The dangers of springing an “off the record” settlement discussion on an employee

The EAT’s recent decision in *Tarbuc v Martello Piling Ltd* clarifies the scope and limits of the protected conversation regime under s.111A of the Employment Rights Act 1996. It reminds us of the limited nature of the protection and highlights that when assessing whether there has been “improper conduct” Tribunals must consider the full circumstances surrounding the conversation. Ambushing an employee and denying them the chance to have a companion may mean protection is lost.

What is the background law?

Section 111A of the Employment Rights Act 1996 allows an employer or employee to initiate a “protected conversation” about terminating employment on agreed terms on a confidential basis, without that conversation being admissible as evidence in any subsequent ordinary unfair dismissal claim. It operates in a similar way to the common law “without prejudice” principle, but with two key distinctions. First, without prejudice protection applies only where there is an existing dispute between the parties, whereas section 111A protection can apply even where no dispute has crystallised. Second, without prejudice protection can apply across all proceedings, whereas s.111A protection is confined to complaints of ordinary unfair dismissal and does not extend to other claims an employee may bring

Both protections are subject to an “impropriety” exception, whereby the protection may be lost. Without prejudice communications lose their protection where there has been “unambiguous impropriety” such as fraud, perjury or blackmail. However, section 111A protection may be lost where a Tribunal considers there has been “improper behaviour”. The Acas Code of Practice on Settlement Agreements gives examples of improper behaviour including harassment, bullying, intimidation, discrimination, victimisation, physical threats, and putting “undue pressure” on a party. Examples of undue pressure include failing to allow a reasonable time to consider the proposed settlement agreement (with Acas suggesting at least 10 calendar days) or telling an employee they will be dismissed if they reject the offer before any dismissal process has begun. Where improper conduct occurs, the Tribunal may allow evidence of the discussion to be admitted in an ordinary unfair dismissal claim to the extent it considers just.

What happened in this case?

Mr Tarbuc (**the Claimant**) began working for Martello Piling Limited (**the Respondent**) as an Estimating Engineer on 19 February 2018. In April 2024, an issue arose about the Claimant’s entitlement to a bonus. On 23 April 2024, the Claimant was unexpectedly called into a meeting with the Managing Director Mr Macklin (**the 23April discussion**). At the outset of the meeting, Mr Macklin told the Claimant that the discussion was a “protected conversation”. When the Claimant queried what that meant, Mr Macklin said it was a “legal term”.

The Claimant said Mr Macklin went on to accuse him of being “entitled”, said that he “did not trust him” and that he wanted him to leave the business. He then passed the Claimant an envelope setting out the terms of a settlement offer and told the Claimant that he did not have to accept it but, if he did not, a redundancy process would follow, and he would "guarantee" that the Claimant would come last (i.e. that he would be made redundant). The Claimant also alleged that Mr Macklin said that he had offered three months' salary which was more than he thought the Claimant was worth and that the Claimant would not receive a discretionary bonus due to his "entitled attitude". The Claimant immediately declined the offer, and he was dismissed on 13 June 2024.

In August 2024, the Claimant brought claims for ordinary unfair dismissal, unlawful deductions from wages and less favourable treatment for being a part-time worker. In his claims, the Claimant referred to the 23 April discussion. The Respondent argued that the 23 April discussion was a protected conversation and was, therefore, inadmissible in the proceedings. In response, the Claimant argued that it was not protected because the Respondent had behaved improperly by:

- threatening him with redundancy if he did not accept the offer;
- not giving him advance notice of the meeting or a right to refuse to go;
- not giving him the option to bring a companion; and
- immediately moving to make him redundant once he had declined the offer.

Mr Macklin disputed the Claimant’s account of the 23 April discussion. He denied threatening the Claimant or saying that he would “guarantee” that he would come last in any redundancy process. However, he accepted that he had said that if the Claimant did not accept the offer, then a redundancy process *may* follow and that if he (Mr Macklin) were tasked with the scoring – which he said he would not be – then the Claimant would *likely* come last. He also noted that the Clamant did not complain about the conduct of the 23 April meeting at the time.

A Preliminary Hearing was held in March 2025. The Employment Tribunal preferred Mr Macklin’s version of events. It was satisfied that he had genuine concerns about the Claimant’s performance and attendance and made the offer as an attempt to bypass the unrest that a redundancy situation would cause. In conclusion, the Tribunal was satisfied that there was no improper conduct. As a result, the 23 April discussion was a protected conversation and was not admissible. The Tribunal Judge ordered all references to the 23 April discussion to be redacted from the pleadings, documents and witness statements and directed that the Respondent did not need to disclose related documents.

