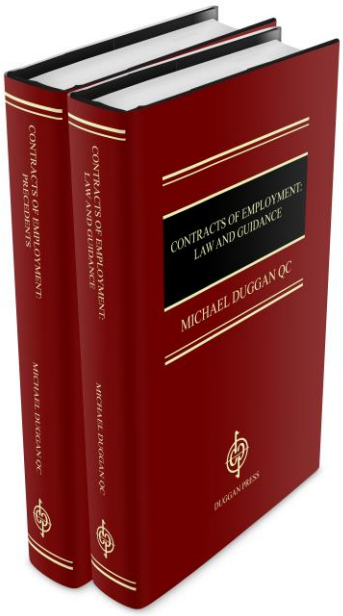
EMPLOYMENT LAW CUMULATIVE CASE INDEX FOR 2017

N-R

JANUARY TO DECEMBER 2017

4th Edition of Contracts due Spring 2018



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.

michael@dugganqc.com

Michael Duggan QC

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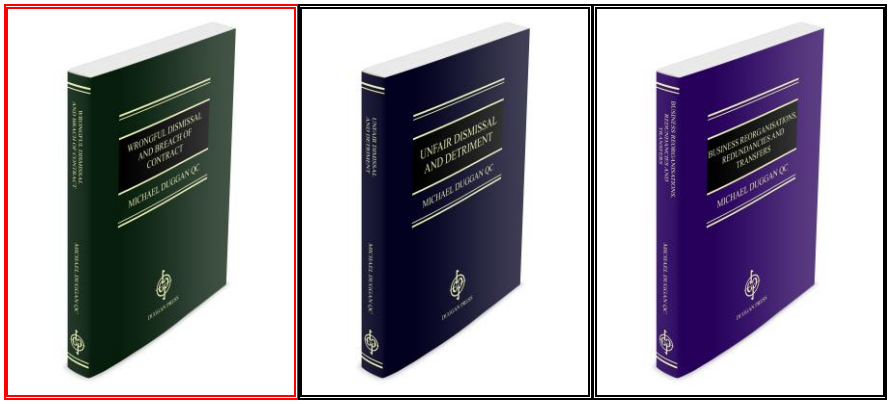

Wrongful Dismissal **Unfair Dismissal** **Reorganisations Redundancies & TUPE**

Michael Duggan QC, BA, BCL, LLM, FRSA, ADR Mediator, MCIArb
www.dugganqc.com
www.dugganpress.com
07967365302

To instruct Michael complete the contact form on michael@dugganqc.com

CONTENTS

NATIONAL MINIMUM WAGE			
Focus Care Agency Ltd v Roberts; Frudd and another v Partington Group Ltd; Royal Mencap Society v Tomlinson-Blake **UKEAT/0143/16/DM, UKEAT/0244/16/DM, UKEAT/0290/16/DM** **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT) (SITTING ALONE)** **SUMMARY** **NATIONAL MINIMUM WAGE** The appeals consider the proper approach to the question whether employees who sleep-in in order to carry out duties if required engage in "time work" for the full duration of the night shift or whether they are only entitled to the national minimum wage when they are awake and carrying out relevant duties. A multifactorial evaluation is required. No single factor is determinative and the relevance and weight of particular factors will vary with and depend on the context and circumstances of the particular case.	**[2017] IRLR 588, July**	**[2017] I.C.R. 1186**	**IDS Brief 1072**
Ajai v Abu **Master McCloud** A migrant domestic worker who claimed she had not been paid the National Minimum Wage over a period of nine years. The Defendant contended she fell within the scope of the "family worker" exemption. . Regulation 57(3)(c) of the National Minimum Wage Regulations 2015 provides that the obligation does not include work done by a worker in relation to an employer's family household where, among other requirements, "the worker is neither liable to any deduction, nor to make any payment to the employer … as respects the provision of living accommodation or meals". Master McCloud found that the exemption did not apply because, on the evidence, the claimant was liable to deductions by the employer as respects the provision of her living accommodation and meals. Ms Ajayi's very limited pay was the product of effectively making her pay for the 'free' accommodation and meals which the terms provided for.	**[2017] IRLR 1113** **Dec**		

Michael Duggan QC michael@dugganqc.com

PART TIME WORKERS			
Engel v Ministry of Justice **UKEAT/337/15** **Judge David Richardson** **SUMMARY** **PART TIME WORKERS** **PRACTICE AND PROCEDURE - Case management** The Employment Judge did not err in law in his application of Regulation 5(2)(a) of the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000**. The Employment Judge did not err in law in refusing the Claimant's application under Rule 36(3) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**.		**[2017] I.C.R. 277**	
O'BRIEN v MINISTRY OF JUSTICE **[2017] UKSC 46** The Supreme Court referred a question to the European Court of Justice concerning the scope of Directive 97/81 and whether periods of service completed by a part-time worker prior to the Directive entering into force in the UK should be taken into account when calculating their retirement pension. The question referred: Does Directive 97/81, and in particular clause 4 of the Framework Agreement annexed thereto concerning the principle of non-discrimination, require that periods of service prior to the deadline for transposing the Directive should be taken into account when calculating the amount of the retirement pension of a part-time worker, if they would be taken into account when calculating the pension of a comparable full-time worker?	**[2017] IRLR 928 Oct**	**[2017] I.C.R. 1101**	**IDS Brief 2017, 1078, 7-9**

PRACTICE AND PROCEDURE			
Hemdan v Ishmail and another **UKEAT/0021/16/DM** **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)** **MR D J JENKINS OBE** **MS N SUTCLIFFE** **SUMMARY** **PRACTICE AND PROCEDURE - Imposition of deposit** 1. A deposit Order was wrongly imposed in circumstances where the Employment Judge recognised that the Claimant would find it difficult to comply with its terms. 2. In fact it was not practically possible for the Claimant to comply with the deposit Order, which was set at so high a level in context as to impede her access to justice because she could not comply with it. 3. The Order imposed was not therefore a proportionate and effective means of signalling to the Claimant the low prospects of success and warning her as to costs.	**[2017] IRLR 228, March**	**[2017] I.C.R. 486**	
General Municipal and Boilermakers Union v Henderson **[2016] EWCA Civ 1049** **LORD JUSTICE UNDERHILL** **LORD JUSTICE BRIGGS** The Claimant brought proceedings in the Employment Tribunal for unfair dismissal; wrongful dismissal; direct discrimination on the grounds of religion or belief, the belief in question being defined as "left wing democratic socialism"; harassment on the same ground; victimisation; and unjustified union discipline. Most of the appellant's claims were dismissed, but his claims of discrimination and harassment were upheld, at least in part. He appealed against the dismissal of his claims of discrimination and harassment. As regards both the discrimination and the harassment claims, the EAT came to the explicit conclusion that there was no basis upon which the Employment Tribunal could properly have found the complaints proved. The EAT did so partly on the basis of the Employment Tribunal's own findings of fact, which, as the EAT demonstrates carefully and with particularity, appear to contradict central elements in the appellant's case, but partly also on the absence of any evidence supporting an inference that any of the relevant actors had the necessary motivation or purpose. I have already set out the relevant passages from the EAT judgment, and I will not recapitulate them here. The essential point is that the EAT did not purport to decide any disputed or disputable point of primary fact, or conduct an evaluation of evidence of the kind that ought to have been carried out by the Employment Tribunal. Instead the EAT held that on the facts found and the evidence submitted the appellant's case was bound to fail. Accordingly, I have no doubt that the EAT directed itself correctly.	**[2017] IRLR 340, April**		

COMPASS GROUP UK & IRELAND LTD v MORGAN **UKEAT/0060/16**/RN **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)** **MR D BLEIMAN** **MR P L C PAGLIARI** **SUMMARY** **PRACTICE AND PROCEDURE - Preliminary issues** This appeal raises a question of procedure in relation to the early conciliation provisions introduced by the **Enterprise and Regulatory Reform Act 2013**, namely whether an early conciliation certificate obtained by a "prospective claimant" can cover future events. The Employment Judge held that it could, and on the facts of the present case, although the Claimant's resignation underlying her constructive unfair dismissal complaint occurred after the early conciliation certificate was issued, the proceedings related to a sequence of events that were in issue between the parties at the time of the early conciliation process, and the Claimant had accordingly satisfied the early conciliation requirement in relation to her constructive unfair dismissal complaint. The appeal fails. The words "relating to any matter" are ordinary English words that have their ordinary meaning. Parliament deliberately used flexible language capable of a broad meaning both by reference to the necessary link between the proceedings and any matter and by reference to the word "matter" itself. It is not useful to provide synonyms for the words used by Parliament. Provided that there are or were matters between the parties whose names and addresses were notified in the prescribed manner, and they are related to the proceedings instituted, that is sufficient to fulfil the requirements of section 18A(1) **Employment Tribunals Act 1996**.	**[2016] IRLR 924, Dec**	**[2017] ICR 73**	**IDS Brief 1056, October 2016**

