3PB Employment Case Law Update – 9 May 2018

By Sarah Bowen

3PB Barristers

6 year time limit for recovery of compensation does not apply to Unauthorised Deductions from Wages Claims: AM Coletta v Bath Hill Court (Bournemouth) Property Management Ltd [2018] UKEAT/0200/17/RN (29 March 2018)

1. **The Facts:** The Respondent is the management company for a substantial block of apartments in Bournemouth, for which it employs a team of porters. In 2000, the Claimant took up employment with the Respondent as a porter, becoming Head Porter in or around 2007. In 2014 he commenced ET proceedings against the Respondent, claiming that he had been underpaid by reference to the National Minimum Wage Act 1998 ('NMWA').

2. In the ET the Claimant successfully claimed that the Respondent had failed to pay him at national minimum wage rates and, at the subsequent Remedies Hearing, he sought to recover payment for the sums that should have been paid, going back to the introduction of the NMWA, a period of some 15 years.

3. Under section 9(1) Limitation Act 1980 ('LA') it is provided that:

   "*(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action is accrued."*

4. Where, however, alternative provision for limitation is made by any other enactment, section 39 LA disapplies the provisions of the LA in their entirety, stating:

   "*This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any enactment (whether passed before or after the passing of this Act)…"*

5. For complaints of unauthorised deductions in the ET, the period within which such a claim must be presented is provided by subsections 23(2) – (4) ERA:

"*(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-*

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of-

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

…

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

6. **The Issue:** Does section 9 LA apply to a claim in respect of unauthorised deduction of wages, so as to apply a 6 year limitation to the recovery of compensation, or does section 23 ERA prescribe an alternative period of limitation for the purposes of section 39 LA?

7. **The ET decision** at the Remedies Hearing was that the 3 month time limit for bringing an unauthorised deductions claim was concerned only with the question of the ET's jurisdiction to determine the claim and did not amount to a period of

limitation for the purposes of section 39 LA such as to disapply section 9. The Claimant appealed.

8. **The EAT decision**, in allowing the appeal, was that where a claim was brought under a statute that prescribed a period of limitation, section 39 LA provided that the limitations that would otherwise apply pursuant to that Act (including the 6 year limitation under section 9 LA) would not do so. Claims for unauthorised deductions were subject to a period of limitation by virtue of subsections 23(2) and (3) ERA.

9. The ET had been wrong to hold that this was not a period of limitation for the purposes of section 39 LA: section 39 drew no distinction between periods of limitation for jurisdictional or remedy purposes.

10. The Claimant had brought his claim in respect of the series of deductions made from his pay within 3 months of the last of the deductions in the series, as prescribed by section 23(3) and was thus entitled to recover the sums that had been deducted from the wages payable to him, as provided by the NMWA, without the imposition of a back-stop of 6 years.

11. **Comment:** Importantly, this decision currently has no impact on claims presented since 1 July 2015 pursuant to the Deduction from Wages (Limitation) Regulations 2014. Nevertheless, it will be interesting to those claiming or defending historic claims. Furthermore, following the ECJ's decision in ***The Sash Window Workshop and another v King*** the legality of the Regulations has been doubted.

Failure to pay enhanced shared parental pay to a male employee was not sex discrimination: Capita Customer Management Limited v (1) Ali (2) Working Families (Intervenor) UKEAT/0161/17/BA (11 April 2018)

12. **The Facts**: A became employed by CCM Ltd following a TUPE transfer. Transferred female employees were entitled to maternity pay comprising 14 weeks' basic pay followed by 25 weeks' statutory maternity pay (SMP). Transferred male employees were entitled to 2 weeks' paid ordinary paternity leave and up to 26 weeks' additional paternity leave which "may or may not be paid". All male and female employees were paid the same for any period of Shared Parental Leave.

13. A's daughter was born in February 2016 and he took 2 weeks' paid ordinary paternity leave. His wife took maternity leave and pay. However, she was advised to return to work to assist with her post-natal depression. Accordingly, A wished to take leave to care for his daughter,

14. When he enquired about taking further leave, he was informed that he was eligible for shared parental leave but would only be paid Statutory Shared Parental Pay (SPP). A argued that this amounted to direct sex discrimination.

15. **The Issue:** Does a failure to provide equal pay to a father on shared parental leave and a mother on maternity leave amount to less favourable treatment on the grounds of sex contrary to s13 EqA 2010?

16. **The ET decision:** A's claim of direct sex discrimination was upheld. It identified the comparator as a hypothetical female transferred employee taking leave to care for her child after the 2-week compulsory maternity leave period. The ET concluded that it was irrelevant that A had not given birth, since he was not comparing himself with a woman who had given birth but a woman taking leave to care for her child after the end of compulsory maternity leave.