The Claimant appealed to the Employment Appeal Tribunal (**EAT**) on the following key grounds:

- Ground 1 – that the Tribunal erred by determining inadmissibility applied globally to all of his claims (both existing and pending claims) and failed to recognise that protected conversations are inadmissible in ordinary unfair dismissal claims only.

- Ground 2 – that the Tribunal failed to give proper consideration to the Acas Code of Practice on Settlement Agreements when reaching its decision. In particular, it failed to consider the cumulative effect of the Respondent's conduct, including being ambushed before the meeting, not being given a chance to take a companion and the short timeframe of five days to consider the offer.

Separately, the Claimant applied to amend his claims to add on an automatic unfair dismissal claim (on several different grounds) and a whistleblowing detriment claim. That application was refused and is the subject of a separate appeal to the EAT.

What was decided?

Ground 1 – was the 23 April discussion inadmissible for the ordinary unfair dismissal claim only?

On Ground 1, the EAT held that the Tribunal Judge had erred in failing to recognise that the 23 April discussion was inadmissible in his ordinary unfair dismissal claim but *admissible* in his unlawful deductions from wages and part-time worker claims. This left the Tribunal with the *"very difficult task of analytical compartmentalisation",* noting that *"mental gymnastics"* would be required to decide the case. The EAT Judge went on to order the Respondent to disclose documents concerning the 23 April discussion for the purposes of the unlawful deductions from wages and part-time worker claims.

Further, as part of Ground 1, the EAT also considered whether the Claimant had pleaded the factual basis for an *automatic* unfair dismissal claim and, if so, whether the Tribunal had erred in failing to identify the claim and confirm that the 23 April discussion was admissible in relation to it. However, the EAT Judge found that the factual basis for such a claim was *not* clearly set out in the original claim (and, even if it had been, the Tribunal Judge would not have erred in failing to identify an un-labelled claim of her own motion).

Ground 2 – was proper consideration given to whether the conduct of the meeting was improper?

On Ground 2, the EAT held that the Tribunal Judge had approached the improper conduct question too narrowly, focusing exclusively on the content of what Mr Macklin said in the meeting and how he said it. She had not engaged at all with the circumstances in which the meeting was called. The EAT accepted that in a previous case (*Gallagher v McKinnon's Auto and Tyres Ltd*)it had been held that a very short notice meeting without a companion was *not* improper conduct. However, that did not create a hard and fast rule. Such conduct may still be improper in other cases, when combined with other conduct.

However, the EAT discounted the argument that only being given five days to consider the offer was improper. The EAT said this was a “red herring” because the Claimant had rejected the offer outright in the course of the 23 April discussion. Therefore, the five-day window did not place him under any pressure. In any event, the Acas Code recommendation of 10 calendar days for consideration related to the formal written terms of a settlement agreement, not to heads of terms contained in an initial offer letter (as was the case here).

The EAT Judge remitted the question of whether there was improper conduct to a different Employment Tribunal Judge to consider.

What does this mean for employers?

This decision reminds us that section 111A protection does not provide blanket protection across all claims (as without prejudice protection does). If an employee has *other* claims alongside an ordinary unfair dismissal claim (e.g. an automatic unfair dismissal claim or a discrimination claim), then evidence of the protected conversation will be admissible in relation to those other claims, even if it remains excluded for ordinary unfair dismissal purposes. Employers should plan for this from the outset and ensure any such conversation is conducted carefully.

Importantly, the decision highlights that the *manner* in which a protected conversation is initiated matters as much as what is said in it. Ambushing an employee with no notice, no companion and no warning of the meeting’s purpose will all be relevant to an assessment of improper conduct. On top of this, what is said in the meeting will also be relevant.

Telling an employee, even in qualified terms, that they will come last in any redundancy selection if they reject a settlement offer is risky. Employers should seek legal advice before any such meeting and keep a clear record of what was said (and be mindful that the employee may covertly record the meeting).

An employer seeking to safely conduct a section 111A discussion should:

- Give the employee reasonable notice of the meeting and make it clear that the purpose of the discussion is about a proposed settlement intended to end employment on agreed terms. The employee should also be told that this voluntary and they are not required to engage with or accept the proposal.

