EMPLOYMENT LAW CUMULATIVE CASE INDEX FOR 2017

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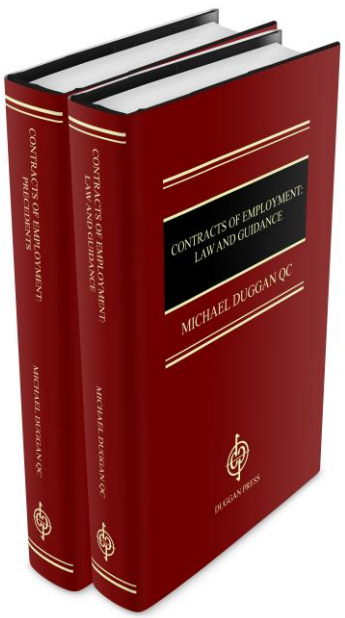
JANUARY TO DECEMBER 2017

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 Duggan QC

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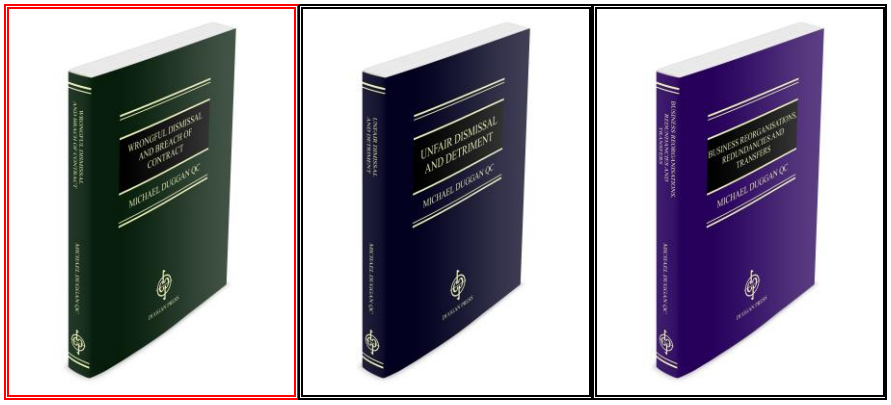

Wrongful Dismissal **Unfair Dismissal** **Reorganisations**

Redundancies & TUPE

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Tees Esk & Wear Valleys NHS Foundation Trust v Harland and others **UKEAT/0173/16/DM** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** **TRANSFER OF UNDERTAKINGS - Service Provision Change** **PRACTICE AND PROCEDURE - Preliminary issues** ***Transfer of Undertakings (Protection of Employment) Regulations 2006*** *regulation 3(3)(a)(i) - service provision change - organised grouping of employees - principal purpose* *Preliminary Issues* The Claimants had been employed by the Tees Esk & Wear Valleys NHS Foundation Trust - the Second Respondent before the ET (the Appellant) - as part of an organised grouping of employees put together to look after CE, an individual in the care of the Second Respondent. Over time, CE had improved such that his need for assistance had reduced from seven-to-one to largely one-to-one care. The team put together by the Second Respondent had, however, been retained and had maintained its identity, albeit that the staff concerned were required to undertake work for other service users, also under the Second Respondent's care, in the same location. That remained the position up to 5 January 2015, when the contract to provide care for CE was taken over by the Danshell Healthcare Ltd - the First	**[2017] IRLR 486, June**	**[2017] I.C.R. 760**	

Respondent in the ET proceedings. The Second Respondent contended this was a relevant transfer (a service provision change) for **TUPE** purposes and that the employees assigned to the team organised to provide care for CE would therefore transfer into the First Respondent's employment. The First Respondent disagreed - as did the employees concerned (who preferred to remain in NHS employment) - but reluctantly agreed to employ those who the Second Respondent was refusing to treat as still in its employment. A number of the employees thus affected brought claims in the ET. A Preliminary Hearing was listed before the ET to determine (1) whether there was a transfer for **TUPE** purposes, and (2) whether any of the Claimants had been assigned to the relevant organised grouping of employees prior to the transfer. The ET concluded that there was a change in the provision of the service - care for CE - from the Second to the First Respondent. Furthermore, there was an organised grouping of employees, put together to provide that service, that maintained its identity up to 5 January 2015, and 11 employees had been assigned to that grouping, including the Claimants. Given that the employees concerned undertook other work, however, the ET considered the principal purpose of the grouping had been diluted such that, by 5 January 2015, it was no longer the provision of care to CE. There was, therefore, no service provision change for the purpose of regulation 3(3) **TUPE**. There being no transfer for **TUPE** purposes, the ET further declared that the Claimants were at all times employed by the Second Respondent and not at any time by the First Respondent. The Second Respondent appealed. Held: *Dismissing the appeal on the question of principal purpose but allowing the appeal against the ET's declaration as to the identity of the Claimants' employer* The determination of principal purpose (regulation 3(3)(a)(i) **TUPE**) required the ET to answer the question: what did the organised grouping have as its principal purpose immediately before the service provision change? The activities actually performed might be relevant to the determination of purpose, as might the intention behind the organisation of the grouping; neither was necessarily determinative. In the present case, allowing that purpose may change over time, the ET had properly focused on the period immediately prior to the service provision change. By that stage, allowing that the principal purpose need not be the sole purpose, the ET found that the dominant purpose of the organised grouping was the provision of care to other service users; by then, care for CE was merely a subsidiary purpose of the group. Given its primary findings of fact, that was a permissible conclusion for the ET in this case. As for ET's declaration as to the Claimant's employment by the Second Respondent, this was not an issue before it at the Preliminary Hearing and the parties had not addressed the point. The declaration could not stand.			

Asklepios Kliniken Langen-Seligenstadt GmbH v Felja (respondent); Asklepios Dienstleistungsgesellschaft mbH (applicant) v Graf Joined cases **C-680/15** and **C-681/15** (EU:C:2017:317) **Article 3** of Council Directive 2001/23/EC 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 and Article 16 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in the case of a transfer of a business, the continued observance of the rights and obligations of the transferor arising from a contract of employment, extends to the clause which the transferor and the worker agreed pursuant to the principle of freedom of contract, pursuant to which their employment relationship is governed not only by the collective agreement in force on the date of the transfer, but also by agreements subsequent to the transfer and which supplement it, amend it or replace it, if the national law provides for the possibility for the transferee to make adjustments both consensually and unilaterally.	**[2017] IRLR 653, July**		
Federatie Nederlanse Vakvereniging and others v Smallsteps BV **(Case C-126/16)** The automatic transfer of employees under the Acquired Rights Directive (*2001/23/EC*) will apply in the event of a "pre-pack" sale aimed at rescuing all or part of an insolvent undertaking as a going concern. The procedure adopted in the Netherlands leading up to a pre-pack sale could not be regarded as a		**[2017] I.C.R. 1316**	**IDS Brief 2017, 1073, 14-15**

bankruptcy procedure or analogous insolvency proceedings instituted with a view to the liquidation of the transferor's assets and under the supervision of a competent public authority. Therefore the exception in Article 5(1) of the Directive did not apply. This was the case even though one of the aims of the pre-pack arrangement was to maximise the proceeds of the transfer for all the undertaking's creditors. This decision confirms that *Key2Law (Surrey) LLP v De'Antiquis [2011] EWCA Civ 1567*, in which the Court of Appeal held that administrations can never be "insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor" for the purposes of regulation 8(7) of TUPE, is likely to be compatible with EU law.			
ICAP Management Services Ltd v Berry **[2017] EWHC 1321 (QB)** **Garnham J** During a garden leave period ICAP was the subject of a share sale acquisition by Tullett Prebon plc. Mr Berry notified ICAP that he considered there was a TUPE transfer and purported to object to it under *Reg 4(7) of TUPE*. That would, by virtue of Reg 4(8), have terminated his contract (and his garden leave) forthwith, releasing him to take up his new employment earlier than would otherwise have been the case. ICAP sued to enforce the garden leave. The High Court rejected Mr Berry's arguments. TUPE requires a change of employer. A share sale does not involve a change of employer.			
Seahorse Maritime Ltd v Nautilus International (A Trade Union) **UKEAT/0281/16/LA** **THE HONOURABLE MRS JUSTICE SLADE DBE** **SUMMARY** **REDUNDANCY - Collective consultation and information** **JURISDICTIONAL POINTS - Working outside the jurisdiction** The Respondent, a company registered in Guernsey, is a supplier of employees to specialist ships owned and operated by other companies. These are stationed in seas all over the world for such operations as oilfields. The Respondent's employees who are of many different nationalities and countries of residence tend to return to the same vessel from their homes for their tours of duty. A Trade Union, Nautilus, has collective bargaining rights. In a redundancy situation the Union alleged a failure to consult in accordance with section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** in respect of employees resident in the United Kingdom. The Employment Judge did not err in holding that each vessel was not an "establishment" for the purposes of section 188. Whilst there was some conflation by the Employment Judge of the two questions of identifying the establishment and that of assignment of employees to it, this did not undermine the conclusion. USDAW v WW Realisation 1 Limited [2015] IRLR 577 applied and		**[2017] I.C.R. 1463**	

