3PB January 2019 Case law update

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Burden of proof in direct discrimination cases

Efobi v Royal Mail Group Ltd [2019] EWCA Civ 18
(Judgment given on 23rd January 2019**)**

The Facts

C is a black Nigerian and a citizen of the Republic of Ireland. He has qualifications, both graduate and post-graduate, in Information Systems, including a BSc honours degree in that subject, and qualifications in Forensic Computing. He was employed by Royal Mail Group Ltd ('RMG') in the operational department of the service as a postman. However, he wanted to be employed in the management / IT service area. To that end he applied for many posts in that area, but was unsuccessful with respect to all of them. They were considered by a number of individuals: at different stages some 6 or more recruiters were used and at least 2 hiring managers. C was longlisted for 2 of the posts and interviewed for 2. The relevant applications included 9 where the decision not to shortlist was made by an external recruitment agency employed to assist RMG.

C considered that he had been discriminated against on the grounds of his race. The complaints related to some 30 or more applications and he brought proceedings for both direct and indirect discrimination in relation to his failure to obtain 22 of those posts[1]. It was not suggested that the recruitment staff of the external organisation had discriminated against C, and there was simply no evidence at all to suggest that they had.

[1] There were also other matters but these were irrelevant for the purpose of the appeal.

The ET decision

C failed to establish that there was any direct or indirect discrimination in the way in which RMG dealt with his job applications. He also made complaints of both harassment and victimisation discrimination and was successful with respect to some of those allegations.

A particularly significant problem facing the ET was that there was no evidence about the identity or qualifications of any of the other candidates, including the shortlisted or successful ones, in relation to any of the posts. Virtually nothing was known of the relevant comparator with whom he was comparing himself. As the ET observed, it did not have enough evidence to establish whether the successful candidates were appropriate comparators. Moreover, in relation to many of the posts, even the race of the successful candidate was unknown. C did not seek disclosure and he did not identify an actual comparator with respect to any of the posts. Nor did he prove facts from which the ET could infer that his colour or country of origin was actually known to any particular hiring manager or recruiter.

The EAT decision

C appealed only the finding that there had been no direct discrimination with respect to his job applications and the appeal was successful. The EAT held that in various ways the ET had erred in its analysis of that question, and in particular the way it had approached the burden of proof in direct discrimination cases.

The EAT remitted the case to a different ET for it to consider the issue of direct discrimination afresh. The EAT carefully prescribed the scope of the remitted hearing, indicating in some detail which findings should be preserved and directed that no fresh witnesses should be called. The rationale for this was that the Judge took the view that "it would [not] be right to give the Respondent the opportunity substantially to re-shape its case".

RMG appealed to the CoA against the EAT decision. Its principal case was that there was no material error by the ET in its legal analysis. As a subsidiary issue, RMG contended that even if the ET was in error as the EAT held, the limited scope of the remission was unjustified.

The relevant law

Section 13(1) EqA 2010 defines direct discrimination as follows:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

It requires a comparison between the claimant and either an actual or a hypothetical comparator.

Section 136 was central to the appeal and deals with the burden of proof. So far as it is material it provides:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Prior to the enactment of the EqA, there were separate provisions of the burden of proof found in different discrimination statutes as a result of amendments to those statutes to give effect to provisions of EU law. They were cast in very similar terms to each other but were framed differently from section 136. For example, section 63A SDA 1975 was as follows:

> "*Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent –*
>
> *(a) Has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2, or*
> *(b) Is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.*"

Similar provisions were found in section 54A RRA 1976.

The way in which those earlier provisions ought to be applied had been considered in a number of cases, but notably 2 CoA decisions, **Igen v Wong**[2] and **Madarassay v Nomura International plc**[3]. Both concerned section 63A SDA 1975 rather than section 136. However, in **Ayodele v Citylink Ltd**[4] the CoA considered and rejected a submission that these authorities could no longer be relied upon in the light of the change of wording. The effect of **Ayodele**, therefore, is that the earlier precedents remain apposite to the construction of section 136 and are binding.

The ET applied the 2 stage test and, in particular, assumed that the burden lay on the claimant at the 1st stage to establish a prima facie case.

The EAT thought that in view of the change in wording since those authorities were decided, the law had changed and there was no longer any burden at all on the claimant at the 1st stage. It held that the ET had erred in law in imposing such a burden.

The CoA in **Ayodele** expressly referred to the EAT decision in **Efobi** and said that it was wrong. Thus the principal ground upon which the EAT upheld the appeal against the EAT decision could not stand. But that was not the end of the appeal.

This was because the EAT had in its judgment gone on to hold that even if it was wrong in its construction of section 136 and there was a burden on C at the 1st stage, nonetheless the ET had erred in the way in which it assessed the evidence as to whether that burden had been discharged. The principal issue in the appeal to the CoA was therefore whether the EAT was right about that.

The Court of Appeal judgment

Sir Patrick Elias gave the unanimous judgment of the Court

"*The authorities demonstrate that there is a two-stage process. First the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the*

[2] [2005] ICR 931
[3] [2007] ICR 867.
[4] [2018] ICR 748

allegedly discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant prescribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."[5]

The 1st question was whether the ET was entitled to find that C had failed to discharge the burden placed upon him at the 1st stage to establish a prima facie case which needed rebutting.

The CoA held that the ET manifestly did have enough evidence to warrant that conclusion. It rejected the submission that the ET only focussed on the evidence adduced by C. Rather it placed heavy reliance on RMG's evidence about the suitability of C's CV in particular, as well as evidence of the role played by external recruiters. It was not seriously suggested that those recruiters had discriminated and yet the posts for which they were responsible were typical of the kind of posts for which C was applying. There was no evidential basis for inferring that the reasons why his applications failed when internal decision makers were involved was for race related reasons when that was not seriously advanced as the reason with respect to the posts where external recruitment officers were involved, even though they were carrying out essentially the same exercise.

The onus of proof at stage 1 was upon C, so it was for C to adduce the information which he was alleging supported his case. In so far as this was in the hands of R, C could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the ET. He did neither. It was only on the first day of the trial that he made an application for certain witness orders when he had not even approached the witnesses to seek their attendance voluntarily.