17. It concluded that the purpose of maternity leave was care of the child. As to health, well-being and recovery for the mother it appeared to only attribute the first 2 weeks' compulsory maternity leave to that purpose. The ET concluded that special treatment justified under s13(6) EqA, which provides for "special treatment afforded to a woman in connection with pregnancy or childbirth" did not apply beyond the 2-week compulsory maternity leave period. A claimed that he wanted to take the leave to help care for his daughter and that men are being encouraged to take a greater caring role for children.

18. **The EAT decision**: The employer's appeal was allowed. Maternity leave and maternity pay are inextricably interlinked. The ET's conclusions on the purpose of the legislation was flawed. Domestic and European legislation provides a distinction between the rights given to pregnant workers who are by reason of biology women, and those who have given birth or are breastfeeding, and the rights given to parents of either sex to take leave to care for their child.

19. The purpose of the two sets of right are different. The purpose of the EU Pregnant Workers Directive is the health and wellbeing of the pregnant and birth mother, and requires Member States to provide at least 14 weeks' paid maternity leave (at least equal to statutory sick pay). On the other hand, the EU Parental Leave Directive focuses on the care of the child and makes no provision for pay. Therefore, the purpose of the 14 weeks' paid maternity leave was not necessarily for a woman to take care of her baby (although obviously this is likely to happen). The purpose of shared parental leave is for care of the child.

20. Further, the ET had relied upon an inappropriate comparator. The correct comparator is a woman on shared parental leave, who would have been given SPL on the same terms as A received. Accordingly, A was unable to show he was treated less favourably for the purposes of s13 EqA. In any event, even if the ET's comparator was correct, it was an error of law to disregard that any more favourable treatment did not fall under s13(6)(b) as special treatment afforded to a woman in connection with pregnancy or childbirth.

21. This case was for a father to be paid the same rate of pay as a mother in the first 14 weeks after childbirth. Interestingly, the EAT did note that after 26 weeks the purpose of maternity leave may change from the biological recovery from childbirth and special bonding period between mother and child, and it may be at that point possible to draw a valid comparison between a father on shared parental leave and a mother on maternity leave (at para 86). This was stated in the context of EU and domestic law encouraging participation of the father in care for his child.

22. **Comment:** It stands to reason to distinguish the purpose of paid maternity leave and paid shared parental leave. The purpose of maternity leave and pay is clearly for the health and wellbeing of a woman in pregnancy, confinement and after recent childbirth.

23. The comparative exercise is perhaps less straightforward. The EAT has enforced that even though a mother will care for her baby during maternity leave that is a consequence and not the purpose of maternity leave and pay.

24. It seems obvious to conclude that shared parental leave must be given on the same basis for men and women. Failure to do so would undoubtedly give rise to a strong claim of direct discrimination.

25. Challenges to any difference in pay over 26 weeks' are now very likely to be pursued.

Acceptance of variation of contract of employment not necessarily inferred if an employee works without protest after variation is imposed: Abrahall v Nottingham City Council [2018] EWCA Civ 796 (19 April 2018)

26. **The Facts:** Historically, terms and conditions of employment of local government employees had been governed by collective agreements between local authorities and the trade unions representing the workforces. Terms differed as between employees doing, broadly, manual work and those doing "administrative, professional, technical and clerical work ('APT&C'). One such difference was in their pay structures. The APT&C employees were paid an annual salary and the jobs done by them were assigned to grades, each of which covered a 'band' of points on a 'spinal column', each spinal column point ('SCP') denoting a particular level of salary. APT&C employees were contractually entitled to move up a point in their pay grade each year until they reached the grade maximum, subject only to 'satisfactory service'. By contrast, manual employees were paid on a weekly or monthly basis by reference to grades which attracted a particular fixed level of pay, without any provision for progression.

27. The differences between the 2 groups of employees became an increasing source of tension and in 1997 agreement was reached between employers and trade unions at national level on a detailed framework for the implementation of so-called 'single status' for all local authority employees. The implementation of single status had to be achieved by negotiations at local level and this proved to be a very slow process, a deadline of 2010 eventually being agreed nationally.

28. One of the fundamental changes to be effected by the introduction of single status was that the grading and pay structure for manual employees should be assimilated to that of APT&C employees, with the creation of a new and simplified single spinal column and a revised system of grades to which the jobs of all employees were allocated on the basis of a job evaluation exercise.

29. Following the 2010 General Election there was a new climate of austerity in the public sector. At its budget consultative meeting in December 2010 – thus only a few weeks after single status had come into effect – Nottingham City Council ('the Council') announced to the trade unions a proposal for "freezing incremental progression for 2 years" – that is, that employees would not move up the spinal

column in either 2011 or 2012. A formal decision was made on 8 March 2011 and the freeze took effect from 1 April.

