DISCRIMINATION LAW ASSOCIATION

Briefings

MARCH 2026 | VOLUME 87 | **1154-1165**

Briefings 1154-1165

Briefings is published by the Discrimination Law Association and sent to members three times a year. Membership enquiries to info@discriminationlaw.org.uk. Telephone 0845 4786375. Editor Lisa Crivello; Editor@discriminationlaw.org.uk. Unless otherwise stated, any opinions expressed in *Briefings* are those of the authors.

A system under siege and a law in conflict

As we move further into 2026, the UK's employment law landscape seems a structure under dual assault. On the one hand, the ET system's mechanical infrastructure is buckling under an unprecedented backlog of cases. On the other, tribunals have become a 'theatre of war', in which judges are being asked to be the moral arbiters of conflicting world views.

Since the Equality Act (EqA) came into force in 2010, we have seen an explosion of cases involving conflicting philosophical beliefs. Initially focusing on religious belief, the frontline is now occupied by the intersection of sex-based rights and gender identity. The landmark Supreme Court ruling in *For Women Scotland* clarified that 'sex' under the EqA refers to *biological sex* – a decision that, rather than settling the matter, has acted as an accelerant.

In our first article in this spring edition of *Briefings*, Audrey Ludwig MBE argues that conflicting rights are nothing new in equality law, and that the recognition and *balancing* of those conflicts should be a key responsibility for a modern democratic legal system. Rather than denying the existence of controversy and fostering a culture of 'no debate', we should encourage a return to civil discourse and create a space for rigorous, evidence-based debate. Otherwise, says Audrey, we risk developing an organisational culture in which nuanced policy decisions are replaced by rigid, defensive procedures to avoid the social media outcry that now accompanies many high-profile cases.

It strikes me that one such example can be seen in the recent tribunal case of *Sandie Peggie v Fife Health Board*, widely reported in the press. The case concerned a nurse who complained about a trans colleague (Dr Upton) being allowed to use the female staff changing rooms at the hospital. The ET (in a judgment of over 300 pages) found that the beliefs of both the claimant and Dr Upton were protected under the EqA, but the Health Board had harassed the claimant both in its treatment of her complaint and of the subsequent disciplinary proceedings against her. A number of other claims, including those against Dr Upton, were dismissed. In reaching this mixed outcome, the tribunal adopted a four-stage 'proportionality test' by which to adjudicate on policies about single-sex spaces. Based on the Supreme Court decision in *Bank Mellat v HM Treasury*, the test emphasises the need for 'balance' between the legitimacy of a policy's aim and the severity of its impact on others.

Peggie was, however, shortly followed by the case of *Hutchinson v County Durham and Darlington NHS Trust*, in which the emphasis moved from the right to freedom of belief to the right of privacy. In what many may see as a directly conflicting judgment, the second ET focused on the statutory requirement for single-sex spaces at work, and found the loss of 'biological privacy' is inherently degrading for women. *Peggie* is being appealed to the EAT, but we wait to see whether *Hutchinson* will do the same, and if so, how the court will resolve this legal divergence.

Another interesting point about *Peggie* is that the judgment had to be reissued twice after significant errors were found in the text. While these errors were more than mere typos, I can't help but wonder whether they were exacerbated by the current overload on the ET administrative system.

This brings us to our second feature article, in which Ocean O'Malley dives into the sobering reality of an ET system in gridlock. For both practitioners and claimants, the backlog represents a significant obstacle to access to justice. Discrimination claims – often the most complex and sensitive – now face extended delays, with many hearings listed as far ahead as 2028. Ocean looks beyond the statistics to examine some of the less direct causes of the backlog, such as problematic modernisation and efficiency measures. He also argues that the most vulnerable claimants are disproportionately impacted, as they lack the financial or emotional resilience to cope with protracted litigation.

All this against a backdrop of the impending implementation of the Employment Rights Act 2025. While the reduction of the qualifying period for unfair dismissal claims is still nearly a year away, there are fears that any expansion of employment rights will only accelerate the increasing caseload faced by ETs. Personally, I remain hopeful that wider access to ordinary unfair dismissal claims will reduce the number of automatic unfair dismissal (and discrimination) cases that claimants without two years' service are currently forced to run. Only time will tell.

Lisa Crivello
Editor, Briefings

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Avoiding 'Goodies and Baddies' thinking: restoring balance in equality law and conflicts of rights

Audrey Ludwig MBE is a non-practising solicitor who retired from practice as an equality law specialist in 2024 to form her own company, Audrey Ludwig Training and Consultancy. She was awarded an MBE in 2025 for founding Suffolk Law Centre and is now dedicated to helping organisations navigate the complexities of Equality Act compliance.