C's case could not succeed given that he had not adduced evidence which enabled the ET to identify the characteristics of the appropriate comparator. Without any information about those who were appointed, such as their skills and experience, it was not possible for the ET to infer a prima facie case of discrimination by any particular individual.

Quite apart from C's failure to adduce any evidence about the other candidates so that no appropriate comparators could be identified, these included the fact that in some of the posts he was rejected by external recruiters who were plainly not discriminating; that he had used inadequate CVs, being generic in nature and not focused upon the particular requirements

[5] Paragraph 10 of the Judgment.

for the job; that the successful candidates had longer managerial experience or other relevant experience; and that he had been a wholly unimpressive witness on this part of his case. All these factors provide, as the ET said, ample justification for its conclusion that the burden on the claimant had not been discharged.

Appeal allowed and the finding of the ET that there was no direct discrimination against the claimant with respect to recruitment to any of the relevant posts was restored.

Comment:

It is hoped that the burden of proof requirements in direct discrimination cases is now firmly settled.

During the course of the Judgment it was specifically stated that It is not for the employer to do the work for C and to provide such information as it thinks might advance his case, and that Tribunals are not exercising an inquisitorial function. With the ever-increasing number of litigants in person, ETs might sometimes need to be reminded of this fact! But also in assessing ET1s etc, practitioners should not feel that their client has to volunteer information that isn't requested or naturally arises from what is complained about.

The CoA has said on a number of occasions that it is for tribunals to determine in each case how far they can properly assist litigants, but it is not an error of law to fail to do so: **Mensah v East Hertfordshire NHS Trust**[6] and **Muschett v HM Prison Service**[7]. Even less is the employer obliged voluntarily to take steps to ameliorate the problems facing the individual litigant and to assist his case possibly to their won detriment. It is not legitimate for a tribunal to draw adverse inferences against an employer who fails to do so. If the employer fails to call the actual decision makers, he is at risk of failing to discharge the burden which arises at the second stage, but no adverse inference can be drawn at the first stage from the fact that he has not provided an explanation.

In breaking down the 2 stages of the test, practitioners should consider that R may adduce evidence at the first stage to show that:

- the acts which are alleged to be discriminatory never happened;
- or that, if they did, they were not less favourable treatment of the complainant;

[6] [1998] EWCA Civ 954
[7] [2010] IRLR 451

- or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant;
- or that even if there had been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy for instance.

Such evidence from R could, if accepted by the tribunal, be relevant as showing that, contrary to C's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground[8].

[8] Paragraph 12 of the Judgment.

Whistleblowing – failure to comply with legal obligation / public interest test

Ibrahim v HCA International Ltd UKEAT/0105/18/BA
(published 22nd January 2019)

The Facts:

C was employed as an interpreter at HCA International Ltd's ('HCA') private hospital to interpret for the Arabic speaking patients who required interpreting services.

On 15th March 2016 C met with the Director of Rehabilitation at HCA ('the Director'). He asked her to investigate 2 issues that he was concerned about: (i) his belief that there were rumours that he had been involved in a breach or breaches of patient confidentiality; and (ii) that a fellow employee, Ilham Mohammed, had behaved in an unprofessional manner towards him.

C sent a follow up email to the Director the next day stating:

"*…I would like you to launch a formal investigation into the following two matters, which might be linked to each other or totally different matters, only an investigation will tell!*

First, to investigate into the rumours among the International patients and their families about my confidentiality and performance (I informed you before that I was blamed by some families for disclosing patient confidential information, but unfortunately they refused to make a complaint against me, although I tried with them to do so. I explained to you that I cannot accept this as a settlement and I need to clear my name otherwise I will not be able to do my work properly.

Second, I told you that I had a feeling that I was 'kicked out of my office' and as the time passes my feeling gets stronger and stronger. I accused Ilham of a major misconduct i.e. She took an action against me without giving me the chance to defend myself, and that she has been slandering me to my colleagues".

The Director referred the matter to HCA's HR team. On 22nd March HCA's chief HR officer met with C, who told her that he felt degraded, humiliated, shocked and confused, and that

he believed there were rumours among patients and their families that he had been leaking patients' confidential information. He told her that he wanted to clear his name and restore his reputation.

C brought an ET claim of, among other complaints, detriment for having made a protected disclosure under section 47B ERA 1996. A preliminary hearing was held to determine whether C had made a protected disclosure.

The relevant law

Section 43B(1)(b) ERA 1996 provides:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following:*
>
> *….*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur*

The ET decision:

The ET dismissed C's whistleblowing detriment claims because it found that C's grievances that false rumours had been made were not protected disclosures since they did not tend to show that a person had failed to comply with a legal obligation or that there had been a miscarriage of justice. C had not identified any legal obligation that may have been breached when the false rumours were made, if indeed they were made.

It went on to find in the alternative that the disclosures were not made in the public interest, rather they were made with a view to C clearing his name and re-establishing his reputation[9].

The issue

Whether the ET had correctly interpreted and applied section 43B(1)(b) ERA 1996 in 2 respects:

[9] Paragraph 10 of the Judgment.

(1) what amounts to an allegation of a breach of legal obligation; and
(2) the public interest element in light of the guidance from the CoA in **Chesterton Global Limited (t/a Chestertons) v Nurmohamed**[10]

The EAT decision:

The EAT held that section 43B(1)(b) is broad enough to include tortious duties, including defamation and breach of statutory duty such as those contained in the Defamation Act 2013. C's complaint of damaging false rumours about him that he had breached patient confidentiality was clearly an allegation that he was being defamed. Thus the ET had erred in concluding that C had not identified any legal obligation that may have been breached. He may not have used the word defamation at the time, but his allegation was clear in all but name and use of the precise legal terminology[11]. Therefore Ground (1) of C's appeal succeeded.

However, as to ground (2) on the public interest issue, HHJ Stacey stated:

"*As set out in **Chesterton** by Underhill LJ there are a number of important general points relevant to the exercise of the Tribunal's Judgment in considering the 2013 amendment and the public interest requirement in a protected disclosure. The Tribunal has to ask itself (a) whether the worker believed at the time that he was making it that the disclosure was in the public interest and (b) whether if so, that belief was reasonable. To satisfy limb (a) a Claimant must have a belief that the disclosure is in the public interest, why s/he considers it to be so may be relevant as to the genuineness of the professed belief, but "the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence" (paragraph 29 **Chesterton**). To satisfy limb (b) it is to be remembered that there may be more than one reasonable view as to whether a particular disclosure is in the public interest. Whilst the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant, or indeed any part of the motive of making it. Finally, Parliament deliberately chose not to define the expression "in the public interest" and therefore left it to Tribunals to consider and apply as a matter of educated impression"*[12]

[10] [2017] EWCA Civ 979
[11] Paragraph 21 of the Judgment.
[12] Paragraph 24 of the Judgment.