Kuznetsov v Royal Bank of Scotland plc **[2017] EWCA Civ 43** **LORD JUSTICE ELIAS** **and** **LORD JUSTICE LEWISON** At a preliminary hearing on the 12 November 2014, EJ Pearl made certain directions including directions which were designed to enable the parties to agree a list of issues. The appellant produced his list of issues on 24 November having foreshadowed them in a letter to the respondent some two weeks earlier. For the first time he identified as an issue, albeit not clearly, potential claims based on alleged public interest disclosures, colloquially known as "whistleblowing claims". There were two distinct claims: that he might have been dismissed for raising as a grievance the failure to pay his bonus; alternatively because he had raised a grievance about the offer to relocate him on less favourable terms. This was almost three years after the original claim had been lodged. On 12 January 2015 Glennie EJ noted that no whistleblowing claim had been made in the original Form ET1 and that it would be necessary to amend the claim in order to allow the claims to be pursued. He refused to allow the amendments The CA stated that the delay of almost three years was very extensive. It is in my view irrelevant to contend that the appellant was not responsible, and certainly not solely responsible, for the delay in the progress of the litigation as a whole. His obligation was to put his claims before the ET when he lodged his application. "This court has said on a number of occasions that it is difficult to see any rational justification for the principle summarised by Laws LJ in *Jafri* applying in all cases. The effect is that the EAT has to remit a question to an employment tribunal even where the EAT is in as good a position as the ET to make the relevant ruling: see the discussion by Underhill LJ in the *Jafri* case, paras.43-47. Remitting the case simply creates more delay and adds to the time and costs of the litigation. It is not conducive to achieving the overriding objective. Where findings of fact are in issue, remittal will almost inevitably be appropriate since the ET is the fact-finding tribunal. But where the issue is, as here, the correctness of a case management order, there is no advantage in the matter being remitted to the ET judge who is no better equipped than the EAT judge to determine the issue. As Underhill LJ pointed out, there is no reason why the EAT cannot decide the issue rather than remitting if the parties agree since there is no jurisdictional bar. I would strongly encourage the EAT to seek that consent in advance of any hearing of this nature where the possibility of remission is likely to arise. But I agree with Underhill LJ that in the light of the authorities, and until the Supreme Court or legislation stipulates otherwise, remission is currently required absent the consent of both parties."	**[2017] IRLR 350, April**		**IDS Issue 1067 – April 2017**
FALLOWS AND OTHERS V NEWS GROUP NEWSPAPERS LTD	**[2016] IRLR**		

Michael Duggan QC michael@dugganqc.com

UKEAT/0075/16/RN **Employment Appeal Tribunal** **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Restricted reporting order** 1. The Employment Judge had jurisdiction to consider an extant RRO notwithstanding the fact that the claims had been withdrawn on settlement. The Employment Tribunal was not *functus* as the Appellants sought to argue. 2. Nor did the RRO expire automatically upon withdrawal. Rule 50(1) of the **2013 Rules** permits RROs that are wider in extent and circumstances than RROs permitted under section 11 **ETA 1996** and Rule 50(3)(d) of the **2013 Rules**. 3. There was no error of law or principle in the balancing exercise conducted by the Employment Judge. Accordingly there was no basis on which to interfere with his conclusion that the Privacy Orders should be revoked	**827, November**		
ADAMS V BRITISH TELECOMMUNICATIONS PLC **EAT UKEAT/0342/15/LA** **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)** **(SITTING ALONE)** Where an ET1 form presented in time is rejected because of a minor error and a corrected form is presented out of time, the tribunal should focus on the second claim when considering whether to extend time. The fact that the claimant was able to present an ET1 within time does not preclude the discretion being exercised. **SUMMARY** **JURISDICTIONAL POINTS - Extension of time: reasonably practicable** **JURISDICTIONAL POINTS - Extension of time: just and equitable** The Employment Judge erred in treating the fact that the Appellant presented a claim in time (albeit a defective one) as meaning that a second claim raising the same complaint could reasonably practicably have been presented in time. The focus should have been on the second claim and whether there was any impediment to timely presentation of that claim. The failure to address that question was an error of law. The Employment Judge further erred in failing to have regard to the prejudice to the Appellant in determining whether it was just and equitable to extend time in reference to the unlawful race discrimination complaints. This was a material factor not addressed by her. Moreover, the prejudice was all one way.		**[2017] ICR 382**	**[2016] IDS Brief 1048, July**

COMPASS GROUP UK & IRELAND LTD v MORGAN **UKEAT/0060/16**/RN **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)** **MR D BLEIMAN** **MR P L C PAGLIARI** **SUMMARY** **PRACTICE AND PROCEDURE - Preliminary issues** This appeal raises a question of procedure in relation to the early conciliation provisions introduced by the **Enterprise and Regulatory Reform Act 2013**, namely whether an early conciliation certificate obtained by a "prospective claimant" can cover future events. The Employment Judge held that it could, and on the facts of the present case, although the Claimant's resignation underlying her constructive unfair dismissal complaint occurred after the early conciliation certificate was issued, the proceedings related to a sequence of events that were in issue between the parties at the time of the early conciliation process, and the Claimant had accordingly satisfied the early conciliation requirement in relation to her constructive unfair dismissal complaint. The appeal fails. The words "relating to any matter" are ordinary English words that have their ordinary meaning. Parliament deliberately used flexible language capable of a broad meaning both by reference to the necessary link between the proceedings and any matter and by reference to the word "matter" itself. It is not useful to provide synonyms for the words used by Parliament. Provided that there are or were matters between the parties whose names and addresses were notified in the prescribed manner, and they are related to the proceedings instituted, that is sufficient to fulfil the requirements of section 18A(1) **Employment Tribunals Act 1996**.	**[2016] IRLR 924, Dec**	**[2017] ICR 73**	**IDS Brief 1056, October 2016**
Commissioners for HM Revenue and Customs v Serra Garau **EAT. THE HONOURABLE MR JUSTICE KERR** Statute only requires one period of Acas early conciliation (EC) and that the statutory provisions extending time limits to take account of EC only apply to that one mandatory period. It followed that, where a claimant commenced a second period of EC for the same matter, that second period of EC did not extend time limits. **SUMMARY** **PRACTICE AND PROCEDURE - Application/claim** **PRACTICE AND PROCEDURE - Preliminary issues** The early conciliation certificate provisions introduced from 6 April 2014 do not allow for more than one certificate of early conciliation per "matter" to be issued by ACAS. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period. The Employment Judge was wrong to hold otherwise.			**IDS Issue 1068 – May 2017**
Amey Services Ltd and anor v Aldrige and ors			**IDS Issue**

EAT. UKEATS/0007/16/JW **THE HONOURABLE LADY WISE** **SUMMARY** **PRACTICE AND PROCEDURE - Amendment** A number of claimants presented amendments seeking to introduce fresh claims on alleged under-payment of holiday pay, which was the subject matter of the originating claims. The amendments sought to cover a period or periods during the course of the proceedings, but did not specify particular dates. At least some of the amendments were on the face of it time barred. The Employment Judge decided to allow the amendments "subject to time bar", on the basis that the limitation issue could be revisited once the test cases of **Lock v British Gas** and **Fulton and Others v Bear Scotland** had finally concluded. Although the decision to grant or refuse an amendment was one for the exercise of discretion, the Employment Judge had made a material error justifying interference with his conclusion. He had failed to follow the established principles for consideration of an amendment in this context. In particular he failed to assess whether the proposed amendments were out of time and if so whether they should nonetheless be allowed as part of a single stage exercise. The cases of **Selkent Bus Co Ltd v Moore** [1996] ICR 836, **Rawson v Doncaster NHS Primary Care Trust** UKEAT/0022/08 and **Newsquest (Herald and Times) Limited v Keeping** UKEATS/0051/09 all support the principle that any time bar issue is an essential component of the decision to grant or refuse and amendment. It made no difference that the claims sought to be inserted arose after the originating claim had been presented, a decision on whether they were time barred still required to be made as part of the determination of the amendments application. The decision to excise timebar and to allow the amendments on a seemingly tentative basis pending resolution of that issue amounted to a material error such that the decision could not stand. While there were also issues in relation to the lack of specification in the proposed amendments, the appeal would be allowed and the case remitted back so that the tribunal could consider the amendments of new, taking all relevant considerations into account.			**1070 – June 2017**
TCO In-Well Technologies UK Ltd v Stuart **UKEATS/0016/16/JW** **THE HONOURABLE LADY WISE** The EAT has held that a tribunal erred in law when it purported to reconsider 'on its own initiative' an issue that a party had raised by way of an out-of-time application for reconsideration. **SUMMARY** **PRACTICE AND ROCEDURE :** **REVIEW/ RECONSIDERATION OF JUDGMENTS** Following a judgment in his favour the claimant, through his representatives, sought reconsideration on the basis that the		**[2017] I.C.R. 1175**	**IDS Brief 2017, 1075, 8-10**