Introduction

This article is based on a talk I gave to the DLA's 30th Anniversary Conference in November 2025. It explores how equality law in the United Kingdom has been shaped over the last decade by a growing tendency to frame legal questions as moral battles between opposing sides.

The talk was not focused on the substantive merits of cases or issues, but rather on the 'mood music' about conflicts of equality rights which developed as a distinct fashion in the late 2010s.

Equality law works best when we recognise that, on occasions, different rights can come into tension. Balancing those rights is not a moral choice – or even worse, an act of aggression – it is the ordinary work of a democratic legal system.

These conflicts began to be discussed not as a normal (albeit only occasional) feature of equality law, but as evidence of political hostility.

This led to many organisations making serious errors when dealing with protected beliefs that they did not share or felt were unfashionable, particularly in cases involving gender-critical beliefs.

My aim is to consider this shift in approach, why it matters, and what we can learn from the case law.

My central argument is simple. Equality law works best when we recognise that, on occasions, different rights can come into tension. Balancing those rights is not a moral choice – or even worse, an act of aggression – it is the ordinary work of a democratic legal system.

When organisations refuse to acknowledge conflict, or when public debate demands loyalty to one side, legal mistakes follow. The result is poor decision-making, unfair treatment of individuals, and a chilling effect on open discussion.

This article outlines the background to these developments, examines key cases, and reflects on how a more balanced approach can be restored.

A shift in public mood

Since 2010, public debate on equality issues has become increasingly polarised, with many discussions framed as zero-sum contests. Essentially, I observed a shift to a combative public discourse. A growing number of commentators began to describe equality law itself as a political tool to secure the rights of a dominant group, rather than a legal framework that engages proportionality to protect the rights of everyone.

This way of thinking has consequences. When people focus on who the 'goodies' and 'baddies' are, they stop looking for balance. They stop asking which rights are engaged and how those rights can be respected.

This led to the emergence of several worrying patterns:

- a reluctance to acknowledge that rights were engaged on more than one side
- a poor understanding of the public sector equality duty
- a surprising lack of sympathy for people who experienced unlawful discrimination because their beliefs were unfashionable.

Conflict does not mean hostility. It simply means that different interests must be balanced.

These patterns contributed to a legal environment in which some organisations made serious mistakes when dealing with belief discrimination. Unfortunately, these mistakes often ended up being corrected through litigation.

Before turning to recent developments, it is helpful to recall that equality law has always accepted that rights can conflict. Conflict does not mean hostility. It simply means that different interests must be balanced.

Earlier recognition of competing interests

In 2008, Maleiha Malik (Kings College) wrote *From Conflict to Cohesion: Competing Interests in Equality Law and Policy*. The paper (commissioned by the Equality and Diversity Forum) made a straightforward point:

> *Competing interests and conflicts in equality law and policy are a reality, however, there are also political forces that exaggerate the extent and nature of these conflicts.*

This statement recognises that such conflicts were once treated as normal. It was also accepted that political forces could distort the conversation, but there was no sense that merely acknowledging a conflict was itself an act of hostility.

By the late 2010s, this had changed. Public arguments began to frame the recognition of conflict as evidence of bad faith. This put pressure on lawyers, policymakers and institutions to deny that conflicts existed, even when courts explicitly referred to them.

One striking example comes from political commentary. In 2021, during the Labour party conference, the deputy leader was quoted by the BBC as saying:

> *Women's rights are not in conflict with trans rights.*[1]

Around the same time, the organisation Trans Actual listed the following as an example of transphobia:

> *Claiming there is a 'conflict' between trans people's human rights and those of any other group.*[2]

These statements treat the recognition of conflict as politically dangerous. But this position sits uneasily with actual case law. For example, in 2021, a judicial review concerned the placement of transgender women in women's prisons[3]. The court referred repeatedly to *'the necessary balancing of competing rights'* or very similar statements. Yet in private discussions, even lawyers involved in the case sometimes denied that any conflict existed. This shows how strong the political pressure had become. The denial was not based on law; it was based on mood and fashion.

Another theme which arose in public debate was the idea that one set of rights represented progress, and the other represented outdated thinking. Issues were framed as moral battles. This 'right side of history' narrative made impartial balancing harder to discuss.

1 BBC (2021). "Women's and trans rights are not in conflict, says Angela Rayner"

2 Transactual UK. "Transphobia"

3 R (FDJ) v Secretary of State for Justice [2021] EWHC 1746 (Admin)

The group Legal Feminist (of which I am a member) wrote in 2020:

> *The resolution of a conflict of rights is not a search for the better, more progressive, or most popular cause. The courts are an arbiter neither of moral certainty nor social progress.*[4]

Courts are not judges of social virtue; they interpret statute. They weigh rights. They assess proportionality. They decide whether any interference with rights is justified.