She goes on to state that C's belief or otherwise is a finding of fact for an ET to make having heard all the evidence. It had found that C's concern was only that false rumours had been made about him, and the effect of those rumours on him. He therefore did not have a subjective belief in the public interest element of his disclosure[13]. Consequently the ET had correctly applied the **Chesterton** test.

Accordingly, C's appeal was dismissed and the ET's judgment upheld.

Comment:

Whilst the case helpfully restates the guidance provided by CoA in **Chesterton** (that being the first time the 2013 'public interest' amendment had come before it on 10th July 2017), it also highlights that Tribunals will look very closely at the words used by a C and construe broadly the nature of the legal obligation which it is being alleged is not being complied with even if that is not made clear. It is suggested that it would be best practice to try and get Cs to be specific at the earliest stage possible. It is quite common for employees to have concerns about what other employees are saying about them and these are sometimes left at informal comments to managers. However, this case highlights that managers must listen very carefully as to what is being said to them and, if necessary, offer a grievance procedure.

[13] Paragraph 26 of the Judgment.

Equal Pay: Cross-establishment comparators

Asda Stores Ltd v Brierley & Others [2019] EWCA Civ 44
(Judgment handed down 31 January 2019)

The Facts

At the date of the ET hearing Asda had 630 retail stores, in which around 133,000 employees worked. Its distribution operation comprised 24 distribution centres / depots employing around 11,600 employees. None of the depots were located on the same site as any of the stores.

About 30,000 Cs, mostly women, working in Asda supermarkets brought equal pay claims against their employer Asda Sores Ltd ('Asda') on the basis of comparisons with the pay of male employees employed at depots as part of Asda's distribution operation ('the comparators'). The claims were primarily brought under the EqA 2010, but if the claims were well-founded some of the Cs would be entitled to arrears going back before that Act came into force, and their claims would be governed by the Equal Pay Act 1970 ('the EPA').

Cs asserted that the terms and conditions of Asda employees in Distribution doing work of equal value were superior to theirs in various respects, including principally hourly rates of pay, contractual allowances or bonuses and various aspects of working hours.

Asda's distribution and retails sectors were fundamentally different. They had evolved differently over time; operated in separate industries; had different objectives; are located in markedly different physical environments; demanded different skill-sets; were subject to varied regulation and, most importantly, had distinctly different functions. Asda is essentially a retailer; its stores are its profit-making centres. The primary function of distribution is to act as an in-house provider of logistics services to Asda's retail stores: it is predominantly a cost-centre, rather than a profit-making operation, and is not consumer-facing.

As a matter of domestic law, Cs acknowledged that they did not work in the same establishments as any of their comparators, because Asda's stores and its depots are entirely separate; but they claimed that common terms of employment applied at both, either generally or as between themselves and their comparators, so that they can rely on section

79(4)(c) EqA – or, as regards the period covered by the EPA, that they are in the same employment as defined in section 1(6).

The domestic law

When the EPA first came into force, the right to equal pay was accorded by section 1(2) in 2 cases – (a) where a woman was employed on "like work" with a man "in the same employment" and (b) where she was employed on work "rated as equivalent" with that of a man in the same employment. With effect from 1st January 1984 a 3rd case was added – (c) where a woman was employed on work "of equal value" with that of a man in the same employment.

The phrase "in the same employment", which is common to all 3 cases, was defined in section 1(6) of the EPA as follows:

"*…[F]or the purposes of this section….men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes*".

The EqA reproduces essentially the same scheme as the EPA but a different drafting technique is adopted. Section 65(1) provides for the same 3 grounds of comparison as under section 1(2), but the comparator is defined simply as "B" rather than "a man in the same employment". The scope of permitted comparisons is prescribed, so far as relevant for this claim, by section 79(2) – (4), which reads:

"*(2) If A is employed, B is a comparator if subsection (3) or (4) applies.*

(3) This subsection applies if –

(a) B is employed by A's employer or by an associate of A's employer, and
(b) A and B work at the same establishment.

(4) This subsection applies if -

(a) B is employed by A's employer or an associate of A's employer,
(b) B works at an establishment other than the one at which A works, and

(c) common terms apply at the establishments (either generally or as between A and B)."

So, you'll note that the phrase in section 1(6) EPA "establishments…at which common terms and conditions of employment are observed either generally or *for employees of the relevant classes*" is replaced in section 79(4)(c) by "common terms apply at the establishments (either generally or *as between A and B*)".

Underhill LJ believed that it is possible to construe the statutory language as continuing to refer to the existence of common terms for employees of A's class and B's class at the two establishments[14].

EU Law

Article 119 of the Treaty of Rome began:

"*Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal value*"

The principle of equal pay for men and women outlined in Article 119 was further defined in Council Directive 75/117/EEC:

"*for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration*".

The necessary implication of that is that the phrase "equal pay for equal work" in Article 119 covers "work to which equal value is attributed".

In **Defrenne v Sabena**[15] the ECJ held that Article 119 gave employees a directly enforceable right to equal pay in some circumstances notwithstanding a failure by the relevant member state to implement the Directive.

The Treaty of Rome was amended by the Nice Treaty in 2003, at which point Article 119 became Article 141 and read:

[14] Paragraph 78 of the Judgment.
[15] Case No. 43/74 [1976] ICR 547

"*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*"
Article 157(1) of the TFEU is in identical terms to Article 141.

The issue

Whether Cs are entitled to compare themselves with employees in the distribution operation at all. If the decision is that they are, it remains to be established whether they do work of equal value with their comparators and, if so, the extent of any differential and whether Asda has a "material factor" defence.

Whether common terms did in fact apply at the stores and the distribution centres within the meaning of the relevant sections of the EqA and the EPA and consequently whether Cs were entitled to compare themselves with employees in the distribution operation at all.