compensatory element of the award made to him should have been " grossed up" to take account of the incidence of tax. The reconsideration application was out of time and was opposed by the respondent, both in relation to lateness and in substance. Subsequent to receipt of the respondent's opposition the Tribunal decided to effect reconsideration " of its own initiative" and purported to gross up the award. The respondent appealed. Rules 70 – 73 of the Employment Tribunal Rules provide alternative routes to reconsideration. Where an application has been made by a party for such reconsideration, that must be dealt with by the Tribunal. There is no scope for a hybrid process where an application is commenced by a party but is then taken on by the Tribunal of its own initiative, at least where there is a single subject matter for potential reconsideration. The course adopted by the Tribunal was procedurally and substantively unfair. It should have addressed the issue of lateness, and whether to extend time, as a first consideration and thereafter deal with the substance of the reconsideration application only if time was extended. In any event, the purported reconsideration judgement had ignored the respondent's opposition, was accordingly not balanced and could not withstand scrutiny. Appeal allowed and case remitted to a fresh Tribunal to consider the out of time reconsideration application.			
J v K and another **UKEAT 0661/16** **HIS HONOUR JUDGE HAND QC** The EAT refused to exercise its discretion to extend the 42 day time limit for lodging an appeal to the EAT where an appeal was lodged one hour late, at 5.00 pm on the relevant day. **SUMMARY** **PRACTICE AND PROCEDURE - Time for appealing** Rule 39(1) of the **Employment Appeal Tribunal Rules 1993** ("the Rules") is not relevant to the process of deciding whether an appeal has been lodged in time pursuant to Rule 37(1) of the **Rules** because the appeal process does not start until an appeal is properly instituted and Rule 39 only applies to a properly instituted appeal. Alternatively, where an appeal has been lodged out of time and the Registrar refuses to extend time that refusal will also operate automatically as a direction, pursuant to Rule 39, that Rule 39 does not validate the appeal. Where it is alleged that a disability has prevented a proposed Appellant from complying with the time limit for the lodging of a properly instituted appeal at this Tribunal then specific medical evidence relevant to the proposed Appellant's condition explaining how the disability has prevented compliance with the Rule must be presented. Quotations from publications on the Internet about conditions generally, whilst of some assistance, will not be sufficient without additional specific medical evidence. The proposed Appellant had failed by an hour to submit his			

proposed appeal in time and had fallen into the trap of attempting to submit too much material attached to one email. This difficulty is clearly referred to in simple terms in guidance material easily accessible and the fact that the proposed Appellant had failed to allow himself sufficient time to submit the material in the series of emails was not a basis for the exercise of discretion in his favour.			
CHARD V TROWBRIDGE OFFICE CLEANING SERVICES LTD **UKEAT/0254/16/DM** **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Application/claim** **PRACTICE AND PROCEDURE - Preliminary issues** **PRACTICE AND PROCEDURE - Time for appealing** The Employment Judge had erred in law when considering whether an error as to the correct name of the Respondent in an early conciliation certificate was a "minor error" and whether it was not in the interests of justice to reject the claim. It was common ground that by the time the error was rectified, the claim was outside the primary limitation period. The Tribunal had decided that it was practicable to have brought the claim within the three month period and therefore refused to extend time. The parties agreed that, pursuant to section 35(1) of the **Employment Tribunals Act 1996**, the Appeal Tribunal would decide the "minor error" and "interests of justice" issues, rather than remit the issue back to the Employment Tribunal. The Appeal Tribunal decided, on the facts, that the error was minor and that it would not be in the interests of justice to reject the claim. The Appeal Tribunal therefore set aside the Decision and substituted a decision that the claim was in time. The claim would therefore proceed on its merits. If the Appeal Tribunal had not found that the Tribunal had erred in law in relation to the "minor error" issue, it would have found no error in the Employment Judge's decision to refuse an extension of time.			
ALEXANDER KUZNETSOV v ROYAL BANK OF SCOTLAND **[2017] EWCA Civ 43** **CA (Civ Div) (Elias LJ, Lewison LJ** In obiter comments, the Court of Appeal noted that it was difficult to see any rational justification for the requirement that cases should be remitted from the Employment Appeal Tribunal to the employment tribunal to be applied in all cases. Where the issue was the correctness of a case management order, there was no advantage in the matter being remitted to the tribunal, which was no better equipped than the EAT to determine the issue.			
Revenue and Customs Commissioners v Garau		**[2017]**	

UKEAT/0348/16/LA **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Application/claim** **PRACTICE AND PROCEDURE - Preliminary issues** The early conciliation certificate provisions introduced from 6 April 2014 do not allow for more than one certificate of early conciliation per "matter" to be issued by ACAS. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period. The Employment Judge was wrong to hold otherwise.		**I.C.R. 1121**	
MR J TRESKA v THE MASTER AND FELLOWS OF UNIVERSITY COLLEGE OXFORD **UKEAT/0298/16/BA** **HER HONOUR JUDGE EADY QC** **SUMMARY** **JURISDICTIONAL POINTS - Claim in time and effective date of termination** **JURISDICTIONAL POINTS - Extension of time: reasonably practicable** **PRACTICE AND PROCEDURE - Costs** **PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity** *Reconsideration - claim struck out as out of time - correct early conciliation notification and impact on time limit - whether presentation of claim in time reasonably practicable.* *Costs - finding of use of ET claims as "device" - whether Claimant given opportunity to address* The Claimant had pursued claims against the Respondents of unfair dismissal, of protected disclosure detriments and of race and disability discrimination. At an earlier Preliminary Hearing, the ET struck out the claims as having been brought out of time. On the Claimant's subsequent application for reconsideration, the ET was unable to see that any ground was disclosed on which there was any reasonable prospect of that decision being varied or revoked. It further made an award of costs against the Claimant of over £11,000, considering it appropriate to do so as, in part, he had pursued his discrimination claims as a "device", without any genuine sense of grievance or belief in those claims. The Claimant appealed. Held: *allowing the appeal in part* The ET had previously found the Claimant's first early conciliation ("EC") notification to have been effective; that meant that his ET claim had been presented outside extended time limit allowed by the early conciliation procedure. In applying for a reconsideration of the striking out of his unfair dismissal claim, the Claimant sought to rely on a later EC notification he had made. That, however, went nowhere: the ET had permissibly found that the first EC notification validly complied with the requirements of section 18A **Employment Rights Act 1996** (as			

amended) (**Mist v Derby Community Health Services NHS Trust [2016] ICR 543** EAT applied); a subsequent EC notification was of no effect and could not serve to further extend the time limit (see **Commissioners for HMRC v Serra Garau** UKEAT/0348/16/LA). As for the question of reasonable practicability, the reconsideration application added nothing to the case that the ET had already considered and (permissibly) rejected at the earlier hearing. Although the ET's reasons for rejecting the reconsideration application were short, they adequately referenced the correct legal test and demonstrated that the ET had had regard to the Claimant's grounds. Given that the point raised in respect of the later EC notification could go nowhere, the ET had not been required to add to its earlier full reasoning in its Judgment on the Preliminary Hearing. Turning to the question of costs, it was noted that the Respondents had not put the application on the basis of dishonesty or bad faith on the part of the Claimant but that was the effect of the ET's finding that he had used the discrimination claims as a "device", without any genuine grievance either in respect of race or disability and without belief in the claims he had made. Although the Claimant had the opportunity to explain the background to the claims, he was not on notice that it was being suggested that he had pursued the discrimination claims for improper reasons (**Cannock Chase District Council v Kelly** [1978] 1 WLR 1 CA, page 6E-F applied). By taking into account its apparent finding of bad faith the ET had, therefore, had regard to an irrelevant factor, which rendered the decision on costs unsafe. The matter would be remitted to a different ET for consideration afresh.			
MRS D SAVAGE v JC 1991 LLP T/A JOHN CAMPBELL, MESSENGERS AT ARMS & SHERIFF OFFICERS & OTHERS **UKEATS/0002/17/JW** **THE HONOURABLE LADY WISE** **(SITTING ALONE)** **PRACTICE AND PROCEDURE** **ACAS Certificates** The claimant raised proceedings against three respondents because there was a lack of clarity as to the identity of her employer. The first and second respondents were the same entity, an LLP. The claimant had been employed from 1998, her contract of employment naming her employer as the individual who was and is the principal actor in the business. However, the identity of her employer appeared to have changed in that by the date of her dismissal in 2016 she was being paid by an LLP. Her position was that she had not been advised or consulted in relation to any change of employer. She secured two ACAS Certificates naming two prospective employers, namely the individual either with a trading name or			

