unfair dismissal and sex and race discrimination. In dismissing the claims, the tribunal held that the trust's case against the Claimant was not one "involving professional conduct", obliging the trust to have an independent medically qualified person on the disciplinary panel, in accordance with the Department of Health's requirements for maintaining professional standards and the trust's internal policy, since the case concerned the Claimant's personal conduct rather than her clinical or professional conduct or competence. The Employment Appeal Tribunal dismissed an appeal by the Claimant, The CA dismissed an appeal. It held that the defining characteristic of professional conduct was that it arose from the exercise of medical skills, but it was not the case that anything done by a doctor which in some way related to the exercise of their medical skills involved their professional conduct. Whilst the paradigm of professional conduct was conduct by doctors in the course of their treatment of patients, being clinical conduct, that would not always be the case. The question whether conduct arose from the exercise of medical skills was imprecise and there would sometimes be borderline cases. In deciding on what side of the line a particular case fell, it would typically be relevant and helpful to ask whether the resolution of the issue raised by the charge required the experience and expertise of an independent doctor. The question whether the conduct charged should be characterised as professional had to be determined by the court and not by the trust The fact that the Claimant was a doctor was no more than the context in which the allegation arose, since they all concerned her relationship with the trust's management and with colleagues and staff with whom she had to deal and did not arise out of the exercise of her medical skills. Accordingly, the allegations against the Claimant did not involve her professional conduct, and the trust had followed the correct procedure.		**WLUK 78** **(2020) 171 B.M.L.R. 143**	
R. (on the application of Kuzmin) v General Medical Council **[2019] EWHC 2129 (Admin)** **Queen's Bench Division: Manchester** **Hickinbottom LJ , Butcher J** The GMC brought disciplinary proceedings against the claimant doctor before the Medical Practitioners Tribunal. At the close of the General Medical Council's case, following an unsuccessful application to have the case dismissed, the claimant withdrew his witness statement and indicated that he would not give evidence before the tribunal. The tribunal ruled that, as a matter of principle, it had the power to draw an adverse inference from the fact that a doctor who faced disciplinary charges did not		**[2020] ICR 403** **[2019] 1 W.L.R. 6660**	

give evidence. The claimant sought judicial review of that ruling. Dismissing the claim, it was open to a panel of the Medical Practitioners Tribunal to draw adverse inferences from the failure of a charged registered medical practitioner to give evidence, whether at all or in relation to a particular issue. This included in an appropriate case, the inference that he had no innocent explanation for the prima facie case against him, subject to such an inference not being procedurally unfair. Whether an adverse inference was drawn would be highly dependent upon the facts of the particular case, but generally no inference would be drawn unless (i) a prima facie case to answer had been established, (ii) the individual had been given appropriate notice and an appropriate warning that such an inference might be drawn if he did not give evidence, an opportunity to explain why it would not be reasonable for him to give evidence and, if it were found that he had no reasonable explanation, an opportunity to give evidence, (iii) there was no reasonable explanation for his not giving evidence and (iv) there were no other circumstances in the particular case which would make it unfair to draw such an inference. The tribunal's power to draw adverse inferences needed no express sanction by statute, statutory instrument or General Medical Council guidance/policy nor any express guidance on how the power should be exercised; and that, accordingly, the tribunal's ruling was correct.			
EMAD ALDIN SMO v HYWEL DDA UNIVERSITY HEALTH BOARD **QBD (Linden J)** **26/03/2020** The Claimant is a consultant colorectal surgeon who has been employed by the defendant since 4 January 2016. Since 2 June 2016, he has been subject to disciplinary proceedings pursuant to a procedure entitled "Upholding Professional Standards in Wales" ("UPSW/the Procedure") which applies to all NHS doctors and dentists employed in Wales. The Boards commenced a parallel procedure and the Claimant the right of the defendant to initiate a parallel process and accusing it of attempting to circumvent UPSW and the procedural safeguards which the Procedure provides. The court granted the Claimant employee an injunction to restrain the continuation of a "working relationships investigation" into his conduct whilst working as a consultant surgeon with the defendant health board, which the defendant had been carrying out in parallel with NHS disciplinary procedures. The Defendant had not commenced the working relationships investigation on the basis of a discretionary power conferred on it by the claimant's employment contract, but had simply decided on a particular course of action in breach of the implied duty of mutual trust that it owed to the Claimant. Linden J stated "In my judgement this is a *Malik* case rather than a *Braganza* case. The working relationships investigation was not decided upon through the exercise of a discretionary power which was expressly or impliedly conferred on the defendant by the claimant's contact of employment. The defendant simply decided on a particular course of action. But, in any event, I do not consider that the outcome would be different on either approach. In my view it is important to be clear as to the premise on which the question of breach of mutual trust and confidence, alternatively rationality, arises. This is that, unlike in *Jain*, UPSW is incorporated into the Contract but the concerns or issues which are being addressed or handled in the working relationships investigation are not ones which the defendant is required to consider under that Procedure. There are, however, closely related concerns or issues which are being investigated under the Procedure, which is ongoing. In my view it was in breach of the implied duty of mutual trust and confidence for the defendant to embark on the working relationships investigation in the circumstances in which it did so." **Braganza is considered in Contracts at 1.117-1.131.**			

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Harrison v Barking, Havering and Redbridge University Hospitals NHS Trust **[2019] EWHC 3507 (QB) (19 December 2019** **Deputy High Court Judge Margaret Obi** A solicitor has obtained a mandatory injunction allowing her to resume most of her duties after the High Court ruled that it was strongly arguable that her suspension was unreasonable. Ms Harrison is the Deputy Head of Legal Services for an NHS Trust. This involves inquest work, handling claims, advisory work and legal teaching. She was suspended following concerns about her handling of a clinical negligence case. She was not provided with details of the allegations and was subsequently diagnosed with stress. The Trust asked Ms Harrison to undertake a phased return on restricted duties, auditing files and carrying out legal teaching but not doing casework. When she refused, on the basis that it was a demotion and contrary to medical advice, she was suspended again for refusing to obey an instruction. She sought an injunction permitting her to perform most of her normal duties autonomously. She argued that the Trust's acts or omissions breached the implied duty of trust and confidence and that her health was being harmed as a result. Applying the legal test established in American Cyanamid v Ethicon Ltd (No1) [1975] 1 AC 396 (as considered in **Jahangiri v St George's University Hospitals NHS Foundation Trust** [2018] EWHC 2278), the court decided that Ms Harrison had strong grounds to argue that the Trust's actions amounted to a breach of the implied duty of trust and confidence. In particular, there was no reasonable and proper cause for suspending her from most of her normal duties. Damages were not an adequate remedy. The balance of convenience was in Ms Harrison's favour because there was no evidence that enabling her to undertake normal duties (except clinical negligence casework) would harm the Trust, whereas the suspensions had affected her health and were professionally to her detriment. "It is strongly arguable that the manner in which the Claimant was treated by the Defendant amounted to a breach of the implied duty of trust and confidence for the following interrelated reasons: (i) There was arguably no reasonable and proper cause for the suspensions (for the reasons set out above) and as a consequence no justification for subsequently restricting the Claimant's duties to legal teaching, policy work and supervised casework. (ii) The criticisms of the Claimant's inquest and medico-legal work, purporting to justify a restriction of her duties, have been made after the decision to suspend. There was no evidence in Mr Avery's witness statement or in the contemporaneous documentation that there were any concerns about the Claimant's handling of the Defendant's inquest work or her medico-legal advice more generally at the time. On the contrary, the Claimant's evidence is that her inquest work has been highly effective. There is no evidence of mismanagement of the inquest work or erroneous medico-legal advice in the warning letter, the first suspension letter, in the first Terms of Reference or in the expanded Terms of Reference. There was also no challenge to the Claimant's assertion that the allegation that she is rude and unprofessional to panel solicitors had not been raised with her during her appraisals. Therefore, restriction of the Claimant's ability to undertake inquest and medico-legal work without supervision is not justified."			

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DISCRIMINATION: AGE Contracts, Chapter T			
Heskett v Secretary of State for Justice **UKEAT/0149/18/DA** **HIS HONOUR JUDGE MARTYN BARKLEM** **(SITTING ALONE)** SUMMARY AGE DISCRIMINATION Following funding cuts imposed by central government the Ministry of Justice made changes, among other things, to the rate at which certain Probation Officers progressed up an incremental salary scale. The effect was that progression to the top of the scale would take many years longer than had previously been the case. The Tribunal found that the policy was prima facie discriminatory in favouring employees over the age of 50 as against younger employees. That finding was not appealed. However, the Tribunal went on to find that the policy was, in all the circumstances, justified. The EAT rejected the Claimant's appeal against that finding, holding that the Tribunal was entitled to find, on the facts, that this was not a "cost alone" case (see Woodcock v Cumbria Primary Care Trust [2012] EWCA Civ 330 which held that cost alone could not amount to a legitimate aim capable of justifying discrimination). The EAT noted that following **HM Land Registry and Benson & Ors** [2012] IRLR 373, [2012] ICR 627 and **Edie & Ors v HCL Insurance BPO Services Ltd** [2015] OVR 713 it is legitimate for an organisation to seek to break even year on year and to make decisions about the allocation of its resources. The present Tribunal had correctly identified the key questions before it and weighed the relevant factors in the balance. The resulting decision was one which it was entitled to make, and with which the EAT could not interfere. **Bemson is considered in Contracts at T190, 197, 198, 304.**		**[2019] 6 WLUK 381** **[2020] I.C.R. 359**	

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DISCRIMINATION: DISABILITY Contracts, Chapter T in particular T340-T405			
DW v Nobel Plastiques Iberica SA (C-397/18) Court of Justice of the European Union President of Chamber J-C Bonichot , Judges C Toader , A Rosas , L Bay Larsen , M Safjan Advocate General G Pitruzzella 2019 Sept 11 (Case C-397/18) The employee worked in a factory which produced pipes. She was diagnosed with an "occupational disease" and was unable to work for several periods. She was categorised as a "worker particularly susceptible to occupational risks" within the meaning of national law. Following her diagnosis, she was declared "fit with limitations" for her job and was assigned, in priority over other workers, to tasks involving work with less risk to her health than in other posts. With a view to carrying out a dismissal on objective grounds, her employer adopted four selection criteria to determine whether or not she should be dismissed: assignment to the processes of assembly and shaping of plastic pipes, productivity below 95%, a low level of multi-skilling and a high rate of absenteeism. Applying those criteria, the employer dismissed her, citing economic, technical, production and organisational reasons. On a preliminary ruling questions concerning the interpretation of Directive 2000/78 . On the reference— Directive 2000/78/EC had to be interpreted, as far as possible, in a manner consistent with the United Nations Convention on the Rights of Persons with Disabilities, since that Convention had been incorporated into European Union law. By virtue of article 1 of the Convention, persons with disabilities included people with long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, might hinder their full and effective participation in society on an equal basis with others. The concept of "disability" in the Directive had to be understood as referring to a hindrance to the exercise of professional activity rather than to the impossibility of exercising such activity. The fact that a person was categorised as a worker particularly susceptible to occupational risks, within the meaning of national law, did not automatically mean that the person had a disability within the meaning of the Directive. The state of health of such a worker, which prevented that worker from carrying out certain jobs on the ground that they would entail a risk to their own health or that of other people, only fell within the concept of disability, within the meaning of Directive 2000/78 where it led to a limitation of capacity arising from, inter alia, long-term physical, mental or psychological impairments which, in interaction with various barriers, might hinder the full and effective participation of the person in their professional life on an equal basis with other workers, which was for the national court to determine. HK Danmark (acting on behalf of Ring) v Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11) [2013] ICR 851 , ECJ, Daouidi v Bootes Plus SL (Case C-395/15) [2017] ICR 420 , ECJ and Ruiz Conejero v Ferroser Servicios Auxiliares SA (Case C-270/16) [2018] 2 CMLR 27, ECJ applied. The selection criteria for dismissal, which consisted of having productivity below a given rate, a low level of multi-skilling and a high rate of absenteeism, could give rise to indirect discrimination on grounds of disability, within the meaning of article 2(2)(b) of Directive 2000/78/EC. Under article 5 of the Directive, employers were obliged, without being	**[2019] I.R.L.R. 1104**	**[2020] I.C.R. 182** **[2019] 9 WLUK 94**	

placed under a disproportionate burden, to make reasonable accommodation for disabled persons, which included modifying premises and equipment, patterns of working time, the distribution of tasks or the provision of training or resources. The dismissal of a disabled worker on the ground that she met such selection criteria constituted indirect discrimination on grounds of disability within article 2 of the Directive, unless the employer had provided the worker with reasonable accommodation, within the meaning of article 5 , in order to guarantee compliance with the principle of equal treatment of disabled people, which was for the national court to determine. 1. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the state of health of a worker categorised as being particularly susceptible to occupational risks, within the meaning of national law, which prevents that worker from carrying out certain jobs on the ground that such jobs would entail a risk to his or her own health or to other persons, only falls within the concept of "disability", within the meaning of that Directive, where that state leads to a limitation of capacity arising from, inter alia, long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in their professional life on an equal basis with other workers. It is for the national court to determine whether those conditions are satisfied in the main proceedings. 2. Article 2(2)(b)(ii) of Directive 2000/78 must be interpreted as meaning that dismissal for "objective reasons" of a disabled worker on the ground that he or she meets the selection criteria taken into account by the employer to determine the persons to be dismissed, namely having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, constitutes indirect discrimination on grounds of disability within the meaning of that provision, unless the employer has beforehand provided that worker with reasonable accommodation, within the meaning of article 5 of that Directive, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, which it is for the national court to determine. **See Contracts at D102, T20, T28, T118, T350, T402.**			
Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061 Lord Justice Underhill (Vice-President of the Court of Appeal (Civil Division)) Lord Justice Davis and Lord Justice Bean Treating a front-line police officer less favourably on the basis of a stereotypical assumption that her hearing impairment, while not currently having an adverse effect on her duties, might do so in future amounted to direct discrimination under the Equality Act 2010 s.13. Police work activities were "normal day-to-day activities" within s.6(1) of the Act. The court briefly considered the protection provided by the Act for persons with a progressive condition, and the circumstances in which claims should be brought under s.15 of the Act. **See Contracts at T105 which considers the cases on perceived discrimination.**	**[2019] I.R.L.R. 805**	**[2020] I.C.R. 145** **[2019] 6 WLUK 327** **[2019] 10 C.L. 87**	
A Ltd v Z	[2019]	**[2020]**	

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UKEAT/0273/18/BA **Employment Appeal Tribunal** **Before Her Honour Judge Eady QC (Sitting Alone)** An employment tribunal, when considering whether an employer had constructive knowledge of an employee's disability, had applied the wrong test by asking itself what further enquiries the employer ought to have made without asking what it might then reasonably have been expected to know. Even if the employer had made the further enquiries, it could not reasonably have known of the employee's disability as she would have concealed it. Disability related discrimination – section 15(2) – knowledge; section 15(1)(b) – justification; loss and mitigation; compensation It was accepted that the Claimant was a disabled person for the purposes of the Equality Act 2010 - by reason of the fact she suffered from mental and psychiatric impairments, namely stress, depression, low mood and schizophrenia – but she had not disclosed these conditions to the Respondent and had given alternative reasons for health-related absences during her employment. The ET accepted that the Respondent had no actual knowledge of the Claimant's disability but found it should have made more enquiries into the position and that it therefore had constructive knowledge for the purposes of section 15(2) Equality Act. The Respondent had dismissed the Claimant because of her poor attendance and time-keeping. The first reason related to something arising from her disability; the second did not. The Respondent was able to demonstrate that it had a legitimate aim - in that it needed a dependable person in the Claimant's post – but, the ET concluded, given the intemperate and precipitate nature of the decision-making process, the Respondent could not show its summary dismissal of the Claimant was a reasonably necessary means of achieving that aim. It therefore upheld the Claimant's complaint of unlawful disability discrimination under section 15 EqA. Going on to consider remedy, the ET sought to apply the guidance in **Abbey National plc v Chagger** [2010] ICR 397, finding that - had the Respondent made further enquiries - the Claimant would have continued to hide her mental health problems and would have refused to engage with any occupational health or other medical referral that might disclose her history. That being so, the ET found that there would then have been a 50% chance that the Claimant would have been the subject of a non-discriminatory dismissal and that, in any event, her employment would have ended before she had reached two years' service. Allowing that the Claimant's poor time-keeping had also fed into the decision to dismiss, the ET considered that this should result in a 20% reduction in her compensation for contributory fault. The Respondent appealed against each of these findings. Held: allowing the appeal in part On the question of constructive knowledge, the ET had focused on what it considered might have been the further steps the Respondent could reasonably have been expected to take; it had failed, however, to ask itself whether the Respondent could then have reasonably have been expected to know of the Claimant's disability. Its further findings relevant to loss answered that question: had the Respondent made the further enquiries the ET considered might have been expected, it would still not have known of the Claimant's disability because she would have continued to hide the true facts of her mental health condition. That being so, the answer for	I.R.L.R. 952	**I.C.R. 199** [2019] 3 WLUK 790 [2019] 11 C.L. 80	

section 15(2) purposes was that the Respondent neither knew, nor could reasonably have been expected to know, of the Claimant's disability. The Respondent's appeal was allowed on this basis. As for justification, the question for the ET was whether the Respondent had made good its justification of the Claimant's dismissal. The ET's reasoning went to the question whether the summary nature of the dismissal was justified but did not fully engage with the issue of the dismissal more generally. Doing so, the ET would have needed to take into account the business needs of the employer (**Hensman v MoD** UKEAT/0067/14 applied) but its reasoning did not demonstrate that it had. Had it been necessary to determine this point, the Respondent's appeal on this ground would also have been allowed. On the question of loss, in the circumstances of this case, the ET had permissibly taken account of the other, non-discriminatory reason for the Claimant's dismissal (her poor time-keeping) when assessing contributory fault. Ultimately the Respondent's appeal against the ET's findings on loss amounted to perversity challenges and did not meet the high threshold required. If the challenges to the ET's liability findings had not been upheld, the Respondent's appeal on the question of loss would not have been successful. **Section 15 is considered in detail at Contracts T351 onwards. Knowledge is considered at T365.** **See Contracts T362 onwards which considers justification in detail.**			
Britliff v Birmingham City Council **UKEAT/0291/18/BA** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY DISABILITY DISCRIMINATION The Claimant is pursuing claims of disability discrimination in the Employment Tribunal, which are defended. It is common ground between the parties that for the purposes of an Equality Act 2010 claim the 2006 United Nations Convention on the Rights of Persons with Disabilities has indirect effect. At a Preliminary Hearing the Employment Tribunal correctly held that it does not have direct effect.		**[2020] I.C.R. 653** **[2019] 8 WLUK 88**	
Igweike v TSB Bank plc **UKEAT/0119/19/BA** **SUMMARY** **DISABILITY DISCRIMINATION – Disability** The Claimant's performance at work received a rating which meant that he did not receive a bonus. He claimed that his performance had been adversely affected by a grief reaction that amounted to a disability, and that he had, in various ways, been subjected to disability discrimination. The Tribunal determined that he was not, in fact and law, disabled and the Claimant appealed that decision. The appeal was dismissed. The Tribunal had not erred in not finding that the Claimant's grief reaction amounted to an impairment. It had not made the errors of thinking that there had to be a clinically well recognised condition, or that an impairment could only be proved by medical evidence. It had properly considered that a natural reaction to adverse life events does not necessarily bespeak an impairment. Herry v Dudley Metropolitan Council [2017] ICR 610 considered. The Tribunal had not erred by focussing on what the Claimant could do,	**[2020] IRLR 267** **April 2020**		

rather than what he could not do, nor by failing to consider the impact on his normal day-to-day activities in the work context. It had not erred in its approach to whether, if there was an impairment, any effect on normal day to day activities was substantial, that is, more than minor or trivial. Paterson v Commissioner of the Police of the Metropolis [2007] ICR 1522 considered. Finally, the Tribunal had not erred in concluding that any such effect was not long-term, and hence had not erred in failing to consider the implications of the long-term question for the impairment question. J v DLA Piper UK LLP [2010] ICR 1052 considered. **See Contracts at T25, T28(2), T105.**			
Tesco Stores Ltd v Tennant **UKEAT/0167/19/OO** **HIS HONOUR JUDGE SHANKS Sitting alone** SUMMARY DISABILITY DISCRIMINATION – Disability The Claimant brought proceedings on 11 September 2017 for disability discrimination and harassment based on actions of her employer Tesco which took place from September 2016. The EJ decided as a preliminary issue that the Claimant was disabled at the relevant time, finding that from 6 September 2016 she suffered an impairment (namely depression) which had a substantial adverse effect on her ability to carry out normal day-to-day activities and which was long-term under para 2(1)(a) of Schedule 1 to EqA 2010 because by September 2017 it had lasted 12 months. Tesco appealed on the basis that in order to claim disability discrimination or harassment the claimant must be disabled at the time of the relevant act and that para 2(1)(a) of Schedule 1 to EqA 2010 required the effect of the impairment to have lasted 12 months **before she could be said to be disabled.** The EAT held that it was clear on the wording of the para that Tesco were right and that the Claimant was only disabled and could only bring claims as from 6 September 2017. **For consideration of Schedule 1 see T29 - 32.**	**[2020] IRLR 363, May 2020**		**IDS Emp. L. Brief 2020, 1124, 22**
Ishola v Transport for London **[2020] EWCA Civ 112** **LADY JUSTICE SIMLER and SIR JACK BEATSON** The claimant was employed by the respondent for almost eight years and was at all material times a disabled person suffering with depression and migraines. Following a period of sickness absence that started in May 2015, he did not return to work and was dismissed on grounds of medical incapacity in June 2016. He complained to the employment tribunal of, amongst other things, unlawful disability discrimination. Save for a limited finding that there was a breach of the duty to make reasonable adjustments (in the respondent's lateness in advising of a reduction to his sick pay and failure to allow a friend or family member to accompany him to sickness review meetings) and a corresponding finding of unlawful indirect discrimination, all claims failed and were dismissed. Save in one immaterial aspect, that decision was upheld by the EAT. The claimant appealed on a single ground relating to the concept of 'provision, criterion or practice' (PCP) in s 20 of the Equality Act 2010. The single ground was that too narrow and technical an approach had been taken to the reasonable adjustments claim, in that the tribunals below should properly have found that the respondent operated a PCP of **requiring the claimant to return to work without concluding a proper and fair investigation into grievances raised by him, which he said were not properly and fairly investigated prior to his dismissal.** The tribunal held	**2020] IRLR 368, May 2020**		**IDS Emp. L. Brief 2020, 1123, 10-12**

there was no PCP operated by the respondent because the alleged requirement was a one-off act in the course of dealings with one individual. The EAT upheld that conclusion. The claimant contended that an ongoing requirement or expectation that a person should behave in a certain manner (here, return to work despite the outstanding grievances) was a 'practice' within the meaning of s 20(3). The Court of Appeal (Civil Division) (Lady Justice Simler, Sir Jack Beatson) by a reserved judgment given on 7 February 2020 dismissed the appeal. It held that not all one-off acts and decisions necessarily qualify as PCPs. In order so to qualify, they must be capable of being applied in future to similarly situated employees. The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, it was difficult to see what the word 'practice' added to the words if all one-off decisions and acts necessarily qualify as PCPs. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage that a claimant suffers but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief that the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP. In context, and having regard to the function and purpose of the PCP in the 2010 Act, all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. **For detailed consideration of PCPs see Contracts at T164 onwards and see T349 in the context of disability..**			
Chief Constable of Gwent Police v Parsons and anor **EAT, 25.2.20 (0143/18)**			**IDS Emp. L. Brief 2020,**

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UKEAT/0143/18/DA **HIS HONOUR JUDGE SHANKS (SITTING ALONE)** SUMMARY DISABILITY DISCRIMINATION The Claimants were police officers in their 40s who were disabled under Equality Act 2010 and in possession of "H1 certificates" which allowed them immediate access to "deferred pension" on leaving the police. They left the force under the police "voluntary exit scheme" (analogous to a redundancy scheme) and their "compensation lump sums" were capped at six months' pay, when they would otherwise have received 21 and 18 months' respectively, because they were in immediate receipt of "deferred pension". The Claimants brought successful claims against the Chief Constable on the basis that capping the compensation lump sums was discriminatory under section 15 Equality Act. On appeal the EAT upheld the decision of the ET on each of the three issues on which the ET had found in favour of the Claimants: (1) capping the compensation lump sum was clearly "unfavourable treatment"; there was no reason to bring into account the "deferred pension" which they also received on leaving the force in considering the relevant treatment; and Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65 was distinguishable in that the relevant treatment in that case was classified as "the award of a pension" which could not be said to be unfavourable, as opposed to "capping the compensation lump sum", which clearly could; (2) possession of H1 certificates (which was the cause of the immediate receipt of deferred pension and therefore the decision to cap the compensation lump sum) was clearly "something arising in consequence of [their] disability" since the certificates were based on exactly the same impairments as the (admitted) Equality Act disabilities; (3) on the material put before the ET by the Chief Constable he had not established that the unfavourable treatment was justified under section 15(1)(b) of Equality Act; the financial material did not show that the Claimants would receive more from the full compensation lump sum than they would receive in earnings by remaining with the police to retirement age as in Kraft Foods UK Ltd v Hastie [2010] ICR 1355; the mere fact that they were in immediate receipt of the "deferred pension" was not sufficient to establish that the compensation lump sum amounted to a windfall and the Chief Constable had not advanced or provided the material necessary to support any other case (see Loxley v BAE Land Systems Munitions and Ordinance Ltd [2008] ICR 1348). **On section 15 see the detailed commentary at Contracts T351.**			**1124, 21-22**

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Q v L **UKEAT/0209/18/BA** **THE HONOURABLE MRS JUSTICE SLADE DBE** **(SITTING ALONE)** SUMMARY DISABILITY DISCRIMINATION – Reasonable adjustments ET Rules 50(3) and 67 In the absence of wider written consent to disclosure of his medical information, the Employment Tribunal erred in holding that the Respondent was fixed from the outset with knowledge of one of the disabilities the Claimant had disclosed to occupational health. On the facts found by them the Employment Tribunal did not err in concluding that the relevant manager should have made further enquiries about the Claimant's medical condition and sought his consent to the release of information about his disability which was given in his pre-employment interview with occupational health. the Employment Tribunal failed to consider adequately or at all whether the adjustments in respect of which a claim was made were reasonable balancing any substantial disadvantage suffered by a person with the Claimant's disability with the reasonable needs of the Respondent. The claim in relation to reasonable adjustments is remitted for decision to a differently constituted Tribunal. The Order that the decision of the Employment Tribunal not be entered on the Register is set aside. **The issue of knowledge of disability is a frequent issue. This is an important case which shows that the employer may not always be fixed with knowledge of what OH was told but that there may be a duty to make wider inquiries if the employer is provided with some information. For a detailed consideration of these issues, see Contracts at T364 and T370.** **On the approach to take with reasonable adjustments see T366 and for examples see T387 onwards.**			

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Mr C Williams v The Governing Body of Alderman Davis Church in Wales Primary School **UKEAT/0108/19/LA** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY UNFAIR DISMISSAL – Constructive dismissal DISABILITY DISCRIMINATION The Tribunal erred in concluding that, because it had found that the conduct of the Respondent which tipped the Claimant into resigning could not contribute to a breach of the implied duty of trust and confidence, his claim that he was constructively dismissed must fail. That would be correct only had it, properly, found that (a) there was no prior conduct by the Respondent amounting to a fundamental breach; or (b) there was, but it was affirmed. But if, in such a case, there was prior conduct amounting to a breach which was not affirmed, and which also materially contributed to the decision to resign, the claim of constructive dismissal will succeed. **London Borough of Waltham Forest v Omilaju** [2005] ICR 481 and **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1 considered. On the facts found, had the Tribunal applied the law correctly, it would have found that there was a constructive dismissal. It had found that there was prior conduct which contributed to the decision to resign, and which amounted to a breach of the implied term. It could not have properly found that such conduct had been followed by affirmation. A finding of constructive dismissal was therefore substituted. The Tribunal could not properly have found such dismissal to be for a fair reason, as claimed, and a finding of unfair dismissal was also substituted. While some claims of discrimination pre-resignation had also succeeded, the question of whether the constructive dismissal was discriminatory would be remitted for consideration by the Tribunal. The Tribunal decided that the withholding of certain information from the claimant in connection with disciplinary charges could not amount to a "practice" for the purposes of a complaint of failure to comply with the duty of reasonable adjustment, because it was not sure that the relevant individual would have so acted in all such cases. That was setting the bar too high. The Tribunal should have considered whether there was sufficient element of repetition or persistence in the Claimant's own case, for a practice to be found. **Nottingham City Transport v Harvey** UKEAT/0032/12 considered. **Lamb v The Business Academy Bexley** UKEAT/0226/15 applied. The appeal against this decision was also upheld, and this complaint remitted to the Tribunal for further consideration. **PCPs are considered in detail in contracts at T164. See T164(5) for the issue of repetition.**			

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Ms M Rakova v London North West Healthcare NHS Trust UKEAT/0043/19/LA **THE HONOURABLE MRS JUSTICE EADY DBE** **(SITTING ALONE)** SUMMARY DISABILITY DISCRIMINATION – Reasonable adjustments The Claimant, who suffered various disabilities (Ehlers-Danlos Syndrome, Dyspraxia and Dyslexia), bought a number of complaints in Employment Tribunal ("ET"), all of which were dismissed. The Claimant appealed against the ET's decision in respect of three claims of discrimination by reason of a failure to make reasonable adjustments: (i) in relation to what she complained was a PCP that conventional software provided by the Respondent be used; (ii) in respect of her claim regarding a failure to provide specialist software updates; and (iii) in relation to her complaint that she suffered substantial disadvantage by not being able to access the Respondent's guest WiFi on her lap-top. Held: allowing the appeal (i) The ET erred in holding that the Claimant had not demonstrated a PCP because the requirement identified only related to her. That was not how the Claimant's case was put. Her complaint was in respect of the general requirement that employees (including her) use the conventional software supplied. Although the Claimant had been provided with specialist software, to the extent that this did not properly function, the PCP continued to apply to her. The ET had further erred in finding that a PCP that might cause the Claimant to be less efficient (hence her request for adjustments that would improve her efficiency) could not establish substantial disadvantage: being subject to a PCP that causes an employee to be less efficient might well mean they suffer a more than minor or trivial disadvantage. Moreover, the ET ruling's in this regard could not be saved by its alternative finding that the Respondent had taken all reasonable steps to remove any substantial disadvantage: it had failed to identify the nature and extent of the substantial disadvantage in issue and was accordingly unable to determine what adjustments were reasonable (**Environment Agency v Rowan** [2008] ICR 218, EAT applied). (ii) As for the specialist software updates, the ET had erred in its approach to substantial disadvantage, again failing to allow that questions of efficiency might be relevant to the determination of substantial disadvantage. It further failed to engage with the Claimant's case that the issue was not merely whether she had been provided with functional dictation equipment - without the software updates that was not fully functional. It was no answer to find that the issue was one of "maintenance": if there was an on-going obligation to provide the adjustments in issue, that would include (so far as reasonable) the maintenance of the software by way of necessary updates; the ET had failed to demonstrate engagement with this point. (iii) The same error of approach to substantial disadvantage was apparent in relation to the third complaint – the Claimant's lap-top access to the Respondent's WiFi. Although the ET also said that any disadvantage in this regard was not substantial, because it took less than a month to resolve, this failed to take account of the earlier finding that the Claimant had raised a general issue regarding the ability to access WiFi over a year previously. **See Contracts at T366 onwards and in particular T368.**			

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Mrs M Itulu v London Fire Commissioner **UKEAT/0298/18/BA** **HIS HONOUR JUDGE SHANKS** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE The EJ struck out the Claimant's claims of disability discrimination on the grounds that her conduct in relation to the provision of expert evidence by doctors as ordered by the ET had been unreasonable. The EAT rejected her appeal against the striking out order: (1) The EJ had provided sufficient reasons for his finding that her conduct had been unreasonable; (2) He had found, as he was entitled to, that her unreasonable conduct made a fair trial impossible; (3) He confirmed that he had considered a lesser sanction, in particular an "unless" order, but he had concluded as he was entitled to that such an order would not have been appropriate in all the circumstances. **Medical evidence may be of some importance and if the employee refuses to co-operate this can be a ground for striking out.**			
Mrs K Martin v The Home Office **2401893/2018** **THE HONOURABLE MR JUSTICE SOOLE** **MS K. BILGAN** **MR P L C PAGLIARI** SUMMARY UNFAIR DISMISSAL DISABILITY DISCRIMINATION The Claimant was summarily dismissed for making unauthorised searches on the Respondent's database. She claimed unfair dismissal and disability discrimination (EqA ss.15 and 20). The ET dismissed all her claims; in respect of unfair dismissal and s.15, having particular regard to the Respondent's 'zero tolerance policy' on database abuse and medical evidence relied on by the Claimant as material to her conduct. The Claimant did not appeal the decision on s.20 EqA. The EAT allowed the appeal on unfair dismissal and s.15 EqA. In particular the ET had in effect misinterpreted the Respondent's zero tolerance policy as requiring any mitigating factors to be a direct cause of, rather than having a material impact on, the misconduct; and had made errors of fact and explanation in its consideration of the medical evidence. The claims were remitted for rehearing by a freshly-constituted tribunal.			