Renfrewshire Council v Educational Institute of Scotland [2013] IRLR 76 considered. The Employment Judge did not err in deciding that the Employment Tribunal had jurisdiction over the section 189 claim. Whilst the Employment Judge may have erred in considering that the employees were peripatetic rather than international commuters, the findings of fact supported the conclusion of the Employment Judge that the connection of the employment with the United Kingdom and UK employment law of those employees domiciled in the UK was sufficiently strong to give the Employment Tribunal jurisdiction, the test for international commuters, although he also observed that the key question was where the employees were based, the test applicable to peripatetic employees. Ravat v Halliburton Manufacturing and Services Ltd [2012] IRLR 315 applied.			
Federatie Nederlandse Vakvereniging v Smallsteps BV Case C-126/16, 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, and in particular Article 5(1) thereof, must be interpreted as meaning that the protection of workers guaranteed by Articles 3 and 4 of that directive applies in a situation, such as that at issue in the main proceedings, in which the transfer of an undertaking takes place following a declaration of insolvency and in the context of a 'pre-pack' where that 'pre-pack' is prepared before the declaration of insolvency and put into effect immediately after that declaration, and, in particular, a court-appointed prospective insolvency administrator investigates the possibilities for continuation of the activities of that undertaking by a third party and prepares for acts which must be carried out shortly after the insolvency to enable such continuation and, moreover, it is irrelevant in that regard that the 'pre-pack' is also aimed at maximising the proceeds of the transfer for all the creditors of the undertaking in question. Even if a pre-pack sale can be regarded as an insolvency procedure, to fall within the exclusion the procedure must be instituted with a view to liquidation of the assets of the transferor, and "a procedure aimed at ensuring the continuation of the undertaking in question does not satisfy that requirement …" The attraction of a pre-pack as part of the "rescue culture" is that it aims to avoid the alternative of liquidation, but the CJEU adds that since a pre-pack procedure "is not ultimately aimed at liquidating the undertaking, the economic and social objectives it pursues are no explanation of, or justification for, the employees of the undertaking concerned losing the rights conferred on them by **Directive 2001/23** when all or part of that undertaking is transferred …"ven if a pre-pack sale can be regarded as an insolvency procedure, to fall within the exclusion the procedure must be instituted with a view to liquidation of the assets of the transferor, and "a procedure aimed at ensuring the continuation of the undertaking in question does not satisfy	**[2017] IRLR 852 September**	**[2017] ICR 1316**	**IDS Brief 2017, 1073, 14-15**

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Piscarreta Ricardo v Portimão Urbis EM SA and others **President of Chamber M Vilaras , Judges J Malenovský , M Safjan Advocate General E Tanchev** 1. Article 1(1) of Council Directive 2001/23 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 to the effect that, where a municipal undertaking, whose sole shareholder is a municipality, is wound up by a decision of the municipality's executive body and its activities are transferred in part to the municipality to be carried on directly by it and in part to another municipal undertaking re-formed for that purpose, whose sole shareholder is also that same municipality, that situation falls within the scope of the Directive, provided that the identity of the undertaking in question is preserved after the transfer, which is a matter for the referring court to determine. 2. A person such as the applicant in the main proceedings who, because his employment contract is suspended, is not actually performing his duties, is covered by the concept of "employee" within the meaning of article 2(1)(d) of Directive 2001/23 in so far as that person is protected as an employee under the national law concerned, which is, however, a matter for the referring court to verify. Subject to that verification, in circumstances such as those at issue in the main proceedings, the rights and obligations arising from that person's employment contract must be considered to have been transferred to the transferee, in accordance with article 3(1) of the Directive. 3. The third question raised by the Tribunal Judicial da Comarca de Faro (District Court, Faro, Portugal) is inadmissible. Employee on four years' unpaid leave at time of transfer— Contract of employment suspended under national legislation but rights, obligations and safeguards maintained.		**[2017]** **I.C.R. 1451**	
Unionen v Almega Tjansteforbunden (C-336/15) (ECJ (10th Chamber)) Article 3 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 circumstances such as those in the case in the main proceedings, the transferee must, when dismissing an employee more than one year after the transfer of the undertaking, include, in the calculation of that employee's length of service, which is relevant for determining		**[2017]** **I.C.R. 909**	

the period of notice to which that employee is entitled, the length of service which that employee acquired with the transferor.			
GRAYSONS RESTAURANTS LIMITED v MISS C JONES AND OTHERS **UKEAT/0277/16** **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT) (SITTING ALONE)** **SUMMARY** **TRANSFER OF UNDERTAKINGS - Insolvency** **RIGHTS ON INSOLVENCY** Two short questions of construction arise in an employer insolvency context concerning rights of employees to arrears of pay under Part XII ERA 1996. The first is whether a claim for equal pay arrears is a claim for "arrears of pay", and in circumstances where the claim has not yet been determined, whether it gives rise to a debt to which the employee is entitled on the "appropriate date". The second is whether liability for only that debt does not transfer from the insolvent employer (or transferor) to the transferee under Regulation 8 TUPE Regulations 2006, or whether the whole liability for past equal pay arrears is extinguished so far as the transferee is concerned. The Employment Judge concluded that: (i) equal pay arrears are not a debt payable at the time of transfer (or on the appropriate date) where the equal pay claims have not been determined and quantified. The debt will only be due if the equal pay claims succeed and not before. (ii) If wrong about that, any liability in excess of the eight week sum guaranteed by the statutory scheme in Part XII, transfers to the transferee and is not extinguished. The appeal succeeded in part: (i) equal pay arrears can be 'arrears of pay' within s.184(1) ERA, and therefore a debt within s.182 ERA. (ii) The Employment Judge was in error in concluding that arrears of pay arising from an equal pay claim that is as yet undetermined cannot be a claim for 'arrears of pay' within s.184(1) ERA. (iii) There is a presumption that equality clauses operated in the Claimants' contracts since their work has been rated as equivalent to their comparators. If that presumption is not rebutted by genuine material factor defences the Claimants had a legal entitlement to be paid in accordance with the equality clauses for work they performed before the appropriate date. To the extent that they were not so paid, they were entitled to arrears of pay on the appropriate date. They are in no different position to suppliers of goods who were unpaid on the appropriate date, or employees who did not receive pay due under implied or disputed oral agreements for work done before the appropriate date.			

(iv) The wider point relied on by the Respondent failed. Only liabilities for up to eight weeks of arrears of equal pay do not transfer to the transferee if they constitute sums payable under Part XII ERA by the Secretary of State because the necessary conditions in ss.182 and 184 ERA are established. To the extent that the liabilities exceed the statutory limits in Part XII ERA, liability transfers to the transferee.			
XEROX BUSINESS SERVICES PHILIPPINES INC LTD v MR J ZEB **UKEAT/0121/16/DM** **HIS HONOUR JUDGE DAVID RICHARDSON (SITTING ALONE)** **SUMMARY** **TRANSFER OF UNDERTAKINGS - Varying terms of employment** **TRANSFER OF UNDERTAKINGS - Dismissal/automatically unfair dismissal** **REDUNDANCY - Definition** Within the Xerox group of companies the work of a Finance Accounting Team was transferred from a UK company in Wakefield to a Philippines company and then taken offshore to Manila. It was agreed that there was a **TUPE** transfer. The Claimant stated that he wished to relocate to the Philippines on UK terms and conditions. The Respondent dismissed him for redundancy, stating that he was employed to work in Wakefield and that it was prepared to transfer him only on local terms and conditions. The Employment Judge found that there was a variation of his contract of employment by which he was entitled to work in the Philippines on UK terms and conditions; and that he was not redundant. Appeal allowed. On the Employment Judge's own findings there had been no variation of the contract; and her reasons for finding that the Claimant was not redundant had failed to apply the statutory wording in section 139(1)(b)(ii) of the **Employment Rights Act 1996**. Comments also on the importance of addressing regulation 7 of **TUPE 2006** in a case of this kind.			
TRADE UNION MATTERS			
SERCO LTD V DAHOU **[2016] EWCA Civ 832** **CA - Laws, Longmore and Richards LJJ** It is plain that both the purpose of an employer's act or omission (ss.146 and 148) and the reason for dismissal of an employee (s.152) consist in the factors operating on the mind of the relevant decision-maker. Both under s.146 and s.152 it is for the employee to raise a prima facie case. In the dismissal case it is perhaps more accurate to say that it is for the employee to show "only that there is an issue warranting investigation and capable of establishing the prohibited reason". If the prima facie case is	**[2017] IRLR 81, January**		

made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore to prove what were the factors operating on the mind of the decision-maker. The burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment which requires to be explained. The EAT had not erroneously equated the burden of proof requirement in the detriment case with that in the dismissal case. Both had involved the establishment of a prima facie case, or at least the articulation of issues requiring explanation, and then the need for the employer to prove his purpose or reason for acting. The EAT had been right to conclude that the tribunal had not grappled with Serco's case because it had not confronted relevant matters. The matter would be remitted to a differently constituted tribunal.			
British Airline Pilots Association v Jet2.com Ltd **[2017] EWCA Civ 20** **Lord Justice Mcfarlane, Lord Justice Underhill and Lord Justice Briggs** Jet2.com Ltd was a low-cost passenger airline. It had been required by the Central Arbitration Committee ("CAC"), in accordance with the statutory recognition procedures and against its will, to recognise the British Airline Pilots Association ("BALPA") to conduct collective bargaining for the pilots employed by it pursuant to the scheme for compulsory recognition contained in **Schedule A1** to the Trade Union and Labour Relations (Consolidation) Act 1992. The collective bargaining in respect of which recognition was made was defined in para. 3 of Schedule A1, and included at para. 3(3), as the default position, negotiations relating to "pay, hours and holidays". Shortly before BALPA's compelled recognition, Jet2 promulgated a document called the "Rostering & Crew Policy" ("RCP"), the declared purpose of which was to document what were the basis and terms of the operation and management of the rostering and crewing of flight deck crew workers that had been in place for many years, together with improvements that had recently been put in place. BALPA commenced proceedings in the High Court (**[2015] IRLR 543**) seeking a declaration as to the meaning of "pay, hours and holidays". The Court of Appeal held that the starting-point had to be the language of para.3(3) itself. There was nothing in the phrase "negotiations relating to pay, hours and holidays" to suggest that it covered only proposals which if agreed would give rise to individual contractual rights. It did not matter whether the proposals in the Framework would, if accepted, give rise to contractual rights enjoyed by individual pilots, as Jet2 was obliged to negotiate about them whether they would do so or not, so long as they related to pay, hours or holiday. Following that approach, for the most part, the contested items within the Framework did relate to pay, hours or holiday, and were properly within the scope of collective bargaining negotiations.	**[2017] IRLR 233, March**	**[2017] ICR 457**	**IDS Issue 1064 – March 2017**
Dunkley and ors v Kostal UK Ltd **Sheffield Employment Tribunal.** An employment tribunal holds that an employer's attempt to bypass a recognised trade union by contacting individual employees directly to offer them a package of revised terms and			**IDS Issue 1065 – March 2017**