30. The unions did not agree to the proposed freeze, but it was implemented nonetheless, and there were accordingly no incremental pay increases in 2011 or 2012. Not a single employee raised a grievance about the initial 2 year pay freeze, whether individually or collectively with others. The unions did not raise a formal dispute with the Council either, neither was there any kind of formal or informal industrial action. No letters were written after the March 2011 decision by or on behalf of affected employees to the effect that they did not accept the pay freeze and / or were working under protest. Equally, nothing was said or written by or on behalf of employees to the effect that they did accept it.

31. At the end of the 2 year period, in early 2013, the Council resolved to extend the freeze for a further period. This time the unions responded in April 2013 by activating a formal collective grievance procedure. This did not produce a resolution.

32. **The Issue:** The Claimants' case was that the employees had a contractual right to an annual increment in each of the years 2011 – 2013. The Council's answer was two-fold: (a) it was denied that that under any of the single status contracts employees had any contractual entitlement to an annual increment; (b) even if there had once been such an entitlement, by their conduct in continuing to work without protest after the implementation of the freeze, the Claimants were to be taken to have accepted a variation in their contracts under which pay progression was suspended for the 2 years in question. This was only a partial answer to the claim, since the Council accepted that the lodging of the grievance against the further freeze implemented in 2013 precluded any argument that the Claimants had accepted any contractual variation in that respect.

33. **The Court of Appeal's decision** was that the Claimants had a contractual right to pay progression and gave some guidance on whether acceptance of a variation of a term of a contract of employment should be inferred, including:

- The inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms.
- It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an

intention to do so. To put it another way, the employee should have the benefit of any (reasonable) doubt;

- Protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing.
- Where the variation is wholly disadvantageous to the employee (i.e. where there is no compensating advantage), acceptance is less likely to be inferred;
- An employer's reliance on inferred acceptance will be weakened where the employer represented that there was no variation of contract and thus that acceptance was unnecessary.

Strike out for discussion of evidence whilst under oath: Chidzoy v BBC UKEAT/0097/17/BA (5 April 2018)

34. **The Facts:** The Claimant worked for the Respondent as a journalist and home-affairs respondent for 29 years. She pursued claims of whistleblowing, sex discrimination, victimisation and harassment.

35. During cross-examination of the Claimant there were several breaks and the ET "adopting its usual course" – advised her that she must not discuss her evidence or any aspect of the case with anyone during each such adjournment. She was not informed by the ET that by doing so her claim might be struck out.

36. Approximately 15 minutes before the anticipated end of her evidence, during a short break, the Claimant was seen participating in a conversation with another person. It transpired that the Claimant had participated in a conversation with a journalist. Aspects of this conversation were overheard by one of the Respondent's witnesses and by two members of its legal team, who brought the matter to the attention of the ET.

37. The ET allowed the Claimant to give instructions to her legal representative and to thus provide an initial account of what had taken place. Counsel for the Claimant advised the Tribunal that she had not been discussing her evidence. Initially Counsel had been party to a conversation with the Claimant and the journalist but advised the

ET that he had heard nothing untoward. He had though left the Claimant and the journalist alone whilst he went to the lavatory.

38. The ET then adjourned for a long weekend to enable the parties to provide statements about the mater. The statements were provided by the Claimant, journalist, solicitor for the Respondent and one of the Respondent's witnesses (the latter two were said to have overheard parts of the conversation).

39. Upon resumption of the hearing, the Respondent applied for the claim to be struck out pursuant to Rule 37(1)(b) and (e) Schedule 1 **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, due to the Claimant's unreasonable conduct of the proceedings.

40. The conversation, included some discussion about the case and about a particular aspect of the Claimant's evidence given shortly before the break. The Respondent's witnesses stated that they had heard the Claimant use the words "Rottweiler" and "dangerous dogs". The Claimant and journalist's statements were conflicting both at the reconvened hearing and compared to Counsel's submission to the ET before the long weekend.

41. **The ET decision:** The words heard by the Respondent's witnesses were relevant to the last proportion of the Claimant's evidence in the case. Accordingly, it concluded that the Claimant had been party to a discussion about her evidence, in flagrant disregard of the warnings given by the ET on 6 separate occasions that she must not do so when still giving evidence. Accordingly, the ET concluded that it has irretrievably lost trust in the Claimant and could no longer fairly hear her case.

42. It considered whether there were any alternatives to striking out the claim but concluded that there were none. It therefore, struck out the Claimant's case. The Claimant appealed.

43. **The issue:** Was the correct procedure utilised? Was it proportionate of the ET to strike out the Claimant's case?