- If the employee agrees to the meeting, consider whether any reasonable adjustments are needed if the employee has a disability. Also consider whether flexibility in the arrangements is required to accommodate any caring commitments or part-time / hybrid working pattern.

- Hold the meeting at the agreed time and place and allow the employee to bring a colleague or trade union representative.

- At the start of the meeting, explain to the employee that the conversation is off the record and explain the meaning of a section 111A protected conversation (and of without prejudice if appropriate). Ask the employee to confirm that they understand.

- Conduct discussions professionally and avoid harassment, bullying, intimidation, offensive language, aggression, threats or victimisation.

- Avoid the risk of placing undue pressure on the employee. If the employee is vulnerable, unwell, or visibly distressed suggest an adjournment.

- Allow reasonable time to consider the proposal. As a general rule, allow at least 10 calendar days to consider the written settlement terms and obtain independent advice, unless both sides agree otherwise. Although a shorter amount of time may be given to consider heads of terms, this should also be reasonable.

- Present the reasons for the proposal neutrally and factually. While it is permissible to explain possible alternatives, including that a dismissal process may commence if there is no settlement, do not say that dismissal is inevitable.

- Mark all written communications "Without Prejudice" and "Subject to Section 111A ERA 1996" where appropriate, especially if there may already be a dispute.

Tarbuc v Martello Piling Limited

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Failure to dispel an employee's confusion and offering sham alternatives meant redundancy dismissal was unfair

The Employment Tribunal's reserved judgment in *Crawford-Thomas v Collinson (Central Services) Limited* offers a useful reminder that a genuine business case for redundancy is not, on its own, sufficient. Where the consultation process is inadequate, a finding of unfair dismissal will follow.

What happened in this case?

The Claimant, Mr Crawford-Thomas, was employed as Financial Crime Manager by Collinson, a global travel benefits company, from February 2009 until his dismissal on 14 March 2024. He had approximately 40 years' employment history in financial crime and fraud work.

In October 2023, Ms Smith joined as Vice-President of Risk and Compliance and became the Claimant's new line manager. She was tasked with evaluating the company's safeguarding strategy to protect against cyber-crime and emerging artificial intelligence (**AI**) risks (including anticipated compliance obligations under the EU's AI Act) and she conducted a "gap analysis" of her team's competencies.

As part of that exercise, she asked the Claimant to set out what elements of his role he currently performed. She concluded that of his 11 listed activities, seven could be handled by the company's existing Refinitiv automated system, two could be absorbed into her own role, and two were already performed by other colleagues. She determined that a new higher-grade role of 'Head of Risk and Assurance Manager' was required to address future AI and cyber risk and ensure compliance with the EU AI Act. She formed an early view that the Claimant was not qualified for this role.

The Claimant was placed at risk of redundancy on 31 January 2024.

The first consultation meeting was held on 7 February 2024. The Claimant said he did not understand how his role was at risk of redundancy. Ms Smith referred him to selected slides from a business-facing slide deck. She also said he would be sent the job description for the new Head of Risk role and that he could apply for any suitable roles on the company's website. The Head of Risk role was then advertised externally before the Claimant had fully considered whether to apply, and he discovered that Ms Smith had also invited a former colleague to apply for it. This discovery made the Claimant suspicious about the authenticity of the process.

The second consultation meeting was held on 26February 2024. At the meeting, the Claimant said he was still unsure why there was a need to make him redundant and little was said or done to address that concern. He also said he was interested in the Head of Risk role and asked whether he could have a trial period. Ms Smith did not agree to this (without explaining why) but said that he was at liberty to apply for the role.

The third and final consultation meeting was held on 7 March 2024. The Claimant said he was still struggling to understand why his role was at risk of redundancy and why aspects of it were no longer required. Ms Smith attempted to clarify the position, but the Claimant disagreed with her rationale, He asked further questions about the restructure but did not understand the answers given. Ms Smith referred him back to the slides he had previously been given. He asked to see the gap analysis, but Ms Smith refused and said the rationale had already been explained. He also asked whether he could be "mapped" into the new role with additional training and support. This was also refused.

The Claimant was dismissed on 14 March 2024, and his appeal was rejected. He brought claims for unfair dismissal and direct age discrimination.

What did the Employment Tribunal decide?

Unfair dismissal

The Tribunal had little difficulty finding that a genuine redundancy situation existed. The Claimant's core functions had been substantially automated by the Refinitiv system, remaining tasks had been redistributed, and there was a credible business need for a differently skilled role. The requirements of the business for work of the Claimant's particular kind had diminished within the meaning of s.139 Employment Rights Act 1996.