conditions amounted to an unlawful inducement to cease collective bargaining contrary to the Trade Union and Labour Relations (Consolidation) Act 1992.			
Unite the Union v United Kingdom **App. no. 65397/13** **ECHR** Although Unite argued that the abolition of the AWB (Agricultural Wages Board) amounted to an interference with its right to engage in collective bargaining, an essential element of the freedom of association accorded to trade unions, the Court was not persuaded by that argument. The UK did not restrict employers and trade unions from entering into voluntary collective agreements. Legislation, in the form of s.179 of the 1992 Act, was in place to govern the enforceability of collective agreements. Even where the conditions in s.179 were not satisfied, a collective agreement might nonetheless be enforceable in respect of a particular individual where he succeeded in showing that its terms had become incorporated into his employment contract. Thus, Unite was not prevented from exercising its right to engage in collective bargaining and the facts of the case were far removed from those at issue in *Demir* and *Baykara*. Even accepting Unite's submission that voluntary collective bargaining in the agricultural sector was virtually non-existent and impractical, that was not sufficient to lead to the conclusion that a mandatory mechanism should have been recognised as a positive obligation.	**[2017] IRLR 438, May**		
MR K HENDERSON v GMB **Appeal No. UKEAT/0294/16/LA** **THE HONOURABLE MR JUSTICE KERR** **SUMMARY** **CERTIFICATION OFFICER** The Certification Officer had not determined the true complaint made by the Appellant. The Certification Officer had wrongly focused on identifying the correct construction of a particular rule of the Respondent Trade Union, which the Union had misapplied in such a way as to repress unlawfully the Appellant's attempts to become a candidate for the office of General Secretary and Treasurer of the Union. The thrust of the Appellant's complaint was not about what was the correct interpretation of the rule. That was common ground. It was that the Union had misapplied the rule and used its wrong interpretation of it as a vehicle for repressing the Appellant's campaign and disciplining officials of his branch who proposed to support his nomination as a candidate. The Appellant was entitled to a finding that the Union had thereby acted in plain breach of section 47 of the **Trade Union and Labour Relations (Consolidation) Act 1992**. An amendment to the grounds of complaint had not been necessary. If, however, the amendment were regarded as having			

been necessary, the Certification Officer had been wrong not to allow a late amendment that would have made the wording of the complaint reflect the true nature of the Appellant's case. The amendment, though late, did not introduce any new facts or rely on any new cause of action of which the Union did not have prior notice. The Certification Officer's alternative reasoning and conclusion that the Appellant's case was "disingenuous" was perverse and could not stand. The Appellant was as much entitled to the protection of sections 47 and 108A of the **1992 Act** as any other member of the Union and was not to be denied a remedy merely because he had failed to contact other branches before complaining to the Union about its rules; nor because he could be motivated by hostility to the Union's leadership or a desire to cause difficulties for it. The Appellant's application to the Certification Officer had not been an abuse of process. The Appeal Tribunal would make a declaration of breach of section 47 and section 108A of the **1992 Act**, but declined to order the election to be re-run, as the election results had been announced over 15 months before the hearing; the Appellant's chances of becoming a candidate would have been slender even without the Union's unlawful interference with his campaign.			
Lidl Ltd v Central Arbitration Committee and another **[2017] EWCA Civ 328** **LORD JUSTICE LONGMORE** **and** **LORD JUSTICE UNDERHILL** Lidl and GMB were unable to agree whether the proposed bargaining unit was "appropriate", so under para. 19(2) it fell to the CAC to determine whether it was appropriate. On appeal to the CA it was held that Paragraph 19B(3)(c) of Schedule A1 to the 1992 Act does not apply where there is a single proposed bargaining unit and no risk of proliferation. Sub-paragraph (3) included at (c) "the desirability of avoiding small fragmented bargaining units within an undertaking". The CAC decided that the proposed unit was appropriate. The determinative question under paras. 19(2) and 19B is whether the proposed bargaining unit is "appropriate". That term is not defined anywhere, but in considering the statutory question the CAC is obliged to take into account the matters specified in para. 19B(2). The CAC had been right to proceed on the basis that para. 19B(3)(c) did not apply where there was a single bargaining unit and no risk of proliferation. Lidl's concerns could still be considered under the more general heading of effective management, or indeed as the considerations itemised in para. 19B were non exhaustive, their appropriateness more generally. The kind of fragmentation of which Lidl complained was not, however, one which was to be treated as axiomatically undesirable. The CAC had been entitled to reach the decision it had.	**[2017] IRLR 646, July**	**[2017] I.C.R. 1145**	**IDS Brief 1073**

Pharmacists' Defence Association Union v Boots Management Services Ltd and another **[2017] EWCA Civ 66** **THE PRESIDENT OF THE FAMILY DIVISION** **(Sir James Munby)** **LORD JUSTICE UNDERHILL** **and** **LORD JUSTICE SALES** An independent trade union's inability to seek compulsory recognition by an employer because of the employer's existing agreement with a non-independent trade union did not involve a breach of the union's freedom of association under Article 11 of the European Convention on Human Rights.	**[2017] IRLR 355, April**		**IDS Issue 1066 – April 2017**
Smith v United Kingdom **Application no.** 54357/15 **The European Court of Human Rights** The Claimant was was denied statutory protection under British law in respect of trade union membership rights because he was not an employee of the end user. The law was extended in 2004 to cover worker status, but this was not made retrospective and did not assist Mr Smith, a trade union activist who left the construction industry in 2001 after being unable to find work. The Claimant asserted that the collection and use of his confidential data by way of a blacklist contravened the right to private life under Article 8, and that there was a violation of his trade union rights contrary to Article 11. The European Court of Human Rights accepted that the retention of personal data interfered with the applicant's Article 8 rights. However, held that he could not claim to be a "victim" of a violation because "the legal framework provided a combination of domestic remedies which proved to be effective in the applicant's case, resulting in an acknowledgment of the violation of the applicant's rights, and giving appropriate redress", including that he had settled a High Court claim against a group of construction companies on being offered £50,000 compensation.	**[2017] IRLR 771** August		**IDS Brief 1073**
Public and Commercial Services Union v Minister for the Cabinet Office **[2017] EWHC 1787 (Admin)** **LORD JUSTICE SALES** **MRS JUSTICE WHIPPLE** The Superannuation Act 1972 as amended requires the Minister to consult with trade union representatives and defines the duty to consult as "a duty to consult with a view to reaching agreement with the persons consulted." There was a judicial review application by PCSU challenging the decision of the Minister to make changes to the Civil Service Compensation	**[2017] IRLR 967 Nov**		**IDS Brief 2017, 1078, 18-19**

Scheme (CSCS) without adequately **consulting** the trade union. The Government excluded PCSU from a second round of consultations because the union refused to accept in principle the Government's broad aims of achieving significant savings. Lord Justice Sales stated that "this is not an obligation of result, since no agreement may be forthcoming at the end of such consultation. However, it is an obligation to consult in good faith and in a spirit of willingness to consider counter-proposals put forward by any representative trade union, such as the PCSU, with a view to seeing if, after giving them consideration, they might be accommodated in or alongside any proposed changes to the CSCS which the Minister proposes to make...the natural meaning of the word 'agreement' in this context is, actual agreement on any provision in a scheme which would have the effect of reducing the amount of a compensation benefit." On this interpretation by cutting the PCSU out of the second round of discussions the Minister acted in breach of the obligation of consultation with them in that he did not consult with the union on the terms of the scheme which he ultimately made. "The Minister was not entitled to impose additional entry conditions above and beyond those stipulated in the 1972 Act for participation in that consultation, in the form of the pre-commitments he required the unions to make."			
UNITE THE UNION V MILLS **UKEAT/0148/16/LA** **THE HONOURABLE MRS JUSTICE SLADE DBE** **PROFESSOR K C MOHANTY JP** **MR M WORTHINGTON** **SUMMARY** **CERTIFICATION OFFICER** **HUMAN RIGHTS** The Certification Officer did not err in holding that Unite had failed to comply with **Trade Union and Labour Relations (Consolidation) Act 1992** ('TULRCA') section 30(1) by not giving her access to accounting records showing 'stand down' payments to each trade union official of her branch which together totalled a substantial monthly amount. Under sections 28 and 29 the Union was obliged to keep available for inspection accounting records of its transactions necessary to give a true and fair view of the state of affairs of the trade union and to explain its transactions. On the facts the Certification Officer did not err in holding that the cumulative amounts in the accounts relating to 'stand down' payments which had been made available did not comply with this obligation. Previous decisions of the Certification Officer in **Mortimer v Amicus** (D/1/03) and **Foster v Musicians Union** (D/13-17/03) considered. Nor did the Certification Officer err in refusing to redact the names of the officials in receipt of such payments. Article 8 **ECHR** considered. Further, on the cross-appeal, the Certification Officer did not err		**[2017] I.C.R. 693**	

in refusing the application by the union member for access to bank statements when she had been given access to the accounting records regarding sundries to which they relate. Appeal and cross-appeal dismissed.			