The questions for the ET were whether (broadly) common terms and conditions applied (a) for retail workers irrespective of where they worked; and (b) for distribution workers irrespective of where they worked. Since no retail workers were in fact employed at depots, or distribution workers in stores, that question could be framed in terms as follows:

(a) if (however unfeasibly) retail workers were employed, in retail jobs, in depots, would they be on the same terms as retail workers employed at stores? And

(b) if (however unfeasibly) distribution workers were employed, in distribution jobs, in stores, would they be on the same terms as distribution workers employed at depots?

ET and EAT decisions

The ET and the EAT focused on the EU aspect of the case.

The ET concluded that Article 157 was of direct effect, that comparison is possible in any case where there is a "single source" for the terms of employment of Cs and their comparators (which was plainly so as they had the same employer), and that common terms were observed generally at Asda's stores and depots.

The EAT dismissed Asda's appeal. It held that the right to equal pay under Article 157 was unconditional and sufficiently precise to have direct effect, and so could be relied on by Cs against Asda. It endorsed the ET's conclusion that there was a 'single source', given that Asda's executive board or Walmart's board regularly scrutinised the work done in setting pay in both retail and distribution, and could overrule decisions at any time. It also held that the ET was correct to find that common terms applied for the purposes of the tests under EPA and EqA.

The Court of Appeal

In a 119 paragraph Judgment, Underhill LJ gave the unanimous judgment of the Court dismissing Asda's appeal.

He focussed on the domestic legislation.

The essential concept conveyed by the reference to "common terms and conditions….[being] observed" at two establishments is that no distinction is made between the establishments as regards what terms and conditions apply (at least for the relevant classes)[16].

It follows from the correct approach that it is not necessary that any employees in the comparator's class should actually be employed in the C's establishment[17]. One way of making the same point is to say that if someone in the comparator's class was employed at the C's establishment he would enjoy the terms in question[18].

In considering whether common terms and conditions are observed as between employees in the comparator's class at two establishments – that is C's establishment and the comparator's – it is not necessary that all the terms are common: "broad commonality" is enough[19].

It was not necessary for the purpose of a cross-establishment claim that anyone in the comparator's class should actually be employed at C's workplace[20].

[16] Paragraph 34 of the Judgment.
[17] Paragraph 36 of the Judgment.
[18] Paragraph 36 of the Judgment.
[19] Paragraph 41 of the Judgment.
[20] Paragraph 42 of the Judgment.

The comparison is between the terms applicable *at the two establishments*, not between the terms applicable to C and comparator[21].

North v Dumfries and Galloway Council[22] is binding authority that the fact that C and comparator have the same employer will in the ordinary case mean that the terms have a single source and thus that EU law permits comparison between them for equal pay purposes; but it is not binding authority that EU law is in that respect directly effective[23].

Summary:

- The question is whether common terms apply at X and Y depends on whether they apply irrespective of which particular establishment a relevant employee is employed at. The test will be satisfied whether that is so "generally" (i.e. for all employees) or only for employees in the relevant classes – that is, the classes to which A and B respectively belong. Which gateway it makes sense to focus on depends on the circumstances of the particular case[24].

- That question entails comparing the terms applying *as between the two establishments*, not as between the claimant and the comparator. The tribunal needs to ask either "do common terms of employment apply at X and at Y for all employees?" (the "generally" alternative) or "do common terms of employment apply for cleaners at X and at Y and for manual workers at X and at Y?" (the "relevant classes" alternative)[25].

- Common terms apply at X and Y not only where they apply to actual employees in the relevant classes working there but where they *would* apply, even if a manual worker would never in practice be employed at X or a cleaner at Y. The fact that if a manual worker were employed at X he would enjoy the same terms as B is a *consequence* of the fact (if established) that the same terms apply for manual workers irrespective of where they work: it is not the test as such[26].

[21] Paragraph 43 of the Judgment.
[22] [2013] UKSC 45
[23] Paragraph 59 of the judgment.
[24] Paragraph 66 of the Judgment.
[25] Paragraph 67 of the Judgment.
[26] Paragraph 68 of the Judgment.

- It will be straightforward to answer the question in C's favour if there is a collective agreement governing the terms of the 2 classes without reference to where they work;

- The requirement that common terms apply as between the establishments does not mean that all the terms of the relevant employees at both must be common. It is enough that terms of cleaners at X and cleaners (actual or hypothetical) at Y and of manual workers at Y and manual workers (actual or hypothetical) at X are "broadly" common, taking a common sense approach[27].

- It is irrelevant whether there is any similarity between the actual terms of A and B. The question is whether the terms for cleaners are (or would be) the same (or broadly so) whether they are employed at X or at Y and likewise as regards the terms for manual workers. If that test is satisfied, cleaner and manual worker terms may be identical to each other, or wholly different in structure and content, or anywhere in between[28].

- The above is simply a way of asking whether the terms for the relevant employees apply irrespective of where they work, and does not require an exercise of creative imagination[29].

CoA believed that the ET conducted wholly the wrong exercise in posing itself the question "whether there are (and were) common terms generally *as between claimants and comparators*".

Cs' terms and the distribution workers' could be as different as anything, as long as terms for distribution workers were common as between the two establishments.

Underhill LJ appreciated that it may seem artificial to say that common terms and conditions apply between depots and stores on the wholly hypothetical basis that if a distribution worker worked (as a distribution worker) in a store distribution terms would apply to him.

The preliminary issue could have been decided on the straightforward basis that Asda's terms for retail workers and for distribution workers both applied wherever they worked[30].

[27] Paragraph 71 of the Judgment.
[28] Paragraph 72 of the Judgment.
[29] Paragraph 69 of the Judgment.
[30] Paragraph 106 of the Judgment.

Comment:

Whilst the claims in this case have some way to go in terms of establishing whether Cs do work of equal value with their comparators and, if so, the extent of any differential, and whether Asda has a "material factor" defence, it really does potentially expose companies with multi-site and multi-functional operations, in particular the major supermarkets, to substantial liabilities. It might be anticipated that there will now be a flood of speculative claims from supermarket employees.