possible trading as an unlimited liability partnership and secondly the LLP. The Employment Tribunal had erred in treating the two certificates as if they applied to the first and second respondents, who were the same entity, and in not allowing the claim against the individual to proceed. Appeal allowed on the basis that the claimant now conceded that the second respondent would be deleted from the proceedings so that the claim would proceed against the individual and the LLP pending final clarification of the identity of the employer			
Giny v SNA Transport Ltd **EAT 0317/16** **THE HONOURABLE MR JUSTICE SOOLE** **(SITTING ALONE)** **SUMMARY** **JURISDICTIONAL POINTS** The Claimant notified ACAS under the early conciliation procedure, erroneously identifying an individual (Mr S N Ahmed) as his employer and "prospective respondent" (rather than Mr Ahmed's company), but giving the correct address. ACAS duly issued an early conciliation certificate with that information. Having taken legal advice the Claimant issued his ET1 claim form with the Respondent correctly named. The Employment Judge rejected the claim under Rule 12(2A) on the basis that the difference between the name in the early conciliation certificate and the ET1 was not a "minor error". The Claimant contended that the decision was wrong in law; and that on a purposive interpretation of Rule 12(2A) the question was whether the information given to ACAS was sufficient for it to achieve contact with the true Respondent, which was satisfied in this case. The Respondent contended that the difference between the name of a natural person and a legal person could never be a "minor error". Rejecting both contentions, the Employment Appeal Tribunal concluded that it was not appropriate to put any gloss on the simple and straightforward language of the Rule; and that there was no error of law in the Employment Judge's conclusion.			**IDS Brief 2017, 1076, 9-11**
Chard v Trowbridge Office Cleaning Services Ltd **UKEAT/0254/16** **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Application/claim** **PRACTICE AND PROCEDURE - Preliminary issues** **PRACTICE AND PROCEDURE - Time for appealing** The Employment Judge had erred in law when considering whether an error as to the correct name of the Respondent in an early conciliation certificate was a "minor error" and whether it was not in the interests of justice to reject the claim. It was common ground that by the time the error was rectified, the claim was outside the primary limitation period. The Tribunal			

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AHIR v BRITISH AIRWAYS PLC **CA (Civ Div) (McFarlane LJ, Underhill LJ**			
R (on the application of Unison) v Lord Chancellor **[2017] UKSC 51** The Supreme Court declared that employment tribunal and EAT fees are unlawful, under both domestic and EU Law, and quashed the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (*SI 2013/1893*), on the basis that it prevents access to justice.		**[2017] I.C.R. 1037**	**IDS Brief 2017, 1075, 3-7**
GILLETT (APPELLANT) v BRIDGE 86 LTD (RESPONDENT) **UKEAT/0051/17/DM** **THE HONOURABLE MR JUSTICE SOOLE** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Amendment** The Claimant, with less than two years' service, brought a claim for unfair dismissal by reason of disability and disability discrimination. Within three months of dismissal she applied to amend by addition of a claim of unfair dismissal for whistleblowing. The application was refused on the basis, which included the Employment Judge's assessment, that the proposed claim contradicted or diluted the existing claim based on disability; that its merits were weak; and that the balance of hardship/injustice favoured the Respondent. The appeal was allowed on the basis that it was wrong to refuse the amendment in circumstances where the application was in time; the merits were not such as to have no reasonable prospects of success; and so that the balance of hardship/injustice favoured the Claimant.			
Public and Commercial Services Union v Minister for the Cabinet Office [2017] EWHC 1787 (Admin) (18 July 2017). **ADMINISTRATIVE COURT** **DIVISIONAL COURT**			

[2017] EWHC 1787 (Admin) **LORD JUSTICE SALES** **MRS JUSTICE WHIPPLE** The government published a consultation on reform of the CSCS in February 2016 (see *Legal update, Reform of the Civil Service Compensation Scheme: consultation launched*) and duly consulted with relevant trade unions, including the PCSU. Having completed that consultation, the government proposed further talks, but required the unions to agree in principle to the government's broad aims (to produce significant savings, including by means of reducing exit payment entitlements). Some unions, including the PCSU, declined to provide that agreement and were excluded from the further talks. The High Court has held that this breached the statutory duty to consult and, accordingly, has held that the CSCS reforms are unlawful. The court declined to say that consultation would have made no difference.			
Mechkarov v Citibank NA **UKEAT/0119/17/DM** **HIS HONOUR JUDGE DAVID RICHARDSON** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Application/claim** **PRACTICE AND PROCEDURE - Amendment** The Employment Judge did not err in law in holding that the Claimant had not made a claim of public interest disclosure detriment in his ET1 claim form. The Employment Judge did not err in law in refusing permission to amend in order to introduce such a claim. The Employment Judge held that Claimant was seeking to introduce a new cause of action; that it would have been reasonably practicable to have brought the claim in time; it was two years out of time; though the Claimant was confused about the concepts of whistleblowing and victimisation he had had access to legal advice. The EAT held that was not the time limit alone that caused him to reject the application but also delay and significant prejudice.			
DR Z SHUI v UNIVERSITY OF MANCHESTER & OTHERS **UKEAT/0230/16/DA** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity** **PRACTICE AND PROCEDURE - Postponement or stay** *Fair hearing - postponement/adjournment of proceedings* The Claimant - a litigant in person suffering from mental health issues but not lacking capacity for the purposes of the **Mental Capacity Act 2005** - had received medical advice that he was unfit			

to participate in the Full Merits Hearing of his ET claim. Although, at an earlier stage, the ET had itself proactively asked for the medical advice in this regard and had advised the Claimant of his right to seek a postponement of the hearing, he had not done so; at one stage expressing his concern that the on-going proceedings made his health worse. There had also been correspondence between the parties shortly before the Full Merits Hearing, in which the Respondents had set out the different options should the Claimant then seek a postponement of the hearing (including the potential applications to strike out and/or seek costs that might be made) and the issue was also canvassed in the Respondents' opening submissions, which the Claimant had the opportunity to read on the first day of the hearing. At the outset of the Full Merits Hearing, the ET clarified with the Claimant that he wished to proceed and discussed with the parties the reasonable adjustments that would need to be put in place. The ET did not expressly remind the Claimant of his right to apply for a postponement or adjournment of the hearing but he was aware that it was open to him to do so and he decided not to make such an application. The hearing proceeded with appropriate adjustments being made to enable the Claimant's participation but he broke down when being cross-examined and the Respondents applied to bring the questioning to an end, notwithstanding that the Claimant had said he was willing to continue. The ET agreed with the Respondents and the parties moved on to closing submissions, with the Claimant having a long weekend to consider the Respondents' submissions and then to make his own points in reply. Having considered all the evidence and submissions, the ET dismissed the Claimant's claims. The Claimant appealed on the basis that he had been denied a fair hearing, specifically arising from (i) the ET's failure to proactively adjourn the proceedings at the outset of the hearing, or at least raise the possibility of the Claimant making an application to this effect; and (ii) the decision to bring cross-examination to a halt rather than adjourning the hearing at that stage to permit the Claimant time to recover. Held: *dismissing the appeal* Allowing that the appellate Tribunal must itself determine whether a fair procedure was followed at first instance (**R (Osborn) v Parole Board** [2014] AC 1115 SC, **Rackham v NHS Professionals Ltd** UKEAT/0110/15/LA, and **Galo v Bombardier Aerospace UK** [2016] IRLR 703 NICA, applied), in this case the Claimant had not been denied a fair hearing. As he had acknowledged, he was aware of his right to seek a postponement or adjournment at the outset of the hearing but had determined not to do so. The ET had made all appropriate reasonable adjustments thereafter and the Claimant had been able to participate in the hearing and present his case until he broke down in cross-examination. At that stage, the ET adopted an appropriate course in acceding to the Respondents' request to stop the evidence. In truth, it was a matter for the Respondents			

as to whether they challenged the Claimant's evidence by cross-examination; the decision not to continue to do so gave rise to a risk for the Respondents, it did not deny any right of the Claimant. Moreover, the Claimant was still able to present his case and respond to the case against him: he had already cross-examined the Respondents' witnesses, was able to rely on his own witness statement and had the opportunity to make closing submissions in response to the Respondents' arguments. Viewed overall, the hearing had been fair.			
NHS TRUST DEVELOPMENT AUTHORITY (NHS TDA v DR S M SAIGER **UKEAT/0167/15/LA** **UKEAT/0276/15/LA** **HIS HONOUR JUDGE HAND QC** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity** **PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke** In the first appeal (UKEAT/0167/15/LA), the Appellant, the NHS Trust Development Authority ("TDA"), complained that the Employment Tribunal ("ET") had reached conclusions which were not supported by the evidence or were arrived at by inferential conclusions, which could not be drawn from the evidence, or were findings no reasonable Tribunal properly directing itself on the evidence could have reached. Alternatively, it was submitted that there had been a serious procedural irregularity amounting to an error of law by the ET reaching the conclusion that there must have been a telephone conversation between an employee of the TDA and an employee of the Third Respondent, IRG Advisors LLP t/a Odgers Berndtson ("Odgers"), without giving the witnesses a proper opportunity to comment on that proposition or inviting the parties to make submissions about it. In the second appeal (UKEAT/0276/15/LA) the Appellant, North Cumbria University NHS Trust ("the Trust"), complained in similar terms that the ET had arrived at conclusions which were not supported by the evidence or were arrived at by inferential conclusions, which could not be drawn from the evidence, or were findings no reasonable Tribunal properly directing itself on the evidence could have reached. Alternatively, it was submitted that there had been a serious procedural irregularity amounting to an error of law by the ET reaching the conclusion that the Trust, through an agent, had victimised the Claimant without giving the witnesses a proper opportunity to comment on that proposition or inviting the parties to make submissions about it. In order for a serious procedural irregularity to amount to an error of law it must be established that it has led to an unjust or unfair result. There may be a variety of categories of serious procedural irregularity. In the context of this area of law cases such as			