The Tribunal found that the Respondent had attempted a genuine redundancy consultation process: three meetings were held, HR was present throughout, and the Claimant was offered access to job search support. However, the Tribunal identified two areas where the process fell critically short.

First, Ms Smith had formed an early view, following her very first one-to-one with the Claimant, that he lacked the skills and qualifications needed for the new Head of Risk role. Given that she was new to the company, she had little independent knowledge of his broader career or competencies. Although she reviewed his Linked In profile, the Tribunal notes that this was *“not a satisfactory way to obtain a full picture of the abilities of an employee within her own team.”* The Tribunal found that once that view was formed, subsequent meetings became meaningless in respect of alternative employment. Ms Smith was holding out the Head or Risk role as a potential alternative while having already concluded that the Claimant was unsuitable for it.

However, the Tribunal accepted that the Respondent reasonably believed the new role required urgent filling by a suitably qualified candidate, and that an upskilling period was not a viable option. That was a reasonable business position. The problem was not the decision itself, it was that the consultation presented a false choice.

Second, Ms Smith's only method of explaining the restructure was to refer the Claimant back to slides that he had already said he did not understand. This was not adequate or meaningful. She made no attempt to find an alternative explanation when it became clear the slides were not adequate. She concluded that the Claimant was merely trying to elongate the process, and she effectively disengaged. As a consequence, the Claimant did not fully understand the process he was going through and this detrimentally impacted his ability to suggest ways to mitigate the risk of his role being made redundant.

Despite upholding the unfair dismissal complaint, the Tribunal accepted the Respondent’s submission that a fair process would ultimately have resulted in redundancy. A *Polkey* reduction to compensation will, therefore, be made, though remedy has not yet been determined.

Age discrimination

The Tribunal held there was no evidence suggestive of the Claimant’s age being the reason for the difference in treatment compared to a hypothetical comparator. Therefore, the burden of proof did not pass to the employer. If wrong about that, the Respondent had provided reasonable and adequate explanations for its treatment of the Claimant and none of them indicated discriminatory conduct on grounds of age.

What does this mean for employers?

This decision makes it clear that managers must not approach consultation processes with a fixed mindset, particularly in respect of alternative roles. Redeployment searches based solely on a self-reported job description and a quick look at the employee’s LinkedIn profile are unlikely to be sufficient, particularly for a long-serving employee.

In this case, a trial period with support and training was not viable due to the urgency involved, but in a non-urgent case then a reasonable approach may be to allow a trial period plus training. Alternatively, where there are reasonable grounds to consider that an alternative vacancy would not be suitable for an employee, then it should not be put forward as an option during consultation.

HR and managers must also take care to ensure employees understand the process. Where an employee repeatedly says they do not understand the rationale for their redundancy, the answer is not to keep referring them back to the same document. Employers must find alternative ways to explain the position (even if where they are cynical about the employee’s motives for pleading ignorance).

Crawford-Thomas v Collinson (Central Services) Limited

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Employer's correspondence with lawyer could not be relied upon by Claimant under the iniquity exception to legal privilege

In Shawcross v SMG Europe Holdings Ltd and ors, Ms Shawcross argued that email correspondence between her former employer and its legal advisers, which she had been accidentally copied into, was not legally privileged meaning she could rely on it to support her claim.

What happened in the case?

The Claimant was dismissed by SMG Europe Holdings Ltd (**SMGEH**) on 28 April 2023. Two days prior to her dismissal, the Claimant was copied into an email chain between SMGEH and its legal advisers by mistake. There were seven emails in the chain, one of which had a draft dismissal letter attached to it. The dismissal letter had been drafted by SMGEH's solicitors. All of the emails were sent on either 25 or 26 April 2023.

The Claimant claimed that her dismissal was, amongst other things, an act of victimisation for having raised a grievance on 29 November 2022. She sought to rely on the email chain in support of her victimisation claim. Specifically, the Claimant argued that the emails contained a discussion about fabricating the reason for her dismissal and disguising the true identity of the dismissal decision-maker.

SMGEH argued that the emails were subject to legal advice privilege, since they were communications between SMGEH and its solicitors. The Claimant argued that legal advice privilege did not apply to the emails because they fell within the “iniquity exception”. The iniquity exception to legal advice privilege arises where correspondence has come into existence in furtherance of fraud, crime or other iniquity.