This reminder is important. Courts are not judges of social virtue; they interpret statute. They weigh rights. They assess proportionality. They decide whether any interference with rights is justified. If public debate forgets this, legal decision-making becomes harder for organisations to navigate.

How conflicts of rights typically arise

Conflicts often arise when both sides hold legally protected rights. A conflict does not imply wrongdoing; it simply means two sets of interests must be considered. Typical areas of tension include:

- religion or belief and sexual orientation
- gender-critical belief and gender identity
- freedom of expression and the right to private life.

The case law in these areas is extensive and long-standing.

Ladele v Islington Borough Council

In *Ladele v Islington Borough Council* [2009] EWCA Civ 1357, the courts had to balance rights across several stages of appeal. Lillian Ladele was a Christian and an experienced registrar who refused to conduct same-sex civil partnerships after the law changed. She was dismissed by her employer after complaints by gay colleagues, and brought a claim for discrimination on grounds of religion and belief. Her claim was initially upheld by an employment tribunal but then reversed by the Employment Appeal Tribunal. The Court of Appeal upheld the reversal. In 2013, the European Court of Human Rights dismissed her application, holding that the council's aim of providing non-discriminatory services justified the interference with her religious freedom.

This decision demonstrates the proportionality approach. The courts accepted that Ladele's religious rights were engaged, but held that the employer's aim was legitimate and the means proportionate.

Vancouver Rape Relief Society v Nixon

In an earlier Canadian case, *Vancouver Rape Relief Society v Nixon* 2005 BCCA 601, a rape crisis centre refused to hire a trans woman. The centre argued that the role required 'life experience' as a woman born female. The British Columbia Supreme Court found that this did not amount to unlawful discrimination, a decision upheld by the Court of Appeal. The Supreme Court of Canada declined to hear an appeal.

McFarlane v Relate

In *McFarlane v Relate* [2010] EWCA Civ 880, a Christian counsellor was dismissed after he declined to provide psycho-sexual therapy to same-sex couples. The Court of Appeal held that the dismissal was lawful. It found the claimant's rights regarding his religious belief were engaged, but in this context, could not justify the discriminatory treatment of service users.

4 Legal Feminist (2020). "Conflict of rights"

Eweida and others v United Kingdom

The European judgment of *Eweida and others v United Kingdom* [2013] 57 EHRR 8 combined several cases on religious manifestation at work. The court accepted that there had been interferences with the claimants' rights, but went on to consider whether the interferences were proportionate by reference to context and evidence. The decisions emphasised the need for balance and acknowledged the margin of appreciation given to employers.

Bull v Hall; Black and Morgan v Wilkinson

In 2014, Lady Hale gave the Annual Human Rights Lecture for the Law Society of Ireland on freedom of religion and belief.[5] She highlighted two 'Christian bed and breakfast' cases: *Bull v Hall* [2013] UKSC 73; and *Black and Morgan v Wilkinson* [2013] EWCA Civ 820.

Lady Hale quoted Lady Justice Rafferty in the Court of Appeal as saying

> *It would be unfortunate to replace legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the defendants' beliefs).*[6]

However, Lady Hale went on to add

> *If you go into the market place you cannot pick and choose which laws you will obey and which you will not*

before concluding

> *Fair-minded people may disagree about the application of these principles, but it is clear that we are in the territory of fair balance, between the interests of the individual and the community at large, and between the competing rights of individuals.*

These statements demonstrate a principled approach grounded in balance rather than moral ranking.

Lee v Ashers Bakery

Lee v Ashers Bakery [2018] UKSC 49 is a good example of how public debates can simplify complex legal issues. The public discussion framed the dispute as Christians versus the gay community. But the Supreme Court focused on a different distinction, holding that the bakery objected to the message ('support gay marriage') rather than the person. This was a matter of freedom of expression, not discrimination. The reasoning was subtle. Much of the commentary was not.

Recent developments: a wave of gender-critical belief litigation (2021 onwards)

Since 2021, more than 20 cases have been heard involving gender-critical belief discrimination, harassment or dismissal. Ruth Birchall and Professor Jo Phoenix analysed these in their 2024 paper for the University of Reading, *Don't Get Caught Out*.[7] They found:

> *The outcomes of recent secular gender-critical belief discrimination claims [2021–2024] is unprecedented … 83 per cent of gender-critical belief claims result in a successful outcome for the claimant (as opposed to three per cent for belief discrimination in general [2007–2021]).*

5 Annual Human Rights Lecture for the Law Society of Ireland. Lady Hale (2014). "Freedom of Religion and Belief"

6 Bull & Bull v Hall & Preddy [2012] EWCA Civ 83 (para 61)

7 *Don't get caught out*: A Summary of Gender Critical Belief Discrimination Employment Tribunal Judgments, 2024, University of Reading Occasional paper

This is a dramatic shift. As the vast majority were not appealed or upheld, it is strong objective evidence that many organisations misapplied equality law and misunderstood their obligations.