44. **The EAT decision:** The ET had correctly addressed the 4 questions identified in ***Bolch v Chipman [2004] IRLR 140 EAT***:

(1) There must first be a conclusion by the ET not simply that a party has behaved unreasonably but that the proceedings have been conducted unreasonably by her or on her behalf.

(2) Assuming there is such a finding, in ordinary circumstances the ET will still need to go on to consider whether a fair trial is still possible, albeit there can be circumstances in which a finding of unreasonable conduct can lead straight to a Debarring Order (see ***De Keyser Ltd v Wilson [2001] IRLR 324 EAT*** *(Lindsay P presiding)). That might be, for example where there has been "wilful, deliberate or contumelious disobedience" of an ET Order, otherwise it might be where the conduct in issue is so serious it would be an affront to the ET to permit the party in question to continue to prosecute their case (see* ***Arrow Nominees Inc v Blackledge [2000] EWCA Civ 200****).*

(3) Even if a fair trial is not considered possible, the ET must still consider what remedy is appropriate and whether a lesser remedy might be more proportionate.

(4) And even if it determines that a Debarring Order is the appropriate response, the ET should consider the consequences of that Order (allowing that, for example, where a response has been struck out at the liability stage, it might still be appropriate to allow the Respondent to participate in any remedy hearing).

45. The ET adopted an entirely fair process and was entitled to make the findings it did as to what had taken place and had permissibly concluded that the Claimant had unreasonably conducted proceedings. The ET went on to consider whether it could still conduct a fair trial of the Claimant's case but, having concluded that trust had broken down, had correctly concluded that it was not.

46. Asking itself whether it was proportionate to strike out, the ET had considered whether there were any alternatives but had concluded that there were not. In the circumstances, that was a conclusion that was open to it. The Claimant's appeal was accordingly dismissed.

47. **Comment:** In my experience, the ET makes a varied attempt to warn witnesses who are still on oath during adjournments (e.g. overnight, in the hearing day or perhaps over longer periods). Whilst it is right to say it is common to do so it is not always done. In this case the employer was able to prove that the Claimant had received 6 warnings, including one immediately before her conversation with the journalist. Accordingly, this gave great strength to their application for strike out.

48. The EAT has rejected the suggestion that such a warning needs to include the details of the possible consequences of such actions. The EAT was satisfied that any witness in the Claimant's circumstances would have understood the nature and

significance of the instruction, given that she was legally represented and it would be reasonable to assume that the instruction would have been explained to her by her own representative. Such a warning does not impact upon any rights (e.g. freedom of expression or the right to a fair trial) because it is reasonable and proportionate.

49. When the media takes interest in a case, it is perhaps appropriate to remind the ET to warn the witness as to their obligation not to discuss evidence (with anyone) whilst still on oath if they do not independently do so.

50. Counsel for the Claimant received some criticism from the ET in this case. It is a warning to practitioners to take steps to avoid the risk of this sort of problem arising.

51. The process utilised in this case as to the application for strike out and the procedure utilised by the Tribunal is a useful guide for practitioners who might face similar issues in litigation.

Endorsement of the sequential approach to time extension for ACAS EC: Luton Borough Council v Haque [2018] UKEAT 0180_17_1204 (12 April 2018)

52. **The facts:** The Claimant was summarily dismissed on 20 June 2016 ('the EDT'). ACAS was contacted on 22 July 2016 and the EC certificate issued on 22 August 2016 (31 days). The ET1 was presented on 18 October 2016 for claims of unfair and wrongful dismissal, direct and indirect race and region or belief discrimination. The primary limitation period for unfair dismissal was 19 September 2016. In the ET3 the Respondent contended that the claims were out of time. At a PHR the ET concluded that the claims were in time and the matter should proceed to a full hearing. The Respondent appealed.

53. **The relevant legal provision:** Section 207B of the ERA provides:

"207B. Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(2) In this section -

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

54. Applying section 207B(3) to the facts of ***Hague***, i.e. adding the 31 days of ACAS EC to the primary limitation period of 19 September 2016 would mean that the ET1 needed to be submitted by 20 October 2016. This would mean that the claim was presented in time.

55. However, applying section 207B(4) meant that the claim was not presented in time because, the primary limitation date of 19 September 2016 fell in the period of 1 month after 'Day B' (22 September 2016) accordingly application of the 'precise' wording of the section would mean that the claim needed to be present by 22 September 2016 (thus it would be 26 days out of time).

56. **The Issue:** What is the meaning of the time limit to which 207B(4) refers? Is it the unmodified time limit for which s111(2)(a) ERA provides, or the modified time limit of section 207B(3)? Does section 207B(4) take precedence? Or should they be applied sequentially?