It will typically be the case in a cross-establishment claim that there will be no employee in the comparator's class employed at the C's establishment, because if there were it would normally be sufficient, and more straightforward, for C to compare herself with him and not look elsewhere. But that will not always be so. There can be cases where there is an employee in the comparator's class at the C's establishment but he does not enjoy the particular benefits which are the subject of the claim or is for some other reason inappropriate as a comparator. And in mass claims involving Cs at many different establishments it would be very inconvenient to have to pick a comparator at every establishment[31].

Thus the practitioner acting for Cs or Rs will have to be very careful in looking at the appropriate comparators, where they work, what the extent of any differential is, and whether a material factor defence is likely to be successful in any event.

[31] Footnote 2 of the Judgment.

Practice and Procedure – Case Management – Restricted Reporting Order / Anonymity

Y Ameyaw v PriceWaterhouseCoopers Services Ltd UKEAT/024418/LA
(judgment handed down on 4th January 2019 (HHJ Eady QC))

The Facts:

C brought claims against her employer ('PWC'). PWC had applied to strike out those claims on the basis of C's alleged "scandalous and vexatious conduct" at the Preliminary Hearing. The EJ hearing the strike-out application considered that the reasons of the EJ at the Preliminary Hearing amounted to findings of fact that C had acted disruptively at the Preliminary Hearing. However, he dismissed PWC's application to strike out the claims. The reasoned judgment was entered on to the Public Register. C's claims were dismissed after a full hearing.

C applied for an order that the final judgment not be entered on the Public Register, that the strike-out judgment be removed (sent out and entered in the Public Register over a year before), and / or that she should be anonymised in both judgments.

The relevant law

Regulation 14(1) of the ETs (Constitution & Rules of Procedure) Regulations 2013 provides that the Lord Chancellor shall maintain a register containing a copy of all judgments and written reasons issued by a Tribunal which are required to be entered in the register under Schedules 1 to 3.

So far as is material to the issues arising in this case, Rule 50 of the ET Rules[32] states:

> *(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights[33] of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*

[32] ETs (Constitution & Rules of Procedure) Regs 2013, Schedule 1
[33] "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include-

(a) An order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) An order that the identifies of specified parties, witnesses or other person referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) An order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) A restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act….

Rule 67 of the ET Rules provides that subject to Rules 50 and 94, a copy shall be entered in the Register of any judgment and of any written reasons for a judgment.

Rule 94 deals with national security proceedings.

The ET

The REJ in the ET refused the applications, holding that there was no discretion not to publish the judgments and Rule 50 did not provide any basis to override the principle of open justice.

The EAT

The appeal before the EAT related only to publication of the strike-out judgment.

The EAT held that the ET had correctly held that it had no power to exclude or remove a Judgment from the Public Register.

By Rule 67 it was required that, subject to Rules 50 and 94, every Judgment and document containing Written Reasons for a Judgment was entered on to the public Register.

Although the ET could decide not to enter Written Reasons for a Judgment in a national security case (Rule 94), there was no corresponding power under Rule 50.

The real issue raised by the appeal was whether the ET had properly exercised its discretion in refusing to make an Anonymity Order under Rule 50.

C had contended that such an Order was necessary to protect her article 8 ECHR rights (private and family life). However, her application related to a Judgment reached after an open Preliminary Hearing at which the ET had considered an application to strike out the claimant's claims on the basis of her conduct at an earlier closed Preliminary Hearing. The matters to which the claimant objected had, therefore, been subject of discussion at a public trial of the strike out application. Article 8 was not engaged – C could have had no expectation of privacy in that regard.

Even if that was wrong, it was for the ET to carry out the requisite balancing exercise (see **Fallows & Others v News Group Newspapers Ltd**[34]) and, in the particular circumstances of this case, it had been entitled to take the view that the principles of open justice and the interests arising from Articles 6 (fair trial) and 10 (freedom of expression) were not outweighed by C's interests under Article 8 such that there should be any restriction on publicity under Rule 50.

HHJ Eady QC summarised that In proceedings before the ET, the balancing out of those competing interests or rights is governed by the 2013 Regulations and the ET Rules, which provide:

(1) That the Lord Chancellor is required to maintain a public Register of all ET Judgments and Written Reasons (Regulation 14, 2013 Regulations);
(2) Subject to Rules 50 and 94, the ET is required to enter on to the Register a copy of every Judgment and document containing Written Reasons for a Judgment (Rule 67 ET Rules);
(3) In national security cases, Rule 94 ET Rules permits the ET to make certain redactions from the Judgment and Written Reasons and – significantly – to determine that the Written Reasons will not be entered on to the Register in some cases;

[34] [2016] ICR 801

(4) In cases involving confidential information or where required by the interests of justice or in order to protect rights under the ECHR, Rule 50 ET Rules permits the ET to make certain redactions from the Judgment and Written Reasons (including the anonymisation of the parties) but makes no provision for the ET do other than enter the Judgment and Written Reasons on to the Register.[35]

Although the ET's power to restrict the publication of Judgments and Written Reasons is not unlimited, there is a broad discretion vested in the ET under Rule 50, which is not limited in time. It is likely to be a rare case where other rights are so strong as to grant an indefinite restriction on publicity: the requisite balancing exercise in each case is for the ET[36].

Should the ET be satisfied that an Article 8 right is engaged, in exercising its discretion under Rule 50 it will need to consider whether the interests of the owner of that right should yield to the broader interests established by the rights afforded by Articles 6 and 10. In carrying out the balancing exercise required, the ET will be guided by the following principles:

(i) The burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation;

(ii) It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice;

(iii) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, the ET should credit the public with the ability to understand that unproven allegations are no more than that; and

(iv) Where such a case proceeds to judgment, the ET can mitigate the risk of misunderstanding by making clear it has not adjudicated on the truth or otherwise of the damaging allegations[37].

C's appeal was dismissed.

[35] Paragraph 44 of the Judgment.
[36] Paragraph 45 of the Judgment.
[37] Paragraph 48 of the Judgment.

Comment:

The starting point must be that open justice demands that all details of Tribunal proceedings are published. The fact that the record of the proceedings, published without restriction, might be "*painful, humiliating, or deterrent*" would not, of itself, mean that it should not be made public[38].