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DISCRIMINATION: RACE Contracts especially T68, T135, T204, T265, T313			
Bessong v Pennine Care NHS Foundation Trust **UKEAT/0247/18/JOJ** **CHOUDHURY J (SITTING ALONE)** SUMMARY RACE DISCRIMINATION – Harassment, Third-Party Harassment The issue in this appeal is whether s.26 (1) of the Equality Act 2010 ("the 2010 Act") should be interpreted so as to impose liability on an employer for third-party harassment against employees. The Claimant worked as a mental health nurse and was assaulted by a patient on racial grounds. Whilst the Tribunal found that as a result of various failures on the part of the employer, including a failure to ensure that all incidents of racial abuse were reported, the Claimant had been indirectly discriminated against, it rejected the Claimant's claim of harassment because the employer's failings were not themselves related to race. On appeal, the Claimant argued that s.26(1) of the 2010 Act should be construed in accordance with Directive 2000/43/EC ("the Race Directive") under which it is sufficient for liability to arise where the act of harassment "takes place" without any requirement that the employer's failings themselves had to be related to race. Held: Dismissing the appeal, that on a proper construction of the Race Directive there is a requirement for the unwanted act (in this case, the employer's failings) to be related to race and the words "takes place" in Article 2(3) of the Race Directive do not give rise to the interpretation for which the Claimant contends. The EAT is in any event bound by the decision of the Court of Appeal in Unite the Union v Nailard [2019] ICR 28, which confirms that there is currently no explicit liability under the 2010 Act on an employer for failing to prevent third party harassment. **For the employer's liability where an employer is the harasser see Contracts at T273-277.**	**[2020] IRLR 4**		
Badara v Pulse Healthcare Ltd **UKEAT/0210/18/BA** **THE HONOURABLE MR JUSTICE SOOLE** **(SITTING ALONE)** **SUMMARY** UNLAWFUL DEDUCTION FROM WAGES RACE DISCRIMINATION The Claimant was a Nigerian national who was a family member of an EAA national residing in the UK; and had the right to work in the UK pursuant to the Free Movement European Directive 2004/38/EC and the related provisions of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations). He was employed by the Respondent as healthcare support worker. His UK Residence card confirmed his status under the 2006 Regulations but expired on 20 January 2015. The Respondent refused to provide him work from that date until 17 November 2015, on the basis that he had not supplied evidence of his right to work. Home Office ECS (Employer Checking Services) checks during this period were negative. The Respondent relied on (i) the penalty provisions against employers of those without eligibility to work (Immigration, Asylum and Nationality Act 2006 (the 2006 Act); Immigration (Restrictions on Employment) Order 2007) and (ii) a contractual term in his contract (clause			**IDS Emp. L. Brief 2020, 1121, 12-15**

8.1) concerning the production of evidence of eligibility to work. By two ET1s presented in 2015 the Claimant complained of unlawful deduction of wages and direct and indirect discrimination on the grounds of race and/or nationality. The claims in the first ET1 were dismissed by an ET; but that decision was set aside by the EAT (HHJ Hand QC) and remitted to a fresh ET, which heard both sets of claims. The ET held that, whilst the Claimant admittedly had the right to work under the EEA Regulations, in the light of the penalty provisions in the 2006 Act (s.15), the requirements of the 2007 Order and clause 8.1 of the contract, it had been reasonable to require proof of eligibility in the form of positive ECS checks. For similar reasons, the discrimination claims were dismissed. The Claimant appealed, contending in particular that the ET had been wrong to distinguish the EAT decision in **Okuoimose v City Facilities Management Ltd** (UKEAT/0192/11/DA), which made clear that the provisions of the 2006 Act and 2007 Order were irrelevant in circumstances where the employee had a right to work pursuant to the Directive and the EEA Regulations; and that the ET had failed to take account of Home Office guidance to similar effect. This undermined the decisions in each claim. The Respondent contended that Okuoimose was correctly distinguished; and that in any event the ET's decision on the claim for unlawful deduction of wages was based on the Claimant's obligations under clause 8.1. The EAT held that the decision in Okuoimose and the Home Office guidance were relevant to the clause 8.1 issue and to the justification defence in the claim of indirect discrimination. Those claims were remitted to the same ET for reconsideration. The appeal in respect of direct discrimination was dismissed, as there was no basis to conclude that there might have been a different conclusion.			
Base Childrenswear Ltd v Otshudi **[2019] EWCA Civ 1648** **Court of Appeal, Civil Division** **Dismissal - burden of proof.** **(Lord Justice Underhill (Vice-President), Lord Justice Newey, Lord Justice Haddon-Cave)** "As regards the primary challenge, the question is whether the factors relied on by the Tribunal at para. 156 of its Reasons – summarised at para. 27 above – could reasonably justify the conclusion, in the absence of a satisfactory explanation, that the Claimant's race was a factor in her dismissal. As to that, I feel bound to say that I am not sure that I would have reached the same conclusion as the Tribunal. But the question of what inferences should be drawn from the primary facts is a question of fact and not of law. It is not legitimate for this Court to substitute its own view unless the Tribunal's conclusion was one which was not reasonably open to it... There was, I would therefore hold, a sufficient basis for an inference of racial discrimination, going beyond simply the fact of the Claimant's ethnicity, though I have to say that the case seems to me near the borderline." 42. " the second alternative identified...that Mr Granditer did believe, or at least may have believed the Claimant had stolen the clothes but that he was influenced in coming to that conclusion, so precipitately and on so little evidence, by a stereotypical prejudice based on her race. The nature of any such prejudice is not spelt out, but the Tribunal would of course be well aware that some people do (not always consciously) have prejudices against black people, or Africans, which predispose them to suspect misconduct. 43. That also seems to me inherently a much more plausible basis for a finding of discrimination. It is much easier to accept that Mr Granditer may, for racially tainted reasons, have jumped to the conclusion that the Claimant was stealing, despite the flimsiness of the evidence, than that he dismissed her for some other unexplained race-related reason and then invented, and suborned his staff to support, a story about a suspected theft. 44. If this was, as I believe, the Tribunal's reasoning, I accept that it would have been better if it had been more clearly expressed. But in fact I suspect that its failure to commit itself definitively as between the two "theories of the case" was deliberate. The consequence of the way that section 136 works is that, if a respondent fails to show that the relevant protected characteristic played no part in its motivation for doing the act complained of, a	**[2020] IRLR 118** **February**		

tribunal is not obliged to make a positive finding as to whether or how it did so: indeed one of the reasons for the (partial) reversal of the burden of proof which it effects is that it can often be very difficult for a claimant to prove what is going on in the mind of the putative discriminator. I believe that the Tribunal had this very much in mind. " **See Contracts at T135-136 for a consideration of the mental element with direct discrimination.**			
Tees Esk and Wear Valleys NHS Foundation Trust v (1) Ms H Aslam (Debarred) (2) Ms M A Heads: UKEAT/0039/19/JOJ **HIS HONOUR JUDGE AUERBACH** **MR P M HUNTER MR M WORTHINGTON** SUMMARY HARASSMENT – Conduct Appeal against the ET's decision upholding the Claimant's claim of harassment related to race. Appeal allowed. The Claimant in the Employment Tribunal was present when a colleague made a remark which included a reference to ISIS. She complained that this amounted to harassment by way of conduct related to race, identified by her for this purpose as her own race of being British Asian Indian. The Tribunal upheld the complaint and the First Respondent (the employer) appealed. Held: The Tribunal erred because: (1) It did not make a clear and distinct finding that the conduct related to race, as opposed to addressing the other elements of the definition of harassment; (2) If it did consider that the conduct related to race, it appeared to have done so on the basis of its view that the "perception of ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular, those in such areas as Pakistan, Afghanistan and Iran". But, if so: (a) That was not a proper finding, because there was no evidence before the Tribunal to support it. It was not a matter of which it could take judicial notice; (b) In any event the Tribunal had to decide for itself whether the conduct, and, in this case specifically the making of a reference to ISIS, related to race, as opposed to relying on what it took to be the public perception; and (c) In any event it was unfair to the First Respondent to reply upon this proposition, because it had not been put forward, or canvassed, by either the Claimant or the Tribunal during the course of the hearing. (3) The Appeal would therefore be allowed, and the decision upholding this complaint, and the associated award, quashed. On the evidence before the Tribunal, and the facts as found, the Tribunal, correctly applying the law, could not have properly concluded that this was conduct related to race, as alleged. The matter would therefore not be remitted. **On the law relating to harassment see Contracts at T242. Compare the cases at T259-260 with the facts of the above case.**			
Mr O Adedeji v University Hospital Birmingham NHS Foundation UKEAT/0171/19/BA **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Striking - out/dismissal PRACTICE AND PROCEDURE -Preliminary issues The employment judge had not erred or misdirected herself when refusing to extend time to bring a race discrimination claim brought three days out of time.			

"The sole issue in the appeal relates to the exercise of the judge's discretion whether to extend time to allow the claim for discriminatory constructive dismissal to proceed. He decided not to, recognising that the delay in that regard was "not substantial". 39. The discretion whether to extend time for a discrimination claim, applying the "just and equitable" test is, as the parties agree, a broad one which has been considered in numerous cases. It is unnecessary to cite them here. The judge's explanation for not allowing the claim that was out of time by only three days to proceed, was scant. Nonetheless, her comment that the delay was "not substantial" must be read in the light of the accompanying comments on the cogency of the evidence going back to June 2017 and, indeed, earlier, to November 2016. 40. The judge was fully entitled to consider the effect of delay on the cogency of evidence relating to those earlier events when considering the constructive unfair dismissal claim, and to give such weight to that issue as she thought right, within reason, for the purpose of considering the part of the claim that was only three days out of time.. I accept the submission of Ms Roberts, drawing on the Judgment of Laing J in **Miller v Ministry of Justice**, that it was for the judge to decide what weight to give to the shortness of the three day delay, of which she was aware. As I have already noted, the shortness of that delay had to be considered in the context of the much longer delay following historic events which would be admissible in evidence."			

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DISCRIMINATION – RELIGION OR BELIEF Contracts, Chapter T			
Gray v Mulberry Company (Design) Ltd **[2019] EWCA Civ 1720** **Lord Justice Bean, Lady Justice Simler and Lord Justice Arnold** **Religion or belief discrimination: indirect discrimination claim based on belief in right to own copyright fails** The Claimant, was a freelance writer and film-maker, employed in a non-creative role by the Respondent fashion design company. She was required to sign a contract containing a confidentiality clause and an agreement disclosing all copyright on her designs during her service to the company. She refused to sign the agreement believing that it could extend to the copyright on her own creative output which she was anxious to protect. Although the company amended the agreement to clarify that it had no intention of obtaining the copyright to the Claimant's personal work, she still refused to sign it and was dismissed. She presented a complaint to an employment tribunal of direct and indirect discrimination on the grounds of her belief, which was stated to be "the statutory human or moral right to own the copyright and moral rights of her own creative works and output", which she claimed amounted to a philosophical belief protected under sections 4 and 10 of the Equality Act 2010**.** The tribunal found that, while the Claimant might have held those views privately, at no stage during her employment had she made the company aware that she held them or that they were the reason for her refusal to sign the agreement. The tribunal accepted that the belief was genuinely held but, when applying the test for determining whether her views came within the category of a philosophical belief, namely whether they had sufficient cogency, seriousness, cohesion and importance to be worthy of respect in a democratic society, it concluded that the Claimant did not hold her belief as any sort of philosophical touchstone to her life so as to qualify for protection under the Act. The tribunal dismissed the complaint and the Employment Appeal Tribunal dismissed an appeal by the Claimant. The CA dismissed the appeal, holding that it was essential, before considering whether a belief amounted to a "philosophical belief" protected by sections 4 and 10(2) of the Equality Act 2010 , to define exactly what the belief was. In the present case, the belief relied on was the statutory human or moral right to own the copyright and moral rights of one's own creative works and output, except when that creative work or output was produced on behalf of an employer. If the belief relied on was so confined, then whether or not it amounted to a philosophical belief within the terms of section 10 was irrelevant, because it did not put the Claimant at a disadvantage for the purposes of section 19(2)(c). There was no causal link between that belief and either the Claimant's refusal to sign the copyright agreement or the company's decision to dismiss her. The ET found that what led to her refusal to sign, and thus to her dismissal, was her concern that the wording of the relevant clause leaned too far in the direction of the employer or failed sufficiently to protect her own interest. Debate or dispute about the wording or interpretation of the agreement could not be a philosophical belief within the meaning of section 10 so that the claim had to fail. Since it could be inferred that the Claimant's views about the importance of an author's copyright were no doubt held by many people, including many of the company's employees, the issue under section 19(2)(b) of the Equality Act 2010 was whether the PCP, namely the requirement to sign the copyright agreement as a condition of employment, put, or would have	**[2020] IRLR 29 January**	**[2020] ICR 715**	**IDS Emp. L. Brief 2020, 1121, 16-19**

put, others who shared the Claimant's belief at a particular disadvantage when compared with people who did not share it. There was no evidence that anyone else among the company's employees had suffered disadvantage by sharing the Claimant's belief. The dispute was as to how narrowly or broadly the copyright agreement should be defined. This was a question on which equal and opposite views about the reasonableness or legitimacy of the clause could be held. The Claimant's concern about signing was not the result of her belief, as defined, but the result of her wish to achieve greater protection for her own creative works; and that, accordingly, the indirect discrimination claim also failed on the basis that the PCP was not intrinsically liable to disadvantage a group with the Claimant's shared protected characteristic. **The EAT case is considered at Contracts TT83. For a detailed consideration of the way in which the issues are to be approached, see T82.**			
Sethi v Elements Personnel Services Ltd **Employment Judge Stout** The employment tribunal held that a temporary work agency indirectly discriminated against a practising Sikh when it refused to take him onto its books because he would not be able to shave his beard for religious reasons.			**IDS Emp. L. Brief 2020, 1121, 30**
Casamitjana v League Against Cruel Sports **Employment Judge Postle** Ethical veganism is a philosophical belief which qualifies as a protected belief within the meaning of Section 10 of the Equal Act 2010. A genuinely held belief In this case, the Respondents concede that the belief was genuinely held. Having read vast amounts of evidence as to how the Claimant conducts his life and the basis of his philosophy, I have no doubt whatsoever the Claimant genuinely and sincerely holds his beliefs in ethical veganism. A belief and not a viewpoint It is clear to me that ethical veganism carries with it an important moral essential. That is so even if the Claimant may transgress on occasions. It is clear it is founded upon a longstanding tradition recognising the moral consequences of non-human animal sentience which has been upheld by both religious and atheists alike. Furthermore, there is no doubt that the Claimant personally holds ethical veganism as a belief. He has clearly dedicated himself to that belief throughout what he eats, where he works, what he wears, the products he uses, where he shops and with whom he associates. It clearly is not simply a viewpoint, but a real and genuine belief and not just some irrational opinion. A weighty and substantial aspect of human life and behaviour The belief is at its heart between the interaction of human and non-human animal life. The relationship between humans and other fellow creatures is plainly a substantial aspect of human life, it has sweeping consequences on human behaviour and clearly it is capable of constituting a belief which seeks to avoid the exploitation of fellow species. It is therefore a weighty and substantial aspect of human life and behaviour. Attain a certain level of cogency, cohesion and importance Ethical veganism is without doubt a belief which obtains a high level of cogency, cohesion and importance. It is true that it is capable and the definition of the Vegan Society, namely a philosophy and a way of life which seeks to exclude as far as possible and practical all forms of exploitation and cruelty to animals for food, clothing or any other purpose and by extension promotes the development and use of animal free alternatives for the benefit of humans, animals and the environment. In dietary terms it denotes the practice of dispensing with all products derived wholly or partly from animals. There clearly does exist a community within businesses and restaurants which adheres to this ethical principal. The belief concerns the relationship between individuals and other living things in diet, clothing, consumption, travel and relationships and indeed many other aspects of daily life / living. It is clear this threshold is easily achieved, i.e. attaining a certain level of cogency, cohesion and importance. Worthy of respect in a democratic society and compatible with human dignity			

Given modern day thinking, it is clear ethical veganism does not in any way offend society, it is increasingly recognised nationally, particularly by the environmental benefits of vegan observance. **For a detailed consideration of the way in which the issues are to be approached, see T82.**			

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DISCRIMINATION – SEX Contracts, Chapter T			
South Western Ambulance Service NHS Foundation Trust v King **UKEAT/0056/19/OO** **Employment Appeal Tribunal** **Mr Justice Choudhury (President)** SUMMARY EXTENSION OF TIME: JUST AND EQUITABLE The Claimant lodged a grievance against her managers complaining of, amongst other matters, acts of discrimination. Her grievance was the subject of a report produced by an external consultant. The report dismissed the grievance. The Claimant's appeal was rejected. Dissatisfied with the grievance outcome and the Trust's failure to take action against one manager in particular, she resigned, claiming she was constructively dismissed. Her effective date of termination was 5 October 2017. On 11 December 2017, the Claimant issued proceedings claiming unfair constructive dismissal and victimisation because of doing a protected act, namely lodging a grievance. The Claimant relied upon a series of detriments said to be acts of victimisation. These commenced with the report and included the dismissal of her grievance and grievance appeal. Only the rejection of her grievance appeal fell within the three-month period (plus the conciliation period) prior to the date of issuing her claim. The Tribunal rejected the claim of unfair constructive dismissal. In relation to victimisation, it found that the report itself did amount to a detriment. However, none of the other matters relied upon, including the rejection of her appeal against the grievance decision, were found to amount to a detriment. The Tribunal concluded, however, that there was a course of conduct commencing with the report and which continued to the rejection of the Claimant's appeal. On that basis, the Claimant's claim was held to be in time. The Respondent appealed. Held, allowing the appeal, that the Tribunal had erred in concluding that there was conduct extending over a period within the meaning of s.123 of the Equality Act 2010, in circumstances where several of the acts said to be part of that course of conduct were not upheld as acts of victimisation. The EAT would substitute a decision that there was no conduct extending over a period. The case would be remitted to the Tribunal for it to determine whether time should be extended on just and equitable grounds.	**[2020] IRLR 168** **March**		
Commissioner of the City of London Police v Geldart **EAT, 29.11.19 (0032/19)** **THE HONOURABLE MR JUSTICE LAVENDER** **(SITTING ALONE)** **Sex discrimination claim based on maternity pay did not require comparator** SUMMARY SEX DISCRIMINATION - Jurisdiction MATERNITY RIGHTS AND PARENTAL LEAVE - Sex Discrimination 1. The Employment Tribunal was right to conclude that, on their correct construction, the Police Regulations and the determinations made thereunder entitled the Claimant to receive the London Allowance in full throughout her maternity leave.			**IDS Emp. L. Brief 2020, 1121, 24-25**

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2. However, the Respondent did not pay the London Allowance (in part or in whole) to the Claimant for much of her maternity leave, because she was on maternity leave. 3. The Claimant brought a claim for sex discrimination. This claim: (1) was not excluded by section 76 of, or paragraph 17 of Schedule 9 to, the Equality Act 2010; and (2) (following the judgment of the European Court of Justice in Webb v EMO Air Cargo (UK.) Ltd [1994] QB 718) did not require the Claimant to prove that the Respondent would have treated a man differently. In the present case, the unchallenged position before the Employment Tribunal was that the Claimant was treated as she was because she was on maternity leave. Given that, the Employment Tribunal was right to hold that the Webb principle meant that the Claimant did not have to prove that a man would have been treated differently.			

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DISCRIMINATION: SEXUAL ORIENTATION Contracts, Chapter T			
NH v Associazione Avvocatura per i diritti LGBTI **(Case C-507/18)** During an interview broadcast on an Italian radio programme a senior lawyer, stated that he would not wish to recruit homosexual persons to his firm nor to use the services of such persons in his firm. Having taken the view that that lawyer had made remarks constituting discrimination on the ground of the sexual orientation of workers, an Italian association of lawyers that defends the rights of lesbian, gay, bisexual, transgender or intersex persons in court proceedings brought a claim against him for damages. The proceedings were successful at first instance and the ruling was upheld on appeal. The ECJ held that a statement made by a person during an audiovisual programme, which suggested that they would never hire persons of a certain sexual orientation, constituted discrimination in employment and occupation as they were made by a person who has or may be perceived as having a decisive influence on an employer's recruitment policy. 1. The concept of 'conditions for access to employment … or to occupation' in Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical. 2. Directive 2000/78 must be interpreted as not precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.			

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EMPLOYMENT STATUS:
EMPLOYEE OR WORKER Contracts, Chapter 1 for detailed consideration of employment status.

Stuart Delivery Ltd v Augustine **UKEAT/0219/18/BA** **HER HONOUR JUDGE STACEY** **MS G MILLS CBE** **MRS C BAELZ** SUMMARY JURISDICTIONAL POINTS – Worker, employee or neither CONTRACT OF EMPLOYMENT – Whether established The Tribunal had not erred in concluding that when Mr Augustine, a delivery courier, was undertaking fixed hours "slots" for the Respondent, Stuart Delivery Limited, he was engaged in the capacity of a worker. During the slot the Claimant was under the control of the Respondent, was unable to leave the zone he had agreed to operate in and required to undertake the deliveries offered to him in return for a guaranteed hourly wage. He could not hold himself out as available to other delivery companies during the period (typically 3 hours) of a slot. The Tribunal had correctly considered the arrangement whereby the Claimant could release a slot he had signed up to back into the pool of approved couriers via the Staffomatic app. Its finding that the Claimant would only be released from the obligation of performing the slot himself if another courier signed up for it and that he had no control over whether, or who, picked up the slot he had released, did not amount to a right of substitution, or not one that was inconsistent with limb (b) worker status, was correct. Although there was some confusion as to why the facts in this case fell within category 5 of the situations identified by the Sir Terence Etherington MR in **Pimlico Plumbers v Smith** CA [2017] IRLR 323, paragraph 84, the overall conclusion was correct. Pimlico Plumbers v Smith applied and followed. The Tribunal's conclusion that the Claimant was not in business on his own account and the Respondent was not a customer of the Claimant's delivery business could not be faulted on their findings of fact. **Jivraj v Hashwani** [2011] UKSC 40 applied and followed. The Tribunal had correctly found that the Claimant was not employed on a global or umbrella contract as an employee. Although the Tribunal had not addressed the Claimant's alternative argument that he was an employee of the Respondent whilst working on slots for the duration of the slot itself, it was an entirely academic point in this case. On the facts of this case, no additional benefit would accrue to the Claimant if he were labelled an employee, rather than a worker, on each occasion he undertook a slot. It was therefore unnecessary to refer the matter back to the Tribunal for determination. The Tribunal's decision that the Claimant had undertaken a number of deliveries on an ad hoc basis was not perverse. The high threshold of perversity was not met (**Yeboah v Crofton** [2002] EWCA Civ 794) and the finding had no relevance to the issues in the case in any event. **See Contracts at Chapter One, 1.39-1.111. For a consideration of the 'Gig' economy see 5.3.1. - 5.3.43.**			**IDS Emp. L. Brief 2020, 1121, 30**

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REVENUE & CUSTOMS COMMISSIONERS v PROFESSIONAL GAME MATCH OFFICIALS LTD (2020) **UT (Tax) (Zacaroli J, Judge Thomas Scott) 06/05/2020** A company which engaged referees to officiate at football matches in the English Football League did not engage them under a contract of service and did not therefore incur PAYE and NICs liabilities. Although the referees were engaged under an overarching annual contract and a series of individual contracts covering each single appointment to officiate at a match, there was no employment relationship in the absence of obligations on the company to provide work and on the referees to accept the work offered.			
B v Yodel Delivery Network Ltd **CJEU** Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion: - to use subcontractors or substitutes to perform the service which he has undertaken to provide; - to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks; - to provide his services to any third party, including direct competitors of the putative employer, and - to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88. **For a consideration of the 'Gig' economy see 5.3.1. - 5.3.43. in particular the issue of substitution is considered at Contracts 1.87.**			
Digital Communication Systems Ltd v Mr C Scully **UKEAT/0182/19/LA** **HIS HONOUR JUDGE SHANKS** **(SITTING ALONE)** SUMMARY JURISDICTIONAL POINTS – Worker, employee or neither The issue before the Employment Judge ("EJ") was whether the Claimant was an employee, a "limb (b)" worker or neither. He rejected the claim that the Claimant was an employee inter alia on the basis that there was no obligation to provide personal service because there was a right of Substitution and then went on to decide that he was a "limb (b)" worker. Those two propositions could not stand together and the appeal against the finding that he was a "limb (b)" worker had to be allowed. The matter was remitted to a new EJ to decide the "limb (b)" worker issue afresh in the light of the original findings of primary fact.			

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Uber France The French Court of Cassation confirmed the Paris Court of Appeal's finding that Uber drivers are employees. "working within an organised service may constitute an indication of subordination in cases where the employer unilaterally determines the terms and conditions of performing the job." **For a consideration of the 'Gig' economy and the Uber cases in the UK, see 5.3.1. - 5.3.43.**			

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EQUAL PAY Contracts, Chapter T335.			
Barnard v Hampshire Fire and Rescue Authority **UKEAT/0145/19/JOJ** **UKEAT/0146/19/JOJ** **THE HONOURABLE MRS JUSTICE EADY DBE** **MR D BLEIMAN** **MR D SMITH** SUMMARY EQUAL PAY – JURISDICTIONAL POINTS – CLAIM IN TIME – SECTIONS 129 AND 130 EQUALITY ACT 2010 The Claimant had been continuously employed by the Respondent from 2009 until June 2017, progressing by promotion from an administrative grade into technical roles and then into a managerial position. Upon each promotion, the Claimant was issued with a new contract save that when she first moved into a managerial role as Office Manager, in June 2014, she remained working under her existing contract. Following the termination of her employment, the Claimant submitted a claim to the Employment Tribunal (ET), which included a claim for equal pay going back to her first promotion. The Respondent objected that the claim was out of time for all but the last position held by the Claimant, the stable working relationship between the parties having been broken by each of the Claimant's promotions. This question was initially considered by an ET, which agreed with the Respondent, save in respect of the Claimant's final promotion. The Claimant successfully appealed against that decision and the issue was remitted to a different ET for determination. Although the ET found that there had been a continuing stable working relationship for the earlier promotions, it concluded that this had been broken when the Claimant moved into a managerial role; consequently, the Claimant's equal pay claim was limited to her employment in managerial positions. The Claimant appealed. Held: allowing the appeal: The ET had failed to adopt a broad, non-technical test, looking at the character of the work and the employment relationship in practical terms (**North Cumbria University Hospitals NHS Trust v Fox and Ors** [2010] IRLR 804 CA applied); it had elevated the change in job content on the Claimant's promotion into a managerial position into a determining factor when that had to be seen in context - the Claimant's promotion was a "natural progression" and was part of an incremental progression into higher grades (initially on a temporary basis, under her existing contract) that was entirely indicative of the continued stable working relationship between the parties. In the alternative, the ET's conclusion was perverse: none of the factors it had taken into account suggested other than that the stable working relationship had continued. There being only one answer to this question, the ET's decision would be set aside and a finding substituted that there was no end in the stable working relationship on the Claimant's move to the position of Office Manager in June 2014.	**[2020] IRLR 176** **March**		**IDS Emp. L. Brief 2020, 1122, 3-6**

Safeway Ltd v Newton (C-171/18) EU:C:2019:839 Article 119 of the EC Treaty (now, after amendment, article 141EC) must be interpreted as precluding, in the absence of an objective justification, a pension scheme from adopting, in order to end discrimination contrary to that provision resulting from the fixing of a normal pension age differentiated by gender, a measure which equalises, with retroactive effect, the normal pension age of members of that scheme to that of the persons within the previously disadvantaged category, in respect of the period between the announcement of that measure and its adoption, even where such a measure is authorised under national law and under the trust deed governing that pension scheme.	**[2019] I.R.L.R. 1090**	**[2020] I.C.R. 673 [2019] 10 WLUK 67 [2020] 1 C.M.L.R. 40 [2020] Pens. L.R. 4**	
McNeil v Revenue and Customs Commissioners **[2019] EWCA Civ 1112** **Underhill , Ryder , Holroyde LJJ** The claimants, female employees of the respondent, claimed equal pay with male comparators on the same pay grades, pursuant to section 66(2)(a) of the Equality Act 2010 1. It was agreed between the parties that their work had been rated as equivalent to that of the comparators, and the claimants claimed that under their contracts of employment they were paid less basic pay than the men. They contended that the employer's use of length of service to determine basic pay had placed women at a "particular disadvantage" within the meaning of section 69(2) of the Act compared with men because the grades were historically male-dominated so that women were disproportionately over-represented at the lower end of the pay scale for each grade and disproportionately under-represented at the upper end; and that that could not be objectively justified as a proportionate means of achieving a legitimate aim. The claimants conceded that the average basic pay figures showed no significant long-term differences between the basic pay of men and women in either of the grades. The employer resisted the claim, relying on the defence of material factor under section 69(1) and contending that use of length of service to determine pay did not involve treating women less favourably than male comparators because of their sex. At a preliminary hearing the agreed questions for determination were what was the factor within section 69 causing the difference in basic pay between any claimant and comparator who had a higher basic pay and whether that factor put the claimants and women at a particular disadvantage when compared with men in the same grades for the purposes of section 69(2) . The employment judge found that the relevant material factor was length of service and that a statistical approach based purely on distribution should not supplant evidence as to pay, since the law was concerned with ensuring equal pay for equal work and a distribution analysis on its own said nothing about actual differences in pay. He concluded that the reality was that there was no significant long-term difference in the basic pay of men and women and, rejecting the claimants' case on the statistical evidence, held that the claimants had failed to establish any particular disadvantage on the basis of the distribution of men and women within the pay scale. The employment judge rejected a submission by the employer that, had group disadvantage been shown, each claimant would have needed to establish some further individual connection. The Employment Appeal Tribunal dismissed the claimants' appeal.	**[2019] I.R.L.R. 915**	**[2020] I.C.R. 515 [2020] 2 All E.R. 33 [2019] 7 WLUK 21**	

Dismissing the Claimant's appeal, that the concept of "particular disadvantage" in section 69(2) of the Equality Act 2010 , in a case where the collective disadvantage complained of was on a continuum, did not require the court to measure the incidence of disadvantage to see whether proportionately more women than men were towards the bottom of the scale in question; that, in principle, the only reliable way of demonstrating that women in the grades in question were at a particular disadvantage was to show that there was a significant and long-term difference in the average pay of men and women in those grades; but that calculating the average by reference to total basic pay would not prevent claimants from establishing particular disadvantage on the basis only that the disadvantage was small in percentage terms; and that, accordingly, the employment tribunal and the Employment Appeal Tribunal had not erred in their approach to the concept of "particular advantage" in section 69(2) of the 2010 Act.			
Co-operative Group Ltd and anor v Walker **UKEAT/0087/19** **THE HONOURABLE LORD SUMMERS** **(SITTING ALONE)** **SUMMARY** **SEX DISCRIMINATION – Direct** **SEX DISCRIMINATION – Inferring discrimination** **SEX DISCRIMINATION – Burden of proof** **SEX DISCRIMINATION – Continuing act** **SEX DISCRIMINATION – Justification** **EQUAL PAY ACT – Equal value** **EQUAL PAY ACT – Work rated equivalent** **EQUAL PAY ACT – Material factor defence and justification** The Employment Appeal Tribunal heard an appeal disputing the basis of an ET's finding of direct sex discrimination. The EAT noted that the pay disparity had its origin in a pay negotiation which the ET accepted gave rise to a material factor defence. However in the period of time that followed these material factors ceased to apply. The Claimant's comparators ceased to occupy the roles they had at the time of the pay negotiation and the role of the Claimant increased in significance. This disparity was evidenced in a Hay survey instructed by the Appellants and supplied to them about a year after the pay agreement in dispute. The ET felt able to assume that there had been direct discrimination in the period prior to the survey. On appeal the EAT held that in the absence of a decision or its equivalent which had the effect of displacing the original pay agreement, the original justifications offered in the material factor defence persisted. The EAT held that the Hay survey had the effect of alerting the Appellants that a pay disparity existed notwithstanding the fact that its conclusions were not reported to the committee of the Appellants responsible for setting executive pay. It was not possible however to extrapolate the findings of the Hay survey backwards standing the authority of **Bainbridge v Redcar & Cleveland Borough Council** and a lack of evidence as to when one or all of the material factors ceased to have effect.			**IDS Emp. L. Brief 2020, 1122, 10-12**

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FIXED TERM CONTRACTS Contracts, Chapter 5.6.			
C-103/18 Sanchez Ruiz and C-429/18 Fernandez Alvarez and Others v Comunidad de Madrid (Servicio Madrileno de Salud) The European Court of Justice ruled that Member States may not exclude from the concept of "successive fixed-term employment relationships" the situation of a worker who occupies continuously, by virtue of several appointments, an interim post in the absence of a competition procedure, his or her employment relationship having been thereby implicitly extended from year to year. **PRESS RELEASE**			
KILRAINE v LION ACADEMY TRUST **[2020] EWCA Civ 551** **CA (Civ Div) (Underhill LJ, Henderson LJ) 18/02/2020** A teacher employed on a fixed-term contract was not entitled to three months' notice of termination. The notice requirements for the termination of teachers' contracts set out in the applicable collective agreement did not apply to fixed-term contracts. A fixed-term contract came to an end by the effluxion of time without any need for notice of termination.			

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HARASSMENT Contracts, Chapter T242-265			
BDW Trading Limited v Mr J Kopec **UKEAT/0197/19/OO** **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** SUMMARY HARRASSMENT – Conduct The tribunal erred in law in deciding that the respondent could be liable for harassment of the claimant by the third parties, which the respondent had not taken seriously and had failed to prevent and failed properly to address, without any finding that the respondent's officers themselves had any discriminatory motivation. The matter would be remitted to the same tribunal for further consideration. **Unite the Union v Nailard [2019] ICR 28** - " The tribunal viewed the issue of discriminatory motivation through the prism of the law relating to direct discrimination and not the law relating to harassment. The wording of the relevant statutory provisions is different. 59 Furthermore, the tribunal formulated the hypothetical comparator in a particular way when considering the claim for direct discrimination. In a claim for harassment there is no comparator. Yet further, the tribunal has to apply the burden of proof provisions in section 136 of the Equality Act 2010 in a harassment claim as it does in a direct discrimination claim, as Underhill LJ explained in Nailard. It did not do so, or did not overtly do so, at the last hearing. 60 I think the appropriate course is to set aside the finding of harassment in respect of incidents (1) and (3) and to remit the matter back to the same tribunal for reconsideration of the harassment claim in respect of those two incidents in the light of this judgment and Nailard case".			
The Equality and Human Rights Commission has published a technical note on Sexual Harassment and Harassment at Work.			