57. **The EAT decision** (at a rule 3(10) of the EAT Rules 1993 hearing – following comments at the sift stage that the papers disclosed no reasonable basis to proceed): Section 207B(3) applies in every case; sections 207B(3) and (4) are to be applied sequentially. The EAT considered that subsection (4) furthers that intention by ensuring that a prospective Claimant always has at least one month from the end of the EC period in which to bring a claim. Otherwise, if a prospective Claimant contacted Acas towards the end of the unmodified time limit, he or she would have little time in which to commence proceedings should conciliation fail. The EAT therefore concluded that H's claims had been presented in time, but nonetheless reluctantly directed that the matter should proceed to a full appeal hearing (with the caveat that the Respondent may face a costs application if the Claimant incurred costs at that stage).

Amendment: Is adding a s13 EqA claim to a s15 claim just re-labelling – Reuters Limited v Cole UKEAT/0258/17/BA

58. **The Facts:** The Claimant issued an ET1 under s15 and 21 EqA. The Claimant was an Assistant Editor for Reuters from November 2010 and suffered from chronic depressive illness, which fell within the definition of disability pursuant to s6(1) EqA.

59. A list of issues was prepared by the Claimant for a PHR and it extended beyond the pleaded claims. For the first time the Claimant referred to claims of direct discrimination (s13 EqA) and indirect discrimination (s19 EqA). The employer objected and stated that an amendment application would be necessary.

60. The Claimant applied out of time to add a claim under s13 EqA contending that it was a mere relabelling exercise thus raising no new facts or matters and thus was a mere relabelling exercise (***Selken***t).

61. **The ET decision**: Accepting that it was a mere relabelling exercise the ET allowed the application.

62. **The issue**: Can a judge accept that adding a s13 EqA claim to a s15 claim is just re-labelling?

63. **The EAT decision:** The word re-labelling arising from ***Selkent***, where Mummery J distinguished "the addition or substitution of other labels for facts already pleaded"

from “the making of entirely new factual allegations which change the basis of the existing claim” (page 843G-H).

64. Comparing s13 and s15 EqA and the case law further interpreting the provisions, **s**eeking to add a s13 claim was not a mere re-labelling exercise. Section 13 imposes more stringent tests both as to knowledge and causation and also involves a comparative exercise. This takes the amendment beyond the re-labelling category.

65. Section 13 involves a more onerous test than section 15, and thus a more demanding factual enquiry. The set of facts which is necessary and sufficient to establish liability under section 15 will not be sufficient to satisfy section 13.

66. The existing claim had been framed to establish the ingredients of a section 15 claim and not a section 13 claim.

67. Any inferences that can be drawn which establish the further ingredients of a section 13 claim were inferences of new fact.

68. **Comment:** The dichotomy between re-labelling and ‘new’ claims is relatively unclear before the Tribunal. In practice, the ET appears very ready to accept many claims as simply amounting to re-labelling and decisions can be very generous to Claimants (especially those who are unrepresented). This has resulted in unpredictability in decisions and a lot of uncertainty, especially for Respondents.

69. Whilst the issue of time limits was not the appeal issue, the EAT as expressed an opinion that the correct approach is that the applicant need on demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (***Galilee v The Commissioner of Police of the Metropolis UKEAT/0207/16*** (22 November 2017). This is opposed to the suggestion that a definitive determination should be made (***Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge & Others UKEATS/0007/16*** (12 August 2017).

Amendment: Is the fact that a proposed amendment can be commenced as a new claim within time conclusive in favour of granting an application - Patka v BBC UKEAT/0190/17/DM (12 April 2018)

70. **The Facts:** The Claimant had put his case of race discriminatory unequal pay as a complaint of direct discrimination, albeit relying on general statistical evidence in support. After taking legal advice, he subsequently sought to amend: (a) to add details about a subsequent decision on his internal grievance; (b) to add a claim of indirect discrimination in the alternative; and (c) to include a further basis for his complaint of direct discrimination.

71. **The ET decision**: The application to amend and include (a) was allowed, but only to the extent that it was background information. It otherwise refused the amendments, concluding that these were not simply different labels but added substantively new causes of action and arguments that had been raised too late (the parties had fully prepared their respective cases on the basis of the claim as already pleaded) and had already led to the postponement of the listed Full Merits hearing; in the circumstances, the balance of prejudice supported the refusal of the application. The Claimant appealed.

72. **The EAT decision**: In dismissing the appeal, the EAT stated that the ET permissibly understood the application to amend in respect of (a) to have been limited to adding an update to the factual background; on this basis the Respondent had not objected to the amendment and it had been allowed. That was an entirely appropriate exercise of the ET's case management powers and there was no proper basis of challenge.