UNFAIR DISMISSAL

PHOENIX HOUSE LIMITED V STOCKMAN **UKEAT/0264/15/DM** **Employment Appeal Tribunal** **THE HONOURABLE MR JUSTICE MITTING** **(SITTING ALONE)** **SUMMARY** **UNFAIR DISMISSAL – Reason for dismissal including substantial other reason** Whether Employment Tribunal entitled to find unfair dismissal when reason for dismissal was some other substantial reason such as to justify dismissal – a breakdown in working relationships – without giving employee the opportunity to show that she could work with colleagues about whom she had made complaint – yes, and whether section 207A **Employment Rights Act 1996** applied to dismissal on that ground; - no.	**[2016] IRLR 848, November**	**[2017] I.C.R. 84**	**[2016] IDS Brief 1050, August**
United Lincolnshire Hospitals NHS Foundation Trust v Farren **UKEAT/0198/16/LA** **HER HONOUR JUDGE EADY QC** **MRS M V McARTHUR BA FCIPD** **MR H SINGH** **SUMMARY** **UNFAIR DISMISSAL - Reinstatement/re-engagement** *Unfair dismissal - remedy - re-engagement - section 116* ***Employment Rights Act 1996*** The Claimant was a long-serving Staff Nurse employed by the Respondent in A&E. During the course of a particularly stressful overnight shift, she had administered medication to four patients without prior prescription by a doctor and failed to properly complete records. She was dismissed for her conduct in these respects and because the Respondent considered she had failed to be honest in her initial response to the investigation when she said her record keeping had been satisfactory. On the Claimant's complaints of unfair and wrongful dismissal, the ET found she had been unfairly but not wrongfully dismissed; specifically, she had administered medication without prescription and failed in her		**[2017] I.C.R. 513**	**IDS Issue 1065 – Marc 2017**

record keeping but the Respondent had not shown reasonable grounds for its conclusion as to her dishonesty in that respect. At the subsequent Remedy Hearing, the Claimant sought an order for reinstatement or re-engagement, which the Respondent resisted, contending: (1) it could no longer trust the Claimant to adhere to its Policy for Medicines Management, which raised patient protection issues and questions of public trust; and (2) more generally, it could no longer have trust and confidence in the Claimant because her response to the disciplinary case and her evidence before the ET had been dishonest. The ET accepted there was an issue in respect of the Respondent's Policy: if the Claimant was employed in its A&E department, the Respondent had a legitimate concern as to whether it could trust her to adhere to the Policy if faced with similarly stressful situations (as might be expected in that department). It considered, however, that an order for re-engagement into another department was practicable. It did not accept that the Respondent had shown that the Claimant had been dishonest; the ET considered she was capable of being trusted in another nursing role. In determining the amount of any back-pay due to the Claimant, however, the ET accepted that she had contributed to her dismissal such that there should be a reduction of one third in any sums awarded. The Respondent appealed. *Held:* allowing the appeal in part; the question of re-engagement remitted to the ET. The statutory test laid down by section 116 **ERA** was one of practicability. The ET was required to reach a provisional view on this question (**McBride v Scottish Police Authority** [2016] IRLR 633 SC); practicability was something more than what might simply be possible, the order had to be "*capable of being carried into effect with success*" (**Coleman v Magnet Joinery Ltd** [1975] ICR 46 CA). The answer to that question was not determined simply by the fact that the Claimant had committed the act of misconduct in question, by the ET's rejection of the practicability of a reinstatement order or by its finding on contribution. The point was, however, put in issue by the Respondent's contention that it had lost trust and confidence in the Claimant - a matter that could plainly be relevant to practicability - because she (1) had committed the act of misconduct, and (2) had not been honest about that, either in the internal process or before the ET. To ask (as the ET had) whether the Respondent had established that the Claimant was in fact dishonest and to then apply its own conclusion to			

her honesty and trustworthiness was not the correct test. The ET had to ask (applying **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680 EAT and **United Distillers & Vintners Ltd v Brown** [2000] UKEAT/1471/99) whether *this* employer genuinely and rationally believed that the Claimant had been dishonest. The ET having erred in its approach to the question of practicability, the appeal would be allowed on this basis and the Order set aside. Accepting, however, that there might be more than one answer to the question of practicability (applying the correct approach) in this case, and that the ET was best placed to carry out the necessary assessment, the matter would be remitted to the same ET.			
Stratford v Auto Trail VR Ltd **EAT -** UKEAT/0116/16/JOJ **HIS HONOUR JUDGE SHANKS** **MR P M HUNTER** **MR B M WARMAN** **SUMMARY** **UNFAIR DISMISSAL - Reasonableness of dismissal** An expired warning can be taken into account as part of the overall circumstances under section 98(4) **Employment Rights Act 1996** when the ET is considering whether a dismissal was fair or unfair. The facts of the previous misconduct, the fact that a warning was given and the fact that it had expired, were all relevant matters. See: **Airbus UK Ltd v Webb [2008] IRLR 309**.			**IDS Issue 1063 – February 20**
MR C BANDARA v BRITISH BROADCASTING CORPORATION **Appeal No. UKEAT/0335/15/JOJ** **HIS HONOUR JUDGE DAVID RICHARDSON** **(SITTING ALONE)** **SUMMARY** **UNFAIR DISMISSAL - Reasonableness of dismissal** The Employment Tribunal did not err in law in concluding that the final written warning issued to the Claimant by the Respondent was "manifestly inappropriate": cross-appeal dismissed. The Employment Tribunal, however, erred in its application of section 98(4) of the **Employment Rights Act 1996**: rather than asking whether it was reasonable to dismiss on the footing that the warning given had been an ordinary written warning, it should have focussed upon the actual reasoning of the Respondent and asked whether, applying the objective standard of the reasonable employer, it acted reasonably in			**IDS Issue 1063 – February 20**

dismissing the Claimant. This would depend on how it took account of the final written warning. **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374 CA, **Wincanton Group plc v Stone** [2013] IRLR 178 EAT, **Way v Spectrum Property Care Ltd** [2015] IRLR 657 CA considered and applied. Appeal allowed.			
RABESS V LONDON FIRE AND EMERGENCY PLANNING AUTHORITY **[2016] EWCA Civ 1017** **Lord Justice Laws, Lord Justice Lindblom and Lady Justice King** The effective date of termination is a question of fact; it did not in the circumstances of the case shift by reason of anything that occurred on the internal appeal The case fell squarely within s.97(1)(b). Up to the date of his appeal Mr Rabess could only have understood that he had been dismissed on 24 August 2012. He had three months from that date to bring his claim in the tribunal. There was no suggestion that it was not reasonably practicable for him to do so. He brought his claim shortly before the internal appeal; nothing that occurred at the hearing of the internal appeal drove the date on which he presented his claim to the tribunal. Right up to when he presented the claim, he could only have thought that he had been dismissed on 24 August. That he was late in bringing the claim had nothing to do with anything that happened at the hearing. No unjust disadvantage was occasioned to Mr Rabess by the conclusion that his EDT was 24 August. If an EDT was changed to a later date by force of something that happened at an internal appeal then the expiry of the limitation period was likewise postponed, but that did not demonstrate that in a case where that did not occur the employee suffered any unfairness. Given the result of the internal appeal, 24 August remained the EDT for the purposes of the tribunal claim.	**[2017] IRLR 147, February**		
Ishaq v Royal Mail Group Ltd **UKEAT/0156/16/RN** **HIS HONOUR JUDGE SHANKS** **(SITTING ALONE)** **SUMMARY** **UNFAIR DISMISSAL - Constructive dismissal** The Claimant resigned by letter which relied on numerous reasons for his resignation including one which the Employment Tribunal found to constitute a fundamental and subsisting breach of contract. The Respondent contended	**[2017] IRLR 208, March 2017**		

that the real reason for his resignation was to avoid disciplinary proceedings in relation to a different matter and was not in response to the fundamental breach that he had established. The Employment Tribunal agreed with that contention and found that in those circumstances he could not claim constructive dismissal. In the light of the way the case was put by the Respondent and on a proper reading of the Reasons, it was clear that the Employment Tribunal were not, as the Claimant maintained on appeal, setting up a false dichotomy between two different reasons for resigning (i.e. avoiding the disciplinary action and the fundamental breach of contract) but were finding, permissibly, that the true reason was to avoid disciplinary action and that the fundamental breach in fact had nothing to do with the resignation.			
Portsmouth Hospitals NHS Trust v Corbin **EAT. UKEAT/0164/16/LA** **HER HONOUR JUDGE EADY QC** An employment tribunal had not substituted its own view for that of the employer when concluding that the dismissal of an NHS employee for breach of confidentiality fell outside the band of reasonable responses. The employer's failure to take into account mitigating circumstances and the level of seriousness of the breach meant that it did not consider the possibility of a sanction other than dismissal. **SUMMARY** **UNFAIR DISMISSAL - Reasonableness of dismissal** **CONTRACT OF EMPLOYMENT - Wrongful dismissal** **UNFAIR DISMISSAL - Contributory fault** **PRACTICE AND PROCEDURE - Review** **PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke** *Unfair dismissal - fairness of dismissal (**Employment Rights Act 1996** ("ERA") section 98(4)) and band of reasonable responses test - whether the ET was guilty of a substitution mindset.* *Wrongful dismissal - whether the ET adopted the correct approach and reached a permissible conclusion, taking into account all relevant material.* *Contributory fault - sections 122(2) and 123(6) **ERA** - whether the ET adopted the correct approach, taking into account all relevant material and/or whether it gave adequate reasons to explain its conclusion.* *Reconsideration - whether the ET erred (1) in extending time for the reconsideration application; (2) in failing to reconsider its approach on the evidence before it (in particular given the Claimant's admissions) and/or as to the adequacy of its reasons.*			**IDS Issue 1065 – Marc 2017**