What was decided?

In the first instance, the Employment Judge held that, on the balance of probabilities, the emails were not evidence of iniquitous conduct. As such, the iniquity exception was not engaged, and the emails remained subject to legal advice privilege and could not be relied upon by the Claimant.

The Claimant appealed to the EAT. She argued that the emails showed that her dismissal was a sham and that the decision to dismiss had been taken by 25 April 2023, meaning the Judge had erred in law in finding that the iniquity exception did not apply.

The EAT dismissed the appeal. It held that the Employment Judge had not erred in law in finding that the iniquity exception did not apply, as he had carefully scrutinised the terms of the correspondence as a whole before reaching his decision.

The EAT also made substantive findings as to the nature of the emails. It found that SMGEH's solicitors had provided advice on the risks that the dismissal might be considered unfair or an act of victimisation, but that there was no mention in any of the emails that the Claimant's grievance formed part of the decision to dismiss her. Therefore, read as a whole, the emails were properly characterised as legal advice provided that SMGEH should review the decision to dismiss the Claimant as it would need to be able to justify the decision before an employment tribunal if necessary.

Further, the EAT said that even if the emails *had* shown that SMGEH and its solicitors considered there to be an overwhelming likelihood that the Claimant would be dismissed, this would not have crossed the threshold required to establish the iniquity exception. This was said to be the sort of advice which employment lawyers regularly give to their clients and which falls within the normal scope of professional engagement.

The EAT also agreed with the Employment Judge's observation that the advice contained in these emails was similar in nature to the advice in *Curless v Shell International Ltd*. In that case, the emails in question related to whether an individual who had submitted a disability discrimination claim could be dismissed on the grounds of redundancy. Similarly to the correspondence in this case, those emails were considered to be the sort of day-to-day advice which employment lawyers provide to their clients and the iniquity exception did not apply.

What does this mean for employers?

As a general comment, employers should be careful to ensure that legal advice and other potentially sensitive correspondence is not inadvertently forwarded to unintended recipients to avoid this situation arising in the first place.

This case also highlights that the threshold for establishing the iniquity exception is high. Therefore, correspondence between employers and their legal representatives will be subject to legal advice privilege in the majority of cases, provided the advice cannot be seen to be fabricating a position or acting in a genuinely underhand or iniquitous way.

As such, employers should continue to feel comfortable discussing tricky areas of employment law with their advisers, including consulting advisers on decisions to dismiss employees. In fact, consulting with specialist employment advisers who understand the complexities of the law is usually the most advisable way forward to mitigate an employer’s risks.

Shawcross v SMG Europe Holdings Ltd and ors

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Lifelong anonymity granted in Tribunal proceedings where Claimant had made an earlier allegation of sexual offences in unrelated proceedings

In the case of *AYZ v BZA*, the EAT granted lifelong anonymity to the Claimant in circumstances where she had filed a police report alleging a sexual assault by the Respondent in earlier unrelated proceedings. The EAT was persuaded that this was necessary to comply with the requirements of section 1 of the Sexual Offences (Amendment) Act 1992 (SOAA).

What happened in this case?

The Claimant sought anonymity in Employment Tribunal proceedings. The Employment Judge denied the application on the basis that it would derogate from the principle of open justice. However, in reaching that decision, the Judge was not aware that the Claimant had previously made a report to the police that she had been sexually assaulted by the Respondent. The allegation concerned events that were not related to the Employment Tribunal proceedings.

The Claimant appealed to the EAT on the basis that she should be granted lifelong anonymity in relation to the Employment Tribunal and EAT proceedings according to section 1 of SOAA. She argued that lifelong anonymity was necessary because she had reported an allegation of a sexual offence to the police.

Without anonymisation in both the Employment Tribunal and EAT proceedings, there was a significant risk that a keen-eyed reader of the judgments may be able to piece together relevant information to ascertain her identity and/or the Respondent’s identity.

What was decided?

The EAT decided to grant permanent anonymity to the Claimant in both the Employment Tribunal and EAT proceedings.

This decision was based on the requirements of section 1 of SOAA which mandates anonymity for those who have made allegations of certain sexual offences covered by the Act. Even though the Respondent had not been questioned, arrested or charged, the Claimant’s complaint still amounted to an “allegation” of a relevant sexual offence.

The EAT concluded that the only way to ensure compliance with SOAA was to anonymise the Claimant’s name in all related proceedings, even though this meant she was gaining permanent anonymity through a “side-wind”.