73. As for the indirect discrimination case, the ET was entitled to conclude this was not previously identified by the Claimant as part of his claim. Although the fact that it might still be in time was a potentially significant factor (**Gillett v Bridge 86 Ltd** UKEAT/0051/17 applied), the ET had permissibly taken the view that whether or not there was a continuing act could only be determined at the final merits hearing. It was, moreover, open to the ET to conclude that the different issues raised by the indirect discrimination claim meant the balance weighed against hearing that together with the existing direct discrimination claim, in particular given the prejudice caused to the Respondents.

74. Similarly, the ET had been entitled to see the new argument raised in respect of (c) as giving rise to substantively new issues for determination such as to cause unfair prejudice if this amendment was permitted. To the extent that the Claimant was only seeking to make this amendment to explain how he argued that the burden of proof shifted to the Respondent, that remained open to him given he had always made it clear he intended to rely on the statistical evidence for this purpose.

Wasted costs – is there a need to rigorously examine conduct: Wentworth-Wood & Others v Maritime Transport Ltd UKEAT/0184/17/JOJ (16 April 2018)

75. **The Facts:** The Claimants relevant to this appeal had lodged claims for holiday pay. Their claims were struck out pursuant to Rules 75(1)(a) and 76(1)(a) **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. Following a related costs hearing, an order was made by the ET that the Claimants' solicitor should be liable to pay the sum of £600 to the Respondent by way of wasted costs.

76. The Respondent's wasted costs application against the solicitors was brought on the basis of alleged negligence in bringing and/or conducting the proceedings. In particular, failure to particularise the claims in the ET1, respond to the ET's initial or subsequent orders, and providing incomplete schedules of loss in that they did not address the requirements of ET orders.

77. The solicitors accepted occasional failures and apologised. They accepted that they could have raised difficulties sooner but did not do so.

78. **The EAT decision:** The matter was firstly listed for a preliminary hearing before Langstaff J who said that he doubted if the ET's judgment met the requirement that it be accessible and public.

79. The ET's conclusions were flawed. Where there is more than one Claimant the ET must identify in respect of each Claimant and his or her deficient conduct. The ET had treated them as a group and fell into error by treating them all as a single unit.

80. The reasons were not satisfactory. There was no indication in the judgment of the ways in which the solicitors had acted that amounted to behaviour that no solicitor who was reasonably informed and competent would have behaved.

81. Nor were there any reasons why the ET rejected the submissions made in the Claimant's solicitors' letter addressing the application for costs and why they should not be awarded.

82. The judgment did refer to the decision in ***Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420*** in that the ET did not demonstrate an application of the approach required or explain why the Respondent was successful in the application or why the solicitors lost. There was no outline of factual background or the factual conclusions reached.

83. The ET adopted wholesale the reasons advanced by the successful party, without identifying the reasons or explaining even briefly what those reasons were or why they had been accepted.

84. Accordingly, the judgement was not ***Meek*** compliant and did not meet the dual requirement of being accessible and public in consequence.

85. As to the appropriate approach to be adopted to wasted costs applications by the ET the EAT confirmed that the following should be undertaken:

"32. Accordingly, the approach to be adopted by Employment Tribunals is:

(i) to recognise that wasted costs is an exceptional jurisdiction to be exercised with great care adopting a staged approach, and requiring consideration of what specific conduct is said to be improper, unreasonable or negligent;

(ii) to consider whether the particular conduct caused the opposing party unnecessary costs;

(iii) to consider whether in all the circumstances it is just to order the legal representative to compensate the receiving party for the whole or any part of those costs."

86. The third part of the test allows for the issues of privilege and professional duties.

87. Whilst ***Ridehalgh v Horsefield [1994] Ch 205*** was referred to in the judgment the 3 stage test was not addressed and nor were the solicitors' professional duties.

88. There was no attempt at all to identify the breach of duty relied upon as akin to an abuse of process. It proceeded on the basis of mere negligence which was not sufficient.

89. **Comment:** The EAT has reinforced the principle that wasted costs should only be awarded following proper examination of conduct. Before forming a decision the Tribunal must follow the 3 stage approach set out above and must provide adequate reasons. Mere allegations are not enough – examination of the evidence is necessary and reasons must address the arguments raised by the parties.

Time limits – ACAS advice extension of time: *DHL Supply Chain v Fazackerley UKEAT/0019/18/JOJ (10 April 2018)*

90. **The facts:** The Claimant was dismissed for gross misconduct effective 15 March 2017. He appealed the decision and through no fault of either party the appeal hearing was not held until 22 June 2017. The appeal was rejected.