Hereford and Worcester County Council v Neale [1986] IRLR 168 and **Secretary of State for Justice v Lown** **[2016] IRLR 22** have been concerned with procedural irregularity and on at least one occasion that has been coupled with inadequacy of reasoning (see paragraphs 58 to 62 of the judgment of Underhill LJ in **The Co-operative Group Ltd v Baddeley** **[2014] EWCA Civ 658**). But the existence of an inflexible rule of practice, apparently recognised in other common law jurisdictions as *the rule in Browne v Dunn* (see the House of Lords judgment in **Browne v Dunn** [1893] 6 R 67), is both doubtful and undesirable (**Markem Corporation v Zipher Ltd** **[2005] EWCA Civ 267**, **Allied Pastoral Holdings v Federal Commissioner of Taxation** [1983] 44 ALR. 607, **Deepak Fertilisers & Petrochemical Corporation v Davy McKee (London) Ltd** **[2002] EWCA Civ 1396** and paragraphs 12-12 and 12-35 in Chapter 12 of the 18th edition of *Phipson on Evidence* considered). Any such concept comprises not only a rule of practice but also a rule of evidence and a rule of professional etiquette. In order to amount to an error of law, however, the irregularity must be that of the Tribunal and the extent to which a procedural irregularity will be a serious procedural irregularity resulting in injustice and unfairness such as to amount to an error of law depends on the circumstances of each case and not on the existence of an overarching rule of practice. Removing an applicant from further consideration during an appointment process (in this case from a preliminary interview stage) can amount to a detriment within the meaning of section 27(1) **Equality Act 2010** ("EqA") (**Shamoon v Chief Constable of the RUC** **[2003] UKHL 11**, **[2003] ICR 337** applied) and the Trust's appeal could not succeed on that basis. Section 111(7) **EqA** does not have the effect of excluding corporate bodies from the scope of section 111 and TDA's appeal could not succeed on that basis. Both sections 111 and 112 **EqA** considered. TDA's appeal succeeded on the ground that the ET had erred in law by reaching a conclusion not supported by the evidence. The ET had reached an inferential conclusion that an employee of TDA had a conversation with an employee of Odgers but the findings of fact could not support the drawing of that inference. In the context of the case it was also a serious procedural irregularity for the ET to have reached that conclusion without indicating to the parties (and the witnesses) that was under consideration and giving an opportunity for the matter to be dealt with both evidentially and in submissions. Having considered paragraph 21 of the judgment of Laws LJ in **Lincoln College v Jafri** **[2014] EWCA Civ 449**, **[2014] ICR 920** it was concluded that this was an exceptional case in which this Tribunal could conclude, because there was no primary evidence to support the inferential conclusion, that such an inference could never be drawn and therefore the matter was not remitted. The Trust's appeal succeeded on the grounds of both inadequacy			

of reasoning and, in the circumstances of the case, serious procedural irregularity. The appeal was disposed of by a remission to the ET for the evidence of a witness to be re-heard and the judgment reconsidered after that evidence had been given. The cross-appeal related to the conclusion of the ET that, absent victimisation, the Claimant had a 50% chance of proceeding to the next stage of the appointment process but no chance of either being short listed or appointed. The Court of Appeal's judgment in **Chagger v Abbey National plc and another** [2009] EWCA Civ 1202, [2010] IRLR 47 did not mean that as well as eliminating the victimisation from consideration, the prior discrimination constituting the protected act upon which the victimisation was based should also be eliminated from consideration. That would produce an artificial perspective. The cross-appeal was essentially an argument that the conclusion was perverse. It was not; on the contrary it was supported by the evidence and the cross-appeal must fail.			
MR N JONES v THE SECRETARY OF STATE FOR BUSINESS INNOVATION & SKILLS **UKEAT/0238/16** **THE HONOURABLE MR JUSTICE KERR** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - procedural irregularity** Rule 60, read with Rules 1(3), 32 and 92 of the procedural rules applying in Employment Tribunals (in Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**) did not, at least in this case, justify the Tribunal not sending a witness order, obtained by a party, to the other party. The fairness of the subsequent trial was compromised by the omission of the Employment Judge to explain to the other party, who was not professionally represented and was taken by surprise by the attendance of the witness subject to the witness order, the right to apply for an adjournment to secure the attendance of a rebuttal witness who had provided a signed statement and whom the unrepresented party had decided not to call. It was impossible to conclude that oral evidence from the absent witness would necessarily have made no difference to the outcome of the trial. The Decision would therefore have to be set aside. The matter would be remitted for a rehearing before a freshly constituted Employment Tribunal.			**IDS Brief 2017, 1082, 12-15**

Michael Duggan QC michael@dugganqc.com

R (on the application of Unison) v Lord Chancellor **[2017] UKSC 51** The Fees Order 2013 was held to have been an unlawful exercise of statutory powers by the Lord Chancellor. As such, it was unlawful from the outset and was therefore quashed with immediate effect on 26 July 2017. Lord Reed stated that "the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication." "The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can *reasonably* be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable." Lady Hale held that the Fees Order was also indirectly discriminatory against women because the higher fees for type B claims put women at a particular disadvantage in that a higher proportion of women bring type B than type A claims, and it had not been shown that charging of higher fees was a proportionate means of achieving the aims of the Fees Order.	**[2017] IRLR 911 Oct**	**[2017] ICR 1037**	
MRS B TREE v SOUTH EAST COASTAL AMBULANCE SERVICE NHS FOUNDATION TRUST RESPONDENT **UKEAT/0043/17/LA** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** **PRACTICE AND PROCEDURE - Imposition of deposit** *Deposit Order - Rule 39* ***Employment Tribunal Rules 2013*** The Claimant had pursued claims of disability discrimination under sections 13 (direct discrimination) and 15 (discrimination because of something arising in consequence of disability) **Equality Act 2010** ("EqA"). At a Preliminary Hearing listed to determine time limit issues, the Employment Judge (having found it would be just and equitable to extend time) raised the question whether it would be appropriate to make Deposit Orders in respect of these claims. There was then a short exchange between the Employment Judge and counsel for the Claimant before a Deposit Order was made in the sum of £1,000. The Claimant appealed. Held: *Allowing the appeal in part*. When making a Deposit Order, an Employment Tribunal needed to have a proper basis for doubting the likelihood of a Claimant being able to establish the facts essential to make good her claims (see the guidance in **Jansen van Rensburg v Royal Borough of Kingston-upon-Thames** UKEAT/0096/07; **Wright v**			

Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14 and **Hemdan v Ishmail** [2017] ICR 486 EAT). In the present case, whilst the ET had correctly recorded the way the Claimant was putting her section 15 case in its case management Order, it was not apparent it had regard to the way in which that case was being pursued when reaching its decision on the Deposit Order. Moreover, the ET's reasoning in respect of section 15 **EqA** demonstrated a misunderstanding of that provision and of the guidance laid down in **Pnaiser v NHS England** [2016] IRLR 170 EAT. In the circumstances, the Deposit Order in respect of the section 15 claim could not be upheld. As for the section 13 claim, however, even if the ET had been wrong in its view as to the identity of the comparator for the purposes of section 23 **EqA** (something arguably better left to the Full Merits Hearing), it had been entitled to take the view that the Claimant had little reasonable prospect of succeeding with her complaint of direct discrimination on the "reason why" question (given the difficulties identified in **London Borough of Lewisham v Malcolm** [2008] IRLR 700 HL); the Deposit Order would be upheld in respect of this part of the claim. As there was no appeal against the amount awarded, the ET's global Deposit Order of £1,000 would be set aside and substituted with an Order for £500 in respect of the section 13 claim alone.			