...a belief is excluded only if it amounts to a 'grave violation' of the principles of the European Convention on Human Rights – meaning it seeks to destroy the rights of others.

In *Forstater v CGD Europe* UKEAT/105/20, the claimant, Maya Forstater, worked for a think tank. Her contract was not renewed after she expressed gender-critical views online and in workplace discussions. The EAT held that her gender-critical belief was protected under the Equality Act (EqA). It also observed that belief in 'gender identity' would likely also be protected. The judge ruled that a belief is excluded only if it amounts to a 'grave violation' of the principles of the European Convention on Human Rights, meaning it seeks to destroy the rights of others.

The subsequent ET found the decision not to renew the claimant's visiting fellowship – and not to offer her an employment contract – was taken, at least in part, because of her belief that biological sex is immutable and not to be conflated with gender identity. The tribunal also concluded she was victimised when her profile was removed from the organisation's website following her complaints of discrimination.

After the case, many organisations continued to assume gender-critical beliefs were inherently discriminatory, which one could hold privately, but not manifest as this would constitute unlawful discrimination or harassment on grounds of gender reassignment. They also continued to make policies to accommodate those who came with the protected characteristic of gender reassignment, with no consideration of any conflict with the rights of other groups. This contributed to further litigation.

Several other cases illustrate common errors by employers or regulators:

- ***Bailey v Stonewall and Garden Court Chambers*** ET/2202172/2020 – the claimant succeeded in direct discrimination and victimisation against the chambers
- ***Adams v Edinburgh Rape Crisis Centre*** (2023) ETS/4102236/2023 – held the respondent unlawfully discriminated against and constructively dismissed employee Roz Adams, finding management had conducted a 'heresy hunt' against her due to her protected gender-critical beliefs
- ***Fahmy v Arts Council England*** (2022) ET/6000042/2022 – held the Arts Council subjected employee Denise Fahmy to unlawful harassment for her protected gender-critical beliefs, finding hostile comments and a petition targeting those beliefs by colleagues amounted to harassment
- ***Phoenix v Open University*** (2023) ET/3322700/2021 – held the claimant faced harassment, discrimination and constructive dismissal by The Open University, which failed to protect her from colleagues' hostility regarding her gender-critical beliefs
- ***Pitt v Cambridgeshire County Council*** (2024) ET/3311160/23 – the county council agreed to pay over £60,000 in compensation and costs to social worker Lizzy Pitt after admitting to discriminating against and harassing her regarding her gender-critical beliefs and sexual orientation.

One case in particular – *Meade v Westminster City Council and Social Work England* (2023) ET/2200179/2022 – stands out because of the level of harm identified. The tribunal found the claimant, a social worker, had been subjected to discrimination and harassment by both her employer and her professional regulator. Sanctions were pursued against her because of her private social media posts expressing gender-critical beliefs. She was awarded compensation, including injury to feelings, aggravated damages and exemplary damages against the regulator, reflecting *'abuse of process'.*

Two further cases demonstrate the approach taken by the most senior courts:

- ***Higgs v Farmor's School*** [2025] EWCA Civ 109 – the Court of Appeal ruled that dismissing an employee for expressing protected beliefs (like gender-critical views) on social media was unlawful discrimination. They found the school failed to prove the dismissal was a fair and proportionate response to the 'objectionable manifestation' of those beliefs, rather than the beliefs themselves.
- ***For Women Scotland v Scottish Ministers*** [2025] UKSC16 – the Supreme Court ruled on how 'sex', 'man', and 'woman' are defined under the EqA, and held they are biological, not based on gender identity or a gender recognition certificate issued pursuant to the Gender Recognition Act.

The arrival of these cases at appellate level indicates that the legal questions raised over the last decade are neither niche nor transient. They concern central questions about rights, belief and equality.

Why so many organisations got it wrong

When organisations assume one side must always be right, errors follow. People are treated unfairly. Policies become inconsistent. Disputes escalate into litigation.

A striking pattern appears across the recent gender-critical belief cases. All respondent organisations were legally represented, yet many repeated similar errors:

- assuming certain beliefs were inherently discriminatory
- confusing the belief with harassment
- failing to apply the proportionality test
- conducting investigations influenced by ideological pressure rather than evidence
- relying on non-legal guidance from lobbying organisations, even after *Forstater.*

These errors show how far the public mood had drifted from legal principle. Organisations often acted as though certain views were automatically harmful, without examining whether conduct actually crossed the line into unlawful harassment.