Adequacy of reasons The Claimant was a long-serving senior Radiographer who, when preparing her defence to earlier disciplinary proceedings, had utilised confidential patient information. The Respondent considered this was conduct in breach of its policies albeit the disciplinary investigation acknowledged that those policies did not expressly address the position of employees facing disciplinary proceedings; the decision was taken that the Claimant should be summarily dismissed by reason of her gross misconduct; a decision upheld on appeal. The ET found the decision that the Claimant should be dismissed had been made with a closed mind: the relevant manager had considered a breach of the policy in respect of confidential patient information justified summary dismissal and did not consider the Claimant had not acted wilfully and thus was not guilty of a repudiatory breach of contract such as to warrant summary dismissal. In any event, the Claimant had not been culpable so as to justify any reduction for contributory fault. The Respondent applied for the ET to reconsider its Judgment out of time, for reasons set out in its application letter. Referring to that letter, the ET extended time for the application but did not consider any proper basis had been demonstrated for it to reconsider its earlier Judgment. The Respondent appealed against both Judgments. The Claimant cross-appealed against the ET's Decision to extend time for the reconsideration application. Held: *dismissing the appeal against the ET's finding of liability for unfair dismissal but otherwise allowing the appeals and dismissing the cross-appeal.* Given the ET's permissible findings of fact (against which there was no challenge) as to the way in which the Respondent had reached the decision to dismiss, it had been entitled to conclude that the Respondent had adopted an unreasonably constrained approach, which failed to allow for lesser sanctions and ignored mitigating factors identified as potentially relevant in the investigation report. The ET had not been guilty of falling into the substitution mindset but had properly carried out its task in applying the band of reasonable responses test. The appeal against the liability finding on the unfair dismissal claim was therefore dismissed. The ET's reasoning on the wrongful dismissal claim and on the question of contributory fault did not, however, demonstrate it had applied the correct approach, considering all the relevant material before it; alternatively failed to adequately explain how the ET			

had approached its task and reached its conclusions. The Reconsideration Judgment did not rectify these failings and was thus also defective. The Respondent's appeals in these respects would be allowed. Even if the cross-appeal raised a matter that the Claimant was entitled to take on appeal, the ET's reasoning expressly referenced the Respondent's detailed application for an extension of time and - adopting a proportionate approach (as the ET was entitled to do) - was adequate to the task. The cross-appeal was duly dismissed.			
Metrolink RATP Dev Ltd v Morris **EAT, 15.12.16 (0113/16)** **Before** **THE HONOURABLE MRS JUSTICE SLADE DBE** The EAT holds that an employment judge had erred in holding that a trade union representative's dismissal was automatically unfair on grounds related to union activities. **SUMMARY** **UNFAIR DISMISSAL - Automatically unfair reasons** **UNFAIR DISMISSAL - Reason for dismissal including substantial other reason** The Employment Judge erred in holding that dismissal for storing and sharing confidential information for trade union purposes enjoyed the protection of **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") section 152. Finding of "automatic" unfair dismissal set aside. The finding of "ordinary" unfair dismissal under **Employment Rights Act 1996** section 98 was based on the finding under **TULRCA** section 152 also set aside. Claims remitted to an Employment Tribunal for rehearing.			**IDS Issue 1066 – April 2017**
Arnold Clark Automobiles Ltd v Spoor **UKEAT/0170/16**/DA **THE HONOURABLE MR JUSTICE SUPPERSTONE** **MR P M HUNTER** **MR T STANWORTH** **SUMMARY** **UNFAIR DISMISSAL - Reasonableness of dismissal** The Employment Tribunal found the Respondent's complaints of unfair dismissal and breach of contract to be well founded. The Appellant's primary ground of appeal that the Employment Tribunal substituted its own view for that of the Appellant failed, as did the contention that the Employment Tribunal reached a perverse decision. The Employment Tribunal	**[2017] IRLR 500, June**		

misapplied the decision in **Ramphal v Department for Transport** [2015] IRLR 985 and it is not clear from the Decision whether the Employment Tribunal accepted that physical violence amounted to gross misconduct for the purposes of the Appellant's disciplinary procedure. The Employment Appeal Tribunal dismissed the unfair dismissal appeal: physical violence amounted to gross misconduct under the Appellant's disciplinary procedures, but the Appellant failed to have regard to all the surrounding circumstances and the Claimant's exemplary disciplinary record over 42 years. The appeal against the breach of contract claim was also dismissed.			
O'Brien v Bolton St Catherine's Academy **[2017] EWCA Civ 145** A finding that the dismissal of an employee disabled by long term sickness was disproportionate for the purposes of the Equality Act 2010 s.15 meant also that the dismissal was not reasonable for the purposes of the Employment Rights Act 1996 s.98(4). The language in which the two tests was expressed was different, but there was no reason to judge the dismissal by one standard for the purposes of unfair dismissal, and by a different standard for the purpose of discrimination law. The two tests, whilst having different burdens of proof, should not lead to two different results. A panel decided that the claimant should be dismissed on the basis of factors including: the length of time off work to date with no substantive progress of condition and the lack of a prognosis that indicated a return to work likely in the near term. The claimant exercised her right of appeal. At the start of the appeal hearing, she presented two documents. The first was a standard-form statement signed by her GP that she was "fit for work". The second was a letter from an associate psychologist recommending a course of treatment and saying that the claimant could be expected to return to pre-trauma functioning within 10–12 sessions. The claimant told the appeal panel that she had undergone the appropriate treatment and was fit to return to work full-time. However, the panel was not satisfied that the fresh evidence really established that she was fit to return to work and dismissed her appeal. In the Court of Appeal it was held by a majority that by the time of the appeal hearing there was evidence, albeit not unproblematic, that the claimant was fit to return to work at once; the present appeal turns on whether it was open to the tribunal to reach the conclusion that it was unjustifiable for the appeal panel to confirm the dismissal of the claimant (at that point)	**[2017] IRLR 547, June**	**[2017] ICR 737**	**IDS Brief 107**

in the light of that evidence. The tribunal had not erred in concluding, in effect, that the dismissal, more particularly the dismissal of her appeal had been, on the basis of the material then available, disproportionate. It would be hard to say that the tribunal was perverse in wanting more evidence about the school's ability to put up with the claimant's absence for a short further period. The reason why the tribunal found that it might be necessary to wait "a little longer" was only so that the school could obtain its own evidence, based on a further examination by occupational health, which would have confirmed or otherwise what the claimant was saying and the GP's "fit note". It was not perverse of the tribunal to conclude that it was disproportionate of the school to pull the plug at that point rather than take that further step.The basic point being made by the tribunal was that its finding that the dismissal was disproportionate for the purpose of s.15 EA meant also that it was not reasonable for the purpose of s.98(4) ERA; in the circumstances of the case that was entirely legitimate. The language in which the two tests is expressed is different and in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act.			
ELMORE V THE GOVERNORS OF DARLAND HIGH SCHOOL AND ANOTHER **UKEAT/0209/16** **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)** **(SITTING ALONE)** **SUMMARY** **UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal** Despite the absence of a reasoned appeal decision or evidence from a member of the appeal panel, the Employment Tribunal was entitled to infer that the appeal panel upheld the capability dismissal for the same reasons as those relied on by the capability panel			

itself. There was no error of law in the Employment Tribunal's approach which was amply open on the facts and in the circumstances of this case. The appeal was therefore dismissed.			
ADESHINA V ST GEORGE'S UNIVERSITY HOSPITALS NHS FOUNDATION TRUST AND OTHERS **[2017] EWCA Civ 257** **LORD JUSTICE LONGMORE** **LORD JUSTICE BEATSON** **and** **LORD JUSTICE UNDERHILL** An employment tribunal was entitled to find that an employee's poor attitude to organisational change had, on the facts, amounted to gross misconduct and a repudiatory breach of contract. Her claims for unfair and wrongful dismissal accordingly failed. In relation to race discrimination, whilst there had been flaws in the original dismissal decision (cured on an internal appeal), there was nothing exceptional about those flaws and, accordingly, they did not amount to a prima facie case.			
BRIGHTON & SUSSEX UNIVERSITY HOSPITALS NHS TRUST v (1) J AKINWUNMI (2) J NORRIS & 4 ORS UKEAT/0345/16/BA **THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE** **(SITTING ALONE** **SUMMARY** **PRACTICE AND PROCEDURE - Perversity** **PRACTICE AND PROCEDURE - Contribution** **UNFAIR DISMISSAL** The Employment Appeal Tribunal ("the EAT") dismissed an appeal from a Decision of the Employment Tribunal ("the ET") upholding the Claimant's claim of unfair dismissal, but dismissing his claims of whistleblowing detriment and victimisation. The EAT held that the ET had been entitled, having regard to the complex background of the case, to hold that the Claimant's dismissal for being absent without authority for 20 months was unfair. Neither that decision, nor the decision that the Claimant had not caused or contributed to his dismissal, was perverse. The Claimant's reason for the absence was that the			

appellant had failed to engage with him in order to bring about a return to work. He contended that his dismissal was unfair as it had not taken account of the reason why he had not returned to work, which was that his health and safety and potentially that of his patients would be endangered if he returned without the appellant addressing the allegations made against him by colleagues and generally facilitating his return to work. The tribunal's reasoning on contribution was a logical consequence of its view that the Claimant's position was reasonable. If his stance was reasonable it could not be culpable or blameworthy, which was a necessary condition for a finding of contributory fault, Nelson v BBC (No.2) [1980] I.C.R. 110.			
JP MORGAN SECURITIES PLC V KTORZA **UKEAT/0311/16/JOJ** **HIS HONOUR JUDGE DAVID RICHARDSON** **(SITTING ALONE)** **SUMMARY** **UNFAIR DISMISSAL - Reason for dismissal including substantial other reason** **UNFAIR DISMISSAL - Reasonableness of dismissal** The Employment Judge erred in law in holding that to qualify as conduct within the meaning of section 98(2)(b) of the **Employment Rights Act 1996** the conduct, in the view of the Tribunal, has to be culpable. The Employment Judge to a significant extent started from his own findings of fact and opinions, whereas the task under section 98(4) was to start with the Respondent's reasons for dismissal and apply an objective test of reasonableness to those reasons. Appeal allowed. Case remitted for re-hearing.			
MR M COOPER v NATIONAL CRIME AGENCY **UKEAT/0016/17/LA.** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** **UNFAIR DISMISSAL - Reasonableness of dismissal** *Unfair dismissal - reasonableness of dismissal - section 98(4)* ***Employment Rights Act 1996*** The Claimant was dismissed for a reason relating to his conduct arising from an incident outside work, which had led to his arrest and in respect of which he then faced criminal charges. In pursuing his complaint of unfair dismissal, he raised concerns that information regarding his arrest had been passed to the Respondent by the police - part of a practice of			