Michael Duggan QC michael@dugganqc.com

REDUNDANCY			
Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis Case **C-201/15** (EU:C:2016:972) 1. **Council Directive 98/59/EC** of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as not precluding, in principle, national legislation, such as that at issue in the main proceedings, under which, if there is no agreement with the workers' representatives on projected collective redundancies, an employer can effect such redundancies only if the competent national public authority which must be notified of the projected collective redundancies does not adopt, within the period prescribed by that legislation and after examining the documents in the file and assessing the conditions in the labour market, the situation of the undertaking and the interests of the national economy, a reasoned decision not to authorise some or all of the projected redundancies. The position is different, however, if – a matter which is, as the case may be, for the referring court to ascertain – in the light of the three assessment criteria to which that legislation refers and of the specific application of them by the public authority, subject to review by the courts having jurisdiction, that legislation proves to have the consequence of depriving the provisions of that Directive of their practical effect. Article 49 TFEU must be interpreted as precluding, in a situation such as that at issue in the main proceedings, national legislation such as that referred to in the first sentence of the first paragraph of this point. 2. The fact that the context in a Member State may be one of acute economic crisis and a particularly high unemployment rate is not such as to affect the answers set out in point 1 of this operative part.	**[2017] IRLR 282, March**		
Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2 Mr Ali received a scholarship from the company to study for a degree. His fees were met outright by the company. In addition, the company made him a monthly allowance of TT$3,500 to help him continue to meet his commitments in Trinidad. The allowance, unlike the fees, was made in the form of a repayable loan. However, the letter offering it stated "Repayment of this loan will be waived if you return and work for the company for a period of five years", A little under 18 months later, at the beginning of October 1995, he was one of a number of employees who received from the company notice that he was invited to consider taking redundancy under an extra-statutory scheme He opted for redundancy. The company sought repayment of the loan. It was held that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to	**[2017] IRLR 432, May**	**[2017] ICR 531**	

the agreement which the parties have negotiated. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement. It was a necessary implication of the agreement to waive repayment if Mr Ali completed five further years of service that the company would do nothing of its own initiative to prevent him from providing such service, justified dismissal for repudiatory breach and compulsion excepted, and that if it did, a similar waiver would operate. Otherwise, the company could at any time negate its agreement to waive repayment on five years' service by preventing Mr Ali from completing that period and the contract would not work. Thus expressed, the implied term was the minimum necessary to make the contract workable. The key to the implied term was that it was triggered if the company *prevented* the employee from completing the five years of service (other than for repudiatory breach or where it operated under compulsion). Mr Ali's claim would fail because he had voluntarily left his employment.			
Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16 **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)** **(SITTING ALONE)** **SUMMARY** **DISABILITY DISCRIMINATION - Section 15** 1. The Employment Tribunal's decision that the Claimant's absence resulting from his disability was not an operative cause of his dismissal for redundancy was reached without error of law or perversity. 2. The Employment Tribunal did not deal with justification, save on what it described as a "cursory" basis and without making findings. That was an approach to be avoided in a case where evidence was called and argument advanced on justification. The parties were entitled to fully informed conclusions based on findings of fact rather than cursory ones. The Employment Tribunal's approach carried the risk of a conclusion that was inconsistent with other findings and conclusions, though it did not affect any aspect of the appeal here.			
Green v London Borough of Barking & Dagenham **UKEAT/0157/16/DM** **HER HONOUR JUDGE EADY QC** **MR D BLEIMAN** **MR M WORTHINGTON** **SUMMARY**			

UNFAIR DISMISSAL - Reasonableness of dismissal **UNFAIR DISMISSAL - Automatically unfair reasons** **REDUNDANCY - Fairness** *Automatic unfair dismissal - section 152* ***TULRCA 1992*** *- reason for dismissal - ET approach - adequacy of reasons* *Unfair dismissal - section 98(4)* ***ERA 1996*** *- fairness of dismissal by reason of redundancy - ET approach* The ET had dismissed the Claimant's claims of automatic unfair dismissal and unfair dismissal for the purposes of section 98 **ERA**. The Claimant appealed. Held: *allowing the appeal in part* Although the ET had not made a clear finding as to the reason for the Claimant's dismissal it could be implied that it accepted it was by reason of redundancy and it was apparent it had not found that it was related to her trade union activities; the appeal in this regard was dismissed. When approaching the question of fairness, the ET had taken the view this was not a case in which it needed to follow the guidance laid down in **Williams v Compair Maxam Ltd** **[1982] IRLR 83** EAT; those principles did not apply because the question was not why the Claimant had been selected for redundancy as much as why she had not been appointed to one of the remaining positions (see **Morgan v Welsh Rugby Union** **[2011] IRLR 376** EAT). In adopting this approach, however, the ET had elevated **Morgan** to a proposition of law, which it expressly did not lay down. It had, further, adopted a blinkered approach to section 98(4) **ERA** and failed to demonstrate it had adopted a range of reasonable responses test, reviewing each stage of the Respondent's decision making and process. That rendered the ET's conclusions on unfair dismissal under section 98 **ERA** unsafe; the appeal would therefore be allowed.			
Fidessa Plc v Lancaster **UKEAT/0093/16** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** **PART TIME WORKERS** **SEX DISCRIMINATION - Detriment** **HARASSMENT** **SEX DISCRIMINATION - Indirect** **UNFAIR DISMISSAL - Reasonableness of dismissal** ***Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000*** *- comparison permitted by regulation 4* *Direct sex discrimination - detriment - section 39(2)* ***Equality Act 2010*** *Harassment - requisite effect for the purposes of section 26(1)* ***Equality Act*** *Indirect sex discrimination - section 19* ***Equality Act*** *- disadvantage* *Unfair dismissal - fairness of dismissal - section 98(4)*			

Employment Rights Act 1996 *- taint of indirect and direct sex discrimination* The Claimant, who had been dismissed by reason of redundancy from her employment with the Respondent, brought complaints of direct and indirect sex discrimination, harassment and of less favourable treatment as a part-time worker and of unfair dismissal. Although rejecting a number of her complaints of less favourable treatment, the ET found the Claimant had been subjected to less favourable treatment because of sex amounting to a detriment and to harassment when she learned that a manager had reacted to news of her pregnancy by saying "*Oh fuck she's pregnant*". The ET further found that, by requiring the Claimant to undertake work on site after 5.00pm, the same manager had reneged on an earlier agreement that she could leave by that time in order to collect her daughter from nursery; that was less favourable treatment on grounds of the Claimant's part-time status. Although the ET did not accept that the subsequent redundancy process was a sham, it found it was rendered unfair by reason of the taint of direct and indirect sex discrimination. The indirect sex discrimination arose from the fact that the new position for which the Claimant might have applied as an alternative to redundancy was subject to the PCP that she undertake work after 5.00pm at the workplace. That placed women, and the Claimant in particular, at a disadvantage and could not be justified as there were alternatives that meant the work in question could have been done remotely without requiring the job-holder to remain at work after 5.00pm. On the Respondent's appeal against each of these findings. Held: *allowing the appeal in part* The appeal against the ET's Judgment on the claim under the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** really depended upon the approach to be taken to regulation 4, which permitted comparison with the part-time worker's previous full-time position. After an earlier period of maternity leave, the Claimant had returned to work a few days before the expiration of the 12 month period allowed by regulation 4; she had, however, then taken accrued annual leave. The Respondent contended that meant she had not actually returned to work until some time after the permitted 12 month period but its arguments on appeal failed to engage with the principled approach adopted by the ET: the contract of employment was not in abeyance during a period of paid annual leave; returning from maternity leave was returning to work, even if the worker immediately took a period of accrued annual leave. The ET's approach not only avoided an overly technical construction of regulation 4, but also protected against the risk of discouraging the taking of paid annual leave in these circumstances. The appeal in this regard was dismissed. Equally the appeal against the finding of indirect sex discrimination failed: the ET's findings, read as a whole, made clear the basis on which it concluded that the Claimant had suffered a disadvantage in considering she should not apply for			

the alternative, new position given the PCP of working on site after 5.00pm. That she was also concerned the new role had little opportunity for progression did not detract from the disadvantage arising from the PCP. On the claims of direct discrimination and harassment arising from the manager's remark on the learning of the Claimant's pregnancy, however, a difficulty arose in that the ET had not set out any findings as to the Claimant's response on later being told of this remark. Whilst this did not detract from the conclusion that this would amount to less favourable treatment of a woman and that it *could* reasonably have the required effect for the purpose of section 26(1) **Equality Act**, it meant there was no basis provided for the conclusion that it had in fact amounted to a detriment for the Claimant and had, subjectively, had the requisite effect under section 26(1) for her. Whilst the effect might be assumed, that would be failing to respect the need for an actual finding as to the Claimant's subjective response to what she had been told and the appeal would therefore be allowed on this basis. It was, however, likely that the omission from the findings of fact could be made good if remitted to the same ET, which would be able to remind itself of the evidence on this issue from its notes of evidence. Although the appeal was to be allowed in respect of the ET's finding on the direct discrimination claim, this did not undermine the conclusion on unfair dismissal. Whilst the ET had found that the dismissal was rendered unfair by the taint of both direct and indirect sex discrimination, its explanation of its reasoning only relied on the indirect discrimination finding and thus remained safe notwithstanding the difficulty identified with its conclusion on the direct sex discrimination. The appeal against the Judgment on the unfair dismissal claim would therefore be dismissed.			
Wandsworth LBC v Vining **[2017] EWCA Civ 1092** **Sir Terence Etherton MR; Beatson LJ; Underhill LJ** The dismissal of two local authority parks police officers by redundancy did not engage ECHR art.8 or art.14 when read in conjunction with art.8. Their claims for unfair dismissal were dismissed. However, their exclusion from the protections of the Trade Union and Labour Relations (Consolidation) Act 1992 s.188 to **s.192** by **s.280** of the Act construed in accordance with ***Redbridge LBC v Dhinsa*** *[2014] EWCA Civ 178, [2014] I.C.R. 834* was a breach of art.11 of the Convention. The court considered how s.280 could be construed in a non-infringing way.			