91. On or around 20 March 2017 the Claimant contacted ACAS. He claimed that ACAS advised him that prior to considering legal or other action he should first exhaust the appeal process. No reference was made to obtaining an ACAS certificate or time limits. The Claimant did not seek any further advice.

92. Shortly after his appeal was rejected the Claimant took legal advice and lodged an ET1 on 19 July 2017. It was out of time.

93. **The ET decision**: The ET accepted the Claimant's account of his conversation with ACAS. It considered it was reasonable for the Claimant to approach the matter thereafter on the basis advised by ACAS. The ACAS advice was erroneous. There was no fault of the Claimant. It was not reasonably practicable for the Claimant to present his claims of unfair dismissal and wrongful dismissal in time pursuant to s.111 Employment Rights Act 1996 (adjusted for the early conciliation procedure).

There was no unreasonable delay by the Claimant after taking legal advice from his representatives.

94. **The EAT decision:** As an unqualified statement the ACAS advice was erroneous. Awaiting the outcome of an appeal in itself it not enough, in the present case the ACAS advice tipped the balance. A different ET might have taken a different view but the decision was not an error of law.

95. **Comment:** I am finding an increasing number of Claimants are attempting to rely on ACAS advice in time limits arguments i.e. claiming that they were not advised of time limits at all. In my experience, this argument does not usually persuade the Tribunal to extend time in itself. Information about the Employment Tribunal and time limits is very accessible online and generally well known. In the present case, the Claimant's account was entirely believed and there do not appear to have been any strong arguments to cast doubt on the same. Claimant's are referred to ACAS for employment disputes, accordingly it is not unreasonable for them to rely on their advice. In circumstances like the present case, where a Claimant has been inadvertently misled, surely justice requires that they should still be able to proceed with their case? However, those representing Respondents will no doubt consider that it is quite perplexing that a Claimant can raise such assertions (without corroborating evidence) about conversations with ACAS in this way. I would be very surprised if ACAS did not refer to time limits or early conciliation in such circumstances.

Constructive dismissal: Affirmation of breach in the context of 'Last Straw' dismissals: *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*

96. **The Facts:** The Appellant was employed by the Respondent Trust as a nurse between 4 August 2008 and 28 August 2014. In January 2015 she commenced proceedings against the Trust in the Employment Tribunal claiming for unfair (constructive) dismissal. At a preliminary hearing on 7 May 2015 her claim was struck out under rule 37 (1) (a) of the Employment Tribunal Rules of Procedure. On 2 June 2016 her appeal against that decision was dismissed by the Employment Appeal Tribunal (HHJ Hand QC sitting alone) under rule 3 (10) of the Employment Appeal Tribunal Rules 1993 (as amended). The Claimant appealed that decision to the CA.

97. On 22 April 2013 there was an altercation between the Appellant (who was pregnant) and Ms Luckaine. Each said that the other assaulted her in the course of the incident. There were several witnesses to the incident or its aftermath. The Appellant went off sick and raised a Dignity at Work complaint against Ms Luckaine.

98. There was an investigation of the incident of 22 April under the Trust's disciplinary processes, which was not completed until the end of July. The recommendation was that disciplinary proceedings should be brought against both the Appellant and Ms Luckaine. Both ended up with a final written warning.

99. The Appellant presented her claim of constructive dismissal relying on a 'last straw' argument. In summary, the Claimant relied upon the following acts and omissions:

(a) The Respondent actively looked for faults with the Claimant in order to push her out of the company.

(b) The Respondent intentionally extended the Claimant's capability procedure (2010-2012) in an attempt to try and make the Claimant fail; causing the Claimant a great amount of stress.

(c) The Respondent disregarded the issues the Claimant had with her colleagues (pre 22 April 2013 and ongoing); despite numerous complaints by the Claimant no action was taken. This made the Claimant's working environment very difficult and uncomfortable.

(d) In accordance with the ACAS Code of Conduct where there is a grievance and disciplinary together, the grievance must be addressed first. The Respondent failed to comply with the ACAS Code of Conduct and failed to acknowledge the Claimant's dignity at work grievance until October 2013. This was when the Claimant was heavily pregnant and ready to start her maternity leave.

(e) The Respondent deliberately prolonged the disciplinary proceedings against the Claimant; specifically, the incident occurred on the 22nd April 2013 but the investigation was not concluded until August 2013. The incident had already caused the Claimant a huge amount of stress and the delays added to this.

(f) The Respondent centred their investigation on the Claimant in an attempt to discredit the Claimant's character. This caused the Claimant to lose trust and confidence in the Respondent.

(g) The Respondent relied on conflicting witness evidence to formulate their decision against the Claimant.