In reaching its decision, the EAT was also keen to point out that it considered the Employment Judge’s decision correct based on the circumstances of the case as it stood at the time. However, the new information about the police report, when read alongside other case law, meant that the EAT was compelled to grant permanent anonymity.

What does this mean for employers?

For employers, this case underscores the importance of understanding the legal requirements for anonymity in cases involving allegations of sexual offences. Employers should be aware that even where an allegation is not part of the Employment Tribunal proceedings, it may still impact those proceedings if it involves a sexual offence.

The case highlights the need for employers to handle such allegations with sensitivity and in compliance with legal standards to protect the identities of those involved.

AYZ v BZA

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Court of Appeal clarifies when employees "know enough" to bring discrimination claims

In a recent Court of Appeal judgment, an Employment Tribunal was found to have erred in deciding that an employee had all

the facts she needed to bring her discrimination claims. This case clarifies that being unaware of a discriminatory motive can justify a late claim.

What happened in this case?

The Claimant lost her job at Barclays soon after returning from maternity leave. She brought sex discrimination proceedings against Barclays. In 2018, she applied for a senior role at HSBC. Early feedback at HSBC was very positive, with managers indicating that they were keen to hire her.

However, by July 2018, HSBC told the Claimant that it would not be offering her the job. At that time, she knew someone at Barclays had given HSBC a bad reference about her. Suspecting that Barclays' negative input was linked to her previous discrimination claims, she pursued further claims against Barclays. She did not bring a claim against HSBC.

Two years later, in 2020, the Claimant received new documents from HSBC following her repeated data subject access requests. These revealed that a senior HSBC manager had, in fact, been told about her earlier sex discrimination proceedings against Barclays and had passed on disparaging comments before the decision not to hire her was finalised. She also learned about potential race-related remarks, including references to "Lebanese connections" which were said to make her hiring more difficult.

Relying on the newly disclosed information, the Claimant brought discrimination and victimisation claims against HSBC in November 2020 and May 2021, over two years out of time. An Employment Tribunal decided that the claims against HSBC could not proceed because of limitation. It concluded that the Claimant's application process ended in July 2018 and that she should have known enough by then to bring her discrimination claims. The Tribunal also treated later events in 2020 as irrelevant, finding that they did not add to the basic facts.

The Claimant appealed successfully to the Employment Appeal Tribunal (the **EAT**). The EAT held that the Tribunal had failed to consider properly whether the Claimant had the relevant knowledge in 2018 to bring a claim against HSBC, as opposed to just suspecting that her ex-employer Barclays was behind it. HSBC appealed to the Court of Appeal.

What was decided?

The Court of Appeal upheld the EAT's ruling and dismissed HSBC's appeal.

The Court of Appeal emphasised that under the standard set out in *Meek v Birmingham District Council*, Tribunals must explain their decisions adequately. It found that the Tribunal had not made the necessary findings about the precise moment that the Claimant had gained enough information to know that HSBC (rather than Barclays) might have discriminated or victimised her.

The Court of Appeal agreed that the EAT was right to criticise the original decision for failing to explain how they had concluded that the Claimant knew enough in July 2018 to pursue a discrimination claim, despite new facts arising in 2020. It emphasised that a Tribunal deciding whether to extend time must carefully consider what a claimant knew, and when, before concluding the claimant had enough information to bring a claim.

The Court of Appeal criticised the Tribunal for failing to address the Claimant’s race discrimination claim, which arose from comments about “Lebanese connections” in 2020 and, therefore, needed its own separate time-limit analysis.

In line with the principle in *Barnes v Metropolitan Police Commissioner,* the Court of Appeal noted that Tribunals should consider both what a claimant suspected and whether any delay in bringing proceedings was reasonable.

As a result, the Court of Appeal remitted the case to a new Tribunal to decide whether it was just and equitable to allow the claims to proceed outside the usual three-month limit.

What does this mean for employers?

This decision highlights the following key points for employers:

- **Understanding the true reason for a decision:** even if a candidate knows that a decision had been made to turn down their application, the ordinary time limit to bring a claim may be extended if they later uncover evidence suggesting a discriminatory or victimising motive.

- **Risk of victimisation claims:** a candidate who has previously raised discrimination complaints remains protected against victimisation – whether from a previous employer or a prospective employer treating them unfavourably as a result of their protected acts.