RESTRICTIVE COVENANTS AND CONFIDENTIAL INFORMATION			
RUSH HAIR LTD V GIBSON-FORBES AND ANOTHER **[2016] EWHC 2589 (QB)** **Martin Chaimberlain QC** A person who entered into a covenant not to "employ" another could not employ that other either himself or through an agent. That was because the agent's acts were, in law, those of his principal, the covenantor. Moreover, when a company acted through its director, the director was normally the agent of the company and not the other way round.	**[2017] IRLR 48, January**		
GAMATRONIC (UK) LTD AND ANOR V HAMILTON AND ANOR **[2016] EWHC 2225 (QB)** Two company directors were in breach of their duties of fidelity as employees and their fiduciary obligations as directors in actions they took prior to leaving to join a competitor. Nevertheless, the company was not entitled to any remedy in respect of the breaches; nor would compensation in respect of their salaries paid by the competitor be awarded as there was no reasonable relationship between those salaries and their breach of fiduciary duty.			**IDS Issue 1061 – January 2017**
Legends Live v Harrison **[2016] EWHC 1938 (QB)** **Edis J** An injunction to enforce a covenant in restraint of trade which is deliberately timed to damage others could be refused on discretionary grounds if that was avoidable by sensible and proper steps.	**[2017] IRLR 59, January**		
MARATHON ASSET MANAGEMENT LLP AND ANOTHER V SEDDON AND OTHERS **[2017] EWHC 300 (Comm)** **Leggatt J** A person may be under an obligation to keep a particular document confidential even though the obligation would not apply to the same information in another form. Some of the documents copied by Mr Bridgeman were indisputably confidential in that they contained commercially sensitive information which was secret to Marathon and could not have been obtained elsewhere. The prime example was a list clients of Marathon who had redeemed investments and the reasons for the redemptions. There were other documents which could not have been properly regarded as confidential because the information which they contained was so freely available. An example was Marathon's prospectus. Many of the documents, however, fell into an intermediate category. They contained information which could have been obtained from other sources but not without a significant cost – if not directly in money, then in terms of time and effort. Such documents (as well as the documents in the first category) were protected by a duty of confidence which continued after Mr Bridgeman's employment	**[2017] IRLR 503, June**	**[2017] I.C.R. 791**	

had ended. In *Faccenda Chicken* the Court of Appeal regarded the duty not to disclose or use confidential information after the employment has ended as an implied term of the employment contract. There is no need so to characterise it, however, as such a duty arises under a general principle of law which does not depend on the existence of a contractual relationship between the parties. Accordingly, a situation in which the defendant has agreed to keep information confidential is merely one application of the general principle under which a duty of confidence is imposed by law. To make, retain, or supply to a third party a copy of a document whose contents are, and were or ought to have been appreciated by the defendant to be, confidential to the claimant is a breach of this duty. Mr Seddon was not liable under the tort of conspiracy to injure by unlawful means. The copying and retention of the files caused Marathon no loss, which was an essential element of the tort of conspiracy. Mr Seddon was not liable under an implied contractual duty to report misconduct. There was no express term of Mr Seddon's employment contract from which any duty to report misconduct could have been inferred. It was possible to conceive of circumstances – for example, discovering that another employee was embezzling large sums of money from Marathon – where it could nevertheless have been said that any reasonable employee in Mr to report the discovery and could not in good faith have stayed quiet. But the facts of the present case did not come into that category. With regard to the term "*Wrotham Park* damages", a label based on the name of the case in which the remedy was originally granted is abstruse. The term "licence fee damages" captures the basic idea that the damages represent a fee that would reasonably have been agreed between the parties to license the defendant's wrongful activity. The fundamental reason why Marathon's approach to the assessment of licence fee damages was flawed consisted in a failure to identify accurately the wrong for which licence fee damages were being sought and to match the remedy to that wrong. Seddon's position would have been bound.			
Protech Site Services Ltd v Russell **[2016] EWHC 1740 (QB** **16 May 2017** **Queen's Bench Division: Martin Chamberlain QC** An interim injunction was granted to enforce an employee's confidentiality obligations and restrain her from working for a competitor where there was sufficient evidence to disclose a serious issue to be tried. The employee denied wrongdoing and was claiming sexual harassment and constructive dismissal, but had shown a lack of candour which justified a rejection of her offer of undertakings. "Contractual undertakings may in some cases provide adequate protection, and a claimant who declines to accept them may for			

that reason be denied injunctive relief in an appropriate case. But in this case Ms Russell's initial lack of candour about the meeting with Harry Johns and Ali Johnson gave Protech legitimate reason to distrust her contractual promises unless backed by penal sanction. Although there was at one stage an offer to give undertakings to the court, I do not think that Protech can be criticised for failing to accept that offer given that it was made on condition that Protech pay Ms Russell's legal costs. In any event, by the time Mr Sethi filed his skeleton argument, it was clear that Ms Russell was arguing that there should be no relief at all. That position was made even clearer in oral argument."			
EGON ZEHNDER LTD V MARY CAROLINE TILLMAN **[2017] EWHC 1278 (Ch)** **Mann J** The High Court upheld a six-month non-compete restrictive covenant, finding that it went no further than reasonably necessary to protect the legitimate business interests of the employer. Although the employee was very senior at the time of the termination of her employment, she had not signed new restrictive covenants since she was first hired in a more junior role. Nevertheless, she had been recruited with high hopes for her future potential and it was in the parties' contemplation that she would be swiftly promoted. The correct approach was to determine the reasonableness of the non-compete clause at the date of the contract by reference to the employee's status at that time and what was contemplated by the parties as a result of that. . Although there was no express territorial restriction, there was an in-built limitation in that the non-compete restriction was limited to businesses in competition with any businesses of the employer's group with which Mrs Tillman had been materially concerned. Also, on a proper construction of the clause, it did not prohibit her from holding a minor shareholding in competitors for investment purposes. Therefore the clause was not void for being wider than reasonably necessary.	**[2017] IRLR 828. September**		
SIMPKIN V THE BERKELEY GROUP HOLDINGS PLC **[2017] EWHC 1472 (QB) (22 June 2017)** **Garnham J** The High Court has rejected the claimant' application to restrain the defendant from relying on allegedly privileged documents in the context of an employment dispute. This decision highlights the risks for an employee in using work IT systems for private communications. It also provides a reminder that the court can and will refuse to exercise its discretion to grant equitable relief if a claimant lacks "clean hands".			
CAPITA PLC (2) CAPITA PROPERTY & INFRASTRUCTURE LTD v RICHARD DARCH & 9 ORS **RICHARD SPEARMAN Q.C.** **[2017] EWHC 1401 (Ch)** The claimant companies had not made out their case for the grant of interim injunctive relief against the defendants, being	**[2017] IRLR 718 August**		