(h) The Respondent failed to sanction the Claimant and Ms Luckaine in accordance with the alleged acts of misconduct committed. The Respondent gave the Claimant and Marilyn a final written warning although it was accepted that Marilyn had physically abused the Claimant, further causing the Claimant to lose trust and confidence in the Respondent.

(i) The Claimant's appeal was not given due consideration despite having valid grounds and was therefore not upheld. This was the last straw for the Claimant.

Importantly, the Claimant appeared to cite two last straws – firstly, the incident on 22 April 2013 (alleged assault) and secondly, the appeal outcome letter.

100. **The ET decision:** The claim was struck out because the final incident i.e. the appeal process and outcome letter was not capable of contributing towards a fundamental breach of contract i.e. last straw.

101. **The EAT decision:** Refused an appeal following a 3(10) hearing.

102. **The issue:** Whether, as the EAT held in ***Addenbrooke v Princess Alexandra Hospital NHS Trust***, a 'last straw' which may itself not amount to a breach of contract but which triggers a resignation can revive an employee's ability to rely on a breach that had previously been waived/affirmed?

103. **The CA decision:** Underhill LJ endorsed the judgment and reasoning of Dyson LJ in ***London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493, [2005] ICR 481***. However, the CA has gone further in clarifying whether a last straw can reignite previous breaches of contract which may have been waived by the employee.

104. Four points have been emphasised, the second and third are significant in clarifying the legal principles:

105. **Firstly,** the "last straw doctrine" is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach of the kind described in the passages which Dyson LJ quotes from Harvey. It does not, have any application to a case where the repudiation consists of a one-off serious breach of contract (at para 42).

106. **Secondly,** in many such cases the employer's conduct will have crossed the ***Malik*** threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the ***Malik*** term. In other words it 'revives' the earlier conduct (at para 43).

107. **Thirdly,** if the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the ***Omilaju*** test), it should not normally matter whether it had crossed the ***Malik*** threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.

108. **Fourthly,** the "last straw" image may in some cases not be wholly apt. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. In some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect).

109. Accordingly, in a "normal" case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation)

(5) Did the employee resign in response (or partly in response) to that breach?

110. **Comment:** This decision should put to rest affirmation arguments where a last straw is established. Claimant's will undoubtedly more commonly refer to historic issues alleged breaches when pleading cases in light of this. This does not necessarily disadvantage employers who will undoubtedly attempt to discredit the last straw and then rely on affirmation arguments, which will then need to be determined.

In other news…

Updated Vento bands apply from 6 April 2018:

111. The Presidents of the Employment Tribunals in England and Wales and Scotland have issued joint guidance updating the Vento bands used for calculating awards for injury to feelings.

112. For claims presented on or after 6 April 2018, the bands will be:

- A lower band of £900 to £8,600 (for less serious cases)
- A middle band of £8,60 to £25,700 (for cases that do not merit an award in the upper middle band); and
- An upper band of £25,700 to £42,900 (for the most serious cases)
- With the most exceptional cases capable of exceeding £42,900

Increase in Compensation Limits and Minimum Awards

113. The Employment Rights (Increase of Limits) Order 2018 has been made which results in the following increases where the 'appropriate date' for the cause of action falls on or after 6 April 2018:

	6 April 2017	6 April 2018
Cap on a week's pay	£489	£508
Cap on Compensatory Award	£80,541	£83,682
Guarantee Pay (per day)	£27	£28
Minimum Basic Award	£5,970	£6,203

New rules for taxation of termination payments and payments for injury to feelings

114. From 6th April 2018 all payments made in lieu of notice will be classed as earnings and subject to tax and class 1 NICs in the normal way pursuant to sections 402A-E IT(EP)A 2003 (inserted by The Finance (No.2) Act 2017). The new provisions operate so as to exclude any PILON sum from the 'tax free termination payment' of £30,000.

115. In addition, payments for injury to feelings will now fall outside the exemption for injury payments, save where the injury amounts to a psychiatric injury or any other recognised condition.

Draft legislation protecting whistleblowers seeking jobs in the NHS…

116. The Government has published a draft of the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018.

117. If brought into force, the Regulations will provide that an NHS employer must not discriminate against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure as defined in s.43A ERA. A breach of the

obligation can give rise to ET claims and actions in the civil courts for breach of statutory duty.

ET claims continue to rise…

118. ACAS has reported that EC notifications are up by 500 a week (to 2200). Whereas on 8 March, the MOJ confirmed that ET1 receipts were up by 90 per cent between Oct-Dec 2017 (compared to the same quarter in 2016).

9 May 2018

Sarah Bowen
Barrister
3PB Barrister
0121 289 4333
Sarah.bowen@3pb.co.uk

Chambers Director: Russell Porter
Telephone: 01865 793 736
Email: russell.porter@3pb.co.uk