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HOLIDAY PAY See Contracts, Chapter I

Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry (Fimlab Laboratoriot Oy intervening); Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry (Kemi Shipping Oy intervening) **Joined Cases C-609/17 and C-610/17** **Court of Justice of the European Union** **JUDGMENT OF THE COURT (Grand Chamber)** The Directive 2003/88 art.7(1) and the right to paid annual leave did not prevent national legislation or collective agreements, such as the Finnish ones concerned, from which it followed that days of paid annual leave beyond a period of four weeks could not be carried over when they overlapped with days of sick leave. 1. Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in that provision, and yet exclude the carrying over of those days of leave on the grounds of illness. 2. Article 31(2) of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 51(1) thereof, must be interpreted as meaning that it is not intended to apply where such national rules or collective agreements exist. **For a consideration of the issues relating to carry over, see Contracts I66**	**[2020] IRLR 141 February**	**[2020] I.C.R. 336**	**IDS Emp. L. Brief 2020, 1121, 23-24**
Harpur Trust v Brazel **[2019] EWCA Civ 1402** **LORD JUSTICE UNDERHILL** **(Vice-President of the Court of Appeal (Civil Division))** **LORD JUSTICE HAMBLEN and LORD JUSTICE MOYLAN** The Working Time Regulations 1998 did not provide for pro-rating of the holiday entitlement or holiday pay of a permanent employee who only worked for part of the year. The exercise required by reg.16 and the incorporated provisions of the Employment Rights Act 1996 for determining holiday pay was straightforward. **The WTR simply required, as the employee had argued, the straightforward exercise of identifying "a week's pay" in accordance with the provisions of s.221 to s.224, and multiplying that figure by 5.6** An employer appealed against an Employment Appeal Tribunal decision in favour of an employee in her claim for unlawful deductions from her wages by underpayment of her entitlement to holiday pay. The issue for the CA was whether the calculation of the employee's holiday entitlement or holiday pay should be pro-rated to that of a full-year worker to reflect the fact that she did not work throughout the year. The Claimant worked hours dependant on the number of pupils requiring tuition. She typically worked around 10-15 hours per week, but only during term time. As a worker she was entitled to 5.6 weeks' paid annual leave. Since the school holidays were longer than that, the employer had not designated any particular parts of them as statutory	**[2019] IRLR 1012**	**[2020] I.C.R. 584 [2019] 8 WLUK 14 [2019] I.R.L.R. 1012 [2019] C.L.Y. 955**	

leave. Instead, it made three equal payments in respect of the employee's leave in April, August and December.
In 2011, the employer purported to follow a method in an ACAS guidance booklet for calculating the pay of casual workers. The guidance stated that holiday entitlement of 5.6 weeks was equivalent to 12.07% of hours worked over a year. The employer proceeded on the basis that that fed into the calculation of holiday pay, and calculated the employee's earnings at the end of a term and paid her one-third of 12.07% of that figure. The employer maintained that that gave effect to a "principle of pro-rating", which was required by EU law. The employment tribunal accepted that the employee's holiday pay should be pro-rated, but, on appeal, the EAT held that there was no warrant for departing from the plain statutory language of the WTR.
The employer submitted that CJEU authorities, in particular **Greenfield v Care Bureau Ltd** (C-219/14) EU:C:2015:745, [2016] I.C.R. 161, [2015] 11 WLUK 255, established that as a matter of EU law, entitlement to annual leave accrued in step with the relevant units of work, so that if an employee worked less than a full year's work, they should get less than a full year's holiday entitlement/pay. The employee argued that the employer's method bore no relation to the calculation required by the WTR and produced a lower figure.
It was common ground that the had no normal working hours so that ERA 1996 s.224 applied in determining the amount of "a week's pay". She argued that, by virtue of reg.16(1), which incorporated s.224, the correct approach was to calculate a week's pay by taking her average weekly remuneration for the 12 weeks prior to the calculation date, and then, by virtue of reg.13 and reg.13A, to multiply it by 5.6.
The CA dismissed he appeal and held that the CJEU authorities relied on by the employer appeared to establish that Directive 2003/88 (the Working Time Directive (WTD)) required only that workers should accrue entitlement to paid annual leave in proportion to the time that they worked (Zentralbetriebsrat der Landeskrankenhauser Tirols v Land Tirol (C-486/08) EU:C:2010:215, [2010] 3 C.M.L.R. 30, [2010] 4 WLUK 341, **Brandes v Land Niedersachsen** (C-415/12) EU:C:2013:398, [2013] 6 WLUK 331, **Heimann v Kaiser GmbH** (C-229/11) EU:C:2012:693, [2013] 1 C.M.L.R. 52, [2012] 11 WLUK 197, Tribunalul Botosani v Dicu (C-12/17) EU:C:2018:799, [2019] C.E.C. 1387, [2018] 10 WLUK 52, Hein v Albert Holzkamm GmbH & Co KG (C-385/17) EU:C:2018:1018, [2019] 2 C.M.L.R. 19, [2018] 12 WLUK 183 and Greenfield).
The "accrual approach" endorsed by the CJEU related specifically to entitlement to annual leave, and had no effect on the assessment of the remuneration to be paid in respect of that entitlement. The fact that the requirements of the WTD were satisfied by an accrual approach did not mean that such an approach was mandatory. On the contrary, the WTD did not prescribe any particular mechanism for the assessment of holiday pay entitlement; and art.15 expressly provided that Member States could accord workers entitlements which were more favourable than those required by the WTD. There was no requirement as a matter of EU law to give effect to the pro rata principle, or, more particularly, to pro-rate the entitlement of part-year workers to that of full-year workers. The fact that the CJEU had endorsed an accrual approach remained, in principle, relevant to the construction of the domestic provisions but there was no need to strive to reach the same result, and no justification for the deployment of Marleasing.
It might at first sight seem surprising that the holiday pay to which part-

year workers were entitled represented a higher proportion of their annual earnings than in the case of full-year workers, but it was not unprincipled or obviously unfair. It was reasonable to treat the fact that such workers were on permanent contracts as a sufficient basis for fixing the quantum of holiday entitlement, irrespective of the number of hours, days or weeks that they might have to perform under the contract. It was important to bear in mind that the actual days from which they would be relieved, and the quantum of their holiday pay, would reflect their actual working pattern. There was an attraction to having the same entitlement for all permanent employees. The calculation of holiday entitlement would be a great deal more complicated if it were necessary to assess not simply their earnings in the reference period, as required by s.224, but also the proportion of "full-year hours" that a part-year worker, or indeed any part-time worker, had worked in the year. It was not necessary to approach the construction of the WTR on the basis that they had to be taken to incorporate the pro rata principle. On any natural construction, the WTR made no provision for pro-rating. **See Contracts Chapter I58 for the EAT decision and comment. It was noted that the EAT had failed to address the central issue. This has now been rectified by the Court of Appeal.**			

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HUMAN RIGHTS Contracts, Chapter M101-M119			
López Ribalda and others v Spain **App nos 1874/13 and 8567/13** **European Court of Human Rights** **European Convention on Human Rights: art 8.** **For monitoring and surveillance of employees.** A Spanish supermarket installed surveillance cameras because of suspected theft. Workers were only told about the visible cameras, but not ones which had been placed covertly. Several employees were dismissed relying on the covert images. They alleged the images had been obtained in breach of their right to privacy under art. 8 of the European Convention on Human Rights. **ECHR Grand Chamber judgment** The appeal was allowed by a majority decision. The majority held that the principles set out by the Grand Chamber in Barbulescu (monitoring employees' communications at work) applied to an employer's covert use of CCTV. The key factors were: • whether the employee has been notified of the possibility of video surveillance measures being adopted and of how such measures will be implemented • the extent of the surveillance by the employer and the degree of intrusion into the employee's privacy • whether the employer has provided legitimate reasons to justify covert video surveillance and the extent of it • whether it would have been possible to set up a surveillance system based on less intrusive methods • the consequences of the surveillance for the employee subjected to it, and • whether the employee has been provided with appropriate safeguards, especially where the employer's surveillance operations are of an intrusive nature The majority held that the workers' claims failed because of the scale of the theft involved, the relatively short duration of the monitoring which was two weeks, the fact that the monitoring was in a public area where there was a low expectation of privacy and the limited amount of people who could view or access the images. The fact that telling the workers of the monitoring would have defeated its purpose was taken into account. **The issues that arise in cases of this nature are considered in detail in Contracts at M111-119.**	**[2020] IRLR 60** **January**		

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INDUSTRIAL ACTION See Bowers QC, Duggan QC and Reade QC, Industrial Action and Trade Union Recognition (3rd ed) OUP.			
British Airways plc v British Airline Pilots' Association **[2019] EWCA Civ 1663** **Lord Justice Davis, Lord Justice Hamblen, Lady Justice Simler** The appeal concerned the refusal to grant an interim injunction preventing the respondent trade union, the British Airline Pilots' Association (referred to as "BALPA"), from calling on its members to take part in industrial action in furtherance of a trade dispute. If it is more likely than not that the union will succeed in establishing a trade dispute defence at a full trial, it is only in a "very exceptional case" that an injunction should be granted: see *Serco* at paragraph 13, Elias LJ. There was no suggestion that the present case falls into such a category. It was common ground that the likelihood of succeeding in establishing a trade dispute defence is determinative. It was argued that he Notice did not comply with the obligation to give a list of the "categories of employees" and the number of employees in each of the categories entitled to vote because BALPA failed to specify, in respect of the balloted pilots, the numbers who are in (i) the short-haul fleet, or (ii) in one of the four long-haul fleets (each of which is specific to a particular aircraft type) respectively. BA contended that if BALPA had provided this information, it would have substantially assisted BA to make contingency arrangements to mitigate the effect of the strike action. Simler LJ stated that " The starting point is that the word 'categories' is not defined. It is, as both sides agree, broad and flexible. It is not necessary or desirable for this court to attempt a comprehensive definition or explication. As Buxton LJ held in *Westminster City Council v Unison* **[2001] EWCA Civ 443**,, it is neither to be exclusively nor narrowly defined and means no more than a reference to the types or groups of workers. The legislation leaves it to the union to determine what categories are to be specified, but the lists, categories, workplaces and numbers must be as accurate as is reasonably practicable based on information in the possession of the union's officers or governing body at the time the notice is given. It was held that question is not whether the categories could have been provided with greater specificity but, rather, whether what was provided was sufficient to meet the statutory requirements. It was held that it was. Elisabeth Laing J was right to reject BA's argument based upon purpose. Her conclusion that the particular categorisation adopted by BALPA in the Notice was in accordance with the language of s.226A was correct. "64. There are examples where general job categories have been held to be insufficient in the decided cases: (a) Notices stating that the union would ballot categories of workers "working on the TFL contracts either on a full-time or part-time basis" were held to be too imprecise for the employer readily to deduce the categories of employee concerned in *Metroline Travel Ltd v Unite the Union* [2012] IRLR 749. This was a check-off case, but Supperstone J held it was not clear from that phrase whether particular works fell within or outside the description. The notice was" plainly imprecise". (b) In *EDF Energy Power Ltd v NURMT* [2010] IRLR 114 the category given by the union was "engineer/technician", but the employer did not recognise the term "technician" and categorised employees by trade as "fitters, jointers, test room inspectors, day testers, ship testers or OLBI fitters". Blake J held that the particular descriptions the employer was seeking fell into the category of trade and not job description and accordingly should have been given. (c) In *VAA v PPU* Choudhury J concluded that "pilots" as a category was too broad and insufficiently specific in the circumstances of that particular case. There was evidence in that case about the significantly different level of responsibility and function of a pilot ranked as captain as compared with the rank of first officer. For example, a plane could	**[2020] IRLR 43** **January**		

not fly unless there was a captain on board. The information as to rank was readily available and in the union's possession as details of rank were included in the application form for membership of the union. 65. In other words, what amounts to a category is liable to be affected by the facts and circumstances of the particular case, subject to the union being in possession of the relevant information. It is to be assessed in a common-sense and practical way in light of the twin policy objectives of the legislation. Unions are not, however, required to determine what information has to be given by reference to what would help the employer to make plans and bring information to the attention of those to be balloted, for example by determining the relative importance to the employer's business and substitutability of the skills, roles, functions and qualifications of the employees who are to be balloted. That is not warranted by the current wording of the legislation and imposes too onerous a burden on the union."			
Royal Mail Group Ltd v Communication Workers Union **[2019] EWCA Civ 2150** **Court of Appeal, Civil Division** **Lord Justice Males, Lady Justice Simler, Sir Patrick Elias** Industrial action, Tort immunities – strike ballot – conduct of ballot The Court of Appeal upheld the High Court's decision to grant an injunction preventing a strike by postal workers. The High Court had been entitled to hold that, in encouraging its members to intercept their own ballot papers at the delivery offices where they worked, the union had interfered with the strike ballot under S.230 of the Trade Union and Labour Relations (Consolidation) Act 1992. Sir Patrick Elias: Nor is it open to the court to refuse an injunction on the grounds that the legal error made no difference to the result; that is not a factor which can influence the court in this context. Lord Hendy properly conceded that the concept of *de minimis* cannot apply if the plan adopted by the union does amount to interference within the meaning of section 230(1). Such interference, carried out across the country, will taint the ballot and render the strike illegal. The integrity of the ballot itself has been undermined, in the sense that it is not the ballot which Parliament has sanctioned. The ballot is invalid and the effect on the result is immaterial.	**[2020] IRLR 213** **March**	**[2019] WLR(D) 658**	**IDS Emp. L. Brief 2020, 1121, 20-22**

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INSOLVENCY			
Re Debenhams Retail Ltd **[2020] EWCA Civ 600** **THE CHANCELLOR OF THE HIGH COURT** **LORD JUSTICE BEAN** **and** **LORD JUSTICE DAVID RICHARDS** The appeal concerns the inter-relationship between the Government's Coronavirus Job Retention Scheme (the Scheme) and the "adoption" of contracts of employment by administrators under the Insolvency Act 1986 (the Act). Specifically, the issue is whether by paying only the amounts which may be claimed under the Scheme to employees while they are "furloughed" under the Scheme and therefore not permitted to work for the Company, the administrators have adopted the contracts of those employees. the administrators have, for the purposes of paragraph 99, adopted the contracts of those employees who have consented to be furloughed. For these reasons, we dismissed the appeal.. The effect of paragraph 99 of schedule B1 to the Act is that: 1) A liability arising under a contract of employment which is adopted by an administrator is charged on and payable out of the property of which the administrator has custody or control immediately before the cessation of his appointment (paragraph 99(3)). (2) The liability ranks ahead of the administrator's remuneration and expenses and any amounts secured by a floating charge, which themselves rank ahead of ordinary unsecured liabilities, and is therefore commonly described as enjoying "super-priority" (paragraph 99(4)). (3) The liability is restricted to "wages or salary" and excludes any liability which arises by reference to anything which is done, or which occurs, before the adoption of the contract (paragraph 99(5)). Wages or salary includes holiday pay and sick pay (paragraph 99(6)), but has been held not to include redundancy payments and payments for unfair dismissal (*Re Allders Department Stores Ltd* [2005] EWHC 172 (Ch), [2005] ICR 867, [2006] 2 BCLC 1) or protective awards or payments in lieu of notice (*Re Huddersfield Fine Worsteds Ltd* [2005] EWCA Civ 1072, [2005] 4 All ER 886). (4) The administrator is given an initial 14-day period following appointment to decide on the action, if any, to be taken. Any action taken within that period does not amount or contribute to the adoption of a contract (paragraph 99(5)(a)). The issue is therefore whether the administrators have continued the employment of the furloughed employees. That is an issue to be decided by reference to the evidence before the court in the particular case.			**IDS Emp. L. Brief 2020, 1125, 3-6**
Re Carluccio's Ltd High Court **2020 EWHC 886** **Snowden J** Snowden J *held that* the administrators of the restaurant chain Carluccio's were able to place the company's employees on furlough and claim for their wages under the Coronavirus Job Retention Scheme. The administrators had validly varied employees' contracts so as to put in place a furlough agreement. Administrators will be taken to have 'adopted' the contracts of furloughed employees for the purposes of insolvency law when they eventually apply for funding under the CJRS, meaning that monies paid under the scheme can be paid to the employees in priority over the administrators' fees and expenses and the distribution of assets to floating charge and unsecured creditors. The administrators had been concerned that, although the CJRS has set out the position in broad terms in the guidance, there has been no precise detail given of its legal structure and how it was intended to operate consistently with insolvency legislation. In particular, while the HMRC guidance is clear that the scheme is open to companies in			**IDS Emp. L. Brief 2020, 1125, 26-27**

administration, the scheme provided that monies must be paid to the employer rather than directly to employees. This would mean that they constitute assets of the administration and so must be disposed of in the order of priorities prescribed in the legislation. The administrators sought a ruling on the legal basis upon which they might place employees on furlough and pay them wages in priority to other claims against the company. Mr Justice Snowden held that the variation letter had validly amended the contracts of the employees who had expressly agreed to it. The Judge rejected the argument that the contracts of those who had not yet responded had also been amended. Only days had passed since the letter was sent. The consenting employees were currently employed on varied contracts that give them an entitlement to wages in the sum of the grants to be paid to the company under the CJRS. Snowden J held that, when the administrators were to make an application under the CJRS in respect of a consenting employee, or make any payment to the employee under the varied contract, that would constitute 'adoption' of that employee's contract for the purposes of insolvency law. By paragraph 99(5) of Schedule B1 to the Insolvency Act 1986, the employees would then have super-priority ahead of the administrators' fees and expenses, floating charge creditors and unsecured creditors, and so payments can be made to them using the grant monies as and when received under the CJRS. Snowden J concluded that employees who had not yet responded would be put in essentially the same position as consenting employees if they belatedly responded by agreeing the variation. However, unvaried contracts of the non-responders would not be treated as adopted at the end of the 14-day period and so the administrators would not have to take the precaution of dismissing those employees in order to avoid incurring super-priority liabilities towards them.			

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JURISDICTION For a consideration of cases involving overseas employment see Contracts Chapter 5.10.			
Merinson v Yukos International UK BV **[2019] EWCA Civ 830,** **LORD JUSTICE GROSS, LORD JUSTICE PETER JACKSON and LADY JUSTICE ROSET** **T**he proper interpretation of Regulation 1215/2012 art.23(1) was to protect employees from bargaining away their right to be sued in their home jurisdiction except where they were positively choosing a specific jurisdiction for the resolution of a specific existing dispute. The appellant former employee appealed against a decision that the UK rather than the Netherlands had jurisdiction to try claims brought by his former employer. He applied for the UK proceedings to be set aside on the ground of lack of jurisdiction. The employee had been employed by the employer's group of companies from March 2002. For most of the relevant period, he had been based in the Netherlands. After disputes arose between the parties, proceedings were commenced in the Dutch courts which culminated in 2016 in a settlement agreement approved under the "proces-verbaal" of the Dutch court. That agreement was widely drawn and included an exclusive jurisdiction clause in favour of the Netherlands. In 2017, while the employee was living in England, the employer brought English proceedings claiming damages for his alleged breaches of duty in negotiating the employer's banking arrangements and an annulment claim seeking a declaration that such a claim was not barred by the Dutch settlement. **The CA considered various questions:** **Were the damages and the annulment claims "matters relating to [an] individual contract of employment" within the meaning of Regulation 1215/2012 art.20(1)?** Yes. **Regulation 1215/2012** (known as "Brussels recast") was designed to protect the weaker party to certain contracts, including employment contracts, from bargaining away their rights to a hearing in their country of domicile. The English action and the annulment claim were both matters related to the employee's individual contract of employment and the judge had been right to find a highly material nexus between the two, which had not been broken by the interposition of the settlement agreement and which brought them within art.20(1), Aspen Underwriting Ltd v Credit Europe Bank NV [2018] EWCA Civ 2590, [2019] 1 Lloyd's Rep. 221, [2018] 11 WLUK 335 followed **Was the settlement agreement "entered into after the dispute has arisen" within the meaning of art.23(1) of the Regulation?** No. The Regulation had to strike a balance between its protective policy for employees on the one hand and respect for the contracting parties' autonomy to enter into exclusive jurisdiction agreements on the other. There was no reason why the Jenard test (derived from the Jenard Report [1979] OJ C/59/1 on the Brussels Convention) for establishing when a dispute had arisen in relation to insurance contracts under art.11 should not be equally applicable to employment contracts under art.23(1). Under that test, two cumulative limbs had to be satisfied: (a) the parties disagreed on a specific point; and (b) legal proceedings were imminent or contemplated. The judge had been correct to find that the test had not been satisfied at the time of the settlement agreement. Although it was clear from a third part deposition that the employer had some suspicion of the employee prior to the settlement agreement,		**[2020] I.C.R. 63** **[2019] 3 W.L.R. 877** **[2020] QB 336** **[2020] 1 All E.R. 629** **[2019] 2 All E.R. (Comm) 644** **[2019] 5 WLUK 198** **[2019] 11 C.L. 45**	

there was a difference between a jurisdiction agreement entered by way of a precautionary measure in a potential dispute and one entered after an actual dispute had arisen. As no dispute had arisen the parties were not free to enter into a jurisdiction agreement departing from the jurisdiction regime encapsulated in section 5 of the Regulation. **Was the English court precluded from entertaining the annulment claims by Ch.IV of the Regulation?** No. The English courts had no equivalent of the enforceable instruments of the German and Dutch legal systems referred to in art.2, art.58 and art.59. Although such settlements were enforceable in other Member States without further formality, they were essentially contractual in nature and, on the evidence of Dutch law, could be impugned on the same basis as any other contract. Provided the English court would otherwise have jurisdiction to entertain the annulment claims, it did not lose that jurisdiction simply because the settlement agreement had been incorporated in the Dutch court settlement. The employee's submissions confused enforceability and jurisdiction. A reconciliation between enforcement of the Dutch court settlement and consideration of the annulment claims could be achieved by case management, Solo Kleinmotoren GmbH v Emilio Boch (C-414/92) EU:C:1994:221, [1994] E.C.R. I-2237, [1994] 6 WLUK 25 applied.			
Walker v Wallem Ship Management Ltd and another **UKEAT/0236/18**/LA **THE HONOURABLE MR JUSTICE KERR** **MS SUSAN WILSON CBE** **MR CLIFFORD EDWARDS** SUMMARY JURISDICTIONAL POINTS – Working outside the jurisdiction The employment tribunal had not erred in law by deciding that it had no power to entertain the claimant's claim for sex discrimination. The tribunal was correct to hold that the combined effect of section 81 of the Equality Act 2010 (the 2010 Act) and regulation 4 of the Equality Act (Work on Ships and Hovercraft) Regulations 2011 (the 2011 Regulations) was that Part 5 of the 2010 Act did not apply to protect the claimant against sex discrimination in respect of her recruitment in England to work on foreign registered vessels outside Great Britain. The Hong Kong based respondent is an employment service provider within section 55 of the 2010 Act. It provides personnel to serve on foreign registered ships sailing outside United Kingdom waters. The female claimant qualified as a cadet deck officer and applied in this country through the respondent for work on a foreign registered ship. The respondent informed the claimant that it would not offer her work because of her sex; the respondent recruited only men, not women, to work on its clients' ships. The first respondent admitted that this was an act of direct sex discrimination. The tribunal also found, subject to the jurisdiction point, that the claimant's claim for victimisation would have succeeded, though her claim for harassment would have failed. The tribunal would have awarded compensation for injury to feelings of £9,000. Her claim for loss of earnings would not have succeeded as she had since succeeded in obtaining employment with earnings sufficient to offset any such loss. The appeal tribunal dismissed the claimant's appeal with regret. The	**[2020] IRLR 257** **APRIL**		

respondent's conduct had been reprehensible, but the tribunal had been powerless to right the injustice done to the claimant. The 2011 Regulations, surprisingly, permit an offshore employment service provider to discriminate on United Kingdom soil on the ground of any of the protected characteristics in the 2010 Act when recruiting, in this country, personnel to serve on its clients' foreign flagged ships sailing outside United Kingdom waters. No international law obligation of the United Kingdom requires UK domestic law to permit such discrimination. It is, at least, doubtful whether the 2011 Regulations conform to the provisions of Directive 2006/54/EC (the Equal Treatment Directive). The claimant has no remedy against the respondent because the latter is not an emanation of the state. The claimant's remedy, if any, lies against the United Kingdom itself. The Secretary of State may well consider it wise to revisit the scope of the 2011 Regulations. A review and report on their impact is due to take place soon, in accordance with regulation 6.			
Foreign and Commonwealth Office v Bamieh **[2019] EWCA Civ 803** **LORD JUSTICE GROSS, LORD JUSTICE LEWISON and LORD JUSTICE SINGH** The claimant was employed by the respondent government department to work at the European Union mission in Kosovo on an annually renewable contract. When her contract was not renewed, the claimant brought claims in the tribunal under section 48(1A) of the Employment Rights Act 1996 against the department and two co-workers, who were also employed at the mission by the respondent department, alleging that the co-workers had subjected her to unlawful detriments in the course of their employment because she had made protected disclosures, contrary to section 47B(1) and (1A)(a) of the Act. The employment tribunal held, inter alia, that, though the claimant and her co-workers had a common employer in the United Kingdom Government, as individuals their base was in the international world that was the mission, to which a large number of contributing states seconded personnel. There could be no jurisdiction over co-workers from other states, and it would be anomalous to hold some colleagues liable and some not, the tribunal should not assume jurisdiction to hear the claims against the co-workers. The Employment Appeal Tribunal held that the territorial reach of the detriment provisions in section 47B(1A) required an assessment of the sufficiency of the **connections** between each individual co-worker and Great Britain and British employment law. The individual respondents were sued as co-workers of the respondent department in the course of their employment by the department. The position of the mission was analogous to an international enclave with no particular connection with the country in which it happened to be situated. There was no other system of law with which either could be said to be connected; and that, as a result of their own especially strong connections with Great Britain and British employment law, it could be said that Parliament **would have** regarded it as appropriate for an employment tribunal to deal with claims against them under the 1996 Act. The CA allowed an appeal. It was necessary for the claimant and the co-workers to have a **common employer** to found a claim under section 47B(1A) of the Employment Rights Act 1996. The fact that there was a	**[2019] IRLR 736**	**[2020] ICR 465** **[2019] WLR(D) 269**	

common employer was not sufficient to determine that section 47B(1A) applied extraterritorially to the relationship between them so as to confer jurisdiction on the employment tribunal to entertain the claim under section 48(1A). The correct point of focus should be on the relationship between the claimant and the co-workers as seconded mission staff members, and the key relationship on which the claimant's whistleblower detriment claim against the co-workers turned arose not by reason of the respondent department being their common employer but from the conduct of their roles at the mission. The mission was an international enclave with a closer connection to European Union law, and there was no reason for the default option to be found in British employment law. The combination of extraterritoriality, which called for an exceptional application of the statute, and the international setting of the mission told against the establishment of a sufficient connection with British employment law to warrant the application of section 47B(1A) to the claim against the co-workers. If the scope of the Act extended to some co-workers but not others, it would be inimical to the orderly functioning of the mission, when there was no international consensus in respect of whistleblowing detriment. Sections 47B(1A) and 48(1A) of the 1996 Act should not be applied extraterritorially in respect of a claim between co-workers seconded to the mission.			
Bosworth v Arcadia Petroleum Ltd (C-603/17) Company directors who carried out their duties in full autonomy were not bound to the company for which they performed those duties by an 'individual contract of employment' within the meaning of the employment section of the Lugano Convention 2007 as there was no subordination. The provisions of Section 5 of Title II (Articles 18 to 21) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, the conclusion of which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008, must be interpreted as meaning that **a contract between a company and a natural person performing the duties of director of that company does not create a relationship of subordination between them and cannot, therefore, be treated as an 'individual contract of employment', within the meaning of those provisions, where, even if the shareholder(s) of that company have the power to procure the termination of that contract, that person is able to determine or does determine the terms of that contract and has control and autonomy over the day-to-day operation of that company's business and the performance of his own duties**.	**[2019] IRLR 668**	**[2020] ICR 349** **[2019] WLR(D) 219**	
Hexagon Sociedad Anonima v Hepburn UKEATS/0018/19/SS **THE HONOURABLE LORD SUMMERS** **(SITTING ALONE** SUMMARY This appeal concerns a challenge to the jurisdiction of the UK employment tribunals to hear a claim brought by a former employee following his dismissal. The EAT following earlier authorities considered whether the claimant had a sufficiently strong connection with the UK to justify hearing the case where the claim arose. The claim arose from conduct on a vessel moored in the territorial waters of	**[2020] IRLR 263** **April 2020**		

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Equatorial Guinea. In particular the EAT considered the effect of a clause in the claimant's contract of employment which prorogated the jurisdiction of the courts and tribunals in Scotland. The EAT held that following the reasoning of Lady Hale in Duncombe v Secretary of State for Children, Schools and Families the existence of such a clause was a relevant factor provided there were other connections that supported the prorogation clause and that independently connected the claim with the jurisdiction of the UK employment tribunals. The EAT also rejected an argument that the jurisdiction of Equatorial Guinea was supported by the wording of another clause in the contract.			
Ms H Hamam v 1) British Embassy in Cairo 2) Foreign and Commonwealth Office **UKEAT/0123/19/JOJ** **THE HONOURABLE MR JUSTICE LAVENDER** **(SITTING ALONE)** SUMMARY JURISDICTIONAL / TIME POINTS The Employment Tribunal was right to find that it did not have jurisdiction over claims for unfair dismissal, racial discrimination, victimisation and detriment resulting from a protected disclosure brought by an Egyptian national who had been employed as a Vice Consul in the British Embassy in Cairo. She contended that the ET had jurisdiction because she worked in a "British enclave", but that label was not determinative of, and indeed was not relevant to, the "sufficient connection question" (as it was termed by Underhill LJ in **Jeffery v British Council** [2019] ICR 929). The ET's decision was neither perverse nor irrational and it correctly applied the law as stated by Baroness Hale in **Duncombe v Secretary of State for Children, Schools and Families** [2011] ICR 1312: "The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law." **See Contracts 5.10.11.**			

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NATIONAL MINIMUM WAGE Contracts Chapter E16 onwards for detailed consideration			
Commissioners for HM Revenue and Customs v Middlesbrough Football and Athletic Company (1986) Ltd **UKEAT/0234/19/LA** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY NATIONAL MINIMUM WAGE By agreement with the employees concerned, Middlesbrough Football Club made deductions from their wages in respect of the cost of season tickets. HMRC served enforcement notices on the basis that the deductions unlawfully took their pay below the national minimum wage ("NMW"). The Employment Tribunal concluded that the proper construction of the National Minimum Wage Regulations 2015 was that an exception applied to this arrangement, and these deductions therefore should not have reduced remuneration, for the purposes of the NMW calculation. It therefore rescinded the notices. HMRC further appealed to the EAT. The appeal was allowed and the enforcement notices reinstated. Held: (1) The arrangements in this case were properly treated as deductions and not payments, in accordance with the ordinary meaning of the words, and applying Revenue and Customs Commissioners v Leisure Employment Services Limited [2006] ICR 1094 (EAT); [2007] ICR 1056 (CA). (The LES case). The regulation primarily relied upon by the Club as excepting these deductions from the NMW calculation – regulation 12(1)(e) – unambiguously applies only to payments within its scope, not deductions. There is no need or room for a purposive interpretation, as the language is clear. In any event an expansive interpretation of "payment" so as to apply to this case, following the approach taken in tax legislation, as advocated by the Club, was inappropriate. It would undermine, rather than further, the purposes of the NMW legislation. (2) The Employment Tribunal had been right to conclude that this arrangement was for the "use and benefit" of the Club, so that, unless some specific exception did apply, these deductions reduced reckonable pay for the purposes of the NMW calculation. The monies deducted were freely available to be used by the Club as it wished, and the deductions were for its benefit, because it thereby secured payment for the season tickets. The fact that the employees also benefited from the arrangement did not affect this. LES followed and applied. (3) The Tribunal had erred in concluding that the employees concerned were not contractually comitted to the arrangement. However, it was still right to conclude that the exception in regulation 12(2)(a) did not apply. That exception is only of potential application where a contractual provision for a reduction is triggered by conduct on the part of the worker amounting to misconduct, or by another specific event amounting to voluntary conduct for which the worker is responsible. LES and Commissioners of HMRC v Lorne Stewart plc [2015] ICR 708 considered and applied. (4) The Employment Tribunal had correctly concluded that the present case does not fall within the regulation 12(2)(b) exception, which applies to reductions on account of certain loans. The arrangement in this case could not properly be construed as a loan of cash.			**IDS Emp. L. Brief 2020, 1124, 16-20**

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That exception could not properly be construed as applying to a non-cash loan; but in any event the arrangement in this case did not involve a non-cash loan either. (5) A direction issued by the Secretary of State on 11 February 2020, pursuant to section 19A(2) National Minimum Wage Act 1998, does not affect any of the foregoing conclusions.			

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NON DISCLOSURE AGREEMENTS			
Acas produces new guidance on non disclosure agreements On 10 February 2020, Acas published new guidance on the use of non-disclosure agreements (NDAs). Acas's new guidance is clear that NDAs cannot be used to stop someone from: • reporting discrimination or **sexual harassment** at work or to the police • '**whistleblowing**' (workers who expose wrongdoing in the workplace) • disclosing a future act of discrimination or harassment			

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PARENTAL LEAVE For detailed consideration of shared parental leave see Contracts, Chapter K108			
Ali v Capita Customer Management Ltd **Chief Constable of Leicestershire v Hextall** **[2019] EWCA Civ 900** **The Master of the Rolls Lord Justice Bean and Lady Justice Rose DBE** It was not sex discriminatory for male employees to receive a lower rate of pay on shared parental leave compared with female employees on statutory maternity leave. The purpose of statutory maternity leave related to matters exclusive to the birth mother resulting from pregnancy and childbirth, and that purpose had not been altered by the introduction of shared parental leave. The male employees could not therefore compare their treatment with that of female employees on maternity leave; the correct comparator was a female employee on shared parental leave. In the first case the claimant took two weeks' paternity leave with full pay immediately after the birth of his child, under his employer's parental leave policy. When his wife was diagnosed with post-natal depression and was advised to return to work to help her recovery, the claimant asked for leave to enable him to look after the baby. He was told that he was eligible for **shared parental leave** but would **only receive the statutory shared parental** leave payment, whereas a female colleague on maternity leave would receive **full pay for 14 weeks** following the birth of her child. The claimant made a claim of sex discrimination contrary to sections 13(1) and 39(2) of the Equality Act 2010. An employment tribunal upheld the claim, concluding that the claimant's circumstances were comparable to those of a woman who had recently given birth, in accordance with section 23(1) of the 2010 Act, since after the initial two-week compulsory maternity leave both would be taking leave to care for their child, and rejecting application of the special treatment exception in section 13(6)(b) for women in connection with pregnancy or childbirth on the ground that the alleged special treatment, paying the mother full pay, was not in connection with pregnancy and childbirth but was about caring for a newborn baby. The Employment Appeal Tribunal allowed an appeal by the employer, holding that a woman on maternity leave was not a proper comparator for a man on shared parental leave and that, further, the tribunal had erred in holding that the special treatment exception in section 13(6)(b) did not apply. In the second case the claimant, a police officer whose wife had recently given birth to their second child, took shared parental leave under the force's maternity leave and pay policy, **which was paid at the statutory rate**. He made claims of direct and indirect discrimination and equal pay, contending that the only option for men taking leave after the birth of their child was shared parental leave at the statutory rate of pay, whereas women had the option of taking maternity leave on full pay. He named as a comparator a police constable who took maternity leave at her full pay. An employment tribunal rejected the chief constable's contention that the claim was properly a claim for equal pay rather than discrimination, and thereby precluded by paragraph 2 of Schedule 7 to the 2010 Act, holding that both the claimant's and the comparator's contracts included the rights to shared parental leave pay and to maternity pay and were the same in all relevant respects, so that there was no term to be modified in accordance with section 66 of the	**[2019] I.R.L.R. 695**	**[2020] I.C.R. 87** **[2019] 4 All E.R. 918** **[2019] C.L.Y. 978** **[2019] 5 WLUK 443** **[2019] 9 C.L. 116**	

Act. It dismissed the claim of direct discrimination under sections 13 and 39(2) on the ground that the requirement in section 23 that there should be no material difference between a claimant's circumstances and those of the comparator was not satisfied, in that the claimant's comparator, a woman who had given birth, needed special measures with regard to her health. The tribunal also dismissed the claim of indirect discrimination on the ground that, as already held, a woman on maternity leave was not a valid comparator for a man on shared parental leave; and that the provision, criterion or practice to be applied under section 19(1) , namely paying only the statutory rate of pay for those taking a period of shared parental leave, did not put men at a particular disadvantage when compared with women. The Employment Appeal Tribunal allowed an appeal by the claimant and dismissed a cross-appeal by the chief constable, holding that, while the claim was one of indirect discrimination and not one of equal pay, the tribunal's reasons for rejecting that claim were incorrect. On appeals by the claimants in both cases, and an appeal by the chief constable in the second case, contending that the claim was a claim for equal pay— (1) dismissing the appeal of the claimant in the first case, that the entire period of maternity leave following childbirth, and not just the first two weeks of compulsory leave, was for more than just facilitating childcare; that the purpose, or predominant purpose, of statutory maternity leave included preparation and coping with the later stages of pregnancy, recuperation from the pregnancy and from the effects of childbirth, developing the special relationship between the mother and the newborn child, breastfeeding the child, and care for the newborn child; that the promotion of shared parental leave, by European Union law, and the principles underlying it, did not in any way qualify the need and reasons for the specified minimum period of maternity leave, and there were numerous important differences between the two forms of leave; that, accordingly, the claimant's proper comparator for the purposes of section 13(1) of the Equality Act 2010 was a female worker who was on shared parental leave and not a female employee wishing to leave work to look after her child; and that section 13(6)(b) was not to be seen simply as a derogation from a general principle of non-discrimination but rather as the preservation and promotion of a protection for particular categories of female workers sharing the protected characteristic of pregnancy and maternity. (2) Allowing the appeal of the chief constable in the second case, that the claimant's claim was in effect that the more favourable terms of work benefiting his chosen female comparator, in regard to her entitlement to take time off to care for her new baby, were included in his terms of work by operation of the sex equality clause, pursuant to section 66 of the Equality Act 2010 , and he relied on that term to claim that he had not received his contractual entitlement to pay over the period when he was absent from work to care for his new baby and suffered a reduction in pay; that, however, for the purpose of applying section 66 , any terms contingent on a police officer being pregnant or giving birth or breastfeeding were not terms of the claimant's work because he was not a woman, and the terms of his leave and pay and those of his comparator were different			

because the comparator's included entitlements as to maternity leave and maternity pay; and that those terms amounted to "special treatment" afforded to her "in connection with pregnancy or childbirth" and, under paragraph 2 of Schedule 7 to the Act, the sex equality clause did not, therefore, operate to include them in the claimant's terms of work and he could not make a claim based on such terms. (3) Dismissing the claimant's appeal in the second case, that, even though the claimant's claim was defeated by paragraph 2 of Schedule 7 , the mutual exclusivity provision of section 70 of the Equality Act 2010 prevented him from putting forward his claim as an indirect discrimination claim, since the effect of section 70(2)(a) was that the claimant's terms of work relating to the time he could be absent to care for his newborn child, which were less favourable than his comparator's terms as to maternity leave and pay, were not regarded as indirect sex discrimination for the purposes of section 39(2) ; that, while the mutual exclusivity specified in section 70 was tempered by section 71 as far as direct discrimination was concerned, section 71 did not assist the claimant because no appeal had been made against the employment tribunal's dismissal of his direct discrimination claim; and that, in any event, there was no comparator with whom the claimant could compare himself for the purpose of section 13 , and maternity leave and pay were special treatment afforded to women in connection with pregnancy or childbirth and so were to be left out of account pursuant to section 13(6)(b). *Per curiam* . Women on maternity leave are materially different from men and from women taking shared parental leave and should therefore be excluded from the pool for comparison, when considering the indirect discrimination claim. Once that is done the provision, criterion or practice can be seen to cause no particular disadvantage to the claimant, and the issue of justification simply does not arise. In any event, any disadvantage was justified as being a proportionate means of achieving a legitimate aim, namely the special treatment of mothers in connection with pregnancy or childbirth. **Note that the Supreme Court has refused leave to appeal. See Contracts K108-109**			

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PART TIME WORK Contracts, Chapter 5.11. contains detailed consideration of part time working.			
Miller and others v Ministry of Justice **[2019] UKSC 60** **Supreme Court** **Part-time workers, Less favourable treatment** **Lady Hale President, Lord Reed Deputy President, Lord Wilson, Lord Carnwath, Lady Arden** "The issue was whether the unfavourable treatment continued throughout the period of employment. The House was not required to consider whether there was an unfavourable treatment also at the point when the pension was or would be taken. ...As regulation 5 makes clear, the unfavourable treatment may relate to the terms of the contract, or "any other detriment" resulting from an act or failure to act by the employer. By analogy, in the context of judicial pensions, the part-time judge may properly complain both during his period of service, that his terms of office did not include provision for a future pension; and, at the point of retirement, that there has been a failure at that point to make a pension available. The former does not exclude the latter."	**[2020] IRLR 239** **March**		**IDS Emp. L. Brief 2020, 1121, 25**