Applications under Rule 50 are becoming more prevalent. Generally, such applications are made by Cs. Historically, R employers have taken a neutral approach to such applications, believing it to be a matter between C and the Tribunal. However, there are many instances in which it is strongly suspected, if not known, that Cs have ulterior motives for wanting anonymity (i.e. they have been involved in previous ET litigation with other employers but Rs lack proof of the same). Opposing such applications would ensure that this can no longer happen in future, as all judgments are online. Employers who are before the ET regularly may also believe that unredacted Judgments being in the public domain may also serve as a deterrent for other opportunistic employees / would be claimants.

On the other side of the line, when acting for Cs, there may well be very genuine reasons as to why such an application under Rule 50 should be made, for instance if there is information contained within C's medical records of a sensitive nature or if the issues before the ET involve serious sexual allegations.

[38] Paragraph 56 of the Judgment

Non-solicitation and non-competition clauses in employment contracts

Freshasia Foods Ltd v Jing Lu [2018] EWHC 3644 (Ch)
(judgment handed down on 4th January 2019)

The Facts:

C is a UK registered company which supplies food products to Chinese retail shops and restaurants. It has between 100 and 200 employees and a turnover in the millions of pounds. It has about 500 customers in total in the UK and the EU. There are only a few employers in this industry, which is a very specialist market of frozen and packaged food sold mainly to international student customers.

D had worked as C's Marketing Advertising Manager which involved promoting C to its target market, running the social media platforms and conducting analysis on the marketing strategy.

The non-solicitation clause in D's employment contract prohibited him from soliciting, or attempting to solicit, any business from C's current or potential customers for a 12 month period after termination of his employment.

The non-competition clause prohibited him from directly or indirectly competing with C's business during his employment and for 12 months post-termination, including through his employment in a business substantially similar to or competitive with C's business.

D left C to work for a rival company and supplier of Asian foods, Kung Fu, to do virtually the same job as he had done for C.

C issued proceedings against D seeking to enforce the post-termination restrictions in D's employment contract. It sought an interim injunction pending trial, it being alleged that C had already lost £200,000 worth of business and 55 customers since D's departure.

D contended that both the non-solicitation and non-competition clauses were unenforceable. Further, he submitted that even if part of the non-solicitation clause was reasonable and

enforceable, the parts that were not were not severable and the whole clause was irreparably void.

High Court judgment

Enforceability of post-termination restrictions

General principle of enforceability:

(i) Post-termination restraints are enforceable, if reasonable, but covenants in employment contracts are viewed more jealously than in other more commercial contracts, such as those between a seller and a buyer.

(ii) It is for the employer to show that a restraint is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest of the employer for which the restraint is reasonably necessary.

(iii) Customer lists and other such information about customers fall within such proprietary interests.

(iv) Non-solicitation clauses are therefore more favourably looked upon than non-competition clauses, for an employer is not entitled to protect himself against mere competition on the part of a former employee.

(v) The question of reasonableness has to be asked as of the outset of the contract, looking forwards, as a matter of the covenant's meaning, and not in the light of matters that have subsequently taken place (save to the extent that those throw any general light on what might have been fairly contemplated on a reasonable view of the clause's meaning).

(vi) In that context, the validity of a clause is not to be tested by hypothetical matters which could fall within the clause's meaning as a matter of language, if such matters would be improbable or fall outside the parties' contemplation.

(vii) Because of the difficulties of testing the case of each customer, past or current, whether such a customer is likely to do business with the employer in the future, a clause which is reasonable in terms of space or time will be likely to be enforced. Moreover, it has been said that it is the customer whose future custom is uncertain that is "*the very class of case against which the covenant is designed to give protection…the plaintiff does not need protection against customers who are faithful to him*"

(viii) On the whole, cases in this area turn so much on their own facts that the citation of precedent is not of assistance[39].

The approach to determining enforceability of restrictive covenants is:

(a) Construe the covenants;
(b) Consider whether C has shown it has legitimate business interests requiring protection, as to which it is well established that there is a legitimate interest in maintaining a connection with both past and existing customers although that is not so in relation to merely potential customers as well as protection of confidential information;
(c) Consider whether the covenant is wider than is reasonably necessary for the protection of these interests.

Severance: general principles

A contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision if the following conditions are satisfied:

(1) the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains;
(2) the remaining terms continue to be supported by adequate consideration;
(3) the removal of the unenforceable provision does not so change the character of the contract that it becomes "not the sort of contract that the parties entered into at all".[40]

Non-solicitation clause

The non-solicitation provisions protected a genuine and legitimate interest of C. The clause protected the customer connection and goodwill prospectively at the time the contract was made *if* D were to have such contact[41]. However, the inclusion of potential customers in the scope of prohibited activities was greater than reasonably necessary to protect that interest. It was appropriate that protection was granted only to the extent that goodwill was built up with actual customers. The offending part of the clause was severable, and the remaining

[39] Paragraph 28 of the Judgment.
[40] Paragraph 35 of the Judgment.
[41] Paragraph 66 of the Judgment.

part was sufficiently certain and reasonable to be enforced. C was likely to suffer uncompensatable loss if no injunction was granted[42].

Non-competition clause

Non-compete clauses are frequently regarded as an inappropriate means of protecting legitimate interests[43].

The non-competition provision in D's contract was wider than reasonably necessary to protect C's confidential information or trade connections[44]. C's case on that clause was likely to fail and it would be unlikely to be entitled to an injunction enforcing it at trial[45].

Consequently, the Court declined to grant an interim injunction in respect of the non-competition clause.

Comment

Practitioners are frequently asked by Cs and Rs alike to give advice on the enforceability of restrictive covenants. Such covenants need to be looked at and construed in context and on a case by case basis. Non-solicitation clauses are likely to be held to be enforceable more routinely than non-compete clauses. However, a prohibition on the solicitation of 'potential' customers, as opposed to past and existing customers, is generally likely to be held to be unenforceable.

[42] Paragraph 86 of the Judgment.
[43] Paragraph 79 of the Judgment.
[44] Paragraph 79 of the Judgment.
[45] Paragraph 84 of the Judgment.

Whistleblowing – protected disclosures – teachers – unfair dismissal – migrant work visas

K Gibson v (1) Hounslow London Borough Council (2) Crane Park Primary School
UKEAT/0033/18/BA (judgment handed down on 20th December 2018)

The Facts:

C is a US citizen who was employed by R1 as a Class Teacher in R2's school with its Autistic Children's Education ('ACE') unit on a sponsored tier 2 migrant visa. She was employed on a fixed term contract for just under 3 years to run alongside her work visa.