information-sharing between law enforcement agencies - when this was (he contended) in breach of the **Data Protection Act 1998**. He also complained of the Respondent's refusal to defer the internal disciplinary process pending the determination of the criminal proceedings notwithstanding the Claimant's inability (on legal advice) to participate, given that information regarding the internal process would be forwarded to the police by the Respondent as part of the same information-sharing practice. The ET dismissed the claim, finding the Respondent had been entitled to conclude that no issue arose from the sharing of information with the police - the Respondent having investigated the point further to the extent reasonably required given how it had been raised by the Claimant and the evidence being that this was in accord with normal practice. It was also satisfied that the Respondent's decision not to defer the internal process had fallen within the range of reasonable responses in the circumstances of the case. The Claimant appealed. Held: *allowing the appeal in part* Given the way in which the point had been raised with the Respondent and the steps it had then taken to investigate the Claimant's concerns, the ET had permissibly concluded that the conduct of the investigation into the issues raised regarding the sharing of information with the police had fallen within the range of reasonable responses and was not unfair. As for the decision to proceed with the internal disciplinary process, however, it was unclear whether the ET had regard to the point raised by the Claimant relating to the particular practice of information-sharing as between the Respondent and the police and as to how that might prejudice his ability to participate in the internal process when facing on-going criminal proceedings. This was a relevant factor and the ET's apparent failure to engage with it rendered its conclusion on this point unsafe; it would need to be remitted for reconsideration. "Where, as here, the internal disciplinary process takes place alongside ongoing criminal proceedings, it is common ground that there is no rule that the internal process must be delayed or postponed pending the determination of the criminal proceedings: an employer has to be permitted a broad discretion, balancing the possible prejudice to the employee of proceeding in those circumstances against the alternative unfairness that might arise from the lengthy delays that are likely to take place, see **Secretary of State for Justice v Mansfield** UKEAT/0539/09.			

VINING V LONDON BOROUGH OF WANDSWORTH **[2017] EWCA Civ 1092** **THE MASTER OF THE ROLLS** **LORD JUSTICE BEATSON** **and** **LORD JUSTICE UNDERHILL** 1. Whether Section 200 of the Employment Rights Act 1996 which excludes members of the police service from pursuing claims for unfair dismissal comports with the European Convention on Human Rights. The claimants, who were employed as park constables, were dismissed on the ground of redundancy and the EAT held that they could not bring an unfair dismissal claim. The Court of Appeal held that "it is clear that Article 8 is not engaged by the mere fact of dismissal from employment.". "there is no Strasbourg or domestic case in which it has been held that the mere length of employment, or the inevitable effect of termination of employment on relationships with work colleagues, or the distress and anxiety arising from the fact of the termination and the need to find new employment, or the relative difficulty of finding new employment according to the age of the employee at the date of dismissal are always sufficient of themselves individually or collectively to engage Article 8. Those are matters to a greater or lesser extent involved in every dismissal. They are inapposite as factors engaging Article 8 in the context of a collective redundancy, which involves no imputation of wrongful conduct on the part of the employee, carries no stigma, and would involve differential legal consequences according to the particular circumstances or sensitivities of the individual employees who have been made redundant." In this case, there were no special features capable of bringing the employees within the scope of Article 8. There is a comparable exclusion of a "person in police service" from the Employment Rights Act's definition of "worker" and "employee". 2. Whether the claimants' trade union, Unison, could bring claims for a protective award in respect of an alleged failure to consult in advance of redundancies, relying on the freedom of association provisions in Article 11 of the European Convention. A right to be consulted "falls squarely within the 'essential elements' protected by Article 11." As such, any provision of the legislation which restricted its availability to particular classes of workers had to be justified, and the Secretary of State had failed to advance any such justification for the exclusion in this case. Accordingly, there was a	**[2017] IRLR 1140** **December**		**IDS Brief 2017, 1081, 8**

breach of Article 11.			
MR D BAKER v ABELLIO LONDON LIMITED **UKEAT/0250/16** **THE HONOURABLE MRS JUSTICE SLADE DBE (SITTING ALONE)** **SUMMARY** **UNFAIR DISMISSAL - Reason for dismissal including substantial other reason** **UNFAIR DISMISSAL - Reasonableness of dismissal** **PRACTICE AND PROCEDURE - Withdrawal** The Employment Judge erred in holding that the employer was correct to consider that it was obliged by section 15 of the **Immigration, Asylum and Nationality Act 2006** to hold that it was unlawful to employ someone who, although he had the right to work and reside in the UK, did not provide the employer with documents other than a passport to prove that right. Section 15 did not apply to the Claimant as he was not subject to immigration control within the meaning of section 25. In any event, the reference in section 15(3) to seeking documents from an employee provides the employer excusal from a penalty. It does not impose an obligation on the employer to obtain these documents. The decision that the employer had established that the dismissal of the Claimant for failing to provide such documentation fell within **Employment Rights Act 1996** section 98(2)(d) was set aside. **Bouchaala v Trusthouse Forte Hotels Ltd** [1980] ICR 721 applied. The Employment Tribunal did not err in holding that dismissal because of a genuine but mistaken belief that employment of the Claimant was illegal fell with **Employment Rights Act** section 98(1)(b). **Hounslow London Borough Council v Klusova [2008] ICR 396** applied. The decision that the dismissal was fair was set aside. The Employment Judge erred in dismissing the claim for deduction from wages. The dismissal of a claim following a withdrawal is a two-stage process. A party withdraws a claim under ET Rule 51. A judicial decision is required under Rule 52 to dismiss a withdrawn claim. Refusal to do so will be rare but where, as here, the only basis for withholding pay was obviously erroneous and irrational, an Employment Judge, properly directing themselves in law, would have held that applying Rule 52(b) it was not in the interests of justice to dismiss the withdrawn claim. **Campbell v OCS Group UK Ltd** UKEAT/0188/16 applied. The issues of fairness of the dismissal and the deduction from wages claim were remitted to a differently constituted Employment Tribunal.			

VICARIOUS LIABLITY/EMPLOYER'S LIABILITY			
Bellman v Northampton Recruitment Ltd **[2016] EWHC 3104 (QB)** **HHJ Cotter QC** The Claimant was assaulted by the MD resulting in brain damage. The assault took place about 3 am after the Claimant and other guests had gone to a hotel following the Christmas party. In proceedings against the company it was held that an employer is not liable for an assault by his employee merely because it occurred during working hours and not axiomatically free from liability because it occurred outside normal working hours and/or the workplace. There are two questions to be considered. First, looking at matters in the round or broadly, what were the functions or what was the field of activities entrusted by the employer to the relevant employee? Secondly, was there sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice? The test was inevitably imprecise given the nature of the issues. Whilst consideration of the time and place at which the relevant act occurred will always be relevant, it may not be conclusive. There must be some greater connection than the mere opportunity to commit the act provided by being in a certain place at a certain time.	**[2017] IRLR 124, February**	**[2017] ICR 543**	**IDS Issue 1064 – Marc 2017**
VARIOUS CLAIMANTS V BARCLAYS BANK PLC **[2017] EWHC 1929 (QB)** **THE HON. MRS JUSTICE NICOLA DAVIES DBE** Sexual assaults were alleged to have been committed by an independent physician in the course of carrying out medical assessments on behalf of the employer in respect of employees and prospective employees. The doctor was an independent contractor but this was held not to be conclusive. Mrs Justice Nicola Davies held that in accordance with a "modern theory" of vicarious liability, "a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question." Whether or not vicarious	**[2017] IRLR 1103 December**		

liability exists in a particular case involves a two-stage test: (i) is the relevant relationship one of employment or 'akin to employment'? (ii) if so, was the tort sufficiently closely connected with the employment or quasi employment? Both criteria were met.			
VICTIMISATION			
Greater Manchester Police v Bailey **[2017] EWCA Civ 425** **LADY JUSTICE GLOSTER** **(Vice President of the Court of Appeal (Civil Division))** **LORD JUSTICE UNDERHILL** **and** **SIR PATRICK ELIAS**			
WHISTLEBLOWING			
Eiger Securities LLP v Korshunova **UKEAT/0149/16/DM** **THE HONOURABLE MRS JUSTICE SLADE DBE** **(SITTING ALONE)** **SUMMARY** **VICTIMISATION DISCRIMINATION - Protected disclosure** **VICTIMISATION DISCRIMINATION - Detriment** **VICTIMISATION DISCRIMINATION - Dismissal** (1) whether the finding of the tribunal that the claimant said to the managing director "It is wrong for you to log in under my name when I am not in the office and trade under my name without making it clear that it is not me who is making the trade and identifying that it is you. Yes, and my clients do not like that you talk to them pretending it is me when I am away for lunch" did not disclose information but was an allegation of wrongdoing; (2) that the tribunal had failed to engage with the question of whether she reasonably believed that Eiger had been in breach of a legal obligation, which was a requirement for it to be a qualified disclosure under s.43B; (3) that the tribunal had failed to make findings of fact to support its conclusion that Eiger had removed clients from her and thereby subjected her to a detriment because she had made a protected disclosure; and (4) that the tribunal had erred by wrongly applying the test for determining whether a worker had been subjected to a detriment on the ground that they had made a protected disclosure to the question of whether the reason for the dismissal was that the claimant had made a protected disclosure. The Employment Tribunal erred in failing to identify	**[2017] IRLR 115, February**	**[2017] ICR 561**	