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PHI See, Contracts Chapter F5-135 for detailed consideration of the cases on PHI			
ICTS (UK) Ltd v Visram **[2020] EWCA Civ 202** The claimant's contract of employment contained a clause providing for long-term disability benefit ('LTDB'). The detail of the scheme was set out in a booklet, which provided : 'Should you be absent from, and unable to, work due to sickness or injury for a continuous period of twenty-six weeks or more, you will receive a Disability Income of 2/3rds of your Base Annual Salary less the State Invalidity Pension. The disability income will commence twenty-six weeks after the start of your absence. It will continue until the earlier date of your return to work, death or retirement.' The claimant was off work for an extended period of time with depression and work-related stress until he was dismissed. He made a successful claim for unfair dismissal and unlawful disability discrimination. At a remedies hearing, the employment tribunal had to decide, amongst other things, the basis and amount of compensation to be awarded to the claimant for loss of LTDB caused by the disability discrimination and unfair dismissal. It had to decide whether or not the LTDB entitlement was dependent upon a return to work with the respondent to the role being performed immediately before absence on sick leave, or to any role. Dismissing the respondent's argument that 'return to work' should be interpreted as a return to any full-time suitable work, the tribunal held that the claimant was contractually entitled to LTDB until he returned to his original job, died or attained retirement age, and that LTDB payments would not cease at the point at which the claimant became fit enough to carry out suitable alternative full-time work. The EAT upheld that finding and the respondent appealed. The Court of Appeal (Civil Division) (Lord Justice Bean, Lord Justice Baker, Lord Justice Phillips) by a reserved judgment given on 20 February 2020 dismissed the appeal. On its correct interpretation, the phrase 'return to work' in the relevant clause meant return to the role being performed immediately before absence on sick leave. In the first sentence of the relevant clause, 'work' clearly referred to the specific occupation. Therefore 'your return to work' in the next sub-paragraph must likewise mean 'your return to your previous work'. That, in any event, was a natural construction of the phrase 'return to work'. If the drafters of the LTDB plan had wished to say that the benefit would only be payable for so long as the individual was unable to perform any full-time remunerative employment it would have been easy enough so to provide.	**[2020] IRLR 365, May 2020**		**IDS Emp. L. Brief 2020, 1123, 21-22**

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PRACTICE AND PROCEDURE			
Curless v Shell International Ltd **[2019] EWCA Civ 1710** **(Sir Terrence Etherton MR, Lord Justice Lewison, Lord Justice Bean)** **Restricted reporting order, anonymity order, legal professional privilege.** The claimant was employed as a lawyer. As a result of being given low individual performance ratings, he raised an internal grievance and also brought a claim of disability discrimination. When he was subsequently selected for redundancy, he brought a second claim of disability discrimination, victimisation and unfair dismissal, alleging that the genuine or principal reason for his dismissal was not redundancy but his disability, matters arising from his disability and his first claim of discrimination. He relied on evidence sent to him anonymously, contained in an internal e-mail giving legal advice and headed "Legally privileged and confidential", concerning his selection for redundancy. In support of his interpretation of the e-mail, he relied on a conversation overheard in a pub discussing his case. He contended that the e-mail indicated that his redundancy process was a sham designed to end his employment and that his employer wanted his employment to end because he had done protected acts. The employer denied the allegations and claimed that the e-mail was protected by legal advice privilege and that the overheard conversation, if it had taken place at all, was similarly privileged. The Tribunal held that the e-mail and the conversation were privileged and struck out the paragraphs of the claim form relying on those matters. The Employment Appeal Tribunal allowed an appeal, holding that the e-mail recorded advice on how to cloak as dismissal for redundancy the dismissal of the claimant for making complaints of disability discrimination. This established a strong prima facie case of iniquity requiring legal advice privilege to be disapplied. The Court of Appeal allowed the appeal. It held hat the proper meaning of the e-mail in question was a matter of law. The e-mail gave legal advice about the process of selection for redundancy that was standard advice regularly given by employment lawyers in cases where an employer wished to select for redundancy an employee whom the employer regarded as under-performing. It was not advice to act in an underhand or iniquitous way so that the e-mail remained privileged and could not be relied on by the claimant. The pub conversation could not be used as an aid to the interpretation of that e-mail, since there was no evidence that the person whose conversation was overheard had seen the e-mail. Per Sir Terence Etherton: Whether or not legal professional privilege attaches to a communication must be clear at the time when the communication is made. It cannot depend on a retrospective evaluative judgment by the court whether the purpose of seeking advice is "sufficiently iniquitous" to prevent privilege from attaching to the communication. The iniquity exception is confined to dishonesty. In so far as there are competing public policies, the balance has been struck in favour of legal professional privilege. For those reasons *Eustice [1995] 1 WLR 1238* cannot be considered to be good law. Although as a general proposition this court would be bound by an earlier decision of the same court, there is an exception where this court considers that an	**[2020] IRLR 36 January 2020**	**[2019] 10 WLUK 297** **[2020] I.C.R. 431**	

earlier decision cannot stand with a subsequent decision of the House of Lords, even though it has not been expressly overruled: *Young v Bristol Aeroplane Co Ltd [1944] KB 718* , 725–726. Accordingly, Norris J went too far in *BBGP [2011] Ch 296* , which was relied upon by Slade J, in saying, at para 62, that the iniquity exception is engaged in any "circumstances … which the law treats as entirely contrary to public policy".			
Ince Gordon Dadds LLP v Tunstall **UKEAT/0144/19/JOJ** **Employment Appeal Tribunal** **2019 WL 02550473** **Before Her Honour Judge Eady QC (Sitting Alone)** The Employment Appeal Tribunal considered the approach to be taken when proceedings were pursued against a company in respect of which proceedings had been stayed by virtue of the Insolvency Act 1986 Sch.B1 Pt 006 para.43(6) and also against other defendants, to which the moratorium that applied to legal proceedings against a company in administration, would not otherwise apply. SUMMARY PRACTICE AND PROCEDURE – Postponement and stay. Practice and Procedure – Stay – Paragraph 43(6) Schedule B1 Insolvency Act 1986 The Claimant had commenced Employment Tribunal ("ET") proceedings against eight Respondents. Subsequently, the first two Respondents (one of which had been the Claimant's employer) went into administration and a stay was imposed on the proceedings under paragraph 43(6) Schedule B1 Insolvency Act 1986. Although accepting (absent the consent of the administrators or permission from the Companies Court) that stay must be remain in respect of the First and Second Respondents, the Claimant applied for the proceedings to be continued in relation to the remaining Respondents (the Third to Seventh being employees or agents of the First and/or Second Respondents; the Eighth Respondent being said to be a the relevant transferee of the First and/or Second Respondent's business (or relevant part) under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")). The ET agreed with the Claimant, holding that paragraph 43(6) did not prevent legal proceedings being continued in respect of standalone claims against other Respondents (those proceedings being pursued against the Third to Seventh Respondents by virtue of section 110 Equality Act 2010; against the Eighth Respondent under regulations 4 and 7 TUPE). The ET considered the potential prejudice the remaining Respondents might face, in particular in relation to disclosure (it being accepted that the First and/or Second Respondents would possess most of the relevant documentation) and privilege. It did not, however, consider these were issues that necessarily arose from the stay under paragraph 43(6) but, in any event, took the view that orders for disclosure could nevertheless be made against the First and/or Second Respondents under rule 31 ET Rules 2013; more generally, the ET did not consider that there was yet any evidence to suggest that disclosure/privilege issues would arise such as to give rise to any overwhelming prejudice against the Third to Eighth Respondents. The Third, Fourth, Fifth, Seventh and Eighth Respondents appealed. Held: dismissing the appeals Notwithstanding the potential vicarious liability of the First and/or Second Respondent		**[2020] I.C.R. 124** **[2019] 6 WLUK 323** **[2019] B.C.C. 1109** **[2020] 1 C.L. 74**	

(whether by reason of section 6 Limited Liability Partnership Act 2000 or under section 109 Equality Act 2010) and the likely application of the doctrine of res judicata (understood as giving rise to a cause of action or to an issue estoppel), paragraph 43(6) Schedule B1 Insolvency Act 1986 did not require the ET to continue the stay in relation to the Third to Eighth Respondents; the issue was not one of jurisdiction but of case management discretion. The ET had taken into account the potential liabilities faced by the First and/or Second Respondents and the likely application of the doctrine of res judicata but had permissibly concluded that it was a matter of choice for the administrators as to whether they consented to the proceedings being continued against the First and/or Second Respondents in these circumstances: that was not a "choice fallacy", as the Respondents contended as the option of consenting to the continuation of proceedings was expressly allowed by paragraph 43(6). As for the potential prejudice to the remaining Respondents, the ET had taken proper account of the risk to professional reputation and of the difficulties arising in respect of disclosure and questions of privilege. It had correctly identified that these were largely issues arising in the proceedings in any event, not as consequences of the stay. It had also been right to point to its power to make disclosure and information orders under rule 31 of the ET Rules 2013. The ET had, moreover, not discounted the possible problems that might arise but had decided it would be wrong to simply assume that this would necessarily arise be so, allowing that this might be a question to be revisited if there was actual evidence of prejudice faced by the Respondents.			
Adams v Kingdom Services Group Ltd **EAT, 11.12.19 (0235/18)** PRACTICE AND PROCEDURE – Striking Out of Claims PRACTICE AND PROCEDURE – Imposition of Deposit PRACTICE AND PROCEDURE – Amendment of Notice of Appeal 1. The Employment Tribunal was correct to refuse to strike out the claim of unfair dismissal under s.104 of the Employment Rights Act 1996. It was entitled to make a deposit order in respect of that claim on the basis that it had little reasonable prospect of success. 2. The Employment Tribunal erred in law in failing to give reasons for the particular amount of the deposit that was ordered to be paid. The deposit order (and the order striking out the claim for non-payment of the deposit) was set aside and the Employment Appeal Tribunal substituted, at the request of the parties, its own decision as to the appropriate amount of the deposit order. 3. The Employment Appeal Tribunal held that in the unusual circumstances of the case, the Claimant would be permitted to amend the Notice of Appeal to bring an appeal against the operative deposit order, which had been made after the filing of Notice of Appeal following a successful request for reconsideration of the amount of the original deposit order.			**IDS Emp. L. Brief 2020, 1121, 30**
Basfar v Wong **UKEAT/0223/19/BA** Soole J SUMMARY DIPLOMATIC IMMUNITY	**[2020] IRLR 248** **APRIL 2020**		**IDS Emp. L. Brief 2020, 1123, 13-15**

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The Claimant was employed by the Respondent diplomat to work as a domestic servant at his diplomatic residence in the UK, having previously been employed by him in his diplomatic household in Saudi Arabia. By her ET1 form she contended that she was a victim of international trafficking by the Respondent and had been employed in conditions amounting to modern slavery. She made complaints including wrongful (constructive) dismissal, failure to pay the National Minimum Wage, unlawful deductions from wages and breach of the Working Time Regulations 1998. The Respondent applied to strike out all the claims (which were denied) on the basis of diplomatic immunity, contending that his employment of the Claimant did not constitute a 'commercial activity exercised…outside his official functions' within the meaning of Article 31(1)(c) of the Vienna Convention on Diplomatic Relations 1961 as enacted into domestic law by s.2(1) Diplomatic Privileges Act 1964. The application proceeded on the basis of assumed facts as pleaded in the ET1. The Employment Tribunal dismissed the application and the defence of diplomatic immunity. In doing so, it held that (i) the decision of the Court of Appeal in Reyes v Al-Malki [2015] ICR 289 on the meaning of 'commercial activity' in a case involving similar assumed facts was not binding in circumstances where the Supreme Court had allowed the appeal on another ground (R v Secretary of State for the Home Department, ex parte Al-Mehdawi [1990] 1 AC 876 followed); and (ii) the non-binding observations of three Justices of the Supreme Court in Reyes (Lord Wilson, Baroness Hale and Lord Clarke) on the meaning of 'commercial activity' were to be preferred to those of the Court of Appeal and two Justices of the Supreme Court (Lord Sumption and Lord Neuberger). The EAT allowed the Respondent's appeal. It rejected his argument that the decision of the Court of Appeal on 'commercial activity' was binding (Al-Mehdawi considered); but held that the current state of the law on that issue was represented by the conclusion in Reyes of Lords Sumption and Neuberger and the Court of Appeal. Accordingly, it held that the defence of diplomatic immunity succeeded.			
Mervyn v BW Controls Ltd **[2020] EWCA Civ 393** The claimant was employed as an administrator for BW Controls Ltd until she left and brought proceedings against the company. In her ET1 claim form she ticked the box next to the words 'I was unfairly dismissed (including constructive dismissal)'. Her attached particulars of claim contained allegations which seemed to indicate a case of constructive dismissal, including that she had been humiliated by the managing director/owner and had been forced to leave due to a build-up of stress. The company's ET3 response form stated that it was clear that the claimant had resigned. A case management hearing was heard by telephone with the claimant appearing in person. The judge produced a case management order, which stated that *'the claimant has suggested she was constructively dismissed but before me she was clear that she neither resigned nor intended to resign. Her case is that she was "actually" dismissed … If … she resigned, her claim must fail, since she does not allege that she did so because of the respondent's actions (indeed she says there was no resignation at all) … It follows that the tribunal will not need to hear evidence on [the alleged misbehaviour of the managing director/owner]*'. At the substantive tribunal hearing	**[2020] IRLR 464** **June 2020**		

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the claimant again appeared in person. The tribunal set out the list of issues which had been identified at the case management preliminary hearing. It went on to find that the claimant had in fact resigned and concluded that 'accordingly, the claimant's complaint of unfair dismissal failed. She was not dismissed and she did not claim that any resignation had amounted to a constructive unfair dismissal'. The claimant appealed to the EAT, arguing that her claim had included one of constructive unfair dismissal and that the tribunal should have considered that claim. The EAT found that the allegations in the ET1 had raised a potential constructive dismissal claim, but held that 'her clear stance throughout the litigation was that she had not resigned' and that in those circumstances the tribunal could not have been criticised for not doing more to investigate the constructive dismissal claim. The claimant appealed to the present court. Rule 29 of the Employment Tribunals Rules of Procedure 2013 provided that a tribunal '… may at any stage of the proceedings, on its own initiative or on application, make a case management order. …' The Court of Appeal (Lord Justice Bean, Lord Justice Singh and Lady Justice Asplin) by a reserved judgment given on 16 March 2020 allowed the claimant's appeal. It held that there is no requirement of exceptionality in every case before a tribunal can depart from the precise terms of an agreed list of issues. It will no doubt be an unusual step to take, but what is 'necessary in the interests of justice' in the context of the tribunal's powers under r 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it. It is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice. In the present case, it 'shouted out' from the contents of the particulars of claim that, on a proper analysis, the claimant was alleging that she had been constructively dismissed. Against that background, and with the claimant appearing once again in person, it was not enough for the tribunal simply to ask at the start of the substantive hearing whether the parties confirmed the previous list of issues. It would not have amounted to a 'step into the factual and evidential arena' for the tribunal to have said that it seemed to them that there was an issue as to whether the claimant had been dismissed or had resigned and that the list of issues ought to have been modified accordingly. No significant adjournment would have been necessary. It was necessary in the interests of justice for the list of issues to be amended so that the tribunal could consider 'ordinary' unfair dismissal and constructive unfair dismissal as alternatives. The constructive dismissal claim would be remitted for rehearing by an employment tribunal.			

Radia v Jefferies International Ltd **UKEAT/0007/18/JOJ** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE - Costs In a Liability Decision which followed a full Merits Hearing, all of the Claimant's complaints brought pursuant to the Equality Act 2010 by reference to the protected characteristic of disability were dismissed. The Respondent then applied for costs. In a further Decision which followed a Costs Hearing, the Employment Tribunal awarded the Respondent the whole of its costs of the litigation, subject to assessment. The principal bases of that Costs Decision were that the claims had no reasonable prospect of success and that the Claimant either knew or ought reasonably to have known that; and that, on that account, he had also conducted the proceedings unreasonably, by bringing the claims and/or continuing with them after receipt of a costs warning letter to which he did not respond. The Employment Tribunal also found that, in respect of certain complaints, he had lied to, or misled the Tribunal; and it would in any event have awarded costs in respect of those particular complaints. An appeal against the Costs Decision was allowed to proceed to a full Appeal Hearing on four grounds, all of which failed. Ground 1 challenged a finding in the Costs Decision that, at the time of a discussion with the Respondent, about the possibility of his departing with a severance package, at which the Claimant had, for the first time, raised allegations of disability discrimination going back five years, he did not believe those allegations to have merit. However, that finding was properly made, drawing on the findings in the Liability Decision; and the Claimant had had a fair opportunity to address the point in evidence at the Liability Hearing, and to make submissions about it at the Costs Hearing. Ground 2 contended that, if Ground 1 was well-founded, then the conclusions in the Costs Decision, that the Claimant ought to have known that his claims had no reasonable prospect of success, and, on that account, unreasonably pursued them, could not stand. However, this Ground failed because: (a) Ground 1 failed; (b) the awards of costs on those bases in any event stood on the independent footing that the claims had no reasonable prospect of success, which the Claimant ought reasonably to have known; and (c) those latter findings were not, as such, challenged, and were, in any event, properly made without the Tribunal having wrongly relied upon hindsight. Ground 3 challenged the Costs Decision's reliance on findings that the Claimant had given false or misleading evidence on two particular issues. But these drew on findings in the Liability Decision, in respect of which the Claimant had been fairly cross-examined at the Liability Hearing, and which the Tribunal properly regarded as central to a sub-group of complaints. Ground 4 challenged the conclusions that the Claimant acted unreasonably in continuing with his claims after receipt of the Grounds of Resistance and/or a later costs-warning letter. But, having regard to the reasons why Ground 2 failed, this Ground also failed.	**[2020] IRLR 431** **June 2020**		
Home Secretary v Parr	**[2020] IRLR**		**IDS Emp. L.**

UKEAT/0046/20/BA **THE HONOURABLE MR JUSTICE GRIFFITHS** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE The Employment Tribunal at the full hearing of claims for equal pay and sex and race discrimination was entitled to review and revoke an earlier case management order which had provided for part of the proceedings to be in private under rule 50 of the ET Rules. The earlier order was expressly subject to review by the full Tribunal. There had also been a material change of circumstances within the meaning of rule 29. The full Tribunal was able to see all the documents and witness statements for the hearing, which were not before the earlier Tribunal. The second Tribunal had the benefit of being shown authorities on the open justice principle which the first Tribunal had not seen.	**422** **June 2020**		**Brief 2020, 1125, 7-9**
In civil proceedings (, all statements of case and witness statements need to be accompanied with a signed Statement of Truth. From 6 April 2020, **the 113th update to the CPR includes new wording** to include an awareness that making a false statement may result in criminal proceedings being brought. **PRACTICE DIRECTION 22 – STATEMENTS OF TRUTH** 1) In paragraph 2.1, in the wording of the statement of truth, at the end insert **"I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.".** 2) In paragraph 2.2— a) after "as follows" insert "(and provided in the language of the witness statement)"; and b) in the wording of the statement of truth, at the end insert **"I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.".** 3) After paragraph 2.3 insert— "2.4 The statement of truth must be in the witness's own language. 2.5 A statement of truth must be dated with the date on which it was signed.". 4) In paragraph 3.8(2), after "to the client" insert "(through an interpreter where necessary)". 5) For the heading above paragraph 3A.1 substitute— "Inability of persons, other than by reason of language alone, to read or sign documents to be verified by a statement of truth" 6) In paragraph 3A.1, after "the document," insert "other than by reason of language alone,".			
L v Q Ltd **[2019] EWCA Civ 1417** **LORD JUSTICE BEAN and LADY JUSTICE ROSE** There is no explicit power in the Employment Tribunals Rules of Procedure 2013 to prohibit publication of a judgment of an employment tribunal altogether, except in cases raising issues of national security. It is hard to imagine the circumstances in which it would be right for an employment tribunal acting under rule 50 , which	[2019] I.R.L.R. 1033	[2019] 8 WLUK 37 **[2020] I.C.R. 420** Times, November	

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deals with privacy and restrictions on disclosure, to withhold publication of a judgment altogether in a case not involving issues of national security. Section 11(1)(a) of the Employment Tribunals Act 1996 permits an employment tribunal in a case concerning allegations of sexual misconduct to take steps to ensure that registration of the judgment is effected in such a way so as to protect the identities of individuals, but it is doubtful whether that provision or the rules made under it allow judgments to be kept off the register of employment tribunal judgments maintained by the Lord Chancellor. Even if it does, there is no equivalent power conferred by section 12 in disability cases. Furthermore, rule 50 of the 2013 Rules is not to be construed so as to allow the employment tribunal to keep its judgment secret to protect the rights of a claimant under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The principle of open justice requires that the individuals whom a claimant alleges have discriminated against him, or harassed or victimised him, must be allowed to see the employment tribunal. It is wholly unjustifiable to have judgments censored by redacting information relating to disabilities and the consequences of them when to do so would fundamentally undermine understanding of the employment tribunal's judgment. The only justifiable redactions are anonymisation of the witnesses and other individuals referred to in the judgment by random initials and any other redactions reasonably necessary to preserve the anonymity of the individuals concerned.		15, 2019	
E.ON Control Solutions Ltd v Caspall **UKEAT/0003/19/JOJ** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Application/Claim PRACTICE AND PROCEDURE – Amendment JURISDICTIONAL POINTS The ET was concerned with two claims lodged by the Claimant. The first gave an incorrect ACAS early conciliation ("EC") number – relating to a different Claimant and a different claim; the second gave the number of an EC certificate that was invalid. Neither had been rejected by the ET under Rule 10 ET Rules nor had the claims been referred to an Employment Judge under Rule 12. At a Preliminary Hearing before the ET, the Claimant applied to amend his claim to correct the ACAS EC number. The ET allowed the application, seeing this as consistent with the overriding objective and the general principle of access to justice given that this was a minor amendment to rectify a technical error. The Respondent appealed. Held: allowing the appeal The Claimant's claims failed to include an accurate ACAS EC number and were thus of a kind described at Rule 12(1)(c) ET Rules. Pursuant to Rule 12(2), the Employment Judge was therefore required to reject the claims and return the claims to the Claimant; that was a mandatory requirement that was not limited to a particular stage of the proceedings. As this would mean that there was no longer a claim before the ET, the Employment Judge had no power to allow the		**[2020] I.C.R. 552** **[2019] 7 WLUK 319**	

Claimant to amend; the correct procedure was instead that laid down by Rule 13. The Claimant argued that the ET's decision could be upheld by virtue of Rule 6, read together with the overriding objective. Rule 6 could not, however, import a discretion into a mandatory Rule Cranwell v Cullen UKEATPAS/0046/14 and Baisley v South Lanarkshire Council [2017] ICR 365 applied. Moreover, Rule 6 applied to ET proceedings but the mandatory rejection and return of the claim under Rule 12(2) meant that there were no proceedings before the ET.			
Hossaini v EDS Recruitment Ltd (t/a J&C Recruitment) **UKEAT/0297/18/BA UKEAT/0013/19/BA** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - New evidence on appeal** **PRACTICE AND PROCEDURE - Costs** The claimant (who described himself as a Muslim of South Africa /Turkish/Iranian origin) was employed by the First Respondent as an agency worker and had been assigned to the Second Respondent as a driver. He pursued ET claims of race and religion/belief discrimination and harassment, relating to comments made by other workers, alleging they had called him "babaji", which he said was an inherently discriminatory term, and "fucking Muslim". He also made a claim of victimisation when his placement with the Second Respondent was terminated. It was admitted that the term "babaji" was used but the Respondents relied on a translation of that word, obtained by a manager of the First Respondent (Mrs Mears), which suggested it had no racial or religious connotation. Seeing that as the best direct evidence available, the ET rejected the Claimant's case that the use of this term amounted to racial or religious harassment. The ET also rejected the Claimant's evidence that the term "fucking Muslim" was used. As for the victimisation complaint, the ET found there had been diminution in the need for drivers and the termination of the Claimant's placement was unrelated to his complaints of harassment. On the dismissal of the Claimant's claim, the Respondent applied for costs. The ET considered the without prejudice correspondence relating to settlement discussions between the parties and took the view that the Claimant had acted unreasonably in the negotiations, such that it was appropriate to make an award of costs of £10,000 for each the Respondents. Subsequent to the ET hearing, the Claimant approached the translators used by Mrs Mears and was forwarded a copy of the translation provided to the First Respondent, which included a further possible translation of "babaji" stating it was an offensive term related to race /religion. This new evidence suggested the document relied on before the ET had been doctored to remove this alternative translation. The Claimant applied to the ET for reconsideration of its decision, making a number of points but including clear reference to this new evidence. The ET, however, rejected the reconsideration application under 72(1) of the ET Rules 2013. The Claimant appealed against (1) the ET's substantive decision on his claims and the award of costs; and (2) the refusal of his reconsideration application. Held: allowing the appeals The new evidence relied on by the Claimant met the tests laid down in **Ladd v Marshall** [1954] 1 WLR 1489: specifically, it was apparently credible, it was also relevant and would probably have had an important influence on the hearing – not only as to the		**[2020] I.C.R. 491** **[2019] 5 WLUK 643**	

possible meaning of "babaji" and the claim of harassment in that regard but also going to the issue of credibility more generally, and it could not have been obtained with reasonable diligence for use at the ET hearing. Although the translation of the term "babaji" had been in issue, the Claimant had no reason to doubt that the document produced by Mrs Mears was genuine, he had been entitled to expect that the Respondents would comply with their disclosure obligation and produce a complete and unaltered set of documents, and the requirement to exercise due diligence in the search for evidence could not extend to requiring a party to investigate the veracity and reliability of every document produced by opposing parties. On the Claimant's application for reconsideration, the ET had demonstrated no engagement with the new evidence point and had failed to apply Ladd v Marshall. Had it done so, it would have been bound to find that the Claimant had met the three-stage test (see above). The Claimant's appeals on the basis of this "fresh evidence" would thus be allowed. In the circumstances, the appropriate course was for the claims to be remitted to a differently constituted ET for re-hearing and it would be for that ET to reach a final determination on the credibility of the new evidence that the Claimant had adduced and to assess the relevance of that material in the underlying proceedings. Given the potential importance of the new evidence to questions of credibility, it was hard to see how the ET's earlier costs decision could stand. In any event, the ET had erred in having regard to without prejudice correspondence that had not been "without prejudice save as to costs" (Reed Executive plc v Reed Business Information Ltd [2004] 1 WLR 3026 applied). Yet further, the ET'S reasoning did not demonstrate an exercise of discretion in determining whether it was appropriate to make an award of costs in this case, the ET having apparently considered this "therefore" followed from its decision that its costs jurisdiction was engaged (Avoola v Christopher Fellowship UKEAT/0508/13 applied). The appeal against the costs decision would also be allowed.			

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Limoine v Sharma **UKEAT/0094/19/RN** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Appearance /response PRACTICE AND PROCEDURE – Right to be heard The Claimant in the Employment Tribunal presented claims for wages and breach of contract damages. The claim was defended and the Respondent presented an employer's breach of contract claim arising out of the same facts. The Claimant overlooked to enter a response to that claim. No judgement was entered under rule 20(2) of the Employment Tribunal Rules of Procedure 2013. Both parties prepared for the hearing in respect of both claims. At the hearing the Judge gave Judgment on the Respondent's claim because it was undefended, and dismissed the Claimant's claim upon the Respondent agreeing to a set off. Held: (1) It is an error of law to enter Judgment under rule 21(2) simply on the basis that a claim (whether of a claimant or respondent) is undefended. The Judge must first consider, and be satisfied, treating what is asserted in the claim as uncontested, that the essential factual elements of it are properly made out on the material presented to the Tribunal. (2) Where the respondent to an undefended claim (brought by either party) wishes to be permitted to participate in a hearing in relation to that claim, under rule 21(3), it is an error of law not to consider, and decide judicially, whether, and if so, to what extent, they should be permitted to do so. Office Equipment Systems Limited v Hughes [2019] ICR 201 considered. Observations on the approach to be taken to an application by a respondent to an undefended claim to be permitted to participate in a liability hearing. (3) The appeal was allowed in respect of the Judgment on the Respondent's claim, but also in respect of the Judgment dismissing the Claimant's claim. The Judge had done so on the basis that the Respondent had conceded that the amount of the Claimant's claim could be set off against the award on the Respondent's claim. However, it was not appropriate to substitute a Judgment allowing that claim. Both claims would be remitted.		**|[2020] I.C.R. 389 [2019] 7 WLUK 737**	
Morgan v Abertawe BRP Morgannwg University Local Health Board **EAT** **UKEAT/0114/19/JOJ** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Admissibility of evidence The Claimant has an underlying long-term mental health disability. It has for long periods been controlled by medication. However, there were periods during her employment with the Respondent when it became symptomatic in a way which affected her fitness to work. In early 2011, at a time when			**IDS Emp. L. Brief 2020, 1125, 21-24**

she was off sick, an OH doctor advised that the deterioration in her mental health was caused by aspects of her working environment in her current role, and that she was not fit to return to that role, but would be fit to return to a different role, which he recommended should be found for her. The Tribunal found that the Respondent could and should then have redeployed her to another suitable role that she was fit to perform, in the period from April 2011. However, it did not do so and that was found to amount to a failure to comply with the duty of reasonable adjustment. By August 2011 the Claimant's mental health had deteriorated to the point that she had become unfit for any role, and the Tribunal found that there was no failure to comply with the duty of reasonable adjustment thereafter. Her unfitness led to her dismissal. The Tribunal found the dismissal to be fair. The dismissal was not found to be an act of unlawful discrimination. For the purposes of remedy for the failure to comply with the duty of reasonable adjustment, the Claimant contended that, had the Respondent complied with its duty and redeployed her, in the relevant time window, her mental health would, or might, not have then deteriorated to the point when she became unfit for any role; and her employment would, or might, not have ended when it in fact did. She applied for permission to adduce expert evidence in that connection. The Tribunal directed that, for her application to be considered, she needed to obtain and table an expert report, based solely on a review of the existing medical records. The Claimant having done so, the Tribunal, on the basis of an appraisal of that particular report, refused her application. Held: The Tribunal had correctly adopted the test, in CPR 35, of whether expert evidence on the issue was reasonably required. But it should have decided, first, whether, in principle, expert evidence should be permitted on the issue, applying that test. If the answer to that was "yes", it should then have gone on to give appropriate directions in respect of such expert evidence, taking account of the guidance in **De Keyser v Wilson** [2001] IRLR 324. That might have included the obtaining of a joint report, or those of experts on both sides, based on the expert(s) seeing the Claimant, as well as reviewing historic records, and the opportunity for questions to be raised of the expert(s). The Tribunal's approach resulted in unfairness, because it proceeded in the wrong order, based its decision on its appraisal of a more limited report, and pre-empted the task of assessing the actual full expert evidence, which should have fallen to the full Tribunal at the Remedy Hearing itself. In any event the Tribunal wrongly concluded wrongly that the limited report, and any future report, could not be of any assistance on this issue, so that the "reasonably required" test was not met. The nature of this issue in this case is such that the only proper conclusion was that expert evidence is reasonably required in relation to it, and, having been requested, should have been permitted, in principle, with directions to follow. **Royal Bank of Scotland v Morris** UKEAT/0436/10 considered. Accordingly, the appeal was allowed, and a decision that expert medical evidence be permitted on this issue was substituted.			

Fincham v Alpha Grove Community Trust **UKEATPA/0993/18/RN** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Time for Appealing The Claimant in the Employment Tribunal sought to bring an appeal to the EAT. The documents that he delivered to the EAT within the time limit for doing so were not complete. There was one page missing from the copy of the Grounds of Resistance, which formed part of the Response Form, in the bundle of documents that he delivered. After this was drawn to his attention, he supplied the missing page. This was 20 days after the last day for instituting an appeal in time. The Registrar had been correct to hold that the appeal was not properly instituted until the missing page was supplied, and that it was instituted out of time. However, the information contained on the last page was not necessary to an appreciation of the Employment Tribunal's decision or the issues raised by the proposed Grounds of Appeal. The failure to include a copy of the last page was a genuine error on the part of the Claimant, which he had not appreciated until it was drawn to his attention. When it was, he acted promptly to rectify it. He had not been lax or dilatory in any other respect. In all these particular circumstances, this was an exceptional case in which an extension of time should be granted.			**IDS Emp. L. Brief 2020, 1125, 25-26**
Royal Bank of Scotland plc v AB **UKEAT/0266/18/DA UKEAT/0187/18/DA** **THE HONOURABLE MR. JUSTICE SWIFT** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE DISABILITY DISCRIMINATION This was an appeal against the decision at a remedies hearing, following the conclusion that the employee had suffered discrimination on grounds of disability. The employee contended she had suffered a serious psychiatric injury as a result of the unlawful discrimination which prevented her from working for the foreseeable future and which required round the clock care. The Employment Tribunal awarded compensation of £4,670,535 (which the parties are agreed should be altered to £4,724,801 to reflect interest accruing prior to the date of the Employment Tribunal's Judgment). The employer appealed. The issues in the appeal concerned the Tribunal's decisions on (a) whether it was necessary to assess the employee's capacity to conduct the litigation at the time of the remedies hearing; (b) whether (and to what extent) the psychiatric injury was caused by the discrimination; (c) whether the employee had exaggerated her condition; and (d) the sufficiency of the Tribunal's reasons for preferring the evidence of one expert witness over another. The appeal was dismissed, save in respect of one ground of appeal which concerned the Employment Tribunal's conclusion that no assessment of the employee's capacity to conduct litigation had been required. The Employment Appeal Tribunal concluded that there was no			**IDS Emp. L. Brief 2020, 1124, 13-15**

need to remit the question of assessment to the Employment Tribunal. The failure to assess had not rendered the Employment Tribunal proceedings void, and did not constitute unfairness to the employer in the conduct of the proceedings amounting to an error of law.			
Heal v The Chancellor Master and Scholars of the University of Oxford and ors **UKEAT/0070/19/DA UKEAT/0183/19/DA** **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT) (SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE The Claimant indicated that he had a disability in his ET1 and requested some adjustments including permission to use a recording device as his condition made it difficult for him to take contemporaneous notes. The Tribunal indicated that an application for permission should be made at the preliminary hearing although it was also stated that the application would be considered before the hearing if the requisite information was provided. The Claimant appealed 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 the Claimant would be in contempt of court if he attempted to bring a recording device into the building before permission was granted. Held, dismissing the appeal, that the Tribunal 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. Finally, the Tribunal's direction that the application to record be considered at a hearing implicitly gave permission to bring the equipment to court pending leave to record being given. In any event, there is unlikely to be a contempt of court within the meaning of s. 9 of the Contempt of Court Act 1981 where a person brings a device, e.g. a mobile phone, to court for a purpose other than to use it to record sound or subject to the Tribunal's permission to do so.			**IDS Emp. L. Brief 2020, 1123, 15-19**

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Kuwait Oil Company (KSC) v Al-Tarkait **UKEAT/0210/19/00** **THE HONOURABLE MR JUSTICE KERR (SITTING ALONE)** **SUMMARY PRACTICE AND PROCEDURE – Costs** A costs order made by the tribunal under rule 78(1)(b) of the Employment Tribunal Rules of Procedure 2013 was within its powers, even though it capped the costs in favour of the appellant (the respondent below) in an amount that had not yet been precisely ascertained. The tribunal had been entitled to have regard to the claimant's means and ability to pay, under rule 84; and although the precise amount of the cap was not stated as an exact figure, the costs order was sufficiently certain to comply with the requirement that the order should identify the "specified part" of the costs to which it related. The cap on the costs recoverable by the appellant did not usurp the jurisdiction of an employment judge or county court costs judge conducting a subsequent detailed assessment. That judge would still have to determine the amount payable under the costs order; the cap imposed by the tribunal did not determine the amount payable, only the maximum amount payable. The appeal therefore failed and the costs order stands. However, it would be better to specify any such cap as an exact sum, rather than as an amount that was only known as an approximation.			**IDS Emp. L. Brief 2020, 1123, 22-23**
Paul v Virgin Care Ltd **UKEAT/0104/19/RN** **HEATHER WILLIAMS QC (DEPUTY JUDGE OF THE HIGH COURT) (SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Withdrawal During a Preliminary Hearing to consider whether any of the claims should be struck out as lacking reasonable prospects of success or made the subject of deposit orders, the Claimant, who was unrepresented, indicated she was withdrawing her claim for automatically unfair dismissal pursuant to regulation 7(1)(b) Transfer of Undertakings (Protection of Employment) Regulations 2006. The Employment Tribunal dismissed this claim upon her withdrawal and made deposit orders in relation to her other claims. The Claimant appealed contending that the Tribunal had erred in law in dismissing her automatically unfair dismissal claim as the Employment Judge had failed to ensure that she had made an informed choice when she withdrew this claim and/or had exerted unfair pressure on her to do so. The appeal was dismissed. Having regard to all the circumstances, the withdrawal of the automatically unfair dismissal claim was clear, unambiguous, and unequivocal and there was nothing to reasonably suggest otherwise to the Employment Judge. In so far as he questioned the Claimant as to why she said her dismissal was linked to the TUPE transfer, the Employment Judge acted properly and understandably, given the strike out application he had to determine and with a view to understanding the way she put her claim. The questions he asked were fair and clear, and the Claimant was given an appropriate opportunity to consider whether or not to withdraw this part of her claim, in circumstances where it was clear what the implications of that were for its future pursuit. There was no unfair pressure put on her to do so.			**IDS Emp. L. Brief 2020, 1122, 14**

Adams v Kingdom Services Group Ltd **UKEAT/0235/18/LA** **MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT (SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Striking Out of Claims PRACTICE AND PROCEDURE – Imposition of Deposit PRACTICE AND PROCEDURE – Amendment of Notice of Appeal 1. The Employment Tribunal was correct to refuse to strike out the claim of unfair dismissal under s.104 of the Employment Rights Act 1996. It was entitled to make a deposit order in respect of that claim on the basis that it had little reasonable prospect of success. 2. The Employment Tribunal erred in law in failing to give reasons for the particular amount of the deposit that was ordered to be paid. The deposit order (and the order striking out the claim for non-payment of the deposit) was set aside and the Employment Appeal Tribunal substituted, at the request of the parties, its own decision as to the appropriate amount of the deposit order. 3. The Employment Appeal Tribunal held that in the unusual circumstances of the case, the Claimant would be permitted to amend the Notice of Appeal to bring an appeal against the operative deposit order, which had been made after the filing of Notice of Appeal following a successful request for reconsideration of the amount of the original deposit order			**IDS Emp. L. Brief 2020, 1121, 30**
Mr J Patel v The Commissioners of the Police of the Metropolis **UKEAT/0301/19/BA** **HIS HONOUR JUDGE SHANKS (SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE RELIGION OR BELIEF DISCRIMINATION The Claimant (a Hindu police officer) claimed religious discrimination arising out of a decision taken by a Chief Inspector in 2018 that he could not transfer to the Brent area because of his long association with the Hindu Temple in Neasden. A year later in 2019 a different Chief Inspector indicated that the rationale for the earlier decision no longer applied and that he could after all apply for the transfer. The Claimant sought to rely on this change of position in support of his case of discrimination and sought disclosure of documents related to the 2019 decision. The EJ refused the application and ruled that the Claimant could not rely on the 2019 decision. The EJ's decision relied in part on a finding that there had been a change of circumstances in that the Claimant had given up the role of deputy security manager at the Temple between the 2018 and 2019 decisions. On analysis of the 2018 emails it was clear that that was a factual error since the Claimant had informed the Chief Inspector of his resignation as deputy security manager several days before the decision was communicated to him. Since the EJ's decision had proceeded on a false basis it could not stand and the EAT set it aside and remitted it to be decided by a new EJ. The EAT's decision applied both in relation to the disclosure application and the refusal to allow the Claimant to rely on the 2019 decision, which was expressed to be contingent on the disclosure application.			