There was conflict between C and her managers in a number of areas from early on in her employment. She was an outspoken critic of her line managers, senior management, the acting Head Teacher (and her successor), and the Chair of Governors. She had strong and well documented views on many issues, some of which formed the basis of her allegations of protected disclosures (generally relating to the welfare of the children at the school).

There were also concerns expressed about C i.e. a visiting Paediatric Occupational Therapist ('OT') provided a distressing account of possible inappropriate handling of a pupil and an unusual and inappropriately defensive response by C to the OT's concerns about a sensory diet sheet. The School's view was that C was colluding with the parents of pupils and stirring up trouble which generated complaints against the School and its management.

C made a number of complaints and allegations during the course of her employment. She did not ask Rs to apply to renew her visa and Rs decided that it would not take any steps to do so of their own volition and decided not to ask her if she would like them to apply on her behalf.

Matters came to a head when C told a parent that their child had been kicked and mock strangled by another child. C informed the parent that another teacher had witnessed the incident and informed C of it. This led to a complaint by the child's parent. On investigation by the School, the other teacher denied informing C about any strangulation, but C remained adamant that she had been so informed.

Disciplinary proceedings were commenced against both teachers. At around this time C also instituted a grievance procedure against a Teaching Assistant.
C was given a 2 year final written warning following her disciplinary hearing.

C's employment was terminated on the tier 2 sponsored visa expiring without renewal.

C brought proceedings principally for protected interest disclosure detriment (headteacher raising her voice, delay in dealing with grievance, threat of disciplinary action) and dismissal, but also for ordinary unfair dismissal, wrongful dismissal and holiday pay against the school where she worked (R2) and the local authority employer (R1).

The ET decision

Rs conceded that C's dismissal had been unfair as they had since learnt that C's visa had been temporarily renewed when she had applied independently to the Home Office for a visa which would not tie her to a particular employer.

However, the ET rejected C's claims of whistleblowing detriment and dismissal and limited her compensatory award for unfair dismissal to the 6 week period her visa was extended before her application was rejected with no right of appeal.

The grounds of appeal

(1) The ET erred in law in determining that the protected disclosures relied on did not qualify for protection under sections 43B, 43C, 43F and / or 43G ERA 1996;
(2) The ET had failed to determine and / or give reasons for its determination of some of C's claims;
(3) The ET had failed in its assessment of causation and whether the protected disclosures were causative in accordance with the statutory wording of the detriments alleged; and in relation to the Remedy Judgment
(4) The ET's approach to the compensatory award and section 123 ERA 1996, **Polkey** and the ET's decision to limit C's loss of earnings to 6 weeks from date of dismissal.

The EAT decision

The ET did not set out specifically the burden of proof in the detriment provisions of section 47B, but it did accurately cite the dicta of Elias LJ in **Fecitt and Others and Public Concern**

at Work v NHS Manchester[46] "*that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower*" and Davis LJ "*…the test to be applied under section 47B as not simply an objective 'but for' test: there was required an enquiry into the reasons why the Employer acted as it did…*".

Although the ET had not had the benefit of **Kilraine v London Borough of Wandsworth**[47] in analysing whether the disclosures amounted to information, and had wrongly concluded that some of the disclosures were not protected or qualifying disclosures, the ET had nonetheless made findings about the reason why the alleged detriments had occurred i.e. that C refused to follow management instructions or follow school procedures. Thus even though the proximate cause of the dismissal was Rs belief that C no longer had the right to lawfully work in the UK, in any event, they had shown that the protected disclosures did not materially influence Rs decision to dismiss and so dismissed the claim.

The ET had also set out all of the matters necessary in its judgment to deal with the section 103A ERA 1996 claim, which it dealt with in its additional paragraph in the corrective judgment – albeit the causation test was different between section 103A and 47B.

The ET was also entitled to conclude that C's compensatory award should be limited to the period of her entitlement to work in the UK. Since C did not ask R to apply for an extension of her visa on her behalf, it was just and equitable to limit compensation to the date C could work legally in the UK.

Comment

The case serves as a reminder that the test for protected disclosures has moved on from **Cavendish Munro Professional Risks Management Ltd v Geduld**[48] (which sought to identify the dividing line between a mere allegation and information capable of forming the basis of a protected disclosure) to the test in **Kilraine** (which found that the concept of "information" as used in section 43B(1), is capable of covering statements which might also be characterised as allegations and that there was no rigid dichotomy between the two; whether an identified statement or disclosure in any particular case does meet the standard

[46] [2012] IRLR 64 CA
[47] [2016] IRLR
[48] [2009] 8 WLUK 58

of being “information”, is a matter of evaluative judgment by a Tribunal in light of the all the facts of the case).

It is this practitioner’s view that claims for unfair dismissal linked to expiry of fixed term contracts predicated upon migrant visas are likely to become even more frequent, particularly in light of Brexit. R employers will need to be particularly vigilant in relation to potential Cs approaching expiry of their visas / contracts and employment related grievances being raised by them, as well as Rs needing to document transparently why the employer they do not intend to apply to renew any visa.

EAT Procedure: Reasonable Adjustments on Time Limits for Appeal

J v K & Anor & Equality & Human Rights Commission [2019] EWCA Civ 5
(Judgment handed down on 22 January 2019)

The Facts

Following receipt of an order that his ET claim had been struck out with an order for costs of £20,000 against him, C wished to appeal the costs decision. He sent an email to the EAT with an attachment containing the notice of appeal and the necessary documents 5 minutes before the appeal deadline. As the attachment exceeded the 10MB capacity of the EAT's server, it failed. Although a series of smaller files were all sent within 1 hour after the deadline, his appeal was out of time and his application for an extension of time was refused. C appealed to the EAT claiming that there were exceptional circumstances to justify an extension, namely: serious mental ill-health (arising from his HIV-positive status) and ignorance as to the limited capacity of the EAT's server. C's application for an extension of time was rejected on the papers by the EAT Registrar. J appealed that decision.

The relevant law

Under rule 3(1)(a)(i) and rule 37 (1A) of the *Employment Appeal Tribunal Rules of Procedure 1993* ("*EAT Rules*"), a notice of appeal and relevant documents must be received by the EAT no later than 4.00pm, 42 days after the date that the ET's reasons are sent out.