former employees who were alleged to have set up a competitor company. The material put before the court gave rise to serious issues to be tried as to wide-ranging and protracted wrongdoing on the defendants' part. However, interim relief was not justified. The claimants faced historic difficulties that were rooted in the terms of the contracts of employment. In particular, the contractual restrictions that they had sought to impose upon employees were likely to be held at trial to be too wide. Further, the claimants faced current difficulties in respect of the various forms of relief that they had sought; they were also too wide. Moreover, clouds of suspicion (albeit that they might transpire to have substance at trial) were not the same as cogent evidence of wrongdoing sufficient to warrant the particular injunctions that the court had been asked to grant. The outcome at trial, of course, might be an entirely different matter.			
ADORN SPA LTD & ANOR v AMJAD & ANOR QBD (Richard Salter QC) The claimant companies, which ran beauty salons, were entitled to an interim injunction to enforce restrictive covenants prohibiting former employees, who intended to set up a competing business, from soliciting their customers for six months after the end of their employment and from soliciting their employees for nine months.			
AIRSYS COMMUNICATIONS TECHNOLOGY LTD & ANOR v BECKER **QBD (R Davies QC) 05/05/2017** A company was allowed to add further claims to an existing speedy trial where it believed a former employee had retained copies of company documents allegedly breaching restrictive covenants in his service agreement. Whether he had unlawfully accessed the company's email system to view the documents was not allowed to form part of the trial as it ran the risk of diverting attention from the real issues.			
TRADITION FINANCIAL SERVICES LTD v (1) ANDREA GAMBERONI (2) SPECTRON SERVICES LTD (3) MAREX SPECTRON GROUP LTD **[2017] EWHC 768 (QB)** **Foskett J** A post-termination restriction preventing an inter-dealer broker in the energy market from working for his employer's competitors for six months was reasonable, even if he were placed on garden leave for three months prior to termination, resulting in a nine-month absence from brokering.	**[2017] IRLR 698 August**		
SEAFOOD HOLDINGS LTD v (1) MY FISH CO LTD (2) GARY APPS (3) BENJAMIN PHILIP COUPE (4) MARK ORMISTON (5) MARK HADLAND **[2017] EWHC 766 (CH)** **Norris J** In proceedings brought by the claimant seafood supplier against a newly-formed rival company and its staff in connection with the latter's breach of a non-solicitation clause, the court granted the			

claimant summary judgment on competition law claims in the new company's counterclaim. It examined what constituted a dominant position and held that the claimant did not occupy one. It also examined whether vertical agreements could constitute agreements to prevent, restrict or distort competition and found that, in the instant circumstances, they could not.			
MPT GROUP LTD V PEEL **[2017] EWHC 1222 (Ch** **Recorder Edward Pepperall QC** The Court considered the balance of convenience in granting springboard relief and stated that "While I am satisfied that the Claimant has established a case sufficient to get it over the low hurdle of a serious issue to be tried, such case is largely built upon inference and, for the reasons given above, does not in my judgment establish that the Claimant is likely to establish sufficient misuse of its data to justify a springboard injunction at trial". The Claimant granted some limited relief in respect of confidential information relating to drawings and customer lists. It refused to grant a general injunction stating that wide and generic definitions of confidential information are objectionable, relying on Marathon Asset Management LLP v Seddon **[2017] EWHC 300 (Comm)**.			**IDS Brief 2017, 1082, 15-17**
OCS GROUP UK LTD V DADI AND OTHERS **[2017]EWHC 1727 (Ch)** **MRS JUSTICE ROSE** The Claimant obtained an interim injunction prohibiting the employee from disclosing the information, and requiring him to preserve all hard copy and electronic documents pending the return date. It also prohibited him from informing anyone else about the order or tipping them off about any future legal action. Immediately on receiving the order, the employee immediately telephoned his former manager, who worked for the competitor, to tell him about it, before deleting several emails from his personal email account, and a further 8,000 emails the next day. He also informed various family members. He then sought legal advice, following which he made a full admission to the court, and cooperated with the employer in attempts to retrieve the emails (which were unsuccessful). The court, having regard to the deliberate nature of the breaches, but also to the employee's subsequent remorse and cooperation, imposed four sentences of six weeks' imprisonment, to be served concurrently. " I have however come to the conclusion that a short sentence of imprisonment of six weeks must be imposed on Mr Dadi to mark the court's strong disapproval of his conduct and to act as a deterrence both in respect of his further compliance with the orders of the court and as a warning to others who might be tempted to flout the court's orders in this manner."			**IDS Brief 2017, 1078, 17**
UTILITYWISE PLC v NORTHERN GAS & POWER LTD & ORS			

Whipple J **25/07/2017** The defendant had offered undertakings to deal with "conventional" covenants, regarding confidential information, procurement and solicitation. What was in dispute at the instant hearing was non-competition clauses in the claimant's employees' contracts, in the event that individuals should start working for the defendant. The claimant maintained that the defendant had undertaken a course of conduct that harmed the claimant's business, and had "lured" its employees away to work for the defendant. It said that at least 75 employees had been approached by the defendant, and it supplied further anecdotal evidence of predatory tactics by the defendant to convince the claimant's employees to work for it It was not appropriate to grant interim relief to restrain a defendant from luring a claimant's employees to work for it, in alleged breach of non-competition clauses in some of the employees' employment contracts. Not all the contracts had non-competition clauses in them, and those that did had it in different forms. It was not fair that the employees were excluded from the instant hearing; the claimant should have taken action against individual employees who were looking to breach their employment contract.			
WE COX CLAIMS GROUP LTD v SPENCER **QBD (Judge Simpkiss)** The examination of electronic devices belonging to a former managing director of a company who had taken and copied a list of the company's business contacts was ordered where he had not admitted that he had taken the list until the company found out by examining emails. There was a real issue to be tried as to whether the respondent had copied confidential information for the purpose of helping himself post-termination. The emails discovered by the company were extremely damaging. Perhaps copying the list had been a coincidence, but that was a matter for trial. It was difficult to overcome the inference that when the respondent had copied the list he knew that that was a breach of his employment contract. The court was not satisfied that he could be assumed to have come clean. It might turn out that he had, but he had not initially volunteered that he had taken the list at all. There was a real possibility that he had taken the list for the purpose of using the information, which he must have known was confidential, and still had it on one or both machines. A full examination should therefore be carried out.			
CAPITA PLC V DARCH **[2017] EWHC 1248 (Ch)** **RICHARD SPEARMAN Q.C.** **(sitting as a Deputy Judge of the Chancery Division)** An order was sought for . "copies of all emails that they have	**[2017] IRLR 718** **August**		

received into any non-Capita email account from any email account at Capita (including their own)". This was refused on the basis that it would extend to private and personal information of the employee and would infringe their right to respect for private and family life that is guaranteed by Article 8 of the European Convention on Human Rights. The Judge held that a restriction which relates not only to persons with whom the employee had personal and material dealings but also, as in this case, to those "about whom the employee becomes aware or is informed in the course of his (or her) employment" may well be held to be too wide. Similarly, the definition of a "restricted person" in a non-poaching clause should be limited to those with whom the employee had personal and material dealings.			
TILLMAN V EGON ZEHENDER LTD **[2017] EWCA Civ 1054** **THE RIGHT HONOURABLE LORD JUSTICE LONGMORE** **THE RIGHT HONOURABLE LORD JUSTICE PATTEN** **and** **THE RIGHT HONOURABLE LORD JUSTICE SALES** A restriction on the defendant from becoming a shareholder in a competitor, which prevented the defendant post-termination from being "interested" in any business carried on in competition with any business of her former employer meant that the restraint was unreasonable. Lord Justice Longmore stated that: "I find it impossible to say of a person holding shares in a company that he or she is not 'interested' in the business of the company. Conventionally those words have that meaning not merely in common parlance and in dictionaries but also in authority."	**[2017]** **IRLR** **906** **Oct**		
MPT GROUP LTD V PEEL **[2017] EWHC 1222 (Ch)** **MR EDWARD PEPPERALL QC** **SITTING AS A DEPUTY HIGH COURT JUDGE** Whether the implied duty of fidelity includes an obligation on the employee to disclose their intention to compete in the future. Edward Pepperall QC, sitting as a Deputy High Court Judge, held that there is no such contractual duty. After handing in their resignations whether they intended to compete, both employees had untruthfully denied any intention of going into business together. They set up in business after their covenants had ended. The Judge stated: "I am far from satisfied that these employees were under a duty to disclose their true intentions to MPT. The law will step in to prevent unfair competition or to hold employees to enforceable restrictive covenants or to protect confidential information. Equally, employees must not induce others to breach their own contracts of employment, conspire to cause their employer injury or, in most cases, solicit their colleagues for their new enterprise. Subject to these matters, employees are otherwise free to make their own way in the world. I should therefore be reluctant to hold that an incident of the duty of fidelity is that, when asked a straight question a departing employee is under a	**[2017]** **IRLR** **1092** **Dec**		

contractual obligation to explain his own confidential and nascent plans to set up in lawful competition."			
(1) VISAGE LTD (2) GSCM (UK) LTD v (1) ANITA MEHAN (2) RITA ABROL (3) TINA KHOSLA (4) MANOJ VADHERA (5) SANJEEV MEHAN **[2017] EWHC 2734 (QB** **Mrs Justice Yip** The court granted an interim injunction and springboard relief against the claimants' former employees as there was strong evidence that they had set up a competing business while still employed, made use of the claimants' confidential information and approached the claimants' customers. However, an application for disclosure against three of the former employees failed, as the special circumstances necessary for such an order had not been established.			