ROSE MORTON v EASTLEIGH CITIZENS' ADVICE BUREAU **2020] EWCA Civ 638** **CA (Civ Div) (Underhill LJ, Lewison LJ)** In a disability discrimination claim, an employment tribunal judge had correctly refused to order an adjournment. The employee had had adequate time to prepare and the judge had not erred in his approach by reaching his own conclusion that a joint medical report was not necessary in the face of conflicting case management decisions. Lewison LJ: what is directly in issue on this appeal is EJ Kolanko's refusal of an adjournment. Yet that very application had already been made to the ET and refused by EJ Pirani. Ms Morton was thus doing exactly what HHJ Hand QC said should not be done: namely asking a second judge of the ET to reverse a previous decision of the same tribunal. It is not acceptable, having failed in an application before one employment judge, to make an identical application to a second employment judge in order to provide a peg on which to hang what is essentially an appeal against the decision of the first employment judge.			
Mr Tim Sarnoff v YZ **UKEAT/0252/19/LA** **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Disclosure PRACTICE AND PROCEDURE – Case management An order for disclosure under rule 31 of the 2013 Employment Tribunal Rules of Procedure can be made against a person who is not physically present in Great Britain at the time when the order is made. The words in rule 31: "[t]he Tribunal may order any person in Great Britain to disclose documents or information to a party …" refer to the place where disclosure takes place and where the employment tribunal is located, not to the place where the disclosing party is located.			
O'Neill v Jaeger Retail Ltd **UKEAT/0026/19** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY JURISDICTIONAL POINTS – Extension of time: - just and equitable The Claimant's claim form, containing complaints of discrimination, was presented a little over two months out of time, assuming, in her favour, that she might be able to establish a continuing act in relation to all of the allegations that she raised. The Employment Tribunal accepted that the Claimant genuinely, but erroneously, thought that, having told the ACAS EC officer about her complaints, and obtained an Early Conciliation Certificate, there was nothing else she needed to do to in order to present her claim. The Certificate was obtained at the end of December 2017, and the extended primary time limit expired on 30 January 2018. She approached the ACAS EC officer again in mid-February 2018, and only then, the Tribunal accepted, understood that she should also have submitted a claim form to the Employment Tribunal, and was now out of time to do so. It was also only when she later spoke to someone else in ACAS, that she appreciated that she could still seek to put in a late Employment Tribunal claim, and then finally did so. The heart of the Tribunal's decision concerned why the Claimant had			

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not approached ACAS again until mid-February 2018, and whether she ought to have appreciated sooner that something might be wrong, and taken some further pro-active step. In that regard, the Claimant relied on the state of her mental health as relevant, and in particular, on a GP's letter of June 2018. The Tribunal accepted that various personal circumstances, including bereavements, had had a significant impact, but did not consider that the GP's letter showed that her mental health had had a material impact beyond mid-January 2018 at the latest. The Tribunal had properly directed itself as to the law, and taken a careful and well-structured approach to its fact-finding and overall decision. The EAT should only intervene if the decision was, in some material sense, perverse. However, on a fair reading of the GP's letter, it was not a proper conclusion that it offered the Tribunal no assistance at all on the state of the Claimant's mental health beyond the period up to mid-January 2018. That conclusion had significantly affected the Tribunal's decision, which therefore could not stand. The matter would be remitted for a re-hearing of the question of whether it was just and equitable to extend time. It would be important for the Tribunal, at the re-hearing, to have the benefit of sight of all the relevant contemporaneous medical evidence that might be available, whatever it might or might not show, in particular, the GP's records, and not just the letter.			
Payco Services Ltd v Mr T Sinka (Debarred) **UKEAT/0134/19/OO** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE At a case management Preliminary Hearing it was determined that three substantive issues, and strike-out and deposit order applications, should be considered at a public Preliminary Hearing. That further hearing duly took place, evidence was presented and submissions made. The Judge then reserved her decision. In that decision she set out her analysis of aspects of the evidence, and made certain findings of fact, but came to the conclusion that she could not determine the preliminary issues without two other Respondents being first joined to the proceedings. The Judge erred in law in so deciding, principally because (a) the substantive issue having been set down for a Preliminary Hearing, and heard at that Hearing, the Judge was obliged to make findings of fact, on the basis of the evidence presented, and determine them, as best she could. She had not identified any material change in circumstances or other exceptional reason to justify a change of course; and (b) she had taken her decision without the parties being made aware that she was considering doing so, and they had not had a fair opportunity to make submissions on that proposed course.			
Chelmsford Unisex Hair Salon Ltd v Miss Kaomi Grunwell **UKEAT/0135/19/JOJ** **MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE - Appearance/response PRACTICE AND PROCEDURE – Absence of party			

The Respondent did not file a response to the Claimant's claim before the Employment Tribunal. Judgment on liability was entered and the scheduled preliminary hearing was converted to a remedy hearing. The judgment and the new notice of hearing were sent out. The Respondent did not attend the hearing. The Claimant was awarded compensation by the Employment Tribunal at that hearing. The Respondent then sought to appeal the Employment Tribunal's decision on remedy on that basis that the claim had not come to the attention of the director of Respondent. The ET1, judgment and correspondence from the Tribunal had however been sent to the Respondent's correct address (and at least some of that correspondence had been received at that address prior to the remedy hearing). The appeal was stayed for the Respondent to make an application for reconsideration to the Employment Tribunal, however none was made. Written reasons for the decisions on liability and remedy were not requested from the Employment Tribunal. Nor did the Respondent file, either with the Employment Tribunal or with the Employment Appeal Tribunal, an ET3 form and draft grounds of response to the claim. The Respondent's representative did not participate in preparing the bundle for the appeal hearing, which was prepared by the Claimant. The Respondent did not file a skeleton argument and did not attend the hearing of the appeal before the Employment Appeal Tribunal, nor did its representative attend on its behalf. The Employment Appeal Tribunal dismissed the appeal, holding that the grounds of appeal advanced disclosed no error of law on the part of the Employment Tribunal in proceeding to reach its decision on remedy as it had done in these circumstances. The case was distinguishable from **Office Equipment Systems Ltd v Hughes** [2018] EWCA Civ 1842, [2019] ICR 201, where the Employment Tribunal had refused an application by the respondent to participate in determining remedy and had proceeded to determine remedy without a hearing. Here, there was hearing to determine remedy. The Respondent was sent notice of that hearing but did not attend. The Employment Tribunal proceeded to determine remedy in the Respondent's absence, which was not itself an error of law			
Duncan Lewis Solicitors Ltd v Miss M Puar **UKEAT/0175/19/RN** **THE HONOURABLE MR JUSTICE SOOLE** **(SITTING ALONE)** SUMMARY PRACTICE AND PROCEDURE – Striking-out/dismissal The Claimant's claims were automatically struck out for breach of an 'unless' order by failure to serve further particulars of her claims. The Claimant applied under ET Rule 38(2) to set aside the strike-out order. The ET granted the application. The Respondent appealed the decision on various grounds. The EAT allowed the appeal on the grounds that the ET had failed to give Meek-compliant reasons for its decision and remitted the application to be heard afresh by the same ET.			
AMAZON UK SERVICES v AHMED TEJAN-KELLA **QBD (Steyn J) 06/02/2020** Against the background of employment proceedings, an interim injunction requiring delivery up of documents from an individual to his former employer was maintained. There were no grounds on which to			

set the injunction aside and the individual should not have retained the documents after his termination.			
Mr S Patel v Specsavers Optical Group Ltd **UKEAT/0286/18/JOJ** **HER HONOUR JUDGE STACEY** **(SITTING ALONE)** SUMMARY CONTRACT OF EMPLOYMENT – Whether established JURISDICTIONAL POINTS – Worker, employee or neither PRACTICE AND PROCEDURE – Amendment PRACTICE AND PROCEDURE – Application/claim On the specific grounds of appeal put forward by the Appellant (the Claimant before the ET), the ET had not erred in refusing the application by the Claimant to add a second respondent to the claim when he did not have an ACAS Early Conciliation Certificate in respect of the proposed Second Respondent. The Claimant's request to amend the grounds of appeal on the day of the hearing to widen the grounds of appeal was refused: paragraphs 3.5 and 3.12 of the PD applied and **Khudados v Leggate** [2005] IRLR 540 followed. The Claimant had not established that the Tribunal's written reasons had deviated from the oral extempore judgment and in any event as per The Partners of **Haxby Practice v Collen** [2012] UKEAT/0120/12/DM (Underhill P), and **Ministry of Justice v Blackford** [2018] IRLR 688 (Lady Wise), the written reasons prevailed over the oral reasons. The Tribunal did not err in concluding that the Claimant had a contract of employment only with the proposed Second Respondent and that he did not have dual employment contract with two different employers (the First Respondent and proposed Second Respondent) for the same job and work. There was no reason to deviate from the principle that one person cannot have two employers in respect of the same employment on the facts of this case. The line of authorities from Laugher v Pointer (1826) 5 B & C 547 to **Cairns v Visteon UK Ltd** [2007] ICR 616 followed.			

PREGNANCY AND MATERNITY ETC, FAMILY 'FRIENDLY' MATTERS, LEAVE AND PAY Contracts Chapter K			
The Parental Bereavement Leave Regulations 2020 and The Statutory Parental Bereavement Pay (General) Regulations 2020			
Statutory Parental Bereavement Pay and Leave: employer guide Abstract: HM Government guidance for employers advises on the circumstances in which employees may be eligible for parental bereavement leave and statutory parental bereavement pay. It states that an employee can claim such benefits if they or their partner: has a child who has died under 18 years old; or had a stillbirth after 24 weeks of pregnancy. It notes that the death or stillbirth must have happened on or after 6 April 2020.			

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REDUNDANCIES			
Agarwal v Cardiff University **UKEAT/0115/19/RN** SUMMARY REDUNDANCY The ET was entitled to find that the Claimant was validly dismissed by reason of redundancy, and its reasons adequately explained its decision. Its rejection of the evidence of one potential witness was justified in the circumstances of the case and its failure to mention evidence of a relatively peripheral nature from another witness did not amount to an error of law. The Claimant had a lengthy history of grievances, complaints and long-term sick leave. Following a redundancy process, the Claimant's contract was terminated, and she brought a number of claims in the ET including for automatic and "standard" unfair dismissal, direct race discrimination, harassment, victimisation and breach of contract. The ET rejected all of these claims, and the Claimant appealed on the grounds that the ET erred in failing to identify the decision maker in relation to the redundancy, with the result that the "mental processes" of those persons could not be subjectively examined, and the ET had omitted from its reasons "relevant and probative evidence" and had excluded other evidence. The EAT held that the decision makers were adequately identified in the reasons, without the need to name each member of the redundancy committee, and that the ET's choice of witnesses and evidence was a sensible and permissible case management decision; accordingly, the ET was entitled to reach the conclusion that the Claimant's dismissal was genuinely by reason of redundancy, and the appeal would be dismissed.			
Gwynedd Council v Shelley Barratt and Other **UKEAT/0206/18/VP** **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)** **MRS G SMITH** **MR M WORTHINGTON** SUMMARY REDUNDANCY The Claimants were dismissed for redundancy following the closure of the school where they worked. They were unsuccessful in applying for positions at a new school that opened at the same location. The Tribunal held that the dismissals were unfair because of the failure to provide the Claimants with a right of appeal, the absence of consultation and because of the manner in which they were required to "apply for their own jobs". The Respondent local authority appealed on the grounds that the Tribunal had erred in its approach to the assessment of fairness under s.98(4) of the 1996 Act in that it had treated guidelines as to what an employer should do in a redundancy dismissal as inflexible legal requirements; and had failed to take account of the particular limitations on the Respondent's role in relation to recruitment at a maintained school. Held, dismissing the appeal, that the Tribunal had not erred in its approach to fairness. Whilst some parts of the Tribunal's judgment might be indicative of a rigid approach, a fair reading of the whole judgment reveals that it did not treat guideline cases as laying down			

mandatory requirements that had to be applied in every case. Whether or not the Respondent acted fairly in applying that process in the circumstances of this case was to be judged by an application of s98(4) of the 1996 Act and that is what the Tribunal did. In doing so, it did not err in its understanding of the relationship between the Respondent and the Governing Bodies of the schools as set out in the relevant regulations.			

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RESTRICTIVE COVENANTS AND CONFIDENTIAL INFORMATION For detailed and practical exposition of this area see Contracts Chapter q			
Wells and another v Cathay Investments 2 Ltd and another [2019] EWHC 2996 (QB) **His Honour Judge Simpkiss (sitting as a Deputy Judge of the High Court)** The employee Claimants were in material breach of their employment agreements and guilty of gross misconduct. when they shared confidential information with a former shareholder and chairman of the company in order to reverse-engineer a budget to match a representation that he had made before the sale of the company. The Claimants claimed damages for wrongful dismissal and sought declarations that they had not materially breached their employment agreement with the Second Defendant employer. The Second Defendant was a transport and logistics business. The Claimants were senior employees who owned 5% of the company shares. The chairman was the Second Claimant's father and owned 41% of the shares. In 2016 the First Defendant approached the Second Defendant with a view to buying it, and in 2017 the purchase was completed. The Claimants continued working for the Second Defendant under employment agreements which provided that they must not use the Second Defendant's confidential information for their own purposes or disclose it to third parties, and contained covenants restricting soliciting of customers and the provision of services to competitors for 12 months after they left employment. The Claimants retained their shares but entered into option agreements under which they could sell their shares to the First Defendant for a fair value. They also entered into shareholders agreements which provided that if they committed a material breach of their employment agreement they would become a departing shareholder, and they could be required to transfer their shares at nominal value. It also contained covenants restricting them from being involved with a competitor or soliciting customers for 12 months following the date of them ceasing to be a shareholder. They exercised their option to sell their shares, but a share value could not be agreed. The Second Defendant began disciplinary proceedings against the Claimants believing that they had improperly disclosed confidential information to the chairman and been involved in the improper preparation of the 2017 budget, and that the First Claimant had sent confidential information to his personal email without permission and accessed pornography on his work laptop. They were summarily dismissed for gross misconduct. The Second Defendant gave notice to the Claimants that they were in material breach and were required to transfer their shares to the First Defendant at nominal value. The Claimants argued that when the share price could not be agreed the Second Defendant had engaged in a scheme to find a reason to dismiss them for gross misconduct. **The Court found for the Defendants.** (1) The Claimants had shared confidential information with the chairman in order to give him oversight of the 2017 budget so that a representation that he had made pre-acquisition, that the EBITDA would be £1.2 million, was in line with the budget figures. The Claimants had continued to believe that they owed their loyalties to he chairman, and had not taken on board that there was a new regime and that their duties now differed. The	**[2020] IRLR 281** **April 2020**		

Claimants were aware that the 2017 budget was being prepared without transparency and with a view to ensuring that it matched the figure given by the chairman before the purchase, the £1.2 million reported to the board, and against a background of severe cash flow problems and accounting irregularities prior to the acquisition of the Second Defendant. The disclosure had been for a purpose totally inconsistent with their duties to the Second Defendant and was a serious breach which went to the heart of the employee/employer relationship (see paragraphs **102, 137, 156** of the judgment). (2) Highly confidential information had been transferred to the Second Claimant's personal email account without consent and in breach of the employment agreement (para.**145**). He had viewed pornography on his work laptop in an open office, which was serious misconduct (para.**147**). (3) The disclosure of confidential information and reverse-engineering OF the 2017 budget was a repudiatory breach of the employment agreements. In consequence, the Claimants were defaulting shareholders. The other breaches, although serious misconduct, were not material breaches or gross misconduct (paras **155, 160**). (4) The Claimants' conduct had undermined the whole basis of trust between employer and employee with the potential for undermining the trust and confidence of the Second Defendant's bank. In acting as such, the Claimants had had no regard to their duties to the Second Defendant but had been motivated by a misplaced loyalty to S and the desire to put off the day when the previous improprieties in the running of the Second Defendant would come to light. The Second Defendant had been entitled to dismiss the Claimants summarily (para.**162**). (5) There were legitimate reasons for imposing restrictive covenants in the shareholders agreement as the Claimants were in a position to do considerable damage to the Second Defendant's business if they chose to compete. The 12-month period was reasonable and the restrictions were not too wide. The restrictions in the employment agreement were the minimum necessary to deal with the risk of key personnel leaving and setting up a competing business. The restrictive covenants were enforceable (paras **176, 180-181, 185**). **For consideration of the definition of confidential information see Contracts, Q50-59.** **For consideration of shareholders and restrictive covenants see Q127.**			
Allen (t/a David Allen Chartered Accountants) v Dodd & Co Ltd [2020] EWCA Civ 258 Lord Justice Lewison, Lord Justice David Richards, Lady Justice Rose Mr Pollock was employed by David Allen. His contract of employment contained what appeared to be restrictive covenants. He was offered a job by Dodd t, a competitor firm, resigned from Allen and joined Dodd. Before Mr Pollock took up his new job, Dodd obtained legal advice from their solicitors about whether the restrictive covenants were enforceable. The essence of the advice received was that while the matter was not entirely without risk, it was more likely than not that the	**[2020] IRLR 387, May 2020**		**IDS Emp. L. Brief 2020, 1124, 3-5**

restrictive covenants were ineffective and unenforceable against Pollock. In fact it turned out, after a contested hearing, that subject to some permissible blue pencilling, the covenants were enforceable and that, by working for Dodd, Pollock was in breach of them. A question arose as to whether Dodd had sufficient knowledge to expose them to liability in tort for procuring a breach of P's contract. The judge found that they did not. Dodd had not turned a blind eye to P's contractual obligations nor was Dodd indifferent to them because they went to the trouble of obtaining early legal advice, upon which they honestly relied. The fact that the legal advice turned out to be wrong was not enough. On appeal, the Court of Appeal (Civil Division) (Lord Justice Lewison, Lord Justice David Richards, Lady Justice Rose) by a reserved judgment given on 27 February 2020 dismissed the appeal. It held that the tort of inducing a breach of contract does not require an absolute belief that one's actions would not amount to inducing a breach of contract. It is sufficient if the advice is that it is more probable than not that no breach will be committed. In order for a person to be liable in tort for inducing a breach of contract, the contract in question must be a binding and enforceable contract. If it were not, then the inducement cannot have caused any loss, which is part of the essence of the tort. Since liability in tort for inducing a breach of contract is an accessory liability to that of the contract breaker, if the party to the contract is not liable (because the relevant term of the contract is unenforceable) the accessory cannot be liable either. It was clear from OBG Ltd v Allan; Douglas v Hello! Ltd (No 3); Mainstream Properties Ltd v Young **[2007] IRLR 608** that it is for the claimant to prove the defendant's actual knowledge of the breach; not for the defendant to prove an absolute belief that there would be no breach. That test was not consistent with a requirement for an absolute belief that one's actions would not amount to inducing a breach of contract. It was difficult to see a principled distinction between: (a) a case in which the defendant does not know that there is a contract; (b) a case in which the defendant knows that there is a contract but does not know that the act that he induces will be a breach of contract; (c) a case where the defendant has an honest doubt about whether a contract as a whole is binding or enforceable; and (d) a case in which the defendant knows that there is a contract but believes that it is probable that the relevant term of the contract is unenforceable with the consequence that the act he proposes to procure will not amount to a breach. People should be able to act on legal advice, responsibly sought, even if the advice turns out to be wrong. Lawyers rarely give unequivocal advice, and even if they do the client must appreciate that there is always a risk that the advice will turn out to be wrong. To insist on definitive advice that no breach will be committed would have a chilling effect on legitimate commercial activity. **See the article on www.dugganpress.com, which first appeared in ELA briefing on this case.**			
Guest Services Worldwide Ltd v Shelmerdine [2020] EWCA Civ 85 **Lord Justice Patten, Lord Justice Peter Jackson, Lady Justice**	**[2020] IRLR 392, May 2020**		

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Asplin The Claimant was in the business of producing maps for distribution to the guests of luxury hotels. It was founded by the Defendant, who sold the company in around 2011. He was originally retained as an employee. In July 2015, the Defendant and a company owned by him entered into a consultancy agreement with the Claimant. The appointment was to commence on 6 April 2015 and to continue until 6 April 2017, or such later date as the parties might agree. Clause 10 the consultancy agreement contained post-termination covenants in relation to, inter alia, solicitation, canvassing and dealing with customers and competition. The restrictions in the covenants applied for a duration of 12 months after the cessation of the consultancy. The Defendant was also a shareholder of the Claimant. He was party to a shareholders' agreement dated 15 June 2016 which was made between the Claimant and the persons listed in schedule 1 to the agreement who were referred to as "Shareholders", which included the Defendant. At clause 5 it also contained a number of covenants including a post termination non-competition covenant and restrictions in relation to the solicitation of clients or customers, and the solicitation of employees and suppliers. The fixed term of the consultancy agreement expired and the Defendant continued to provide services to the Claimant on an ad hoc basis. A new draft agreement was drawn up, which also contained restrictive covenants but this agreement faltered and the ad hoc consultancy arrangements between the parties were terminated by notice which expired on 9 February 2019. As a result of the termination of the agency, the Defendant was deemed to have served a transfer notice in respect of his shares in the Claimant, though no shares were transferred. It was alleged that the Defendant had used a map produced for the Claimant to solicit business after the consultancy agreement expired. The Claimant asked the Defendant to complete and return a number of undertakings that were appended to a letter, which included undertakings to comply with the restrictions in clause. The Claimant issued proceedings seeking an injunction restraining breach of post-termination covenants in the shareholders' agreement and what was referred to as the new consultancy agreement in the form of the travelling draft. It was held after a trial that the Claimant was not bound by the terms of the draft agreement. As regards the shareholders' agreement, the judge noted that the restrictions only applied to 'Employee Shareholders', not the shareholders as a whole. Having considered the definition of 'Employee Shareholder' the judge concluded that on a proper construction of clause 5 and the relevant definitions, if an employee, agent or director ceased to be an Employee Shareholder he must also cease to be subject to the covenants at that time. Accordingly, he held that it was no longer open to the Claimant to advance a claim on the basis of the covenants in the Shareholders' Agreement once the Defendant ceased to be its agent in February 2019. The Claimant appealed. ***Clause 5.1 provided: 'No Employee Shareholder shall during the times specified below, carry on or be employed, engaged or interested in any business which would be in competition with any part of the Business, including any developments in the Business after the date of this agreement. The times during which the restrictions apply are: (a) any***			

time when the party in question is a shareholder; and (b) for a period of 12 months after the party in question ceases to be a Shareholder.' The Court of allowed the appeal. The CA held that, when read as a whole, the proper interpretation of clause 5.1 of the shareholders' agreement was that a person falling within the definition of 'Employee Shareholder' who is described as such in schedule 1 to the Shareholder's Agreement (such as the Defendant) and those who become so thereafter, having adhered to the terms of the shareholders' agreement, remained subject to the restrictions in clause 5.1 until either they cease to be a shareholder having chosen to transfer their shares (and for 12 months thereafter) or they cease to be a shareholder as a result of the compulsory transfer provisions that apply on ceasing to be an employee, agent or director (and for 12 months thereafter). Such a construction was consistent with the definition of Employee Shareholder in the Shareholder Agreement itself and gave meaning to clause 5.1. It followed that the Defendant was bound by the terms of clause 5.1 and would continue to be so until he ceased to be a shareholder and for 12 months thereafter. The period of 12 months was not unreasonable in respect of the restraints specified in clause 5 and, in particular, in relation to clause 5.1. The Claimant had a legitimate interest in seeking to prevent Employee Shareholders from competing with the business and soliciting clients, given the particular nature of the business and the knowledge that such individuals were likely to have obtained. The clause appeared in a shareholders' agreement made between experienced commercial parties. A period of restraint lasting 12 months was entirely reasonable to protect that interest. That was so even though the 12 month period under clause 5.1(b) ran from the date on which the individual ceased to be a shareholder rather than the cessation of his employment, agency or directorship. **For consideration of shareholders and restrictive covenants see Q127.**			
Trailfinders Ltd v Travel Counsellors Ltd and others **[2020] IRLR 448** **[2020] EWHC 591 (IPEC)** **HHJ HACON** Trailfinders is a travel agent which employed the second to fifth defendants as sales consultants. Those individual defendants left to join the first defendant, Travel Counsellors Ltd which traded using a franchise model with franchisee travel consultants. Trailfinders brought proceedings alleging that when the individual defendants left they took client information and subsequently accessed further such information. The client information included clients' names, nationalities, interests, contact details and past bookings. It was held by Trailfinders on two systems. Viewtrail was an online portal used to record booking details and Superfacts was a software system which recorded information about clients. Trailfinders focused on two of the four individual defendants, being Mr La Gette and Mr Bishop. The latter admitted using the Superfacts system to assemble, for about six months before he left Trailfinders, a 'contact book' information about clients. After leaving Trailfinders he sent TCL his contacts list. Both admitted accessing Viewtrail after they left Trailfinders. The first issue was whether Trailfinders' client information was confidential. Trailfinders alleged that there had been misuse of 'class 2'	**[2020] IRLR 448** **June 2020**		

information. In ***Faccenda Chicken Ltd v Fowler***, Goulding J divided information to which an employee may have gained access into three classes. The first class was information which was not confidential. The second was confidential information acquired during the normal course of employment which remained in the employee's head and became part of his own experience and skills. The third was confidential information in the form of specific trade secrets. The Court of Appeal differed with Goulding J's analysis as to where the line was to be drawn between classes 2 and 3. The second issue was whether the individual defendants were in breach both of implied contractual terms of confidence and of equitable obligations of confidence. The third issue was whether TCL was in breach of an equitable obligation of confidence. Trailfinders alleged that TCL was in breach through having received the other defendants' confidential customer information and having allowed those defendants to exploit the information for TCL's and their benefit. The duty of good faith as pleaded by Trailfinders referred only to that part which implied an obligation not to misuse or disclose confidential information. The court considered the effect of the Trade Secrets Directive 2016/943. Article 2(1) defined 'trade secret'. Article 4(2) provided for when the acquisition of a trade secret would be unlawful. Article 4(3) set out when the use or disclosure of a trade secret would be unlawful. Article 4(4) provided that the acquisition, use or disclosure of a trade secret could be unlawful when a person knew or ought to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully. The High Court (Judge Hacon) held that Trailfinder succeeded. Trailfinders' client information was confidential. The best guide to the distinction between information which is confidential and that which is not is now to be found in the definition of 'trade secret' in art 2(1) of the Trade Secrets Directive (always bearing in mind the broad interpretation of 'trade secret' in the Directive). Trailfinders' client information was confidential as it had the characteristics set out in art 2(1) of the Directive. It fell within 'class 2' of confidential information as defined by Goulding J. Trailfinders clearly took steps to ensure that the information was not openly available to anyone by requiring the use of a password or, in the case of Viewtrail, limiting access to information to clients only if their name and booking reference was known. The individual defendants were in breach both of implied contractual terms of confidence and of their equitable obligations of confidence. The implied terms of confidentiality in the employment contracts restrained the employees from using or disclosing the client information save in pursuance of the business interests of Trailfinders. That duty ceased after the end of their employment. However, to the extent that any employee acted in breach of the implied term during the course of their employment, liability remained. Such acts in breach included copying or deliberately memorising any confidential parts of the client information for use by the employee after leaving Trailfinders' employment. The equitable obligation of confidence owed by Trailfinders' employees was similar, but differed in that the obligation did not cease once they left the employment of Trailfinders. That said, the obligation could not have been enforced by Trailfinders in relation to information forming part of the experience and skills acquired during the normal course of			

their employment with Trailfinders. The latter covered only information that was held in their minds, as the case may have been, when each left Trailfinders' employment, and excluded any information which was deliberately memorised. Mr La Gette provided a lot of contact information to TCL after he left Trailfinders. Some of the information was copied from the Superfacts system on his last day of work at Trailfinders. Both individual defendants argued that none of that information was confidential because it was also available from public sources. But the names of all the clients were not public knowledge and it was no defence to an allegation of breach of confidence by taking information from confidential data held by an employer that the information could have been obtained from publicly available sources. Mr La Gette further submitted that the information was also part of his experience and skills, held within his memory. However, as observed in *Universal Thermosensors*, the argument that a former employee went to the trouble of copying information although he need not have bothered because it was in his mind made for 'a difficult row to hoe': that argument would not be accepted. The information Mr La Gette copied from Superfacts was class 2 information and at least in part beyond his experience and skills. The copying was done in breach of the implied term in his contract of employment. Similarly, Mr Bishop was in breach when he compiled his contact book. The disclosure of that information to TCL and its subsequent use by Mr La Gette was also in breach of his equitable obligation of confidence to Trailfinders. Similarly, Mr Bishop was in breach in relation to his contact book. He was further in breach of that equitable obligation when he accessed Viewtrail after he left Trailfinders and obtained and used information about his former clients. Further, these were unlawful acts within the meaning of art 4(2) and (3) of the Trade Secrets Directive. TCL was in breach of an equitable obligation of confidence it owed to Trailfinders. Equity imposed a duty of confidence on TCL if it received information it knew or ought to have known was fairly and reasonably regarded as confidential: see also art 4(4) of the Trade Secrets Directive. If the duty was imposed, TCL was in breach of it because the information in question consisted of the client details received from Mr La Gette and Mr Bishop and TCL used those for the benefit of its business. So the short question was what TCL knew or ought to have known about the client details it received. TCL argued that it was a proposition of law that, in order to be fixed with an obligation of confidence, a third party must *know* that the information was confidential. That proposition could not be accepted. It was no longer good law. Further, the proposition could not have been good having regard to art 4(4) of the Directive. TCL further argued that that if anyone at TCL knew or ought to have known that TCL was receiving confidential information from Trailfinders, then it could not have been anyone more senior than a recruiter who was too junior for her knowledge to have been imputed to TCL. That argument would not be accepted. All franchisees joining TCL were encouraged to disclose the names and details of their contacts to TCL: the CEO must have known that. A reasonable person in his position or other person of sufficient significance in TCL's operations would have been aware that at least part of the contact information brought to TCL by Mr La Gette and Mr Bishop was likely to have been copied from Trailfinders' customer data. There was too much of it to			

have been carried in their heads. Such persons at TCL knew or ought to have known that Trailfinders would have regarded the information as confidential. A belief that TCL was thereby receiving confidential information could only have been reversed if Mr La Gette and Mr Bishop had given TCL convincing reasons why this was not the case. They did not and the impression left was that TCL did not wish to inquire. In those circumstances TCL ought to have known that they were in receipt of information which Trailfinders reasonably regarded as confidential. Equity imposed on TCL an obligation of confidence and it was in breach of that obligation. Per HHJ Hacon: t should be noted that in *Faccenda Chicken* and later judgments 'trade secrets' is a term which has been used narrowly to mean information having a high degree of confidentiality. Directive 2016/943 uses the term 'trade secrets' broadly, covering any sort of confidential information and thus both of Goulding J's classes 2 and 3. To avoid confusion, I will use Goulding J's class numbers rather than referring to trade secrets. **For consideration of the definition of confidential information see Contracts, Q50-59.** **The Trade Secrets (Enforcement etc) Regulations 2016 are set out in Contracts at Q135.**			
MEDIA ENTERTAINMENT NV v (1) SAPAR KARYAGDYYEV (2) ALFONSO GONZALEZ GARCIA **QBD (Master Dagnall) 06/05/2020** The High Court declined to strike out as inadequately pleaded the entirety of a claim for misuse of confidential information. The claimant sought damages and an injunction, and although it should have pleaded, in support of its damages claim, that the defendants knew that their use of the confidential information was unauthorised, such pleading was not necessarily a prerequisite to obtaining an injunction.			
SQUARE GLOBAL LTD v JULIEN LEONARD **[2020] EWHC 1008 (QB)** **JON TURNER Q.C. SITTING AS A DEPUTY HIGH COURT JUDGE** A six-month non-compete clause in a broker's contract of employment was justified and enforceable. Square has legitimate protectable interests in this case. The evidence at trial established in particular that the nature of Mr. Leonard's job at Square involved building up and exploiting customer connections. " In the course of examination of Mr. Leonard at trial, it was also established that he had retained a copy document containing highly confidential information about clients and trades on his personal Hotmail account. This is not to say that he had done so deliberately, for illegitimate purposes: Mr. Leonard explained convincingly in evidence that his device may innocently have selected his personal account as the relevant account from which to send the electronic document. The salient point, however...was that this incident Illustrated vividly the portability of Square's confidential information. If Mr. Leonard were to start work at a rival "shop", and to undertake the same line of work that he had been engaged in at Square, it would be almost impossible to find out that he was using Square's confidential information illegitimately... the six-month Non-Compete clause is reasonable, and that it goes no further than necessary to protect Square's legitimate business interests. In this regard, I take into account that Mr. Leonard's previous employment contract with ICAP contained a six-month non-compete			

covenant, and that the evidence shows that he actively negotiated his contract with Square too. Similarly, his employment contract with Market Securities contains a six-month non-compete covenant". On garden leave: "188. In Credit Suisse Asset Management v. Armstrong [1996] ICR 882 Neill LJ in the Court of Appeal held that the existence of a garden leave clause can be taken into account in determining the validity of a restrictive covenant as at the date of the contract. Moreover, in an exceptional case, where a long period of garden leave had already elapsed, perhaps substantially in excess of a year, there was the possibility that the Court would as a matter of discretion decline to grant any further protection based on a restrictive covenant... I am satisfied that the six-month Non-Compete clause is reasonable, and that it goes no further than necessary to protect Square's legitimate business interests. In this regard, I take into account that Mr. Leonard's previous employment contract with ICAP contained a six-month non-compete covenant, and that the evidence shows that he actively negotiated his contract with Square too. Similarly, his employment contract with Market Securities contains a six-month non-compete covenant. 189. It is true that the latter contract, as executed, includes a provision (clause 4.2) that was introduced very late at Mr. Leonard's request on 14 February 2020, stipulating that there should be a set-off between any worked period of garden leave and the period of time during which the non-compete covenant would apply. In my judgment, this does not point to the unreasonableness of the six-month Non-Compete clause. 190. Finally...even if the Non-Compete clause is reasonable and valid, the Court should exercise its discretion to refuse to grant injunctive relief enforcing it. His argument was that: (i) Mr. Uzan's position was that he would not have put Mr. Leonard on garden leave, had he given due notice to terminate his employment; (ii) it follows that Square has conceded that the maximum protection it needs by way of a non-compete clause is six months from the date that Mr. Leonard leaves the market; (iii) in the circumstances of the present case, Mr. Leonard has in fact been off the market already for over four months. 191. I do not accept that this argument is well-founded. The premise is the assumption that relations between Square and Mr. Leonard are sufficiently harmonious to permit him to work out his notice period, following which time a six-month PTR suffices. As Square's counsel pointed out, the garden leave clause which is included in the contract exists to cater, among other matters, for a situation where Square has concerns about an employee's conduct (e.g. harvesting client information, or engaging in deceptive behaviour), and so chooses to restrict the employee's duties during the notice period. On the assumption that such concerns have a reasonable foundation, it would not then be unreasonable to enforce the full period of the PTRs. In the present case, Mr. Leonard is not placed on garden leave having given notice to resign, but he is nonetheless in a comparable position for present purposes. I do not regard the fact that since his summary resignation on 11 November 2019 he has been "off the market" as a reason to set off this period against the six-month term envisaged by the Non-Compete clause." **The above case did not consider a garden leave clause to preclude a six month non compete clause. The cases on non complete clause are fully reviewed in Contracts at Q115 onwards.**			