Paragraphs 4.6 and 5.3 of the *EAT Practice Direction* provide that a Registrar will make a decision.

Under rule 21 of the *EAT Rules*, a request to appeal the Registrar's decision to a judge must be notified to the EAT within five days of the date on which the Registrar's decision is sent to the parties.

In relation to extending time, paragraphs 4.7 and 4.8 of the *EAT Practice Direction* state:

4.7) In determining whether to extend the time for appealing, particular attention

will be paid to whether any good excuse for the delay has been shown and to the guidance contained in the decisions of the EAT and the Court of Appeal, as summarised in cases such as United Arab Emirates v Abdelghafar [1995] ICR 65, Aziz v Bethnal Green City Challenge Co Ltd [2000] IRLR 111, Jurkowska v HLMAD Ltd [2008] ICR 841 and Muschett v London Borough of Hounslow [2009] ICR 424.

4.8) It is not usually a good reason for late presentation of a Notice of Appeal that (a) an application for litigation support from public funds has been made, but not yet determined; or that support is being sought from, but has not yet been provided by, some other body, such as a trade union, employers' association or the Equality and Human Rights Commission; (b) the Appellant was waiting for the result of an application for reconsideration; (c) negotiations between the parties were occurring.

Page two of the EAT's guidance leaflet for appellants, *I Want to Appeal to the Employment Appeal Tribunal* (T440) states:

> *If you use email, the size of any one email, including attachments, should not exceed 10MB. If you attach scanned documents you should check that they do not exceed that size. If they do, you may need to rescan them at lower quality and/or send them in more than one email.*

Under section 29(7) EqA, providers of goods, services and facilities, and those exercising public functions are under an anticipatory duty to make reasonable adjustments for disabled people generally, except providers of judicial functions (paragraph 3 of Schedule 3, EqA).

The Issue:

Having been denied permission to extend by the registrar and the EAT, C was given permission to appeal to CoA on 2 grounds, with the EHRC intervening to assist the court in relation to the 1st ground of appeal:

(1) Whether the EAT's reasoning needs modification to take account of the duty to make reasonable adjustments under the EqA; and if so whether reasonable adjustments should have been made for C; and

(2) Whether the combination of (a) the very modest delay of one hour in transmitting the required documents to the EAT and (b) the reason for the delay being the

limited size of the EAT ought inbox to have amounted to exceptional circumstances such as to require an extension of time in order to comply with the overriding objective.

The Court of Appeal judgment:

With regards to the size of the file, CoA said this failing seemed "*venial*" and where the cause of the problem was the EAT's own system, and the service was correctly effected within an hour of the deadline, this was one of those exceptional cases where an extension was required as a "*matter of justice*"[49].

With regards to reasonable adjustments, and in response to submissions by the EHRC, Underhill LJ acknowledged that similar obligations arise under international law, namely: the ECHR, The EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities, and also the common law right of effective access to justice as affirmed in *R (Unison)* v *Lord Chancellor* [2017] UKSC 51, [2017] ICR 1037. Although hesitant to prescribe detailed guidance, the CoA made a few "very general" points:

(1) *The starting-point in a case where an applicant claims that they failed to institute their appeal in time because of mental ill-health must be to decide whether the available evidence shows that he or she was indeed suffering from mental ill-health at the time in question. Such a conclusion cannot usually be safely reached simply on their say-so and will require independent support of some kind. That will preferably be in the form of a medical report directly addressing the question; but in a particular case it may be sufficiently established by less direct forms of evidence, e.g. that the applicant was receiving treatment at the appropriate time or medical reports produced for other purposes.*

(2) *If that question is answered in the applicant's favour the next question is whether the condition in question explains or excuses (possibly in combination with other good reasons) the failure to institute the appeal in time. Mental ill-health is of many different kinds and degrees, and the fact that a person is suffering from a particular condition – say, stress or anxiety – does not necessarily mean that their ability to take and implement the relevant decisions is seriously impaired. The EAT in such cases often takes into account evidence that the applicant was able*

[49] Paragraph 29 of the Judgment.

to take other effective action and decisions during the relevant period. That is in principle entirely acceptable….Medical evidence specifically addressing whether the condition in question impaired the applicant's ability to take and implement a decision of the kind in question will of course be helpful, but it is not essential. It is important, so far as possible, to prevent applications for an extension themselves becoming elaborate forensic exercises, and the EAT is well capable of assessing questions of this kind on the basis of the available material.

(3) If the Tribunal finds that the failure to institute the appeal in time was indeed the result (wholly or in substantial part) of the applicant's mental ill-health, justice will usually require the grant of an extension. But there may be particular cases, especially where the delay has been long, where it does not: although applicants suffering from mental ill-health must be given all reasonable accommodations, they are not the only party whose interests have to be considered.[50]

CoA allowed C's appeal on the basis of his ignorance of the maximum file size of the EAT's server. Underhill LJ stated: "…*in my view an ordinary layman, knowing that the EAT accepted service of appeal documents by email, would reasonably expect that its server would be able to accept all the required documents as attachments to a single email*"[51].

However, this was predicated on the fact that the EAT had found that C did not receive a hard copy of the ET's judgment and therefore he had not received the covering letter which points claimants to other documents which warns Cs that the size of any one email, including attachments, should not exceed 10MB (namely the T440). Ordinarily the reference in the covering letter to those other documents was '*probably sufficient*' to put would-be appellants on notice that they should know of the file size limit.

He agreed with the EAT's decision to refuse to extend time on the basis of C's ill-health, as there was a lack of medical evidence and C had also been very active in appealing against another ET decision.

Comment:

This case is helpful to practitioners in so far as it provides limited general guidance as to the approach to take when considering advising Cs or Rs as to the merits of pursuing or

[50] Paragraph 39 of the Judgment.
[51] Paragraph 25 of the Judgment.

defending an appeal when the deadline has been missed. If mental health is being relied upon as a reason for the missed time limit, then medical evidence should be obtained in support of that. If an appellant leaves it to the last minute to appeal, this will also be an important factor of the Court's discretion to extend time. However, the case further demonstrates the purposive approach that courts and tribunals seem to continue to adopt when interpreting employment practice rules.

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