One contributing factor has been the influence of a 'no debate' culture – a wider strategy by some advocacy organisations to limit debate. The 'Dentons playbook'[8] advised activists to avoid obstacles such as public debate or scrutiny of possible consequences of legislative change. This approach encouraged the idea that discussion itself was harmful and, over time, this became organisational culture. Some workplaces and public bodies became reluctant to allow disagreement. People who raised legal or policy concerns were treated with suspicion. The effect was chilling; lawyers, academics and practitioners became wary of discussing equality law. Some faced complaints or attempts at 'cancellation', even when they engaged politely and constructively.

By 2019, I had become well known as someone prepared to speak out on social media about what I saw as legal inaccuracies in this area of equality law. This led to self-proclaimed trans rights activists, who disagreed with me, seeking to get me silenced or worse.

In the same year, the DLA invited me to present a workshop on some work I had been doing around giving legal advice and neurodiversity. Evidence emerged that activists were planning to disrupt the event simply because I was speaking (albeit on an unrelated topic). The DLA prevented this and ensured the workshop took place. This stands out as an example of an organisation protecting the space for discussion. Such protection is vital to a healthy legal culture.

8 Dentons (2019). 'Only Adults? Good Practices in Legal Gender Recognition for Youth'

Restoring a balanced approach

Equality law assumes that different rights can come into tension and requires organisations to treat those rights with parity of esteem. It does not rank beliefs or identities in a hierarchy. When organisations assume one side must always be right, errors follow. People are treated unfairly. Policies become inconsistent. Disputes escalate into litigation.

A more balanced approach requires a return to core principles:

- universality: everyone has rights, even when their views are unpopular
- parity of esteem: no protected characteristic is more deserving than another
- tolerance: disagreement is part of democratic life
- recognition: rights can conflict and need to be examined
- proportionality: every interference with rights should be tested, using the structure set out in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39.

...when organisations replace legal principles with ideological loyalty, they do not just fail the law – they fail the individuals they are meant to protect.

The application of proportionality should:

- identify the legitimate aim
- consider the rational connection
- ask whether the measure is necessary
- use the least restrictive means
- weigh the fair balance.

These principles should guide both courts and public bodies. They help organisations avoid the mistakes seen in recent cases.

Conclusion – moving beyond 'goodies and baddies'

Finally, we need to recognise that moral framing in this context does not help. Describing one group as 'virtuous' and the other as 'suspect' oversimplifies complex problems. It encourages organisations to act defensively. It makes legal analysis harder. Being on one side or the other of a conflict of rights does not make anyone a 'goodie' or a 'baddie'. It is just part of living in a diverse society.

The aim should be to handle those conflicts with care, respect and legal clarity, not through a moral ranking approach. Equality law is not a tool for moral adjudication or a means to declare a victor in the 'culture wars'.

When we allow the 'goodies and baddies' narrative to dominate, we lose the very essence of a pluralistic legal system, ie, the ability to balance competing rights with impartiality and intellectual rigour. The recent wave of litigation shows that when organisations replace legal principles with ideological loyalty, they do not just fail the law – they fail the individuals they are meant to protect.

Moving forward, our goal must be a return to the 'ordinary work' of the law. By embracing universality, parity of esteem, and the disciplined application of proportionality, we can foster a legal culture which respects the dignity of all – even when we disagree.

Access to justice – is our ET system broken?

Ocean O'Malley currently works alongside Nigel Mackay and William Frost at Leigh Day on employment status claims in the context of the gig economy – a sector well known for exploitative and discriminatory work practices. With years of experience in employment tribunal litigation, Ocean reflects on the catastrophic problems faced by employees currently seeking to enforce their legal rights.

Introduction

The employment tribunal system has changed beyond recognition since the creation of 'industrial tribunals' in 1964. Originally intended to provide an *'easily accessible, speedy, informal and inexpensive procedure'* for claimants[1], the system to rule on workplace disputes has struggled to keep up with expanding legislation. The current ET system now feels sluggish; its initial informality and speed have long since dissipated. Employment tribunals are the primary vehicle for workplace justice, ruling on disputes between employers and workers across a wide range of issues. But visible change has been minimal since the inception of the system; it has failed to adapt to the demands of its modern role.

...the open caseload for single claims has reached its highest on record, at 52,000 ... single claims in 2025 rose by 33% compared to the same period in 2024, when it was 40,000...

Year on year, the backlog of cases in the ETs has been growing larger, as thousands more cases are being received than are being disposed of. Case progression is slowing to record levels as the system strains under the pressure. In the vast majority of cases, the impact of delay is felt disproportionately by the claimants, making meaningful and timely access to justice almost impossible. Employment tribunals in certain regions may soon be (if not already) unable to fulfil the overriding objective set out in s3 of the Employment Tribunals Rules of Procedure, namely *'to deal with cases fairly and justly'*, including, so far as practicable, ensuring that cases are dealt with expeditiously. The ET system is creaking at the seams. If effective steps are not urgently taken to address these problems, it may soon become completely broken.