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SOCIAL MEDIA See Chapter M at M91-164 for detailed consideration of the issues that arise in employment with social media and Q136 for ownership issues that arise out of social media.			
Herbai v Hungary **European Court of Human Rights** The European Court of Human Rights held that Hungary's courts breached their duty to protect freedom of expression under Article 10 of the European Convention on Human Rights when they held that an employee had been lawfully dismissed by a bank for publishing an HR blog. No attempt had been made to demonstrate how the blog could have adversely affected the bank's interests. Herbai worked as a human resources management expert for a bank in Budapest. He and a fellow HR professional, N, set up a public website, with the aim of sharing HR-related knowledge. In January 2011 they published two articles, which gave their opinions and drew on their professional expertise but did not name H's employer. When the bank found out, it terminated H's employment for breaching confidentiality and damaging its economic and business interests. It pointed out that its code of ethics placed Herbai under an obligation not to publish any information relating to the bank's functioning and activities. H instituted legal proceedings challenging his dismissal. The European court of Human Rights held that the enjoyment of the right to freedom of expression should be secured even in the relations between employer and employee. In the present case, the Court could not discern any meaningful balancing of the interests at issue by the domestic courts. The Constitutional Court found that the applicant's fundamental right was not engaged and the *Kúria* did not attribute any relevance to free speech in the present case. The substantive outcome of the labour dispute was dictated purely by contractual considerations between the applicant and Bank O and voided the applicant's reliance on freedom of expression of any effect. The Court found that the domestic authorities failed to demonstrate convincingly that the rejection of the applicant's challenge against his dismissal was based on a fair balance between the applicant's right to freedom of expression, on the one hand, and his employer's right to protect its legitimate business interests, on the other hand. They therefore did not discharge their positive obligations under Article 10 of the Convention.	**2020 IRLR 159**		**IDS Emp. L. Brief 2020, 1122, 13**

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SICKNESS Contracts, Chapter J			
Terveys- ja sosiaalialan neuvottelujarjesto v Hyvinvointialan liitto ry (C-609/17) **Auto- ja Kuljetusalan Tyontekijaliitto AKT ry v Satamaoperaattorit ry (C-610/17)** JUDGMENT OF THE COURT (Grand Chamber) The Directive 2003/88 art.7(1) and the right to paid annual leave did not prevent national legislation or collective agreements, such as the Finnish ones concerned, from which it followed that days of paid annual leave beyond a period of four weeks could not be carried over when they overlapped with days of sick leave. 1. Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum period of 4 weeks laid down in that provision, and yet exclude the carrying over of those days of leave on the grounds of illness. 2. Article 31(2) of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 51(1) thereof, must be interpreted as meaning that it is not intended to apply where such national rules or collective agreements exist. **On carry over and sickness, see Chapter I- I160**	**[2020] IRLR 141**	**[2019] 11 WLUK 238 |** **[2020] 2 C.M.L.R. 11** **[2020] I.C.R. 336**	**IDS Emp. L. Brief 2020, 1121, 23-24**
R. (on the application of Michaelides) v Chief Constable of Merseyside **[2019] EWHC 1434 (Admin)** **Queen's Bench Division** **Judge Kramer sitting as a Judge of the Queen's Bench Division** The claimant police officer ceased work because of stress, alleging that he had been subjected to bullying, harassment, racist abuse and other unfair treatment during his time in the defendant's force which caused him mental illness. Following reports by two consultant psychiatrists, the chief constable appointed a selected medical practitioner ("SMP") pursuant to regulation H1(2) of the Police Pensions Regulations 1987 1 for the purpose of determining (a) whether the claimant was disabled and, if so, (b) whether the disablement was likely to be permanent. the SMP said that the claimant had experienced depressive episodes which arose from perceived issues with his employment, and that, by virtue of those depressive episodes and perceived issues, he was medically unfit for performing the ordinary duties of a member of the police force. The chief constable exercised his power under the 1987 Regulations to require the claimant to retire on the ground that he was permanently disabled from continuing in his role as a police officer, whereupon the claimant applied for an injury award under regulation 11 of the Police (Injury Benefit) Regulations 2006. . The defendant appointed a second SMP for the purpose of determining whether the claimant's disablement was the result of an injury received in the execution of duty and the degree of any such disablement, the decisions already made on questions (a) and (b) under regulation H1(2) of the 1987 Regulations being binding for the purposes of the 2006 Regulations. In his report, the second SMP addressed the claimant's numerous allegations of bullying, but identified only two capable of corroboration and concluded that those incidents in isolation could not		**[2020] I.C.R. 367** **[2019] 6 WLUK 467**	

have caused the claimant's state of ill health. The claimant appealed that finding to a Police Medical Appeal Board, which dismissed the appeal, stating that, while the first SMP had found the claimant to be permanently disabled under the terms of the 1987 Regulations, his diagnosis was not binding, and finding that the specific allegations made by the claimant were not supported by any medical evidence to indicate that they were a trigger for a deterioration in his mental health. By a claim for judicial review the claimant challenged the lawfulness of the board's decision on the grounds, inter alia, that (1) the board had failed to consider itself bound by the diagnosis and reasoning put forward in the binding report of the first SMP and (2) the board had failed to give proper reasons for its decision. On the claim for judicial review— (1) although the first SMP's decision on the two questions under regulation H1(2) as to the existence and permanence of the claimant's disability were binding on an SMP or appeal board considering an injury award, the diagnosis underpinning that decision was not binding; that reliance by the claimant on the earlier medical reports to suggest that the board had to accept that his disablement was the result of an injury received in the execution of duty was misplaced; and that no proper criticism could be made of the board in the significance they had attributed to the first SMP's report beyond his answer to the two questions as to the existence and permanence of the claimant's disability (2) Allowing the claim and quashing the board's decision, that, as a matter of procedural fairness, the board was required to give reasons for its decision, whether or not it disagreed with any part of the report of the SMP, given that it was acting in a quasi-judicial capacity in an adversarial process, making findings of fact, often on contested evidence, and making a decision determinative of the claimant's rights; that, further, under regulation 32 of the 2006 Regulations there was provision for reference of a decision for reconsideration, and justice could not be done if the decision did not explain why one party won and the other lost by reference to the factual and legal issues raised; that the board was aware that it was part of the claimant's case that he had been subjected to bullying and racism causative of his condition, and, in order to decide whether the claimant was entitled to an award, the board had to make a finding as to whether he had been subjected to that behaviour, but it was not possible to tell from the board's report whether it took the view that it did not need to make a decision in relation to those complaints or that it found that the allegations were not, on balance, proved; and that, accordingly, the board had either failed to reach decisions on key factual issues or had failed to give adequate reasons as to how it had dealt with those issues.			

TIME LIMITS AND EXTENSIONS

Lowri Beck v Brophy

[2019] EWCA Civ 2490

LORD JUSTICE UNDERHILL, Vice-President of the Court of Appeal (Civil Division) and LORD JUSTICE DAVID RICHARDS

The Claimant brought claims for unfair dismissal and disability discrimination. He is severely dyslexic and relied on the help of his brother. The Claimant's former employer telephoned him on 29 June 2017, informing him of the negative outcome of a disciplinary hearing stating that he would receive a letter. The letter was received on 6 July and stated:

> *"Further to the disciplinary hearing held on Wednesday, 21 June 2017 and our telephone conversation on Thursday, 29 June 2017, I am writing to inform you of my decision. I have no option but to dismiss you for gross misconduct. This dismissal will be with immediate effect from 29 June 2017."*

An ET held that although the Claimant had lodged his claim after the primary time limit expired, time should be extended for both parts of the claim (under the *Employment Rights Act* and *Equality Act* respectively), noting that the *Claimant is a vulnerable individual who has dyslexia* and the terms of the letter were *"unclear and contradictory"*• .

The employer argued in the Court of Appeal that it was not reasonable for the Claimant to read the letter of 4 July (received on 6 July) as the letter which effected his dismissal. The Court of Appeal disagreed. Underhill LJ stated " It was reasonable for the Claimant and his brother to take the view that his formal dismissal only took effect when he received a letter communicating it. That would be a natural understanding for lay people, reinforced by the fact that the Claimant had previously been told that he would be receiving such a letter. Of course the reference in the letter to dismissal taking effect from 29 June did muddy the waters, but it did not do so to a point where the Judge was bound to find that it was unreasonable of the Claimant and his brother not to have sought further advice

Mr O Adedeji v University Hospital Birmingham NHS Foundation UKEAT/0171/19/BA

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

SUMMARY

PRACTICE AND PROCEDURE – Striking - out/dismissal

PRACTICE AND PROCEDURE -Preliminary issues

The employment judge had not erred or misdirected herself when refusing to extend time to bring a race discrimination claim brought three days out of time.

"The sole issue in the appeal relates to the exercise of the judge's discretion whether to extend time to allow the claim for discriminatory constructive dismissal to proceed. He decided not to, recognising that the delay in that regard was "not substantial". 39. The discretion whether to extend time for a discrimination claim, applying the "just and equitable" test is, as the parties agree, a broad one which has been considered in numerous cases. It is unnecessary to cite them here. The judge's explanation for not allowing the claim that was out of time by only three days to proceed, was scant. Nonetheless, her comment that the delay was "not substantial" must be read in the light of the accompanying comments on the cogency of the evidence going back to June 2017 and, indeed, earlier, to November 2016. 40. The judge was fully entitled to consider the effect of delay on the cogency of evidence

relating to those earlier events when considering the constructive unfair dismissal claim, and to give such weight to that issue as she thought right, within reason, for the purpose of considering the part of the claim that was only three days out of time.. I accept the submission of Ms Roberts, drawing on the Judgment of Laing J in **Miller v Ministry of Justice**, that it was for the judge to decide what weight to give to the shortness of the three day delay, of which she was aware. As I have already noted, the shortness of that delay had to be considered in the context of the much longer delay following historic events which would be admissible in evidence."			
South Western Ambulance Service NHS Foundation Trust v King **UKEAT/0056/19/OO** **Employment Appeal Tribunal** **Mr Justice Choudhury (President)** SUMMARY EXTENSION OF TIME: JUST AND EQUITABLE The Claimant lodged a grievance against her managers complaining of, amongst other matters, acts of discrimination. Her grievance was the subject of a report produced by an external consultant. The report dismissed the grievance. The Claimant's appeal was rejected. Dissatisfied with the grievance outcome and the Trust's failure to take action against one manager in particular, she resigned, claiming she was constructively dismissed. Her effective date of termination was 5 October 2017. On 11 December 2017, the Claimant issued proceedings claiming unfair constructive dismissal and victimisation because of doing a protected act, namely lodging a grievance. The Claimant relied upon a series of detriments said to be acts of victimisation. These commenced with the report and included the dismissal of her grievance and grievance appeal. Only the rejection of her grievance appeal fell within the three-month period (plus the conciliation period) prior to the date of issuing her claim. The Tribunal rejected the claim of unfair constructive dismissal. In relation to victimisation, it found that the report itself did amount to a detriment. However, none of the other matters relied upon, including the rejection of her appeal against the grievance decision, were found to amount to a detriment. The Tribunal concluded, however, that there was a course of conduct commencing with the report and which continued to the rejection of the Claimant's appeal. On that basis, the Claimant's claim was held to be in time. The Respondent appealed. Held, allowing the appeal, that the Tribunal had erred in concluding that there was conduct extending over a period within the meaning of s.123 of the Equality Act 2010, in circumstances where several of the acts said to be part of that course of conduct were not upheld as acts of victimisation. The EAT would substitute a decision that there was no conduct extending over a period. The case would be remitted to the Tribunal for it to determine whether time should be extended on just and equitable grounds.	**[2020] IRLR 168** **March**		

TRADE UNION			
Secretary of State for Justice v Prison Officers Association **LADY JUSTICE SIMLER** **and** **MR JUSTICE CAVANAGH [2019] EWHC 3553 (QB)** **Divisional Court** **Individual's right to trade union membership and activity Right to strike** The Secretary of State for Justice sought an order of appropriate penalty against the Prison Officers' Association under CPR 81, for alleged civil contempt by reason of disobedience of a court order. No order of committal was sought against any named individual. The Secretary of State contended, and the POA did not dispute, that, on 14 September 2018, the POA induced national strike action by prison officers; and on 21 February 2019, the POA supported industrial action by prison officers at HMP Liverpool. It was also the case that the POA accepted that the two incidents referred to amounted to breaches of express terms on the face of the Injunction. Nor did the POA contend that it was unaware of the terms of the Injunction imposed on it. The breaches of the Injunction alleged in the application notice were proved beyond reasonable doubt. AN order for appropriate penalty made against the POA was made the Court and imposed a total fine of £210,000.	**[2020] IRLR 196** **March**		
Kostal UK Ltd v Dunkley **[2019] EWCA Civ 1009** **Lord Justice Bean Lady Justice King and Lord Justice Singh** The Court of Appeal considered, for the first time, the reach of the Trade Union and Labour Relations (Consolidation) Act 1992 s.145B concerning inducements relating to collective bargaining. It focused particularly on the meaning of "prohibited result" in s.145B(1)(a) and s.145B(2) and outlined the only two situations in which such a result might arise.	**[2019] I.R.L.R. 817**	**[2020] I.C.R. 217** **[2019] 6 WLUK 159**	

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National Union of Professional Foster Carers (NUPFC) v Certification Officer **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)** **MRS M V McARTHUR** **MS P TATLOW** SUMMARY TRADE UNIONS WORKER STATUS ARTICLE 11 ECHR The Appellant is a trade union set up to represent the interests of foster carers. It applied to the Certification Officer (who is the Respondent to the Appeal) to be entered on to the list of Trade Unions maintained by the Respondent pursuant to s.2 of the Trade Union Labour Relations (Consolidation) Act 1992 ("TULRCA"). The Respondent rejected the application on the grounds that it was not an organisation consisting "wholly or mainly of workers" within the meaning of s.1 of TULRCA; a "worker", for these purposes, being an individual who works under a contract: s.296 of TULRCA. In particular, the Respondent found that, on the information before him, the relationship between foster carers and local authorities was regulated by a Foster Care Agreement that was not contractual in nature, and he considered himself bound by existing case law to that effect. The Appellant appealed against the Respondent's decision and in doing so raised a number of Human Rights arguments not raised below. Held (dismissing the Appeal): that the Respondent was correct to conclude that the foster carers did not work under a contract. There was binding authority to that effect, which also bound the EAT. The EAT concluded that that line of authority, commencing with Norweb Plc v Dixon [1995] 1 WLR 636 and W v Essex County Council [1993] 3 WLR 534 CA, was correct in any event. There was, in the present case, a statutory code governing the relationship which imposed an obligation on the parties to enter into a form of agreement the terms of which were laid down by statute and regulations. In that scenario, there was no freely entered into contract. The refusal to list meant that, amongst other things, the Appellant could not seek compulsory recognition for the purposes of collective Schedule A1 to TULRCA. However, the matters raised did not give rise to an interference with the Appellant's Art 11 rights to form or join a union or to engage in collective bargaining. The Appellant could engage in voluntary collective bargaining. Even if that was wrong, any interference was relatively minor in nature, given the Appellant's ability to engage in voluntary collective bargaining in relation to a wide range of matters. This was an area in which the State had a broad margin of appreciation. In drawing a distinction between those who worked under a contract and those who did not for the purposes of accessing trade union listing and the rights that flowed from that, Parliament had achieved a fair balance between the competing interests of workers and management, and there was no violation of Art 11. Furthermore, there was no breach of Art 14 (the right not to be discriminated against in the exercise of Convention rights) for the simple reason that the absence of a contract did not give rise to any "other status" within the meaning of that Article.	**[2019] I.R.L.R. 860**	**[2020] ICR 607** **[2019] 7 WLUK 366** **[2019] C.L.Y. 981**	

Mr Alec McFadden v Unite the Union **UKEAT/0147/19/DA** **THE HONOURABLE MR JUSTICE LAVENDER** **(SITTING ALONE)** SUMMARY TRADE UNION MEMBERSHIP The Union brought two sets of disciplinary proceeding against the Appellant, a member of the Union, arising out of an allegation that he slapped a woman's bottom. In the first disciplinary proceedings, the disciplinary panel found that the allegation was proved and amounted to misconduct under a particular rule (rule 27.1.7) of the Union's rulebook. The Appellant's appeal was dismissed, but the Assistant Certification Officer held that rule 27.1.7 did not apply and so there was no misconduct. In the second disciplinary proceedings, the Union advanced the same allegation, contending that it was misconduct under three different rules in the Union's rulebook. The disciplinary panel found that it was misconduct under two of those rules. The Appellant's appeal was dismissed and the Certification Officer held that the Union was not estopped from bringing the second disciplinary proceedings, because the doctrine of res judicata did not apply to the Union's disciplinary process. Held, allowing the appeal, that the Assistant Certification Officer's order gave rise to an estoppel, such that the Union was estopped from bringing proceedings relying on the same allegation and the same rule as in the first disciplinary proceedings. Moreover, since the Union could and should have relied on all applicable rules in the first disciplinary proceedings, it was estopped from asserting a breach of those rules by way of the second disciplinary proceedings.			

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TRANSFER OF UNDERTAKINGS			
Grafe and another v Südbrandenburger Nahverkehrs GmbH and another [C-298/18 (EU:C:2019:593, EU:C:2020:121) SBN operated public bus services. In September 2016, the relevant district carried out a tendering process. SBN did not submit a tender but ceased trading and gave notice of termination of employment to its employees (which included the applicants). Kraftverkehrsgesellschaft Dreiländereck mbH ('KVG') was awarded the contract for the relevant bus services with effect from 1 August 2017. In order to provide those services, KVG set up a wholly owned subsidiary, OSL Bus GmbH. OSL recruited the majority of SBN's drivers and management staff. Meanwhile KVG informed SBN that it did not intend either to purchase or lease SBN's buses, depots and other operating facilities, or to use its workshop services. On SBN's account, that was because the taking over of its buses was precluded by the technical and environmental standards then in force. The first applicant, Grafe, was recruited by OSL, but OSL did not recognise his previous periods of employment, and classified him at the entry level of the applicable collective wage agreement. The second applicant, Pohle, was not recruited by OSL. Both applicants challenged those decisions. OSL argued that since the operating resources, including buses, had not been taken over, there could be no transfer of an undertaking within the meaning of art 1(1) of Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. The domestic court referred the matter to the Court of Justice asking, in essence, whether art 1(1) of Directive 2001/23 had to be interpreted as meaning that, in the context of a takeover by an economic entity of an activity under a procedure for the award of a public contract, the fact that that entity had not taken over the operating resources owned by the economic entity that was previously engaged in that activity precluded the classification of that transaction as a transfer of an undertaking. Article 1(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that, in the context of the takeover by an economic entity of an activity the pursuit of which requires substantial operating resources, under a procedure for the award of a public contract, the fact that that entity does not take over those resources, which are the property of the economic entity previously engaged in that activity, on account of legal, environmental and technical constraints imposed by the contracting authority, cannot necessarily preclude the classification of that takeover of activity as a transfer of an undertaking, since other factual circumstances, such as the taking-over of the majority of the employees and the pursuit, without interruption, of that activity, make it possible to establish that the identity of the economic entity concerned has been retained, this being a matter for the referring court to assess.	**2020] IRLR 399, May 2020**		

Dewhurst and ors v Revisecatch Ltd The Tribunal held that workers were covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006. employment Judge Joffe stated "It is clear from its wording that reg 2(1) of TUPE 2006 is intended to confer rights and protections on a broader class of employees than those employed under a contract of employment or apprenticeship as reflected in the words 'or otherwise'. I find that those words in both TUPE 1981 and TUPE 2006 are designed to reflect the words 'employment relationship' in Art 3.1 of the Acquired Rights Directive. 59. In interpreting regulation 2(1) of TUPE 2006, I should give effect to the Acquired Rights Directive in accordance with the principles summarised by Sir Andrew Morritt in Vodafone. 60. Applying those principles, I can properly give effect to the Acquired Rights Directive by concluding that the words 'or otherwise' are to be construed so as to embrace limb b) workers / Equality Act employees. 61. Not interpreting reg 2(1) so as to embrace limb b) workers leads to absurdity. Take the example of the individual who qualifies as an Equality Act 2010 'employee' but is an ERA 1996 limb b) 'worker'. It is difficult to see how the Equality Act employee could be said not to be 'protected as an employee under national law' within Art 2.1 (d) of the Acquired Rights Directive. If such an employee's rights under the Equality Act 2010 are preserved by a transfer, it is equally difficult to see how it could be the intention of Parliament that such rights that same worker has by virtue of being a limb b) worker should not be preserved."			**IDS Emp. L. Brief 2020, 1122, 15**
DUNCAN FERGUSON v ASTREA ASSET MANAGEMENT LTD **UKEAT/0139/19** **HIS HONOUR JUDGE SHANKS** **(SITTING ALONE)** **SUMMARY** **TRANSFER OF UNDERTAKINGS** The Claimants were directors of Lancer and beneficial owners of Lancer's holding company; Messrs Ferguson and Kevill were also employees of Lancer and Messrs Lax and Pull were employed by companies which they controlled which contracted their services to Lancer; there were seven other Lancer employees. Lancer's sole business was managing the Berkeley Square Estate on behalf of the owners under a management agreement. The owners gave 12 months' notice to terminate the agreement and appointed a new company to manager the Estate, Astrea. There was no dispute that this involved a TUPE transfer from Lancer to Astrea. Shortly before the transfer, the Claimants arranged for their employment contracts to be substantially improved to provide for guaranteed bonus payments and generous new termination payments. The EJ found that these changes were made "by reason of" the anticipated transfer and had no legitimate commercial purpose for Lancer but were designed to compensate the Claimants for loss of Lancer's business, dishonestly taking undue advantage of TUPE by awarding themselves remuneration knowing it would be paid at the expense of Astrea. Astrea dismissed Messrs Ferguson and Kevill on or shortly after transfer and did not accept that Messrs Lee and Pull transferred under TUPE or alternatively also dismissed them.			

The Claimants brought claims against Astrea based on TUPE for unfair dismissal and contractual termination payments and for "compensation payments" for breach of reg 13(4) of TUPE under which Astrea was required to provide "measures" information to Lancer. Following a five-day hearing the EJ found inter alia: (1) that the new contractual terms were void "considering reg 4(4) TUPE in the light of the [EU] abuse of law principle"; (2) that Messrs Lax and Pull did not transfer to Astrea under reg 4(1) because they were not assigned to the organised grouping of employees engaged in the management of the Estate; (3) that Mr Kevill was unfairly dismissed by virtue of reg 7(1) but that his compensatory award should be reduced by 100% under s 123(6) of ERA and, under the Polkey principle, that he would have been (fairly) dismissed by Astrea within three weeks of the transfer in any event; (4) that Astrea had breached reg 13(4) of TUPE by failing to provide "measures" information in good time and that "appropriate compensation" should be awarded to all four Claimants for that breach amounting to three weeks' pay for each of them. On appeal by the Claimants against these findings, the EAT decided that: (1) (a) reg 4(4) of TUPE, properly interpreted in a "broad purposive" way consistently with EU law, rendered void all contractual variations made because of a transfer and not just those adverse to the employee as contended by the Claimants; (b) if that interpretation was wrong, on the facts Astrea could rely on the EU abuse of law principle to prevent Claimants relying on the new contractual terms since (i) the purpose of the EU rules (safeguarding employee rights) had not been achieved, but rather some other purpose (ie substantially improving the rights of the Claimants) and (ii) their intention was to obtain an improper advantage by artificially obtaining variations to their contracts of employment with Lancer in contemplation of the transfer; (2) the EJ had erred in her approach to the issue whether Messrs Lax and Pull were "assigned" to the organised grouping of employees managing the Estate so as to be transferred under TUPE, in particular by concentrating on how much work they were doing rather than on whether they were "organisationally" assigned to the relevant grouping; (3) (a) the EJ failed to consider properly whether, and to what extent, Mr Kevill's conduct had "caused or contributed to" his dismissal for the purposes of s123(6) of ERA; but (b) the EJ had been entitled to make the Polkey finding which she did notwithstanding that the "reason" for the putative dismissal would have been conduct before the transfer and may not have amounted to any legal wrong; (4) (a) on a proper interpretation of reg 16(3) of TUPE on the facts of the case the EJ was entitled to find that "appropriate compensation" for Astrea's breach of reg 13(4) amounted to three weeks' pay; (b) on a proper interpretation of reg 15(7) it would not have been open to the EJ to award compensation to the other transferring employees who might have, but did not, bring claims under reg 15(1)(d). The appeal was therefore dismissed save in relation to the issues at (2) and (3)(a) which were remitted to the EJ to reconsider.			

Mr Sean D'auvergne and others v Metroline Travel Ltd **UKEAT/0214/19/DA** **THE HONOURABLE MR JUSTICE LEWIS** **(SITTING ALONE)** **SUMMARY** CONTRACT OF EMPLOYMENT - Incorporation into contract CONTRACT OF EMPLOYMENT - Implied term/ variation/construction of term 1 The claimants are bus drivers. They were originally employed by Arriva. They were entitled to payments, known as meal relief payments, if they had to take meals breaks away from a recognised relief facility. Until about mid 2010, Arriva paid meal relief payments to drivers who took their meal breaks at Hampstead Heath as that facility was not recognised. The bus route was transferred to the respondent in 2015 and the contracts of employment of the claimants also transferred in accordance with the Transfer of Undertakings (Protection of Employees) Regulations 2006. The respondent had an agreement with the recognised union recognising the Hampstead Heath facility. The respondent refused to pay the claimants the meal relief payments. The employment tribunal held that the claimants had a contractual entitlement to the meal relief payment when taking their breaks at Hampstead Heath as evidenced by the payments made prior to mid-2010. There was nothing to indicate that terms and conditions had been changed and therefore the claimants retained that contractual entitlement. 2 The critical question for the employment tribunal was how a facility came to be recognised under the terms of the contract of employment. In the absence of such a finding, it could not be established whether the facility had been recognised in accordance with the provisions of the contract. Further, the tribunal had not addressed the question of whether, if the process for recognition was included in a collective agreement, those provisions were apt for incorporation into the contract of employment of the individual claimants. The appeal was allowed and the matter remitted to the employment tribunal.			

ISS Facility Services NV v Sonia Govaerts (C-344/18) Whether an employee had been transferred where there had been a transfer of an undertaking to several separate undertakings and, if so, to which of the new undertaking the employee had been transferred. Contrasts the approach taken by the UK courts. Where there is a transfer of undertaking involving a number of transferees, Article 3(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that directive, which it is for the referring court to determine. If such a division were to be impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under Article 4 of that directive, even if that termination were to be initiated by the worker.			

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UNFAIR DISMISSAL			
East London NHS Foundation Trust v O'Connor **UKEAT/0113/19/JOJ,** **EMPLOYMENT APPEAL TRIBUNAL** **AUERBACH J (SITTING ALONE)** SUMMARY REDUNDANCY – Trial Period In March 2017 the Claimant in the Employment Tribunal was informed that, as a result of a reorganisation, his current role of PSI Worker was to be deleted with effect on 3 July 2017, and he was at risk of redundancy. He began a trial of a different role of Care Coordinator on 3 July 2017. The parties disagreed as to whether it was suitable alternative employment. The Claimant pursued a grievance, which was unsuccessful. The Respondent again offered the Claimant the Care Coordinator position, which he declined. It then dismissed him, in December 2017. The Employment Tribunal decided, as a preliminary issue, that the Claimant had not actually been dismissed prior to starting the trial in the new role on 3 July 2017, and therefore that was not the start of a statutory trial period. He had only first been dismissed in December 2017. The Respondent's appeal against that decision failed. The principal ground of appeal was that the Tribunal erred by not treating the notification of the deletion of the PSI Worker role, on an identified date, as a dismissal for the purposes of section 136(1)(a) Employment Rights Act 1996, having regard to the fact that the Claimant was employed specifically in that role. However, there is no rule of law that notification of the deletion of the post in which the employee is employed must inevitably amount to notice of dismissal. It depends on all the facts and circumstances of the case. In this case, the content of the relevant communications, and all the circumstances, were properly considered by the Tribunal to point to the conclusion that the Claimant had not been dismissed as of 3 July 2017, and therefore that the trial which he began on 3 July 2017 was not the start of a statutory trial period. Other grounds of appeal also failed	**[2020] IRLR 16** **January**		
Cadent Gas Ltd v Singh **UKEAT/0024/19/BA** **Employment Appeal Tribunal** **(Mr Justice Choudhury (President), Mr D Bleiman, Mrs C Baelz)** SUMMARY AUTOMATICALLY UNFAIR DISMISSAL The Claimant, an active trade union member, was a gas engineer. He was required to respond to priority gas leaks without delay. On 19 June 2017, he was called out to a gas leak at 1.13am. The Claimant had not rested properly or eaten for some time but accepted the job. Instead of going directly to the leak, he stopped for some food without telling Dispatch. He arrived at the premises 1 minute outside the hour stipulated in the service level agreement (SLA). The failure to meet the SLA was noticed by Mr Huckerby, a manager with whom the Claimant had had difficulties in the past relating to his union activities. Mr Huckerby played a leading role in the investigation. In the course of internal emails, Mr Huckerby referred to the Claimant's trade union status which he wanted to keep "on the radar". The Tribunal found these references to be unexplained as were various other steps taken by Mr Huckerby, including his own involvement which was not the norm	**[2020] IRLR 86** **February**		

for a manager of his seniority. Mr Huckerby was also found to have given incorrect information to HR and to the dismissing officer in the course of the investigation. The disciplinary hearing was conducted by Mr Wilson, who had not had any prior involvement. He decided to dismiss the Claimant for gross misconduct. The Claimant claimed, amongst other matters, that the reason or principal reason for his dismissal was because of his trade union activities contrary to s.152 of the Trade Union and Labour Relations (Consolidation) Act 1992. The Tribunal upheld that complaint. In doing so it had concluded that Mr Wilson and Mr Dennis (the manager hearing the appeal) were not motivated by prejudice against the Claimant for his trade union activities and cited a case (Dundon v GPT) that was not mentioned in the course of the hearing. The Respondent appealed on the grounds that having found that Mr Wilson and Mr Dennis were not motivated by prejudice against the Claimant for his trade union activities that was the end of the case, and that there was no scope for attributing Mr Huckerby's trade union animus to the Respondent in these circumstances. Held, dismissing the appeal, that the Tribunal's finding that Mr Wilson and Mr Dennis were not motivated by prejudice did not preclude a finding that trade union activities played a part in their reasoning. The reference to Dundon was not incorrect and it had not played such a central role in the Tribunal's judgment that there was any material injustice caused by not giving the parties an opportunity to comment on it. In any event, the Tribunal's analysis was such that it fell into one of the manipulator scenarios posited by Underhill LJ in Royal Mail v Jhuti [2018] ICR 982. In particular, Mr Huckerby was a manager deputed by the employer to carry out the task of investigating the misconduct. His leading role in the investigation was such that it was appropriate, in the circumstances of this case to attribute his motivation to the employer, even though that motivation might not be shared by Mr Wilson or the appeal officer, Mr Dennis.			
Mr C Davies v DL Insurance Service Limited **UKEAT/0148/19/RN** **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESDIENT) (SITTING ALONE)** SUMMARY REDUNDANCY The Claimant was unfairly dismissed for redundancy. The Tribunal failed to order re engagement after accepting the Respondent's evidence that the Claimant was not the best person for an available job which he contented he could do. The Tribunal thought there was insufficient information to identify a job that he could do. The Tribunal assessed compensation by deducting gross mitigation earnings from the net sum that would have been earned had he not been dismissed and applied a 50 % Polkey reduction. The Claimant appealed. Held, allowing the appeal, that the Tribunal failed to apply the provisions of s.116(3) of the Employment Rights Acts 1996, which required the Tribunal to take into account whether it was practicable for the Respondent to comply with the Order for re-engagement. In circumstances where there was some evidence that the Claimant could do the available role, albeit with some training, the fact that he may not have been, in the Respondent's view, the best candidate for the role did not mean that it was not practicable for the Respondent to			

comply with the Order. By deducting gross mitigation earnings from net sum that would have been earned, the Tribunal assessed compensation on a basis that did not reflect the loss sustained, as required by section123 of the 1996 Act the Polkey deduction of 50 %, which was based merely on the fact on the fact that only two remained in the pool at the time the decision to dismiss, was taken, was inconsistent with the Tribunal's clear finding that on an objective basis, the Claimant was the better candidate. The matter would be remitted to the same Tribunal.			