- **Take a cautious approach to references and subsequent internal discussions:** managers and HR teams must handle references carefully, ensuring no unlawful bias or “protected act” knowledge improperly influences hiring decisions. Feedback should be factual rather than speculative and there ought to robust protocols in place to avoid unconscious bias.

- **Responding promptly to data subject access requests:** delayed disclosures (or failing to disclose key documents when first asked) can undermine an employer’s arguments that a claim is “too late.” If important new evidence is only provided by an organisation long after the event, a Tribunal is more likely to extend time. Check your DSAR handling procedures to ensure completeness and timeliness.

HSBC Bank plc v Chevalier-Firescu

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Tribunal was right not to strike out claims brought against a US company and US-based individuals

In a recent case, the EAT has upheld a decision of an Employment Judge not to strike out Employment Tribunal claims brought against a US company and US-based individuals. In both cases, the claims were reasonably arguable, meaning that striking out was not justified.

What happened in this case?

Dr Armes is a research scientist. He founded a US company, TwistDx Inc, to carry out his work. He also founded a UK company, TwistDx Ltd. In 2010, TwistDx Inc and TwistDx Ltd became subsidiaries of a US company called Alere Inc. Dr Armes remained the sole Director of TwistDx Ltd and was employed as its Managing Director. His wife, Mrs Helen Kent-Armes, was employed as its COO.

In late 2017, Alere Inc was acquired by the multi-national US company, Abbott Laboratories. In May 2018, Dr Armes and his wife were both dismissed. They brought various claims in the Employment Tribunal against:

- TwistDx Ltd (the UK company);
- Abbot Laboratories (the US company);
- Mr Eppert, Mr Haas and Ms Qiu (the US-based individuals);and
- Mr Macken and Mr Muggeridge (the UK-based individuals).

(together, the Respondents).

The Respondents applied to strike out the claims against the US company and US-based individuals. The Employment Judge dismissed the strike out applications, concluding that the Respondents had failed to show that Dr Armes and Mrs Kent-Armes had no reasonable prospects of successfully establishing that the Employment Tribunal had international jurisdiction.

The Respondents appealed to the EAT.

What was decided?

The EAT began by underlining that jurisdictional issues may arise in Employment Tribunal claims in two ways. First, does the Tribunal have international jurisdiction so that the parties can be brought before it? Second, does the claim fall within the territorial scope of the relevant law? This appeal concerned the first jurisdictional issue only.

Claims against the US company

As far as the claim against the US company was concerned, the EAT had to consider the Recast Brussels Regulation (which was in force at the time the claims were brought). In short, this Regulation provided that in order for the Employment Tribunal to have international jurisdiction over the US company, either the US company would have to be the employer of Dr Armes and Mrs Kent-Armes, or the UK company must be a *"branch, agency or establishment"* of the US company.

Turning first to the question of whether the US company could have been the "employer" of Dr Armes and Mrs Kent-Armes, the EAT considered case law where individuals have been treated as employees of companies with whom they did not have a traditional contract of employment:

- In Samengo-Turner and others v J&H Marsh McLennan, employees of a UK company entered into an incentive award scheme under which they had obligations towards the US group companies. The Court of Appeal accepted the employees' contention that the incentive award documentation formed part of their individual contracts of employment. The result was that the US entities were to be treated as their employer for the purposes of the Recast Brussels Directive.

- In Petter v EMC Europe Ltd, the employee was employed by a UK company, while the ultimate parent company, EMC, was based in the US. A substantial part of the employee's remuneration arose from restricted stock unit (RSU) agreements made between him and ECM. In these RSU agreements, he agreed to comply with a key employment agreement in the EMC employee handbook, including a 12-month non-compete restriction in favour of EMC and its subsidiaries. Relying on Samengo-Turner, the Court of Appeal held that a company which provides benefits to employees of associated companies within the same group may be regarded as an employer for the purposes of the Recast Brussels Regulation if it provides those benefits in order to reward and encourage those employees for the benefit of their immediate employer and the group as a whole.

The EAT concluded that the concept of "employment" for the purposes of the Recast Brussels Regulation could potentially include a situation where there was no contract between the "employee" and "employer".

Turning to the alternative question of whether the UK company was a branch, agency or other establishment of the US company, the Respondents sought to rely on a number of non-binding opinions of the Advocates General of the ECJ that suggested a branch, agency or other establishment cannot have a separate legal personality or authority to fix matters such as working hours (as TwistDx Ltd did). However, the EAT did not accept that these decisions established an absolute prohibition on a branch, agency or other establishment having a legal personality.