Increasing demand

Over the last few years, the tribunals have undergone a rocky process of digitalisation, resulting in some significant gaps in accessible statistics, and those that are available do not inspire optimism. The most recent figures from December 2025 show that the open caseload for single claims has reached its highest on record, at 52,000, comfortably exceeding the previous peak of 44,000 recorded in 2020.[2] Even more noteworthy is the rate of acceleration: the open caseload for single claims in 2025 rose by 33% compared to the same period in 2024, when it was 40,000 – itself a 25% increase from 32,000 in the previous year.

The picture is similar in the open caseload for multiple claims, which has reached a five-year high. The latest data shows 463,000 multiple claims at the end of September 2025, spread over 7,200 open 'lead' cases. Government statistics note that *'multiple claims tend to be more volatile as they can be skewed by a high number of claims against a single employer'*[3], but the fact remains that the ET system is facing its highest-ever recorded level, at a combined total of over half a million open claims.

1 Brione, P. (2024). *Legal advice and help in employment matters* (Research Briefing). House of Commons Library.

2 Ministry of Justice (2025). Tribunal Statistics Quarterly: July to September 2025.

3 Ibid.

These numbers have translated into listing windows for hearings extending far into the future, particularly in complex cases, where final hearings often last for several weeks rather than days. For example, at a preliminary hearing in December 2025, a multiple claim in which Leigh Day was instructed on behalf of the claimants could not be listed until two separate periods in 2029 due to a queue of long cases in that region.

ET statistical data show both a rapid increase in incoming single claim receipts and a rapid decrease in the number being disposed of ... This appears to have been accompanied by a rise in the number of complex cases.

While the ET system has never appeared entirely at ease with its expanded role, the pressure has significantly increased recently. Between January 2022 and March 2024, the disposal of single claims was largely equivalent to the receipt of single claims, so the backlog neither grew nor shrank significantly.[4] Indeed, in six of the nine financial quarters in this period, disposals were actually higher than receipts.[5] This trend was also reflected in the data for multiple claims, where disposals were also higher than receipts (though this was partly due to a dismissal judgment issued in December 2021 for a group claim against British Airways[6]). One might say that during that period, the ETs appeared to be coping with the demands being placed upon them – at least to some extent.

From the beginning of 2024, however, ET statistical data show both a rapid increase in incoming single claim receipts and a rapid decrease in the number being disposed of. From July 2023 to September 2025, the number of new single claims for that quarter increased by 62%, from 7,400 to 12,000. Over the same period, disposal of cases also decreased by 23%, from 7,700 to 5,900.

This appears to have been accompanied by a rise in the number of complex cases. For example, discrimination claims, which often require multi-day hearings, have now increased to around 35% of all tribunal cases[7].

Decreasing resources

Despite recent recruitment drives, the number of Employment Judges (EJs) has not kept up with the increased demand. The 2025 Judicial Diversity Statistics[8] show that as of 1 April 2025, there were 177 salaried EJs, 143 fee-paid EJs, and nine Regional EJs in post to cover the entirety of England and Wales. The Lord Chancellor announced in March 2025 that the maximum allocation of 33,900 sitting days would be allocated for ETs in 2025/26[9]. Yet, even at maximum capacity, the backlog continues to rise, indicating the number of EJs is still insufficient. Whilst this problem is national, the government has noted that the *'demand and pressure on London…are particularly acute'*[10]. This could be because London allowances for judicial roles in London have been frozen for the past 20 years.[11] For many judges, it may make sense to live and work in areas where the cost of living is lower.

There are also indications that the lack of capacity in the system is being exacerbated by internal administrative procedures that are not suited to the current level of demand. Unsurprisingly, given the increased pressure, the process of 'docketing' (by which claims are entered, monitored and tracked) is slowing considerably. A digitalisation process commenced in 2021[12], which, in some respects, seems to have caused more problems

4 Ministry of Justice (2023). Tribunals statistics.

5 Ibid; Q4 2021/22 to Q4 2023/24 inclusive.

6 Ministry of Justice (2025). Tribunal Statistics Quarterly: July to September 2025.

7 Mayne, M. (2025). *People Management,* "Employment tribunal backlog tops half a million, government stats reveal",

8 Ministry of Justice (2025). Diversity of the judiciary: 2025 statistics

9 Parliament.uk (2025). Written questions, answers and statements: Courts and Tribunals sitting days FY25/26

10 Parliament.uk (2025). Written questions, answers and statements: Employment Tribunals Service

11 HM Government (2006). Review Body on Senior Salaries Report No.62 (see paragraph 4.30)

12 See, for example, HM Courts & Tribunal Service (2025). *How we made workplace justice simpler, faster and more accessible for everyone*.

than it has solved. Technical faults with the automation of tasks have resulted in some important tasks sitting dormant because they have not been allocated by the system. The sheer number of everyday jobs faced by tribunal staff leaves insufficient time for quality assurance. In addition, certain regions have created separate teams for listing and casework, which can sometimes lead to misalignment.