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Hancock v Ter-Berg **UKEAT/0138/19** **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT) (SITTING ALONE)** **SUMMARY** **VICTIMISATION DISCRIMINATION – Protected disclosure** **VICTIMISATION DISCRIMINATION – Interim relief** **UNFAIR DISMISSAL** The Claimant applied for interim relief pursuant to s.128 of the **Employment Rights Act 1996** following the termination of his contract allegedly because he had made protected disclosures. The Respondent contended that there was no entitlement to make such an application as the Claimant was not an "employee" within the meaning of that section. The Respondent's application for a postponement of the interim relief application pending a determination of the employee issue was refused. At the interim relief hearing, the Tribunal considered that the "likely to succeed" test under s.129 of the **1996 Act** applied not just to the reason for dismissal but also to the contested issue of employee status. It determined that the Claimant had a 'pretty good chance' of success in showing that he was an employee and that he was dismissed for having made protected disclosures. The Respondent appealed on the grounds that the Tribunal erred in entertaining the application for interim relief before first concluding that the Claimant was indeed an employee. **Held** (dismissing the appeal): On a proper construction of ss.128 and 129 of the **1996 Act**, all elements of a complaint of unfair dismissal for a proscribed reason (including that it was because of protected disclosures) were to be determined at the interim relief hearing on the likely to succeed test. That included the question of employment status if that were put in issue by the employer. That construction was consistent with the intention of the interim relief regime, that being to provide a speedy remedy to preserve the status quo pending the full hearing. The Respondent's contention that there should be a Preliminary Hearing to determine conclusively whether the Claimant was an employee before determining the application for interim relief would cause delay and would undermine the interim nature of the remedy under s.129.	**[2020] IRLR 97** **February**	**[2019] 7 WLUK 835** **[2020] I.C.R. 570**	**IDS Emp. L. Brief 2020, 1121, 6-8**
Jagex Ltd v McCambridge **UKEAT/0041/19/LA** **Employment Appeal Tribunal** **Reason for dismissal – conduct – breach of contract or company rules** SUMMARY UNFAIR DISMISSAL – Contributory fault UNFAIR DISMISSAL – Polkey deduction CONTRACT OF EMPLOYMENT – Wrongful dismissal The Claimant was summarily dismissed after finding a document that had been left on the communal printer which contained the salary of a senior employee and telling a few colleagues about it. Although the Claimant was not responsible for any wider dissemination of the information, it was embarrassing for the Respondent when the level of the executive's pay became more generally known in the office. The	**[2020] IRLR 187** **March**		

Claimant succeeded in his claims of unfair and wrongful dismissal. No deduction for either contributory fault or a Polkey reduction was made and the matter was adjourned for a remedy Hearing. The Respondent appealed the wrongful dismissal finding and the Tribunal's refusal to make a reduction in respect of both Polkey and contributory fault. Held: There was no error in the Tribunal's approach to the construction of the contract and its finding that the Claimant's behaviour did not constitute gross misconduct. There was no express term of the contract that salary information was confidential, and nor could it be implied into the contract. In any event, even if it had been, the Tribunal was entitled to find that the Claimant had not breached clause 14 concerning confidential information. Nor had the Tribunal either misdirected itself or failed to follow its direction on the correct approach to Polkey. The Tribunal found the decision to be substantively, as well as procedurally, unfair. The tenor of the Reasons when read overall is that no reasonable employer would, or could fairly, have dismissed the Claimant for what he did. In a case such as this there is no need for a Tribunal to embark on a detailed discussion of Software 2000 or the line of authorities such as King v Eaton (No.2) [1996] IRLR 199 and **Scope v Thornett** [2007] IRLR 155. This was not a redundancy selection exercise, but a substantively flawed decision where the Tribunal found that the Respondent had wrongly sought to make an example of the Claimant to cover their own discomfiture and had been exceptionally heavy handed. It is inherent in its decision that fair procedures would not have made the dismissal fair and the Tribunal has sufficiently answered the questions posed in the approach recommended in paragraph 54 of Software 2000. However the Tribunal had erred in considering a contributory fault reduction could only be made if the Claimant had committed an act of gross misconduct, which was too high a threshold. The correct test is to consider if the conduct was culpable, blameworthy, foolish or similar which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 110. The issue of contributory fault is remitted back to the same Tribunal (applying the factors in Sinclair Roche & Temperley & Others v Heard & Anor [2004] IRLR 763, to be determined at the forthcoming remedy hearing. **See Contracts Chapter R for a detailed consideration of Disciplinary procedures.**			

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MacKenzie v Chancellor, Masters and Scholars of the University of Cambridge **[2019] EWCA Civ 1060** The only remedy for an employer's failure to comply with an order for re-engagement the liability on the employer to pay an additional award under the Employment Rights Act 1996 s.117. A re-engagement order does not create an enforceable obligation on the employer to actually re-engage the employee. An employee sought judicial review of a decision by the university, her former employer, not to comply with an employment tribunal's order for re-engagement. The employee had brought successful unfair dismissal proceedings and the tribunal had ordered the university to re-engage her on specified terms by a specified date. The university refused to comply and paid an amount under section 117. The employee argued that the order created an obligation on the employer to re-engage the employee and a right for the employee to be re-engaged, which had to be capable of being enforced. The university submitted that the tribunal's order did not impose an enforceable obligation to re-engage the employee; it merely rendered the university liable for an additional award under s.117 if it did not comply. The application for judicial review was dismissed. Section 115 had to be read in the context of the group of sections of which it formed a part, and specifically s.117. It was clear that when s.115 and s.117 were read together, an order for re-engagement was not intended to impose an absolute and indefeasible obligation on the employer to re-engage the employee, or a correlative right in the employee to be re-engaged. It created a situation in which the employer must either re-engage the employee or become liable for the awards specified by s.117(3), which included an additional award on top of what it would have had to pay if no re-engagement order had been made. If the employee's argument were accepted the rights created by the Act would fall to be enforced by the ordinary courts. However, the statutory scheme of employment protection was intended to be entirely self-contained and fall under the exclusive jurisdiction of the employment tribunal. Chapter II of the Act included elaborate provisions for continuation of employment by way of interim relief pending determination of a claim. That made it even harder to accept that Parliament intended employees to have an absolute right of re-engagement on a final basis, yet failed to make any explicit provision for it.	**[2020] IRLR 324** **April 2020**	**[2019] ICR 1477, [2019] WLR(D) 340, [2019] 4 All ER 289**	
Sattar v Citibank NA and another **[2019] EWCA Civ 2000** **Court of Appeal, Civil Division** **Reasonableness in the circumstances: conduct and capability – inquiry and investigation** The claimant was a very senior employee of the respondent bank. At the material time, he was also what was termed a 'Code staff member' within the bank. That status was conferred upon staff whose actions might have a significant impact on the bank's risk profile, and brought with it (in return for a significant additional allowance) heightened obligations to demonstrate the highest standards of integrity and probity, and to be seen to be doing so. In July 2013, the claimant was arrested by the Revenue and Customs Commissioners ('HMRC') on suspicion of tax fraud. On the same day HMRC served the bank with a	**[2020] IRLR 104** **February**		

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notice of intention to apply for a production order in respect of cheques signed by the claimant and made payable to Citibank accounts, together with related transactional documents. Representatives of the bank met the claimant to inform him of HMRC's approach and to ask him about the transactions in which HMRC were interested. Although not formally suspended until later, he was told to take time away from the office in order to sort out his personal affairs. HMRC were interested in transactions that involved the use of the bank's systems, and in particular the staff transfer system, to conduct personal and other transactions. The bank set up an internal investigation which revealed what appeared to be a very considerable number of unauthorised and/or illegitimate uses of the bank's payment systems for the claimant's personal transactions, which potentially constituted gross misconduct. The bank decided that disciplinary action should be initiated and that further investigations should take place. Having been formally suspended, the claimant was invited to a formal disciplinary hearing. The core case identified against him was that he had improperly used the bank's transaction systems, staff and resources to engage in financial transactions that were either improper or had the strong appearance of impropriety. The day before the hearing was due to take place, the claimant's solicitors notified the bank that the claimant had a brain tumour from which he had been suffering for about five years and sought a postponement. Correspondence ensued, in which the bank made a number of proposals, including conducting the disciplinary process in writing and reducing the number of transactions to be considered. The hearing was conducted by B, who concluded that the claimant had committed gross misconduct and should be summarily dismissed. In particular he found that the relevant transactions were purely personal and were totally unrelated to the claimant's work for the bank; the claimant had not sought permission from a more senior manager when using the staff transfer process, but instead had sought that of a more junior employee; the transactions had involved a number of unnecessary steps and they lacked transparency; and the transactions had a strong appearance of impropriety and were likely to bring the bank's name into disrepute. That decision was upheld on an internal appeal. The claimant complained to the employment tribunal of unfair dismissal and disability discrimination. He argued, amongst other things, that the procedures were inadequate and did not meet the standard to be expected of a reasonable employer, in particular: (i) at the initial investigatory stage when the bank was determining whether there was a case to answer the bank had conducted a secret investigation and had failed, contrary to its own rules, to allow the claimant a formal hearing; (ii) there was a failure by the bank properly to set out the case against the claimant, and as a consequence, the bank had found misconduct for reasons that had never been properly drawn to the appellant's attention; and (iii) the claimant had not been able to attend the disciplinary meeting because of his disability, and the written procedure was a poor and inadequate substitute for a formal hearing. The employment tribunal rejected those submissions, finding that the investigation overall had been reasonable, the charges had been framed with sufficient particularity and the claimant knew the nature of the case against him, and that it had been his choice not to attend the disciplinary hearing; the bank could infer from the relevant correspondence that the claimant had confirmed that his preference			

was for the written procedure to be adopted, but he was not precluded from attending had he wished to do so; similarly it had also been open to him to attend at the appeal stage. The EAT dismissed the claimant's appeal. Before the Court of Appeal, the claimant's arguments again focussed on the alleged procedural defects in the investigation; failure properly to identify the case that the appellant had to meet; and no proper opportunity to put his case given the shortcomings of the written procedure. The Court of Appeal dismissed the appeal. The employment tribunal had been entitled to reject both the unfair dismissal and disability discrimination claims, and to conclude that, taken in the round, the procedure was one that a reasonable employer could properly consider to be fair, albeit that it was not strictly in accordance with the bank's own procedures and was, in certain respects, unsatisfactory. The chronology did not support the argument that the investigation was carried out covertly without the claimant's knowledge. Continuing the investigation was not a flaw in the proceedings and did not render them unreasonable provided that the employee was given a full and fair opportunity to engage with any new charges or new material that might emerge as a consequence of that process. That opportunity could be at the disciplinary hearing itself. The claimant plainly did have such an opportunity in the present case. A potentially more telling point was that the claimant was given no formal hearing at the early investigatory stage when the bank was considering whether he had a case to answer. In assessing whether, and to what extent, that failure might undermine a fair procedure, it was necessary to consider the purpose of such a hearing. Typically, it was to get the employee's response to alleged wrongdoing; to determine to what extent the facts were disputed; and to explore which, if any, witnesses may assist in resolving those disputed facts. Where facts were not disputed, it would enable the employee to explain his conduct in the hope that the explanation may exculpate him. In the present case, there were no disputed facts as such, or none of significance, and in so far as there might have been a simple answer to the concerns raised by the bank, that could have been disclosed at or shortly after the initial meeting. It is obviously an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the employer's obligation to put that case so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. That duty is not met if the employee has to speculate what may be in issue and what may not. The question is not what charges the employer may have been entitled to charge on the material provided to the employee. It is what charges have in fact been made. There may be potential charges which, for one reason or another, are not being pursued. What the ET must be satisfied about is not that the charges actually made in general terms could be read as entailing specific charges not specifically identified; it is whether it can properly be satisfied that an employee would understand from the way the case is put that these charges were actually being made; and any doubt about that question should be resolved in the employee's favour, given that the burden is on the employer to make the charges sufficiently clear. In the present case, with one exception, it would have been obvious enough to a reasonable employee that the matters dealt with at the disciplinary hearing fell within the generic description of improper use			

of systems and staff. The exception was in relation to a complaint that the claimant had improperly involved one of the bank's employees in negotiations on behalf of the claimant's nephew, in respect of which a charge had not been properly articulated. However, that did not invalidate the overall conclusion of gross misconduct. The employment tribunal had been entitled, on the evidence before it, to conclude that the claimant could have attended and participated at each of the disciplinary hearings. The tribunal had also been entitled to conclude, in any event, that the written procedure was a reasonable procedure to adopt. **See Contracts Chapter R for a detailed consideration of Disciplinary procedures. The case is a useful example of the way in which investigations should be carried out, what the employee should be told and when the disciplinary procedure stage has been reached.**			

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Uddin v London Borough of Ealing UKEAT/0165/19/RN **HIS HONOUR JUDGE AUERBACH (SITTING ALONE)** SUMMARY UNFAIR DISMISSAL – REASONABLENESS OF DISMISSAL SEX AND AGE DISCRIMINATION – BURDEN OF PROOF The Claimant was dismissed by reason of conduct, arising from an allegation of inappropriate Sexual behaviour towards a colleague in an alleged incident at a bar. Claims of unfair and Wrongful dismissal failed, by majority decision of the Employment Tribunal. Claims of sex and age discrimination were dismissed unanimously. Three grounds of appeal proceeded to a full Hearing. Grounds 1 and 3 related to unfair dismissal and, as to Ground 3, wrongful dismissal; Ground 4 to one aspect of the discrimination claims. Ground 1 turned on the fact that the complainant had withdrawn a complaint to the police, but the manager who took the decision to dismiss, who knew that the complaint had been made, as not told that it had been withdrawn. The Tribunal majority concluded that this did not affect the fairness of the dismissal, because she could in any event have fairly dismissed, had the police complaint never been made. Given that (a) the dismissing officer took into account that the police complaint had been made; and (b) her evidence was that, had she been told that the complaint had later been withdrawn, she would have wanted to know why, the Tribunal erred in its approach. Given that the investigating officer knew that the police complaint had been withdrawn, but did not pass this on to the disciplining officer, and the gravity of the allegations, the only proper conclusion was that this rendered the dismissal unfair. *Royal Mail v Jhuti* [2019] UKSC 55 considered. Whether, had she known of the withdrawal of the police complaint, the disciplinary officer would, or might, have still fairly dismissed fell to be considered by the Tribunal at the remedy stage. Ground 3 was to the effect, principally, that, as both the Claimant and complainant had been too drunk to have a clear recollection of what had occurred, and no-one else at the bar had witnessed the alleged incident itself, the majority should have found that there was no proper basis to find the Claimant guilty of the alleged conduct. However, the Tribunal majority properly so found, taking into account its appraisal of photographic evidence, said to be of the complainant's injuries, and the totality of the evidence presented in the disciplinary process. The findings in relation to wrongful dismissal were also properly reached. This ground therefore failed. Ground 4 challenged the Tribunal's decision in relation to allegations of sex and age discrimination relating to aspects of the conduct of the investigating officer. However, the premise of this ground was that the Tribunal erred in not considering these allegations on a more wide-ranging basis than the complaints identified in a list of issues agreed at a Preliminary Hearing. However, the Tribunal had been right to confine itself to the complaints identified in that list of issues. This ground therefore also failed.	**[2020] IRLR 332** **May 2020**		**IDS Emp. L. Brief 2020, 1123, 7-9**
Lafferty v Nuffield Health **UKEATS/0006/19/SS** **THE HONOURABLE MR JUSTICE CHOUDHURY**			**IDS Emp. L. Brief 2020, 1124, 23-**

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MRS G SMITH **MR P PAGLIARI** SUMMARY TOPIC: UNFAIR DISMISSAL The Claimant worked as hospital porter. His duties included transporting anaesthetised patients to and from theatre. He was charged was assault to injury with intention to rape. The Respondent, having considered the matter, decided that the risk to its reputation of continuing to employ the Claimant where he had access to vulnerable patient was too great, particularly where charities are subject to greater scrutiny in relation to such matters. The Claimant was dismissed. The Employment Tribunal held that the dismissal was fair. Held, dismissing the appeal, that the Tribunal had not erred in concluding that the dismissal fell within the band of reasonable responses. The Respondent's belief that there would be a risk to reputation was genuinely held, it had conducted such investigation as was reasonable in the circumstances and the Tribunal was entitled to come to the conclusion that it did.			**24**
Q v Secretary of State for Justice **UKEAT/0120/19/JOJ** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY UNFAIR DISMISSAL – Reasonableness of dismissal HUMAN RIGHTS The Claimant was employed in the Probation Service. Her daughter was placed on a child protection register, in circumstances where Social Services considered (though she vehemently disputed this allegation) that she presented a risk to her daughter. She was dismissed for deliberately failing to report the matter fully and promptly to the Respondent in circumstances where she was aware, following a previous episode and warning, that she was required to do so. Held: The Employment Tribunal had not made contradictory or non-Meek-compliant findings, about what the Respondent knew and when. It had properly considered the impact on the Claimant's Article 8 Convention rights. It correctly found that these were engaged. It also found that, having regard, among other things, to the nature of the Probation Service's work, and its relationship with Local Authorities as statutory partners, the decision to dismiss was not an unjustified or disproportionate infringement of the Claimant's Article 8 rights; and, that the dismissal was overall fair. It did not err in so finding			**IDS Emp. L. Brief 2020, 1123, 3-6**
Mr C Ikejiuba v WM Morrison Supermarkets Plc **UKEAT/0049/19/OO** **THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE** **(SITTING ALONE)** SUMMARY UNFAIR DISMISSAL – Automatically unfair reasons The Claimant ('C') claimed that he had been automatically unfairly dismissed for opting out, or proposing to opt out, of working on a Sunday. The Employment Tribunal ('the ET') dismissed that claim. The Employment Appeal Tribunal held that, on the evidence, it was open to			

the ET to find that the reason or principle reason for the Claimant's dismissal was not that he had opted out, or proposed to opt out, of working on a Sunday. "There were various factors in the evidence before them and to which they referred expressly which entitled them to come to the conclusion that the reason or principal reason for the dismissal was not that the Claimant intended to opt-out of Sunday working but that the Respondent, having respected that proposal and having offered a revised contract which would have enabled the Claimant not to have worked on Sundays, the Claimant refused that revised offer. I consider that that was a finding which was open to the ET on the evidence. I do not consider that the ET either erred in law in reaching that conclusion or reached a perverse decision."			
Mr M Sanha v Facilicom Cleaning Services Ltd **UKEAT/0250/18/VP** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY UNFAIR DISMISSAL The Claimant was employed by the Respondent as a cleaner. He is a national of Guinea Bissau but married to an EEA national exercising Treaty rights in the UK. That being so, the Tribunal correctly found that the Respondent was not at any risk in continuing to employ him after his residence permit expired. However, following inconclusive ECS checks it dismissed him. The Tribunal found that the dismissal was unfair because the Respondent had not shown that it had dismissed for the fair substantial reason of a genuine, though mistaken, belief that he could not lawfully remain employed. The Tribunal had not heard any evidence from the person who made the decision to dismiss and concluded that it could make no finding about their thought process. However, the Tribunal reduced the compensatory award under Section 123(6) Employment Rights Act 1996, relying on conduct whereby it found that the Claimant was less than forthcoming with the Respondent about matters related to his application to renew his residency permit. It also further reduced or limited that award on the basis that the Claimant had failed to mitigate his loss by not applying for night work vacancies with the Respondent. Five live grounds of appeal and one ground of cross-appeal all related to those two decisions. Held: (1) In relation to the Section 123(6) reduction, the Respondent conceded, rightly, that the Tribunal had erred because it wrongly assumed that there was no requirement for the conduct relied upon to be blameworthy. It is a prerequisite of a reduction of either a basic award under Section 122(2) or a compensatory award under Section 123(6), that the Tribunal find the conduct in question to have been blameworthy. Nelson v BBC (No2) [1979] IRLR 346 and **Steen v ASP Packaging Limited** [2014] ICR 56 considered. (2) In view of this conceded, and found, error of law, in relation to the Section 123(6) decision, an alternative ground of perversity fell away. (3) A cross-appeal to the effect that the Tribunal should have drawn a distinction between deliberate and inadvertent conduct was also dismissed. Blameworthy conduct can be of a variety of kinds, and its nature, and extent in the given case, will be relevant to the Tribunal's decision as to the degree of reduction that is just and equitable. But a Tribunal is not obliged to make that particular distinction, and the suggested opposition of inadvertent and deliberate conduct is unhelpful. (4) The Tribunal's conclusion that the conduct relied upon was not			

blameworthy could not stand. It was not supported by any consideration of the law relating to this concept, or any factual reasoning, and fell within the context of a part of the decision which was in error of law. It was not safe. (5) It would have been open to the Tribunal to find that the conduct in question was, in some sense, blameworthy. But it would not be open to it to find that it caused or contributed to the decision to dismiss, to any extent. This was having regard, in particular, to the fact that the Tribunal was unable to make findings about the thought process of the person who took the decision to dismiss. A decision that there be no reduction under Section 123(6) was the only legally correct decision, and would be substituted. (6) In relation to mitigation, the Tribunal had failed to take account of the fact that the burden was on the Respondent, and that the question was not answered merely by considering whether it would have been reasonable to apply for night work. The Tribunal had to consider whether the decision not to do so was unreasonable. **Wilding v British Telecommunications plc** [2002] ICR 179 and **Cooper Contracting v Lindsey** 2015 UKEAT/0184/15 followed. The evidence provided by the Respondent was so scant that it would not even properly support a finding that it would have been reasonable to apply; and the Tribunal failed to consider whether it was in all the circumstances unreasonable not to apply. The reduction was also unfair because the Claimant was not cross-examined about his decision not to apply for night work, and the matter was not raised in submissions. There was no sufficient evidence from which the Tribunal could properly have found that the Claimant unreasonably failed to mitigate his losses by not applying for night work. This issue would, therefore, also not be remitted, as the only possible correct decision was that there should be no reduction on that account. (7) The matter was remitted to the same Tribunal to decide the final amount of the compensatory award, without any reduction under Section 123(6) or for failure to mitigate.			

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UNLAWFUL DEDUCTIONS Contracts at F28 onwards.			
Bath Hill Court (Bournemouth) Management Co v Coletta **[2019] EWCA Civ 1707** **Court of Appeal, Civil Division** **LORD JUSTICE UNDERHILL** **(Vice-President of the Court of Appeal (Civil Division))** **LORD JUSTICE IRWIN and LADY JUSTICE NICOLA DAVIES** **Deduction from wages – limitation period** The **Employment Rights Act 1996 s.23(2)-(4)** which provided that the employment tribunal "shall not consider a complaint" unless presented within the period specified constituted a limitation period. Accordingly, the provisions of the Limitation Act 1980 were disapplied in respect of such complaints. The employee had worked for 15 years as a live-in porter in a block of flats that had been managed by his employer. He claimed that for national minimum wage purposes it was necessary to take into account periods when he was on-call at night, albeit in his flat on the premises and permitted to sleep. The claim was treated as unlawful deductions from wages contrary to the Employment Rights Act 1996 Pt II and was upheld by the employment tribunal and EAT. At a remedies hearing, the tribunal held that he was only entitled to arrears in respect of the six years prior to the commencement of proceedings because the Limitation Act 1980 applied. The EAT allowed his appeal on the ground that the 1980 Act was disapplied by s.39 because a period of limitation was prescribed for the action by s.23(2)-(4) of the 1996 Act. The employer sought permission to appeal against the liability decision two-years out of time on the grounds that the Court of Appeal in *Royal Mencap Society v Tomlinson-Blake* [2018] EWCA Civ 1641, [2019] I.C.R. 241, [2018] 7 WLUK 321 had since disapproved the approach taken by the tribunal and EAT. The appeal was dismissed. An extension of two years would be quite exceptional and was not justified in the instant case. At the time of the decision the case law was confused, and by no means all the decisions favoured workers. There was no reason for the employer to think that a further appeal at that time would have been futile. The fact that the proceedings remained ongoing made no difference. The liability and quantum decisions were self-contained. The quantum proceedings would ordinarily have been concluded prior to the decision in Royal Mencap. It was only the delay caused by the employer's initial unsuccessful liability appeal, coupled with the employee's successful quantum appeal and the instant appeal which meant that the proceedings were still alive when Royal Mencap was decided. If permission to appeal was granted and were to succeed, which would not occur until after determination of a pending appeal to the Supreme Court in Royal Mencap, the employee would be deprived of a sum which in the ordinary course he should have received without question long before that. The EAT had been correct that even if either s.5 or s.9 of the 1980 Act would otherwise apply to the employee's claim, they were disapplied by s.39.	**[2020] IRLR 124** **February**	**[2020] I.C.R. 703** **[2019] 10 WLU** **[202** **C.L. 95**	

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VICARIOUS LIABILITY Contracts at T273			
WM Morrison Supermarkets plc v Various Claimants **[2020] UKSC 12** Morrisons operated a chain of supermarkets. The claimants were 9,263 of its employees or former employees. Personal information about them was published on the internet by another employee, Skelton, who was a senior auditor. After being subject to disciplinary proceedings he had developed an irrational grudge against Morrisons. He searched, using his work computer, for 'Tor' software capable of disguising a computer using the internet. When external auditors (KPMG) requested payroll data in preparation for an audit, Skelton was given the task of collating and transmitting that data to them. He obtained a pay-as-you-go mobile phone that could not be traced back to him. He also surreptitiously copied payroll to a personal USB stick. He then used details of a colleague who had been involved in the disciplinary proceedings to create a false email account, in a deliberate attempt to frame him. He uploaded a file created from the USB stick data and containing the data of 98,998 employees to a publicly accessible file-sharing website, also posting links to the data on other websites. He made that disclosure at home using the mobile phone, the false email account and Tor. On the day Morrisons' financial results were due to be announced, Skelton sent CDs containing the file anonymously to newspapers. The newspapers alerted Morrisons and, within a few hours, Morrisons had taken steps to ensure that the data was removed from the internet, instigated internal investigations, and informed the police. Skelton was arrested and sentenced to eight years' imprisonment. The claimants brought proceedings against Morrisons. The High Court ([2018] IRLR 200) held that Morrisons was vicariously liable for Skelton's breach of statutory duty under the Data Protection Act 1998. The Court of Appeal ([2019] IRLR 73) dismissed Morrisons' appeal. Both courts applied what they understood to be the reasoning of Lord Toulson in **Mohamud v WM Morrison Supermarkets plc** [2016] UKSC 11, [2016] IRLR 362, [2016] AC 677, [2017] 1 All ER 15, [2016] 2 WLR 821; *reversing* [2014] EWCA Civ 116, [2014] IRLR 386, [2014] 2 All ER 990. The Supreme Court (Lady Hale, Lord Reed, Lord Kerr, Lord Hodge and Lord Lloyd-Jones) by a reserved judgment given on 1 April 2020 allowed Morrisons' appeal and held that Morrisons was not vicariously liable. In a case concerned with vicarious liability arising out of a relationship of employment, the court generally has to decide whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer. It may then fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment: that statement of the law (by Lord Nicholls in **Dubai Aluminium Co Ltd v Salaam** [2002] UKHL 48, [2003] IRLR 608, [2003] 2 AC 366, [2003] 1 All ER 97, [2002] 3 WLR 1913, [2003] 2 All ER (Comm) 451, [2003] 3 LRC 682, [2003] 1 BCLC 32, [2003] 1 Lloyd's Rep 65 at para 23) is authoritative. In *Mohamud*, Lord Toulson was not suggesting any departure from the approach adopted in cases including *Dubai Aluminium*. His position was the exact opposite. Nor was he suggesting that all that was involved in determining whether an employer was vicariously liable was for the court to consider whether there was a temporal or causal connection between the employment and the wrongdoing, and whether it was	**[2020] IRLR 472** **June 2020**	**[2020] 2 WLR 941**	**IDS Emp. L. Brief 2020, 1125, 2** **IDS Emp. L. Brief 2020, 1125, 17-20**

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right for the employer to be held liable as a matter of social justice. Plainly, the close connection test is not merely a question of timing or causation, and ***Dubai Aluminium*** makes it clear that vicarious liability for wrongdoing by an employee is not determined according to individual judges' sense of social justice. It is decided by orthodox common law reasoning, generally based on the application to the case before the court of the principle set out by Lord Nicholls at para 23 of ***Dubai Aluminium*****,** in the light of the guidance to be derived from decided cases. Further, read in isolation, Lord Toulson's statement that 'motive is irrelevant' would be misleading: he had already concluded that the tortfeasor had been going, albeit wrongly, about his employer's business, rather than pursuing his private ends, and had treated that fact as supporting the existence of a close connection between his field of activities and the commission of the tort. In the present case, the courts below had misunderstood the principles governing vicarious liability in a number of important respects. For example, the reason why Skelton had acted wrongfully was not irrelevant. The question of whether Morrisons was vicariously liable therefore had to be considered afresh. Considering first the acts which Skelton was authorised to do, so far as relevant, he was given the task of collating and transmitting payroll data to KPMG. He performed that task. The remaining question was whether Skelton's wrongful disclosure of the data was so closely connected with the collation and transmission of the data to KPMG that, for the purposes of the liability of his employer to third parties, that the disclosure might fairly and properly have been regarded as made by him while acting in the ordinary course of his employment. It was necessary to have regard to the assistance provided by previous court decisions. In the present case, it was abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. The DPA did not exclude the imposition of vicarious liability. The imposition of a statutory liability upon a data controller is not inconsistent with the imposition of a common law vicarious liability upon his employer, either for the breach of duties imposed by the DPA, or for breaches of duties arising under the common law or in equity. There is nothing anomalous about the contrast between the fault-based liability of the primary tortfeasor under the DPA and the strict vicarious liability of his employer. Applying orthodox principles of statutory interpretation, since the DPA neither expressly nor impliedly indicates otherwise, the principle of vicarious liability applies to the breach of the obligations which it imposes, and to the breach of obligations arising at common law or in equity, committed by an employee who is a data controller in the course of his employment. Having concluded that the necessary conditions for the imposition of vicarious liability did not exist in the present case, it had not been strictly necessary to consider this issue. **See Contracts at Chapter 2.239**			
Barclays Bank plc v Various Claimants [2020] UKSC 13 The bank required job applicants to pass a medical examination. In Newcastle-upon-Tyne, it arranged appointments with a medical practitioner whose work for the bank was a comparatively minor part of his practice. The bank paid him a fee for each report. Many recruits were young women and as young as 16. The examinations took place in Dr Bates' home. The claimants were 126 individuals who alleged that,	**[2020] IRLR 481** **June 2020**	**[2020] 2 WLR 960, [2020] WLR(D) 205**	**IDS Emp. L. Brief 2020, 1125, 13-16**

between 1968 and about 1984, Dr Bates had sexually assaulted them in the course of the examinations by inappropriate examination of their breasts and/or digital contact with or penetration of their anus or vagina. A trial was ordered of the preliminary issue of whether the bank would be vicariously liable for any proven sexual assaults. The High Court ([2017] IRLR 1103) held that the bank **was** vicariously liable and the Court of Appeal ([2018] IRLR 947) dismissed the bank's appeal. The bank appealed relying on the proposition that the employer of an independent contractor was, in general, not liable for torts committed by the contractor in the course of the execution of the work. The claimants, argued that a trilogy of Supreme Court cases (**Various Claimants v Catholic Child Welfare Society *('Christian Brothers')*, Cox v Ministry of Justice,** and **Armes v Nottinghamshire County Council**) had replaced that proposition with a more nuanced multi-factorial approach in which a range of incidents were considered in deciding whether it was 'fair, just and reasonable' to impose vicarious liability upon the person for the torts of another person who was not his employee: that was the approach adopted by both the courts below in the present case. The Supreme Court (Lady Hale, Lord Reed, Lord Kerr, Lord Hodge and Lord Lloyd-Jones) by a reserved judgment given on 1 April 2020 allowed the bank's appeal. The Supreme Court held that the bank was *not* vicariously liable. There is nothing in the trilogy of Supreme Court cases to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded. The question was whether the tortfeasor was carrying on business on his own account or whether he was in a relationship akin to employment with the defendant. In doubtful cases, the five 'incidents' identified by Lord Phillips in ***Christian Brothers*** may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. The key will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents. In the present case, Dr Bates was not at any time an employee of the bank. Nor, viewed objectively, was he anything close to an employee. He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the bank. Accordingly, the bank was not vicariously liable for any wrongdoing of Dr Bates in the course of the medical examinations he carried out for the bank. Per Lady Hale: Until these recent developments, it was largely assumed that a person would be an employee for all purposes - employment law, tax, social security and vicarious liability. Recent developments have broken that link, which may be of benefit to people harmed by the torts of those working in the "gig" economy. It would be tempting to align the law of vicarious liability with employment law in a different way. Employment law now recognises two different types of "worker": (a) those who work under a contract of employment and (b)			

those who work under a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual" (Employment Rights Act 1996, section 230(3)). Limb (b) workers enjoy some but by no means all the employment rights enjoyed by limb (a) workers. It would be tempting to say that limb (b) encapsulates the distinction between people whose relationship is akin to employment and true independent contractors: people such as the solicitor in Bates van Winkelhof v Clyde and Co LLP [2014] UKSC 32; [2014] 1 WLR 2047, or the plumber in Pimlico Plumbers Ltd v Smith [2018] UKSC 29; [2018] ICR 1511. Asking that question may be helpful in identifying true independent contractors. But it would be going too far down the road to tidiness for this court to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of "worker", developed for a quite different set of reasons. **See Contracts at Chapter 2.239**			

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WHISTLEBLOWING See Contracts at Chapter P for a full exposition of whistleblowing.			
Royal Mail Group Ltd v Jhuti **[2019] UKSC 55** **Supreme Court** The claimant was recruited as a media specialist in the employer company's sales division, on a probationary basis. Shortly after she started her employment, the claimant observed what she believed to be irregularities in the way that colleagues were offering customers "tailor-made incentives". The claimant reported her concern to her immediate line manager. Subsequently, in a meeting between the claimant and her line manager, the line manager put the claimant under pressure to withdraw her allegations, with a veiled threat that if she did not do so her employment would not continue beyond the end of her probation and she then e-mailed her line manager withdrawing her allegations. Over the following months the line manager was critical of the claimant's performance, which she attributed to his reaction to her earlier allegations. Her doctor then signed her off work suffering from work-related stress and she never returned to work. In due course the decision was taken that the claimant's future with the employer needed to be resolved. The responsibility was given to a manager who had had no previous involvement with her management. Due to ill health, the claimant was in no condition to meet the new manager or otherwise to present her case. The new manager took the decision to dismiss the claimant, stating that the reason for dismissal was the claimant's unsatisfactory performance. The claimant brought proceedings in the employment tribunal both for unlawful detriment, contrary to section 47B of the Employment Rights Act 1996, and for unfair dismissal on the ground of making a protected disclosure, contrary to section 103A . She succeeded on the former claim but the unfair dismissal claim was dismissed on the ground that, although her line manager had on the proscribed grounds treated her as having a poor performance record, the manager who took the decision to dismiss her was unaware of that motivation and had made the decision in good faith on the basis of what she reasonably understood to be inadequate performance. On appeal by the claimant against the rejection of her unfair dismissal claim, the Employment Appeal Tribunal held that there had been an unfair dismissal under section 103A on the basis that the line manager's unlawful motivation should be treated as the employer's reason for the dismissal. The Court of Appeal allowed an appeal by the employer, holding that, even if the conduct of the claimant's line manager constituted a deliberate attempt to procure the claimant's dismissal because she had made a protected disclosure, that motivation could not be attributed to the employer, since it was not shared by the person deputed to take the dismissal decision and, therefore, there was no unfair dismissal under section 103A . The Supreme Court allowed the appeal, that, when applying a statutory provision to a company that required attributing to it a state of mind, it was necessary to consider the language of the provision, as well as its content and policy, and, in enacting section 103A of the Employment Rights Act 1996 , Parliament had clearly intended that, where the real reason for dismissal was that the employee had made a protected disclosure, the automatic consequence should be a finding of unfair dismissal. The identification of the reason for a dismissal should be	**[2020] IRLR 129 February**	**[2020] I.C.R. 731**	**IDS Emp. L. Brief 2020, 1121, 9-12**

approached in a broad and reasonable way in accordance with industrial realities and common sense In identifying that reason, a court generally needed to look no further than at the reason given by the appointed decision-maker, but, if a person in the hierarchy of responsibility above the employee determined that the employee should be dismissed for one reason but hid it behind another, and invented, reason which the decision-maker adopted, it was the court's duty to penetrate through the invention and hold that the reason for the dismissal was, in fact, the hidden reason. Accordingly, on the facts found by the employment tribunal, the claimant had been unfairly dismissed for making a protected disclosure for the purposes of section 103A of the 1996 Act .			