any legal obligation, as opposed to guidance, of which the Claimant believed the Respondent to be in breach. Accordingly the finding that the Claimant had made a qualifying disclosure within the meaning of the **Employment Rights Act 1996** ("ERA") section 43B(1) and therefore a protected disclosure was set aside. The finding that the Claimant was subject to a detriment for making a protected disclosure is set aside. The Employment Tribunal also erred in applying the wrong test in considering the claim under **ERA** section 103A. They applied the test appropriate to a section 47B claim and not that for unfair dismissal. Claims remitted to a differently constituted Employment Tribunal for rehearing.			
Day v Health Education England, Public Concern at Work (intervener) and Lewisham and Greenwich NHS Trust (interested party) **[2017] EWCA Civ 329** **LADY JUSTICE GLOSTER,** **VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION** **LORD JUSTICE ELIAS** **- and -** **MR JUSTICE MOYLAN** It was common ground that Dr Day did not fall within the general definition of a worker found in s.230(3) ERA as against HEE, and the only question was whether he was a worker within the extended definition in s.43K ERA and whether HEE was his employer as defined in that section. Section 43K of ERA is to be read as meaning that a "worker" includes an individual who as against a given respondent is not a worker as defined by s.230(3). That individual could be a worker as defined by s.320(3) in relation to another employer. If the terms on which the individual is engaged are substantially determined by the individual himself, he cannot bring himself within the extended definition of "worker". That is so even if the end-user and/or introducer can also be said substantially to determine the terms of engagement. Moreover, if the terms of engagement are not substantially determined by the individual, his employer is the person who does substantially determine them. It is envisaged in s.43K(1)(a)(ii) that this may be both the end-user and the introducer. The words of s.43K could not be read literally, and had to be given a purposive construction. Such a construction maximised the protection available while	**[2017] IRLR 623, July**	**[2017] I.C.R. 917**	**IDS Issue 10 – June 2017**

remaining true to the language of the statute. Further, it could not be said that the worker will have no need for protection against the introducer if he has protection against the end-user. Finally, under the extended definition a worker could in principle be employed by both the end-user and the third-party introducer. The employment tribunal had applied the wrong test in asking itself which party as between HEE and the Trust played the greater role in determining the terms on which Dr Day was engaged. The employment tribunal had not engaged directly with the question whether HEE itself "substantially determined" the terms on which Dr Day was engaged			
Clarke v Abertawe Bro Morgannwg University Health Board **UKEAT/0311/15/RN** Soole J by the Claimant against a decision of the ET following a review hearing in respect of the previous decision upholding its conclusion that her claim against the Respondent Health Trust of detriment contrary to the whistleblowing provisions of sections 47B and 48(1A) of the ERA 1996 should be dismissed. **SUMMARY** **PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity** **VICTIMISATION DISCRIMINATION - Whistleblowing** **VICTIMISATION DISCRIMINATION - Protected disclosure** The Appellant's whistleblowing claim was dismissed by the Employment Tribunal in 2012. Her application dated 7 September 2012 for a review under Rule 34(3) of the **2004 Rules** was permitted to proceed to a hearing in terms which expressly referred to her "extended application", which was contained in a document dated 1 October 2012. Before the hearing she supplied a number of further written submissions and a skeleton argument. The hearing proceeded and the review was dismissed by the Employment Tribunal in 2013. In 2015 the Court of Appeal allowed an appeal against the Employment Appeal Tribunal's refusal of the Appellant's Rule 3(10) application in respect of the Review Decision. In 2016 it was discovered that the Employment Tribunal had by error not had the extended application before it at the Review Hearing			

nor when subsequently considering its Decision. The Appellant added a free-standing ground of appeal that this was a serious procedural irregularity; that a different conclusion might otherwise have been reached; and that the application should be remitted for a rehearing. The Respondent submitted that the extended application added nothing of substance to the documents and oral submissions which the Employment Tribunal had considered; and that the same conclusion would have been reached in any event. The appeal was allowed and the application remitted to the same Employment Tribunal constitution for the review to be heard.			
Beatt v Croydon Health Services NHS Trust **[2017] EWCA Civ 401** **SIR TERENCE ETHERTON, MR** **LORD JUSTICE UNDERHILL** **and** **LADY JUSTICE KING** It is irrelevant that the employer genuinely believed that the employee's disclosure was not protected. A disclosure will be protected if it meets the statutory conditions in Part IVA of the Employment Rights Act 1996 (ERA 1996), and this is an objective test. If the employer dismisses the employee for making a disclosure that a tribunal later finds was protected, the dismissal will be automatically unfair under section 103A of the ERA 1996.	**[2017] IRLR 748** **August**	**[2017] I.C.R. 1240**	**IDS Brief 107**
International Petroleum Ltd and others v Osipov and others **UKEAT/0229/16 and UKEAT/0058/17** **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)** **(SITTING ALONE)** **SUMMARY** **VICTIMISATION DISCRIMINATION - Whistleblowing** **VICTIMISATION DISCRIMINATION - Protected disclosure** **VICTIMISATION DISCRIMINATION - Detriment** **VICTIMISATION DISCRIMINATION - Dismissal** **UNFAIR DISMISSAL - Compensation** **UNFAIR DISMISSAL - Contributory fault** **UNFAIR DISMISSAL - Polkey deduction** A CEO was unfairly dismissed on account of protected disclosures relating to the lack of a tender for oil exploration contracts in Niger. 1. Wide-ranging grounds of appeal and cross-appeal were raised in relation to judgments in the Claimant's			**IDS Brief 201 1078, 10-13**

favour to the effect that he was subjected to detriments for whistleblowing and ultimately dismissed for that reason. 2. The appeals were dismissed save in respect of a point (conceded subject to the cross-appeal) concerned with the liability of the Second Respondent. The liability or otherwise of the Third Respondent is remitted for reconsideration. 3. A number of points raised by way of cross-appeal concerning remedy were successful and sums reflecting these points are to be substituted in the award of compensation made. Two non-executive directors (NEDs) were liable for their part in dismissing a whistleblower. One of the NEDs (who were more akin to executive directors) instructed the other to dismiss the claimant and the other duly did so. The EAT upheld an employment tribunal's decision that the NEDs' actions constituted unlawful detriment on the ground that the claimant had made protected disclosures, contrary to section 47B(1A) of the Employment Rights Act 1996 (ERA 1996), and that the NEDs could be personally liable for post-dismissal losses on a joint and several basis with the employer (which the tribunal found had unfairly dismissed the claimant by reason of whistleblowing). The NEDs' actions of giving an instruction to dismiss and implementing that instruction were actionable as a detriment claim. Furthermore, there was no provision in law or policy relieving the NEDs of their personal liability to pay compensation for the losses flowing from the detriments.			
Small v Shrewsbury and Telford Hospitals NHS **[2017] EWCA Civ 882** **LORD JUSTICE LLOYD JONES** **and** **LORD JUSTICE UNDERHILL** A Tribunal ought to have considered whether to award compensation for long-term loss of earnings to a claimant whose employment was terminated because he had made a protected disclosure. In the particular circumstances of this case, the Employment Tribunal ought indeed to have considered whether the Appellant had a claim in respect of his loss after 21 November 2013 (in other words, a Chagger claim), which would in principle include a stigma claim. The Tribunal had before it, in the form of the passages from the Appellant's witness statement which I have read, very explicit evidence that he was suffering a loss extending into the indefinite, and probably long-term,			

future, partly (though not only) due to the stigma associated with the circumstances in which he was dismissed and/or his consequent claim against the Trust.			
Chesterton Global Ltd v Nurmohamed **[2017] EWCA Civ 314** **LADY JUSTICE BLACK** **LORD JUSTICE BEATSON** **and** **LORD JUSTICE UNDERHILL** In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character[5]), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph. THE FOURFOLD CLASSIFICATION: (a) the numbers in the group whose interests the disclosure served – see above; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.			**IDS Brief 201** **1077, 9-11**

Jhuti v Royal Mail Group Ltd; EAT - reversed - see below.			**IDS Brief 201 1079, 8-10**
Royal Mail Ltd v Jhuti **[2017] EWCA Civ 1632** **Court of Appeal** **LORD JUSTICE JACKSON** **LORD JUSTICE UNDERHILL** **and** **LORD JUSTICE MOYLAN** The Court of Appeal held that an employee was not automatically unfairly dismissed for making protected disclosures to her line manager because the person who took the decision to dismiss her was unaware of those disclosures. A decision made by one person in ignorance of the true facts, which is manipulated by someone else who is responsible for the employee and does know the true facts, cannot be attributed to their employer.			**IDS Brief 201 1085, 9-11**
WORKING TIME			
LOCK and another (respondents) v. BRITISH GAS TRADING LTD (appellant) (No.2) **[2016] EWCA Civ 983** **THE MASTER OF THE ROLLS** **LADY JUSTICE GLOSTER** **and** **SIR COLIN RIMER** **T**he WTR were to be interpreted so as to require Mr Lock's commission earnings to be taken into account when calculating his holiday pay. It is is possible to interpret the WTR in a way that conforms with Article 7. The WTR are properly to be regarded as in the nature of implementing provisions that, in nearly all respects, properly implement the Directive as subsequently explained; but that in two anomalous types of case (Mr Lock's case being one) provide for a lower measure of holiday pay than Article 7 in fact requires. These two anomalous cases do not reflect a positive legislative choice deliberately directed at discriminating against the two types of worker in the calculation of their holiday pay. No one has suggested any reason for such discrimination. As a matter of objective inference, it is more likely that the differential treatment inherent in the scheme of the WTR was simply not foreseen at the time they were enacted. Therefore this is a case in which the grain or thrust of the WTR can fairly be identified as directed at providing holiday pay for workers measured by reference to	**[2016] IRLR 946, December**	**[2017] ICR 1**	**IDS Brief 1057 November 2016**