The EAT said that it was clear why the Employment Judge had concluded that the Respondents had failed to show that there were no reasonable prospects of Dr Armes and Mrs Kent-Armes establishing that the Employment Tribunal had international jurisdiction to hear the claims against the US company. The Employment Judge had been entitled to conclude that it was arguable that the US company could be the employer for the purposes of the Recast Brussels Regulation and/or that the UK company might be a branch, agency or other establishment of the US company.

Claims against the US individuals

As to the claims against the US individuals, Dr Armes and Mrs Kent-Armes had argued that Rule 8 of the Employment Tribunal Rules 2013 conferred international jurisdiction on the Employment Tribunal on the basis that:

- at least one of the respondents to the claim resides or carries on business in England and Wales;
- one or more of the acts or omissions complained of took place in England and Wales; and/or
- the claim relates to a contract under which the work is or has been performed partly in England or Wales.

In contrast, the Respondents had argued that Rule 8 was solely concerned with the division of cases between the alternative

UK jurisdictions of England, Wales or Scotland.

The EAT noted that there were case authorities supporting both sides of the argument and, therefore, concluded that there was no error of law in the Employment Judge’s decision that Dr Armes and Mrs Kent-Armes’ case was reasonably arguable.

Therefore, the appeal against the refusal to strike out the claims against the US company and the US individuals was dismissed.

What does this mean for employers?

It is important to remember that the EAT has *not* determined the substantive question of whether an Employment Tribunal has international jurisdiction. Instead, it was tasked with considering the narrower question of whether there was an error of law in the Employment Judge’s decision not to strike out the claims against the US company and US-based individuals.

Striking out a claim is a Draconian step which should only be taken where an applicant can cross the high threshold of showing that the claim (or response) has “no reasonable prospects of success”. Here, the EAT found that the Employment Judge had been entitled to conclude that it was *reasonably arguable* that the US company and US-based individuals fell within the international jurisdiction of the Employment Tribunal. This is not the same as saying that the Employment Tribunal *does have* international jurisdiction in these types of scenarios.

Frustratingly, the substantive question has yet to be answered. Indeed, the EAT Judge remarked that he was *"troubled"* that this issue had been left undecided but said this was the inevitable result of the fact that the issue had been addressed via a strike out application. The substantive question will eventually be considered when this case returns to the Employment Tribunal. However, given that this litigation *"…has the feel of a war of attrition, the end of which seems dispiritingly far from view",* the strike out decision may yet be appealed further to the Court of Appeal, which will delay the hearing of the substantive question.

In the meantime, international employers should be prepared to respond to Employment Tribunal claims brought against overseas entities and individuals. Given the shifting sands in this area, it would also be wise to seek legal advice should this issue arise in a claim.

TwistDx Limited and others v Dr Armes and others

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Settlement offer alleged to be an act of victimisation was without prejudice and not unambiguously improper

In Garrod v Riverstone Management Ltd the EAT has held that a settlement offer made to an employee after she had complained about discrimination, but before she had started legal proceedings, was genuinely without prejudice and not unambiguously improper.

Can you protect the identity of employees who are named in Employment Tribunal proceedings?

In the recent case of Dr Piepenbrock v London School of Economics and Political Science the EAT made an anonymity order to protect the identity of a non-party and non-witness to the proceedings who was the subject of false, lurid sexual allegations.

No mercy for claimants who fail to submit Acas Early Conciliation certificate numbers when filing Employment Tribunal claims

In the recent case of Pryce v Baxter Storey Ltd, the Employment Appeal Tribunal decided that it could not hear a claimant's sex and race discrimination claims because she had not obtained an Acas Early Conciliation certificate before submitting her Employment Tribunal claim form.

EAT finds that a belief that biological sex is immutable is a philosophical belief protected under the Equality Act 2010

Today, the Employment Appeal Tribunal handed down judgment in the case of Maya Forstater, who lost her job after saying that people cannot change their biological sex.

Gareth Brahams will be speaking at the ELA annual conference

Following BDBF's recent win in the EAT, Gareth Brahams will be speaking at the ELA annual conference on 14 June alongside James Laddie QC

Unfair dismissal: interim relief applications should be heard in public

In Queensgate Investments LLP v Millet the Employment Appeal Tribunal (EAT) ruled that applications for interim relief should be heard in public, save where an order is made to restrict publicity.