'Dead space' in ET hearing lists is caused when a late cancellation or postponement of a hearing means capacity is wasted. This is because ETs often struggle to find other cases where the parties are available to bring their final hearing forward to fill the space. In extreme cases, even cancellations or postponements as far as two to three months in advance still apparently become 'dead space'. This worsens the backlog and increases the pressure on ET staff. It is easy to see how a ruinous feedback loop can form as employees are forced to deal with a heavy, increasing workload and limited resources.

...low value claims serve a vital purpose in society. They can expose poor workplace practices, facilitate employer compliance with legislation, and deter future breaches.

Impact of backlog

Both parties may be adversely affected by delays in the ET system. However, where there is delay, time is usually on the side of those with deeper pockets. Employers generally have far greater resources than employees, and a significant number of claimants in the ET are litigants in person. A government survey from 2018 showed that only 41% of claimants had legal representation at ET hearings compared with 79% of respondents.[13]

The negative impact of this considerable backlog in the tribunal system is wide-reaching and multifaceted, but there are many ways in which delays disproportionately impact claimants over respondents:

- Public policy: many claims do not seek any financial award, for example, those to enforce regular work breaks. Others may be relatively low value, such as claims for unlawful deduction from wages. These claims may only be worth bringing if access to justice is fast and smooth; yet, low value claims serve a vital purpose in society. They can expose poor workplace practices, facilitate employer compliance with legislation, and deter future breaches. Arguably, these issues are in the public interest, helping to rebalance the power dynamic between employer and employee. If it is only practicable for claimants to bring cases of high monetary value, many rights would effectively only exist on paper and not in practice.
- Financial exclusion: lengthy litigation is expensive. Over time, a claimant's financial resources are more likely to become depleted. If they are paying for legal advice or representation, their legal costs will likely increase the longer the claim goes on. Claims of higher value tend to be more complex, requiring more (and potentially longer) hearings, which a stretched ET system finds very difficult to accommodate.[14] Large cases – particularly large multiples – are even more susceptible to delay because of their complexity and need to be handled with judicial caution. Depending on how claimants are funding their cases, they may run up huge legal fees over time as the case can take many years to reach a conclusion.

  Even with smaller, low-value claims, the prospect of litigation fatigue caused by delays can lead prospective claimants to question the point of bringing a claim. This is even more the case given that only half of the claimants who succeed at ET receive payment in full, while around a third receive no payment at all.[15]

13 HM Government (2018) *Survey of Employment Tribunal Applications 2018: Findings;* Rose, N. (2020). Legal Futures "Fewer than half of employment tribunal claimants use lawyers"

14 Mayne, M. (2025). *People Management,* "Employment tribunal backlog tops half a million, government stats reveal"

15 *R (Unison) v Lord Chancellor*; UKSC/2015/0233.

- Evidence: when it takes years to reach a full hearing, crucial witnesses may no longer be available or may have a diminished recollection of relevant events. This may disadvantage respondents more than claimants, as they tend to call more witnesses. On the other hand, a claimant may be deprived of key evidence that would have been obtained during cross-examination. The longer the delay, the worse these issues can be.
- Personal impact: an ET claim is often a matter of greater personal significance to a claimant, as it will often involve very emotive and important issues in a way that is typically not as personal for an employer. Delay to these claims can be incredibly psychologically damaging for claimants who may wish to move on with their lives but who may feel that they can only do so following the closure that comes with a legal judgment.
- Impact on health: navigating the intricacies of a prolonged tribunal claim may place extraordinary stress on a vulnerable claimant, particularly those who are disabled and/or experiencing mental health issues. A prolonged delay is likely to exacerbate any existing health conditions.

...navigating the intricacies of a prolonged tribunal claim may place extraordinary stress on a vulnerable claimant, particularly those who are disabled and/or experiencing mental health issues

Looking ahead

The ET system is now at a critical juncture. If attempts to address the extent of the current backlog fail, things will only get worse. An ET system that is not fit for purpose gives rise to a risk that employers will feel free to suppress workers' rights without fear of legal penalty, and exploitative practices will become entrenched. This would, of course, be contrary to Lord Bingham's principles of the *'rule of law';* that legislation should be accessible and provide a means for resolving (without inordinate delay) disputes which the parties themselves are unable to resolve.[16] Society needs employment tribunals that are genuine and strong vehicles for workplace justice. If things do not change soon, we risk witnessing a systematic weakening of access to justice, with considerable adverse consequences.