criteria required by Article 7 as since explained by the CJEU; and that, in line with that grain or thrust, the court can, and should, interpret the WTR as providing that Mr Lock is also entitled to have his holiday pay calculated by reference to his normal remuneration			
Grange v Abellio London Ltd **Appeal No. UKEAT/0130/16/DA** **HER HONOUR JUDGE EADY QC** **(SITTING ALONE)** **SUMMARY** **WORKING TIME REGULATIONS** ***Working Time Regulations 1998*** *- rest breaks - Regulations 12(1) and 30(1)* Prior to July 2012, the Claimant had an eight and a half hour working day, paid for eight hours, with the intention that he take a half hour unpaid lunch break (although the nature of his work meant that this could be difficult to fit into the working day). On 16 July 2012, the Respondent emailed the Claimant expressing its expectation (at best) or instruction (at worst) that he was to work straight through for eight hours, without the half hour break, but then to leave earlier than he would have done before. In July 2014, the Claimant lodged a grievance complaining that he had been forced to work without a break, which had contributed to a decline in his health. Determining the Claimant's complaint that he had been denied his entitlement to a 20 minute uninterrupted rest break, as provided by Regulation 12(1) **Working Time Regulations 1998** ("the WTR"), the ET considered it was required to follow the approach laid down by the EAT in **Miles v Linkage Community Trust Ltd** [2008] IRLR 602, which had held that there had to be an actual refusal of a request to exercise the right to a rest break in order to give rise to a legal liability under the **WTR**. Adopted that approach, the ET concluded: (1) Prior to July 2012, the Claimant's work arrangements had allowed for a half hour break, consistent with his entitlement under Regulation 12(1). Even if it was often difficult to take that break, that did not mean the Respondent had "refused" to permit the Claimant to exercise his right. (2) By its email of 16 July 2012, the Respondent had (at best) stated its expectation or (at worst) instructed the Claimant, that he should work through for eight hours without a break. Until his	**[2017] IRLR 108, February**	**[2017] ICR 287**	

grievance, however, the Claimant had not actually made a request for a break. Although his grievance had included such a request, there was no evidence - at least by the time of the ET claim - that the Respondent had in fact refused it. The claim was therefore dismissed. The Claimant appealed. Held: *allowing the appeal* There were conflicting decisions of the EAT on the approach to be taken to rights to rest under the **WTR**. As the **WTR** had been introduced to implement the **Working Time Directive** ("the WTD"), it was appropriate to consider the language and purpose of the **WTD**, as explained by the Court of Justice in **Commission v UK** C-484/04 [2006] IRLR 888. Adopting that approach, it was clear that the construction of the **WTR** allowed by the EAT in **Scottish Ambulance Service v Truslove** UKEATS/0028/11 was to be preferred to that in **Miles**. As the ET's reasoning followed the approach laid down in **Miles**, the appeal would be allowed and the case remitted for determination of the issues in the light of this Judgment			
Maio Marques da Rosa v Varzim Sol – Turismo, Jogo e Animação SA C 306/16 Advocate General Saugmandsgaard Øe has given an opinion that the 24-hour weekly rest period provided by the Working Time Directive (Directive 2003/88/EC) may be granted on any day in the seven-day reference period. Article 5 of the Working Time Directive (and its predecessor, Directive 93/104/EC) should not be interpreted as requiring the weekly rest period to be granted on the seventh day following six consecutive working days. Under Portuguese law, this would mean that a worker may be required to work up to 12 consecutive days, if the weekly rest period is granted on the first day of the first seven-day period and the last day of the following seven-day period, as long as the other requirements of the Working Time Directive are satisfied. In theory, this interpretation of the weekly rest entitlement would mean that a worker in the UK, where employers can opt to provide a 48-hour rest period in a 14-day reference period, could be permitted to work for 24 consecutive days.			
THERA EAST v MR J VALENTINE **UKEAT/0325/16/DM** **HIS HONOUR JUDGE DAVID RICHARDSON (SITTING ALONE)** The Claimant was employed by the Respondent as a	**[2017] IRLR 878** **October**		

Support Worker assisting disabled persons in the community. He had to travel from place to place using his car. At the beginning of a period of work he would drive directly from his home to his first assignment, and at the end of a period of work he would drive directly home from his last assignment. He believed that these periods constituted working time, having regard to the decision of the European Court of Justice in ***Federación de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security SL & Anr*** [2015] ICR 1159. His claim to the ET did not state that unlawful deductions had been made as he argued that he was entitled to time off in lieu according to the Respondent's Extra Hours Procedure. The Employment Judge held that these periods were working time and went on to hold that the Respondent had made an unlawful deduction from the Claimant's wages. This was appealed. **SUMMARY** **PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity** **CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term** The Employment Judge erred in law in holding that the Respondent had made an unlawful deduction from the Claimant's wages. The Claimant had not advanced any claim of unlawful deduction from wages. In any event the Employment Judge erred in law in determining that the Claimant was contractually entitled to additional wages because his travel from home to first appointment and from last appointment to home was "working time" for the purposes of the **Working Time Directive** and **Working Time Regulations**. His conclusion could not be reconciled with the express terms of the Claimant's contract.			
Hälvä v SOS-Lapsikylä ry **Article 17(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 meaning that it cannot apply to paid work, such as that at issue in the main proceedings, which consists in caring for children in a family-like environment, relieving the person principally responsible for that task, where it is not established that the working time as a whole is not measured or predetermined or it may be determined by the worker himself, which is for the national court to ascertain. A "relief parent" who acted "as the representative of foster parents of children in care on the parents' days	**[2017] IRLR 942** **October**		

off, lives during this period with the children in a family-like setting and during this time independently attends equally to the children's and family's needs, as parents generally do." The Court of Justice ruled that the derogation from the limits on working time does not appear to apply because the relief parent is not able to determine the duration of his own working time.			
MR D CRAWFORD v NETWORK RAIL INFRASTRUCTURE LTD **UKEAT/0316/16** **HIS HONOUR JUDGE SHANKS** **(SITTING ALONE)** **SUMMARY** **WORKING TIME REGULATIONS** The Claimant/Appellant was a railway signalman working on single manned boxes on eight-hour shifts. He had no rostered breaks but was expected to take breaks when there were naturally occurring breaks in work whilst remaining "on call". Although none of the individual breaks lasted 20 minutes, in aggregate they lasted substantially more than 20 minutes. He claimed that he was entitled to a 20 minute "rest break" under regulation 12 of the **Working Time Regulations 1998** or "compensatory rest" under regulation 24(a). The Employment Tribunal found that regulation 12 did not apply and that the arrangements were compliant with regulation 24(a). He appealed on the basis that "an equivalent period of compensatory rest" must comprise one period lasting at least 20 minutes. The appeal succeeded in the light of **Hughes v The Corps of Commissionaires Management Ltd** [2011] EWCA Civ 1061 (in particular the judgment of Elias LJ at paragraph 54).			
WRONGFUL DISMISSAL			
RICHARDS AND ANOTHER V IP SOLUTIONS GROUP LTD **[2016] EWHC 1835 (QB)** **Mrs Justice May** What constitutes gross misconduct by an employee will vary according to the nature of the employment and the circumstances under which the particular behaviour was said to have occurred. The test is unhelpfully but necessarily circular: gross misconduct is behaviour which is such as to wholly undermine the relationship of trust and confidence between employer	**[2017] IRLR 133, February**		

and employee that it justifies the employer in treating the contract as repudiated. On the evidence, the obtaining of the bonus moneys in March 2015 did not amount to a significant breach of the claimants' statutory duties as directors. They were, or became prior to their dismissal, under a duty to repay the bonus moneys. However, that breach was not sufficiently serious to engage the right to terminate their employment under clause 14.2.2. No part of the claimants' behaviour in relation to their receipt and/or retention of the Q1 bonus moneys gave rise to an entitlement on the part of the company to dismiss them forthwith. Furthermore, the claimants had not threatened to damage the company's long-term interests; nor had they acted to do so. The claimants had been demonstrated to have received certain moneys by way of expenses in respect of which further examination revealed they were not entitled. However, in the absence of any bad faith or dishonesty on the part of the claimants in connection with the amounts claimed, as to which there was no evidence, the expenses claims that they had made/failed to repay did not amount to a material breach of their directors' duties justifying summary dismissal under clause 14.2.2 or otherwise amounting to gross misconduct. As to the penalty argument, the arrangement for "leavers" as provided for under the articles of association appeared akin to a primary obligation agreed between parties for distinct commercial reasons to do with a shareholder leaving the company. On that basis the price of £1 payable for the aggregate shareholding of a person who was a "bad leaver" was simply the agreed price on transfer. Moreover, even if the transfer and pricing provisions in the articles were to have been construed as secondary obligations consequent upon breach of the employment contract, there would have been nothing unconscionable in an arrangement arrived at between parties dealing at arms-length with the benefit of extensive expert advice. Had it been necessary, the transfer provisions relating to a "bad leaver" would have been found to have been enforceable			
ADESOKAN V SAINSBURY'S SUPERMARKETS LTD **[2017] EWCA Civ 22** **LORD JUSTICE LONGMORE** **LORD JUSTICE ELIAS** **and** **LORD JUSTICE DAVID RICHARDS** An employer was entitled to dismiss a senior manager summarily for gross misconduct following his failure to intervene when a subordinate acted in breach of its	**[2017] IRLR 346**	**[2017] ICR 590**	**IDS Issue 106 – April 2017**

employee engagement assessment procedure. Given the significance placed upon the procedure by the employer, the High Court was entitled to find that this was a serious dereliction of the manager's duty, which undermined trust and confidence and therefore constituted gross misconduct.			