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Hancock v Ter-Berg **UKEAT/0138/19** **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT) (SITTING ALONE)** **SUMMARY** **VICTIMISATION DISCRIMINATION – Protected disclosure** **VICTIMISATION DISCRIMINATION – Interim relief** **UNFAIR DISMISSAL** The Claimant applied for interim relief pursuant to s.128 of the **Employment Rights Act 1996** following the termination of his contract allegedly because he had made protected disclosures. The Respondent contended that there was no entitlement to make such an application as the Claimant was not an "employee" within the meaning of that section. The Respondent's application for a postponement of the interim relief application pending a determination of the employee issue was refused. At the interim relief hearing, the Tribunal considered that the "likely to succeed" test under s.129 of the **1996 Act** applied not just to the reason for dismissal but also to the contested issue of employee status. It determined that the Claimant had a 'pretty good chance' of success in showing that he was an employee and that he was dismissed for having made protected disclosures. The Respondent appealed on the grounds that the Tribunal erred in entertaining the application for interim relief before first concluding that the Claimant was indeed an employee. **Held** (dismissing the appeal): On a proper construction of ss.128 and 129 of the **1996 Act**, all elements of a complaint of unfair dismissal for a proscribed reason (including that it was because of protected disclosures) were to be determined at the interim relief hearing on the likely to succeed test. That included the question of employment status if that were put in issue by the employer. That construction was consistent with the intention of the interim relief regime, that being to provide a speedy remedy to preserve the status quo pending the full hearing. The Respondent's contention that there should be a Preliminary Hearing to determine conclusively whether the Claimant was an employee before determining the application for interim relief would cause delay and would undermine the interim nature of the remedy under s.129.	**[2020] IRLR 97** **February**	**[2019] 7 WLUK 835** **[2020] I.C.R. 570**	**IDS Emp. L. Brief 2020, 1121, 6-8**
Ibrahim v HCA International Ltd **[2019] EWCA Civ 2007** **Court of Appeal, Civil Division** **Lord Justice Bean, Lord Justice Baker, Lord Justice Dingemans** **Protection against detriment – protected disclosure – public interest test** "In the light of the judgment of this court in *Chesterton,* and with the benefit of hindsight, it is clear to me that the Claimant should have been asked directly by the ET whether at the time he made the disclosures on 15 and 22 March 2016 he believed he was acting in the public interest. If he had answered "yes" he could have been asked for an explanation, and it would no doubt have been put to him in cross-examination that the suggestion was no more than an afterthought. The ET would then have had to evaluate his evidence on the point and make findings about it. But I am not satisfied, on the material available to us in this court, that this is what happened at the ET hearing."	[2020] IRLR 224 March		IDS Emp. L. Brief 2020, 1121, 3-5

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On the public interest issue - see Contracts at P14.			
Tiplady v City of Bradford Metropolitan District Council **[2019] EWCA Civ 2180** **Court of Appeal, Civil Division** **(Lord Justice Underhill Vice President, Lady Justice Rose, Lady Justice Simler)** **Protection against detriment – protected disclosure** A whistleblowing detriment claim under the Employment Rights Act 1996 s.47B could only be brought in respect of detriments suffered in the employment field. An employment tribunal had therefore been entitled to find that the alleged detriments that the claimant complained of did not fall within the protection of s.47B because they concerned her seeking the exercise of the local authority's powers as a householder and therefore did not arise in the employment field.	**[2020] IRLR 230** **March**		**IDS Emp. L. Brief 2020, 1123, 20-21**
Simpson v Cantor Fitzgerald Europe **UKEAT/0016/18/DA** **Employment Appeal Tribunal** **2019 WL 02603715** **The Honourable Mr Justice Choudhury (President)** SUMMARY WHISTLEBLOWING The Claimant alleged that he had been dismissed for having made a series of protected disclosures about trading practices within the Respondent. The Employment Tribunal ("Tribunal") found that none of the 37 disclosures identified were protected and that in any event, it was "utterly fanciful" to contend that the reason or principal reason for his dismissal was that he had made disclosures. The Claimant appealed on the grounds that the Tribunal ought to have aggregated the disclosures rather than consider each one separately; had wrongly adopted the strict dichotomy between allegations on the one hand and information on the other established by the EAT in Cavendish Munro v Geduld and which had since been held to be incorrect; misapplied the tests for reasonable belief and the public interest element of s.43B of the Employment Rights Act 1996, failed to consider the Claimant's insider status in assessing reasonable belief and had generally failed to comply with Rule 62 of the ET Rules in that it had not set out the legal principles upon which its decision was based. Held (dismissing the appeal): (i) That there was no error of law in not aggregating the disclosures. Whether or not two or more disclosures should be aggregated is a question of fact for the Tribunal and the Tribunal's failure to aggregate could not be said to be perverse, particularly in circumstances where there was no clarity as to which disclosures should be aggregated and when particular disclosures arising from a combination of statements were said to have crystallised. (ii) The Tribunal had not applied the now discredited strict dichotomy between allegations and information. Instead, it correctly analysed the relevant communication in each case to determine whether the same amounted to the disclosure of information within the meaning of s.43B. (iii) There was no error in the Tribunal's approach to the reasonable belief or public interest elements of s.43B. As to reasonable belief, the Tribunal had correctly (and in accordance with the Court of Appeal's decision in **Kilraine**		**[2020] I.C.R. 236** **[2019] 6 WLUK 380**	

[2018] ICR 1850 which was promulgated after the Judgment) considered whether the disclosures contained sufficient factual content and specificity to be capable of giving rise to a reasonable belief that the information tended to show the relevant breach. To say that a disclosure was "speculative" or based on "assumptions" was another way of stating that, in the circumstances, the factual content was insufficient. As to the public interest, the Tribunal had not applied a general rule that a disclosure about commission payments could never engage the public interest. Instead, the Tribunal had merely stated that it did not do so in the present case where there was nothing to suggest that the complaints about commission payments affected others or involved some other factor that could be said to engage the public interest as opposed to the Claimant's self-interest; (iv) Finally, whilst it was regrettable that the Tribunal had not set out a summary of the relevant legal principles clearly in its judgment, it was clear from a reading of the judgment that there had been substantial compliance with Rule 62. Tribunals should, however, in all but the most straightforward of cases, endeavour to set out such a summary. Not only would that serve to dispel unnecessary arguments about compliance with Rule 62, it would also guide the Tribunal's application of the relevant legal principles to the findings of fact. **See Contracts P20 onwards for a consideration of disclosure of information.**			
Robinson v Sheikh Khalid bin Saqr al Qasimi **[UKEAT/0106/19/RN; UKEAT/0107/19/RN; UKEAT/0136/19/RN** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** **VICTIMISATION DISCRIMINATION - Interim relief** **VICTIMISATION DISCRIMINATION - Whistleblowing** **VICTIMISATION DISCRIMINATION - Dismissal** **JURISDICTIONAL POINTS - Fraud and illegality** **Interim relief application - whistleblowing claim - complaint of automatic unfair dismissal under section 103A Employment Rights Act 1996 - protected disclosures - public interest - Ilegality** The Claimant had worked for the Respondent since 2007. In or around 2014, an issue arose as to her employment status for tax and National Insurance purposes and led to a series of communications between the parties and their advisers, in which the Claimant raised a number of matters relating to the way in which the Respondent had approached the employment status and tax liabilities of those working for him in the UK (including the Claimant). These continued over a three year period until ultimately the Respondent dismissed the Claimant by letter of 19 May 2017. The Claimant brought Employment Tribunal proceedings, contending that her dismissal was really because she had made protected disclosures, relying on some eight particular communications. She further applied for interim relief. At the hearing of that application, the ET concluded that the Claimant had a pretty good chance (applying Taplin v Shippam Ltd [1978] ICR 1068 EAT) of succeeding in her claim and made an Order that the contract between the parties should continue until the determination or settlement of the claimant's	**[2020] IRLR 345, May 2020**		**IDS Emp. L. Brief 2020, 1124, 9-13**

complaint of unfair dismissal. The Respondent appealed, arguing that the ET had failed to consider the disclosures relied on separately and to address (so far as disclosures 1, 2 and 8 were concerned) points raised in the ET3 as to whether these were qualifying disclosures grounds 1-3). He further contended that the ET had erred in its approach to the public interest requirement (grounds 4-5) and in respect of the issue of causation (ground 6) and argued that UKEAT/0283/17/JOJ the ET had also erred in law in failing to deal with the point raised by the Respondent that the Claimant's contract was void by reason of illegality (ground 7). Held: *allowing the appeal in part.* The obligation upon an ET on an interim relief application was necessarily to carry out a summary assessment of the material before it (applying the test laid down in **Taplin v Shippam**) to determine whether the Claimant was *likely to* succeed in her claim. In a whistleblowing case, it would need to take a view as to whether the Claimant was likely to succeed in showing that she had made qualifying disclosures, meeting the requirements laid down by section 43B **Employment Rights Act 1996**. The way in which it needed to approach that exercise would, however, depend upon the particular case. Here (contrary to ground 1) the ET had been entitled to view the communications relied on by the Claimant as linked as part of a chain and to thus take an overall view as to whether she had a pretty good chance of showing she had made protected disclosures and, so far as the matters raised by grounds 2 and 3 were concerned, it had reached a permissible view that she had. Equally, taking the ET's reasons as a whole (and including its references to those parts of the evidential material that had obviously weighed with it), it had been entitled to take the view that it did on the question of causation, that the Claimant was likely to succeed in showing that the reason for her dismissal had been the disclosures she had made (ground 6). It was, however, not possible to be similarly confident as to the ET's approach to the public interest element of the protected disclosure requirement (grounds 4 and 5). Whether inadequately reasoned or because the ET had applied the wrong test, it was not possible to see that it had asked itself the question as to whether the Claimant had believed, at the relevant time, that her disclosures were in the public interest (Chesterton Global Ltd v Nurmohamed [2017] IRLR 837 CA applied) and that (even allowing for the limited nature of the task on an interim relief application) rendered the ET's conclusion in this regard unsafe and the appeal would, therefore, be allowed on grounds 4 and 5. The ET had further erred (ground 7) in UKEAT/0283/17/JOJ failing to address the illegality point expressly raised by the Respondent and dealt with in submissions. Whilst there was an obligation on the parties (pursuant to the overriding objective) to notify an ET if they considered it might have inadvertently failed to deal with a point, ultimately the failure was that of the ET itself and the appeal would also be allowed on this basis. **See Contracts at P14 for a consideration of the public interest issue.**			
Jesudason v Alder Hey Children's NHS Foundation Trust **[2020] EWCA Civ 73** **LORD JUSTICE HENDERSON, LORD JUSTICE BAKER and SIR PATRICK ELIAS** The claimant was a paediatric surgeon who worked as an honorary	**[2020] IRLR 374, May 2020**		**IDS Emp. L. Brief 2020, 1124, 5-8**

consultant in the department of paediatric surgery (DPS) for the respondent NHS trust. He was highly critical both of the trust management and of his consultant colleagues in the DPS. Between 2009 and 2014 he made a series of allegations to the trust, various regulatory bodies and certain third parties, including organs of the media, in which he identified what he claimed were fundamental failings in the operation of the DPS. The matters raised included serious allegations of professional incompetence; the use of improper medical practices; deliberate attempts to mislead the legal process; and attempts to cover up wrongdoing and to gag the appellant himself from pursuing his complaints. In some cases specific individuals were strongly criticised. The trust sought to deal with some of those allegations, as did a number of professional bodies. This was not to the appellant's satisfaction. He said that it was because of the trust's unwillingness to remedy those alleged failings that he found it necessary to take his case to a wider audience. There were proceedings in the High Court. It emerged that the claimant had improperly provided documents disclosed in those proceedings to the media. Following that admission, the claimant entered into a compromise agreement under the terms of which he discontinued the High Court action, and resigned from his post with the trust. He had by then also initiated whistleblowing claims in the employment tribunal. It was a term of the compromise agreement that he would also discontinue those claims. As a result of that agreement, the claimant could not seek to rely upon any detriments allegedly suffered before the agreement was reached. However, he alleged that he had suffered post-agreement detriments on the grounds of having made pre-agreement protected disclosures. The claimant lodged a series of claims in the employment tribunal that he had suffered a number of detriments post-agreement as a result of his whistleblowing activities. The case raised issues in three areas: whether the disclosures relied upon were protected disclosures; if so, whether the claimant had suffered any detriment as a consequence; and if so, whether a reason, being more than trivial, in the mind of those acting for the trust, for taking the action causing the detriment was the fact that the appellant had made a protected disclosure or disclosures. The tribunal found that the claimant was an unreliable witness and had failed to make good any of his claims. The EAT dismissed his appeal on all grounds. In particular, the EAT found that there was only one qualifying disclosure post-resignation, but that the trust's robust response to that disclosure in correspondence did not amount to a detriment and that the trust was merely seeking to put the record straight. The claimant appealed to the Court of Appeal. The Court of Appeal (Civil Division) (Lord Justice Henderson, Lord Justice Baker, Sir Patrick Elias) by a reserved judgment given on 31 January 2020 dismissed the appeal. The EAT was correct that there was only one post-resignation disclosure on which the claimant could rely. However, the tribunal and EAT had erred on the issue of detriment. **A detrimental observation about a whistleblower could be made in a letter whose purpose was to put the employer's side of the story.** It did not cease to be a detriment because of the employer's purpose or motive. That purpose was relevant to the issue of **causation** when the question was whether the detriment was by reason of the protected disclosures, but it was irrelevant to the question whether a detriment was suffered at all. However, the trust's objective was, so far as possible, to nullify the			

adverse, potentially damaging and, in part at least, misleading information that the claimant had chosen to put in the public domain. That both explained the need to send the letters and the form in which they were cast. The trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire. Although sending letters in the way they were drafted did constitute a detriment to the claimant, it was not a detriment on the grounds that the claimant had made a protected disclosure or disclosures.			
Hancock v Ter-Berg **UKEAT/0138/19** **THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT) (SITTING ALONE)** **SUMMARY** **VICTIMISATION DISCRIMINATION – Protected disclosure** **VICTIMISATION DISCRIMINATION – Interim relief** **UNFAIR DISMISSAL** The Claimant applied for interim relief pursuant to s.128 of the **Employment Rights Act 1996** following the termination of his contract allegedly because he had made protected disclosures. The Respondent contended that there was no entitlement to make such an application as the Claimant was not an "employee" within the meaning of that section. The Respondent's application for a postponement of the interim relief application pending a determination of the employee issue was refused. At the interim relief hearing, the Tribunal considered that the "likely to succeed" test under s.129 of the **1996 Act** applied not just to the reason for dismissal but also to the contested issue of employee status. It determined that the Claimant had a 'pretty good chance' of success in showing that he was an employee and that he was dismissed for having made protected disclosures. The Respondent appealed on the grounds that the Tribunal erred in entertaining the application for interim relief before first concluding that the Claimant was indeed an employee. **Held** (dismissing the appeal): On a proper construction of ss.128 and 129 of the **1996 Act**, all elements of a complaint of unfair dismissal for a proscribed reason (including that it was because of protected disclosures) were to be determined at the interim relief hearing on the likely to succeed test. That included the question of employment status if that were put in issue by the employer. That construction was consistent with the intention of the interim relief regime, that being to provide a speedy remedy to preserve the status quo pending the full hearing. The Respondent's contention that there should be a Preliminary Hearing to determine conclusively whether the Claimant was an employee before determining the application for interim relief would cause delay and would undermine the interim nature of the remedy under s.129.	**[2020] I.R.L.R. 97**	**[2019] 7 WLUK 835 [2020] I.C.R. 570**	**IDS Emp. L. Brief 2020, 1121, 6-8**
Foreign and Commonwealth Office v Bamieh **[2019] EWCA Civ 803** **LORD JUSTICE GROSS, LORD JUSTICE LEWISON and LORD JUSTICE SINGH** The claimant was employed by the respondent government department to work at the European Union mission in Kosovo on an annually	**[2019] IRLR 736**	**[2020] ICR 465 [2019] WLR(D) 269**	

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renewable contract. When her contract was not renewed, the claimant brought claims in the tribunal under section 48(1A) of the Employment Rights Act 1996 **1** against the department and two co-workers, who were also employed at the mission by the respondent department, alleging that the co-workers had subjected her to unlawful detriments in the course of their employment because she had made protected disclosures, contrary to section 47B(1) and (1A)(a) of the Act. The employment tribunal held, inter alia, that, though the claimant and her co-workers had a common employer in the United Kingdom Government, as individuals their base was in the international world that was the mission, to which a large number of contributing states seconded personnel. There could be no jurisdiction over co-workers from other states, and it would be anomalous to hold some colleagues liable and some not, the tribunal should not assume jurisdiction to hear the claims against the co-workers. The Employment Appeal Tribunal held that the territorial reach of the detriment provisions in section 47B(1A) required an assessment of the sufficiency of the **connections** between each individual co-worker and Great Britain and British employment law. The individual respondents were sued as co-workers of the respondent department in the course of their employment by the department. The position of the mission was analogous to an international enclave with no particular connection with the country in which it happened to be situated. There was no other system of law with which either could be said to be connected; and that, as a result of their own especially strong connections with Great Britain and British employment law, it could be said that Parliament **would have** regarded it as appropriate for an employment tribunal to deal with claims against them under the 1996 Act. The CA allowed an appeal. It was necessary for the claimant and the co-workers to have a **common employer** to found a claim under section 47B(1A) of the Employment Rights Act 1996. The fact that there was a common employer was not sufficient to determine that section 47B(1A) applied extraterritorially to the relationship between them so as to confer jurisdiction on the employment tribunal to entertain the claim under section 48(1A). The correct point of focus should be on the relationship between the claimant and the co-workers as seconded mission staff members, and the key relationship on which the claimant's whistleblower detriment claim against the co-workers turned arose not by reason of the respondent department being their common employer but from the conduct of their roles at the mission. The mission was an international enclave with a closer connection to European Union law, and there was no reason for the default option to be found in British employment law. The combination of extraterritoriality, which called for an exceptional application of the statute, and the international setting of the mission told against the establishment of a sufficient connection with British employment law to warrant the application of section 47B(1A) to the claim against the co-workers. If the scope of the Act extended to some co-workers but not others, it would be inimical to the orderly functioning of the mission, when there was no international consensus in respect of whistleblowing detriment. Sections 47B(1A) and 48(1A) of the 1996 Act should not be applied extraterritorially in respect of a claim between co-workers seconded to the mission.			
CHRISTOPHER RILEY v BELMONT GREEN FINANCE LTD (T/A VIDA HOMELOANS) **UKEAT/0133/19/BA**			

EAT (Mathew Gullick) 13/03/2020 **SUMMARY** **VICTIMISATION DISCRIMINATION – Whistleblowing** **PRACTICE AND PROCEDURE - Perversity** The Claimant was a worker employed by the Respondent on a temporary assignment. On 14 March 2017, the Respondent terminated the assignment with immediate effect. There had been a meeting the previous day between the Claimant and one of the Respondent's managers. The Claimant had made several complaints at the meeting. He contended that they amounted to protected disclosures under Part IVA of the Employment Rights Act 1996 and that the Respondent's subsequent actions amounted to unlawful detriments on the grounds of his having made those disclosures. The Employment Tribunal dismissed the Claimant's claim, finding that no qualifying disclosures had been made at the meeting and, in the alternative, on the basis of causation. On appeal, the Employment Appeal Tribunal dismissed the appeal and held that: 1. The Employment Tribunal had not made perverse findings of fact regarding what the Claimant had disclosed to the Respondent at the meeting on 13 March 2017. 2. On the Employment Tribunal's factual findings about what the Claimant disclosed in the meeting, there was no material error of law in its conclusion that the matters raised did not amount to qualifying disclosures attracting statutory protection. 3. The Employment Tribunal had erred in law in its approach to causation. Having found that the Respondent's actions in subjecting the Claimant to the detriments complained of had been motivated in part by the Claimant's attitude and behaviour during the meeting, it had failed to address the issue of whether that behaviour was separable from the making of any disclosures. However, given the Employment Tribunal's finding that the complaints that it had found were made did not amount to qualifying disclosures, any such error was not material to the outcome.			
Mr N Williams v Michelle Brown AM **UKEAT/0044/19/OO** **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY VICTIMISATION DISCRIMINATION – Protected Disclosure The Claimant was employed by the Respondent, a Member of the Welsh Assembly. He was suspended and later dismissed by her on the given ground of conduct. He claimed that the suspension amounted to detrimental treatment on the grounds that he had made a protected disclosure, and that he was dismissed for the reason or principal reason that he had done so. The claimed disclosure was contained in a letter. It referred to the fact the Respondent's brother had not been recommended for permanent appointment to a position in her office, following interview by a panel on which the Claimant had sat. It stated that her brother did not make the grade despite her having tried to manipulate the recruitment process. The Claimant's case, among other things, was that this was a disclosure containing information which he reasonably believed tended to show that she had committed a criminal offence, in particular under the Fraud Act 2006, section 4.			

The Tribunal found that the claimed disclosure did not contain sufficient specific factual information to be reasonably capable of being regarded as tending to show that a criminal offence had been committed. It was therefore not a qualifying or protected disclosure and the claims were dismissed. The Claimant's appeal against that decision failed. The Tribunal had correctly applied the guidance in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850, as further recently elucidated in **Simpson v Cantor Fitzgerald Europe** UKEAT/0016/18/DA. It had properly found that the disclosure did not meet the threshold test of containing sufficient specific information so as to tend to show that there had been a criminal offence. The Tribunal was entitled to take a view that the assertion that the Respondent had tried to manipulate the process did not necessarily or obviously connote criminality, in particular by way of some dishonest conduct. In any event the threshold test was properly viewed as not passed, because the disclosure did not state what, specifically, the Respondent was said to have done, in fact, that amounted, in the Claimant's view, to an attempt to manipulate the process. Without some such additional factual content, the information that the Respondent held public office, that the candidate was her brother, that there were special rules about the recruitment of family members, and that the brother would gain financially by being, or remaining, employed, was not sufficient to tend to show that a criminal offence had been committed. **See Contracts P20 onwards for a consideration of disclosure of information.**			
Mr Justin Sanjay Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust UKEAT/0047/19/BA **HIS HONOUR JUDGE AUERBACH** **(SITTING ALONE)** SUMMARY VICTIMISATION DISCRIMINATION – Protected disclosure The Employment Tribunal found that the Claimant made protected disclosures in respect of the introduction of a new rota system, which he reasonably believed posed a danger to the health and safety of patients, and to be made in the public interest. Subsequent to this, concerns raised by colleagues about his alleged conduct were referred to an investigation process, during which he was placed on restricted duties. The Claimant alleged that a number of matters to do with the instigation and handling of that process amounted to detrimental treatment by the colleague at whose instigation the new rota system had been introduced, as well as by others. The Tribunal found that he did make protected disclosures, but all of his claims of detrimental treatment because of the protected disclosures failed. Held: the Tribunal had failed properly to analyse and engage with its own findings of fact, and evaluations of the Respondent's conduct, in various respects. That is having regard to the legal test of whether a detriment is on "grounds" of a protected disclosure, to the provisions of section 48(2) Employment Rights Act 1996 on the burden of proof, and associated guidance in the authorities. A cross-appeal in respect of the Tribunal's conclusions that there were protected disclosures was dismissed. The EAT noted: "I recognise that this Tribunal was in principle potentially entitled to make a finding that the whole explanation was not the one advanced by the Respondent, but a mixture of genuine performance concerns and animosity towards, or dislike of, the			

Claimant, but that, nevertheless, it was satisfied that the Claimant's disclosures in relation to the rota were not also among the things that materially influenced the conduct. However, if so, the Tribunal needed, in its reasons, to engage with those features of its findings that I have highlighted, and to set out a far more full account of the reasoning taking it to that conclusion, than it in fact did."			
PERTEMPS MEDICAL GROUP LIMITED v IMRAAN LADAK **[2020] EWHC 163 (QB)** **THE HONOURABLE MR JUSTICE PEPPERALL** "Pertemps Medical Group Limited ("PMG") claims that its former CEO, Imraan Ladak, has pursued a campaign of harassment against the company and its senior directors. It argues that Mr Ladak's actions are in breach of a settlement agreement entered into on 4 December 2018 following the termination of his employment. Further, the company contends that Mr Ladak's actions are in breach of s.1 of the *Protection from Harassment Act 1997*. Mr Ladak denies behaving unlawfully and argues that he has at all times acted as a bona fide whistle-blower properly drawing attention to a substantial fraud upon the NHS. His Honour Judge Worster, sitting as a High Court judge, granted PMG an interim injunction. It was alleged that Mr Ladak was in breach and there was a committal application. The Judge heard an application to continue the injunction. The Judge stated " This case turns not on confidentiality but rather on Mr Ladak's contractual obligations not to make adverse or derogatory comment or bring PMG, its directors or employees into disrepute. Nevertheless, I consider that, for the reasons explained in *Mionis* and *ABC*, the court should accord particular weight to the fact that this action is brought to enforce obligations contained in a settlement agreement that was freely entered into, involved the payment of a six-figure sum in full and final settlement of all disputes arising from the employment and in respect of which Mr Ladak had the benefit of independent legal advice. I agree, however, with the observation of Judge Worster that this case is not as strong as a case such as [*Mionis v. Democratic Press SA* [2017] EWCA Civ 1194, [2018] QB 662] where the agreement was entered into to settle pending litigation.". On the issue of whether there had been a public interest disclosure the Judge stated " I do not have to decide that point at this interim stage. Indeed, for current purposes I am prepared to assume in Mr Ladak's favour that all of the requirements of ss.43G and 43H are satisfied in this case, save for the matter of reasonableness." The Judge was "satisfied that PMG is likely to succeed at trial in its claim for injunctive relief. Further, I am satisfied that it is just to grant interim relief pending trial or further order. It is, however, important to stress that this judgment makes no findings as to the truth of the serious allegations made by Mr Ladak. Plainly it is important that no fetter should be placed upon Mr Ladak's right to raise his concerns with the NHS Counter Fraud Authority. To that end, my order will not prevent any further disclosure to such body. In addition, my order will adopt Judge Worster's mechanism allowing Mr Ladak to seek the prior approval of the court before making any wider disclosure."			
Mrs Gina Leclerc v Amtac Certification Ltd **UKEAT/0244/19/RN** **Lewis J** When dismissing a whistleblowing claim, an employment tribunal had not erred in concluding that alleged protected disclosures relied on by the employee did not contain information tending to show one of the matters referred to in the Employment Rights Act 1996 s.43B(1). SUMMARY VICTIMISATION DISCRIMINATION - Whistleblowing VICTIMISATION DISCRIMINATION – Protected disclosure The respondent employer was one of five bodies responsible for assessing the technical documentation and quality managements systems of manufacturers of medical devices to ensure compliance with regulations and certifying that the medical devices were fit for purpose, safe and effective. The claimant was employed as a technical reviewer. She was dismissed and alleged that she had been subjected to a number of detriments. She alleged that that occurred because she had made protected disclosures within the meaning of section 43A of the Employment Rights Act 1996 ("ERA"). The employment tribunal found that a number of the statement relied upon were not qualifying			

disclosures as they did not contain information tending to show one of the matters referred to in section 43B of ERA. The claimant appealed on the basis that the employment tribunal had construed the boundaries of a qualifying disclosure too narrowly. In order for a statement to be qualifying disclosure within the meaning of section 43B ERA, "it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters in subsection (1) see **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 at paragraph 35. Further, there is no rigid distinction between an allegation and information as sometimes a statement which can be characterised as an allegation will also constitute information and amount to a qualifying disclosure: see **Kilraine** at paragraph 31. In the present case, the employment tribunal did not draw the boundaries of qualifying disclosures too narrowly. It was well aware that a statement making an allegation was also capable in principle of containing information amounting to a qualifying disclosure. On the facts, the employment tribunal found that the particular disclosures in issue did not contain information tending to show one of the matters in section 43B of the ERA. It was entitled to reach that conclusion on the evidence before it. **See Contracts P20 onwards for a consideration of disclosure of information.**			

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WORKERS See Contracts Chapter One			
Gilham v Ministry of Justice **[2019] UKSC 44** **LADY HALE P (with whom LORD KERR, LORD CARNWATH, LADY ARDEN and SIR DECLAN MORGAN agree)** The Claimant, who was a district judge, brought proceedings against the Ministry of Justice, contending that she had been subjected to public interest disclosure detriment, contrary to section 47B in Part IVA of the Employment Rights Act 1996. At a preliminary hearing, an employment judge held that the Claimant was not a "worker" within the meaning of section 230(3) of the Act and, therefore, was not within the scope of the protection given to whistle-blowers by **Part IVA** . The Employment Appeal Tribunal and the Court of Appeal dismissed the appeal on the grounds that the Claimant was an office-holder only, and not a "worker" within the meaning of section 230(3) and that it was unnecessary to read that section as including someone in the Claimant's position so as to give effect to articles 10 and 14 . On appeal it was held that in considering whether the Claimant was a "worker" the issue was whether, despite the Claimant being a statutory office-holder, the parties intended to enter into a contractual relationship. It was necessary to look at the manner in which the Claimant was engaged, the source and character of the rules governing her service and the overall context. The essential components of the relationship derived from statute and were not a matter of choice or negotiation between the parties and responsibility for the judiciary was divided between the Lord Chancellor as a minister of the Crown and the Lord Chief Justice as head of the judiciary. Many of the Claimant's complaints related to deployment and workload and were directed towards local leadership judges and senior court officials. The fragmentation of responsibility had both statutory and constitutional foundations; that, moreover; the judiciary was a branch of government separate and independent of both Parliament and the executive. Whilst by itself that would not preclude the formation of a contract between a minister of the Crown and a member of the judiciary, it was a factor which told against the contention that either of them intended to enter into a contractual relationship; that, taking into account all those factors, there was no contractual relationship between a judge and the executive or any member of it, or between a judge and the Lord Chief Justice; and that, accordingly, the Claimant was not a "worker" for the purposes of Part IVA of the 1996 Act. Judges were not in "Crown employment" within the meaning of section 191(3) of the Employment Rights Act 1996 since they were not employed "under or for the purposes of" the Ministry of Justice, the Lord Chief Justice or the Lord Chancellor, and they were not civil servants or the equivalent of civil servants; and that, accordingly, section 191 could not be relied on to give judges the protection of the rights in Part IVA of the 1996 Act. However, allowing the appeal, it was held that that the facts of the Claimant's case fell within the ambit of the right to freedom of expression protected by article 14 of the Human Rights Convention. The Claimant and others like her had been denied the protection which was available to other employees and workers who made responsible public interest disclosures within the requirements of Part IVA of the Employment Rights Act 1996 , including protection from "any	**[2020] IRLR 52** **January 2020**	**[2019] 1 W.L.R. 5905** **[2020] 1 All E.R. 1** **[2019] 10 WLUK 193** **[2019] I.C.R. 1655**	

detriment" and the possibility of bringing proceedings before an employment tribunal. The denial of those advantages amounted to less favourable treatment than that afforded to others in the workplace who wished to make responsible public interest disclosures; that being a judge was a "status" within the meaning of article 14. Since the difference in treatment was without reasonable justification, the exclusion of judges from the protection in Part IVA of the 1996 Act was in breach of their rights under article 14 read with article 10 of the Convention; and that, in all the circumstances, the 1996 Act should be read and given effect so as to extend the protection given to whistle-blowers to the holders of judicial office. **See Contracts P68.**			

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WORKING TIME See Contracts, Chapter E16-42			
Member States must require employers to set up a system for recording actual daily working time for full-time workers. **Federacion de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE (C-55/18)** EU:C:2019:402 Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, and Article 4(1), Article 11(3) and Article 16(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, must be interpreted as **precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.** The ECJ was requested by a Spanish court to give a preliminary ruling concerning the interpretation of Directive 2003/88 (Working Time Directive). The request was made in proceedings where the Spanish trade union Federación de Servicios de Comisiones Obreras (CCOO), supported by four other trade union organisations, brought a group action against Deutsche Bank SAE **seeking a declaration that the bank was under an obligation to set up a system to record the actual number of hours worked each day by its employees and make it possible to check that the working times laid down in legislation and collective agreements were properly adhered to**. The trade unions took the view that the obligation to introduce such a system derived not only from national law but also from the EU Charter of Fundamental Rights and the Working Time Directive. On their part, Deutsche Bank maintained that it was clear from the judgments of the Tribunal Supremo (Supreme Court, Spain) that no such general obligation existed under Spanish law. According to that court, Spanish law merely imposed an obligation to keep a record of overtime worked. The Working Time Directive, read in the light of the Charter, did not allow a national law that, according to the interpretation given to it in national case-law, did not require employers to set up a system enabling the duration of time worked each day by each worker to be measured. The Working Time Directive obliged Member States to ensure that minimum rest periods were observed and to prevent maximum weekly working time being exceeded. The ECJ reasoned that, in the absence of any system for measuring the number of hours worked, there could be no guarantee that the time limitations laid down by the Working Time Directive would actually be observed or, consequently, that the rights which the directive itself conferred on workers may be exercised without hindrance. The absence of such a system also made it more difficult for workers to obtain protection from the courts of the rights conferred on them by the directive, depriving them of an essential first line of evidence. National provisions which failed to expressly to require employers to measure in some way or other or to monitor the ordinary working time of workers in general were therefore incompatible with EU law. On the other hand, the ECJ pointed out that Member States	**[2019] I.R.L.R. 753**	**[2020] I.C.R. 48** **[2019] 5 WLUK 167** **[2019] 3 C.M.L.R. 32**	

were free to determine what method of recording of the number of hours actually worked each day was best suited for ensuring the effectiveness of EU law. It was for the referring court to determine, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, whether they could arrive at an interpretation of domestic law that was capable of ensuring the full effectiveness of EU law. In the event that it was impossible to interpret national provisions in a manner consistent with the Working Time Directive and the EU Charter of Fundamental Rights art.31(2), it followed from the latter provision that the referring courts must disapply such provisions and ensure that the obligation on undertakings to equip themselves with an adequate system for recording actual daily working time was met.			
Mears Homecare Ltd v Bradburn **UKEAT/0170/18/JOJ** **Employment Appeal Tribunal** **The Honourable Mr Justice Choudhury (President) (Sitting Alone)** The obligation to maintain employees' wage records under the National Minimum Wage Act 1998 s.9 transferred to the transferee on a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006. Following the transfer, the transferor was no longer required to maintain wage records or to comply with a production notice. SUMMARY TRANSFER OF UNDERTAKINGS – Transfer This issue in the appeal was whether, following a relevant transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations2006 ("TUPE"), the transferor continues to be bound by the duty, pursuant to s.9 of the National Minimum Wage Act 1998 ("NMWA"), to maintain wage records in respect of the transferred employees. The ET had held that the Respondent transferor continued to be bound by that duty and was therefore the appropriate subject of a production notice. The Respondent appealed. Held: Allowing the Respondent's appeal, the said duty transferred to the transferee upon transfer pursuant to Reg 4(2) of TUPE. Accordingly, the Respondent transferor was no longer required to maintain such wage records and was not required to comply with the production notice. There was no warrant in the legislative scheme for carving out an Exception from the wide scope of Reg 4(2) in respect of NMWA matters.	**I.R.L.R. 882** **[2019] 11**	**[2020] I.C.R. 31** **[2019] 5 WLUK 644** **[2019] C.L. 90**	

WRONGFUL DISMISSAL			
Human Kind Charity v Gittens **UKEAT/0086/18/BA** **THE HONOURABLE MR JUSTICE GRIFFITHS** **(SITTING ALONE)** **SUMMARY** CONTRACT OF EMPLOYMENT – Wrongful dismissal PRACTICE AND PROCEDURE – Disposal of appeal including remission The Employment Tribunal misdirected itself in law by applying **Ranson v Customer Systems plc** [2012] EWCA 841 to a case in which the employee did not remain silent but submitted an Investigation Report which was "not true" and in which "there was clearly some element of dishonesty" (quoting ET Reasons). The right to remain silent (where it exists) is not the same as a right to say something that is not true. Finding of wrongful dismissal set aside. **Bell v Lever Bros Ltd** [1932] AC 161 HL and Item **Software (UK) Ltd v Fassihi** [2005] ICR 450 CA considered. The Claimant was employed by a charity as an area manager. After the charity had to pay over £8,000 in data charges for her team's tablet computer, her line manager asked her to carry out an investigation into the high charge. She submitted an investigation report which stated that she could not pin down use of the iPad to anyone in particular. The line manager considered the report inadequate and commissioned someone else to carry out a separate investigation. The Claimant then admitted that she had been in possession of the iPad when the charges had been incurred. The charity summarily dismissed her for gross misconduct on grounds of dishonesty and the resulting breach of trust and confidence. The tribunal upheld her claim for wrongful dismissal. It found that she was not a fiduciary. It noted the absence of an express term in her contract requiring her to disclose any wrongdoing. It then stated that it had taken account of *Ranson v Customer Systems* 'which suggests that an employee does not have the same fiduciary duty as a director, and (in the absence of an express contractual term) does not have a general duty to disclose her own wrongdoing'. It regarded that as a significant factor in the case. The charity appealed, submitting that *Ranson* had been misapplied. On appeal it was held that the Claimant had not been wrongfully dismissed. *Ranson* considered the question of whether or not an employee (in some cases) or a fiduciary has a duty of disclosure – that is, a duty not to remain silent about some misconduct or other – and, if so, the extent of such a duty and the circumstances in which it arises, or does not arise. In the present case, however, the Claimant had written an investigation report in which she stated something that was not true and in respect of which the tribunal found there was clearly some dishonesty. There was an important distinction between silence and a positive statement which is untrue, and, and dishonestly, rather than inadvertently or negligently untrue. The implication in the tribunal's reasons, that the person given the task of investigation need not produce an investigation report which is true, if an untruth or a lack of honesty are required to cover up the investigator's own conduct, because of a right of silence, or a right not to incriminate oneself, had no basis in principle or in law. The right to remain silent, where it exists, is not the same as a right to say something that is not true. In confusing those questions, the tribunal erred in law.	**[2020] IRLR 412, June 2020**		

There was a difference between being asked a direct question, and being asked to investigate as fully as possible and then producing an investigation report which was not true, The difference in the two situations did not make the difference between whether there was a breach of duty or not, or whether any such breach was repudiatory or not. The Claimant had delivered a report which was not true, and she did so dishonestly, thereby covering up her own responsibility for the very subject matter of the report she had agreed to write. No employment tribunal, properly directing itself, would have failed to conclude that the Claimant had committed a repudiatory breach of contract. The award of damages for wrongful dismissal would be set aside. **See Contracts at P02-P13 which considers duties of disclosure and drafting issues.**			
East Coast Main Line Company Ltd v Cameron **UKEAT/0212/19/BA** SUMMARY CONTRACT OF EMPLOYMENT The Claimant had been employed by the Respondent since 1981, most recently in the role of shunter. In late 2015, during a night-shift, the Claimant had authorised the departure of a train. A driver, standing between that train and his own, had been 'brushed' by the departing train in what was found to be a serious safety incident. An investigation concluded the Claimant had failed to carry out adequate safety checks. The Claimant was subsequently summarily dismissed on 11th April 2016. The Claimant brought discrimination, unfair dismissal and wrongful dismissal claims. Following a final hearing and an appeal, a subsequent final hearing found the Claimant had been wrongfully dismissed. In doing so it placed weight on the fact that the Claimant had been employed for a considerable length of time. Two grounds of appeal (numbered 1 and 3) from the Tribunal's finding, on remission, that the Claimant had been wrongfully dismissed had been permitted to proceed to a full hearing. The EAT allowed both grounds of appeal. In accordance with the principles in **Jafri v Lincoln College** [2014] EWCA Civ 449, it substituted its own decision that the claim of wrongful dismissal failed and should be dismissed. As to ground 1, an application of the applicable legal principles to the combined findings of fact made in the original 2017 judgment and in the 2019 judgment, following remission, rendered the Tribunal's conclusion that the dismissal had been wrongful perverse. As to ground 3, in determining whether the Claimant had been wrongfully dismissed, the Tribunal had erred in taking into account his long service, which, as a matter of law, was not a relevant consideration. Further and in any event, the Tribunal's implicit conclusion that, in all the circumstances, the Claimant's length of service tended in his favour was perverse.			