Looking ahead, the most significant impact on employment rights for years to come will likely result from the Employment Rights Act 2025 (ERA 2025). While the relative merits of the Act are beyond the scope of this article, there are multiple significant achievements that should comprehensively extend employment protections to workers, perhaps the most notable of which are:

- the reduction in the qualifying period of employment from two years to six months for unfair dismissal for dismissals from 1 January 2027
- removing the cap on compensatory awards for unfair dismissal
- the increase in the time limit within which employees can bring an ET claim from three to six months.

At the moment, it is unclear when the latter will take effect, but it is expected to be no earlier than October 2026. In theory, ERA 2025 should have a beneficial impact on access to justice: fewer claims will be time-barred, and more employees will be fairly compensated when found to have been unfairly dismissed.

Sometimes, though, a decision casts a shadow that moves against it. Many have projected that ERA 2025 will cause a further significant increase in the number of ET claims brought; the government's own economic analysis of the Act predicts a 17%

16 Parliament.uk. *The roles of the Lord Chancellor and the Law Officers: Select Committee on the Constitution*

increase in new claims.[17] This would mean an extra 21,000 early conciliation notifications to ACAS, and 6,900 more employment tribunal cases. If this happens, the backlog could get far worse, causing disproportionate harm to the vulnerable people ERA 2025 was designed to protect.

...the government's own economic analysis [of ERA 2025] predicts a 17% increase in new claims

Pressure must therefore be kept up to ensure that (among the many issues the government is responsible for) the employment tribunal system is not forgotten or under-resourced. The previous government failed to deal with the problem of an overstretched ET system. The Bureau of Investigative Journalism submitted a freedom of information request in 2024, querying how long people were waiting on average to have their case heard in the employment tribunal. Concerningly, the government replied that it stopped collecting that information in 2021.[18]

Cautious optimism is inspired by the fact that the current government appears to be aware of and engaged with the problem. Caspar Glyn KC, Chair of the Employment Lawyers Association (ELA), has reported that the ELA is working alongside ministers Kate Dearden MP and Sarah Sackman MP and their officials, to find ways to address backlogs, delays and access to justice in the ET system.[19] The process is said to involve all sides of industry and is confidential in order to allow proposals to germinate in free discussion. The existence of this 'ministerial taskforce'[20] and the government's willingness to engage with this issue is encouraging.

More generally, it would be completely perverse to sacrifice access to justice in an attempt to solve the backlog. The most pertinent example of this would be the reintroduction of tribunal fees. These were found unlawful in 2017 in *R (Unison) v Lord Chancellor* [2017] UKSC 51, as they did not strike a fair balance between proportionality and the promotion of access to justice. The judgment does not, however, provide that a fees regime per se is unlawful, only the way it was structured at that time.[21] Fees for ET claims would not, therefore, necessarily be found to be unlawful if they were proposed in the future. Indeed, the Conservative party had committed to introducing ET fees had it won the general election in 2024, and there were strong rumours – albeit quashed for now[22] – that the current government was considering the same.[23]

When fees were previously introduced, there was a dramatic and persistent fall in the number of ET claims. As Lord Reed noted in *Unison*, this meant

> *…no sensible person will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full.* [para 96]

In reality, however, as acknowledged in *Unison*, the success of a claim can never be absolutely guaranteed. Yet another proposal to reintroduce fees would be a perfect example of the government asking the right question but providing the wrong answer.

Reform in the employment tribunal system may be an absolute necessity, but it must be the right reform – one that achieves the overriding objective of fairness and justice.

17 UK Government (2026). Employment Rights Act 2025 Economic Analysis.

18 The Bureau of Investigative Journalism (2025). Employment tribunals: can you help us with a major new project?

19 Caspar Glyn KC (2025). LinkedIn. The Ministerial Taskforce on Employment Dispute Resolution.

20 Hansard (2026). Employment Rights Bill - Volume 851: debated on Tuesday 16 December 2025

21 Nicholas Siddall. Littleton Chambers (2020). Employment Tribunal Fees Regime Declared Unlawful.

22 Stewart, H. and Partington, R. (2025). *The Guardian*. "David Lammy rules out charging workers for employment tribunal claims"

23 Partington, R. (2025). *The Guardian*. "Labour considering charging workers for employment tribunal claims, sources say"

1157

Disability discrimination by association, and unpaid carers' rights

G.L. v AB SpA [2025] C-38/24; September 11, 2025

Implications for practitioners

The Court of Justice of the European Union (CJEU) found that neutral working arrangements, including shift patterns and working hours, placed carers at a particular disadvantage, leading to indirect discrimination. The result is that protections once limited to disabled employees now also cover their unpaid carers in some circumstances. This judgment is only binding within the European Union, but domestic practitioners will find it a useful tool for persuading our courts to take similar steps, especially in light of s19A of the Equality Act 2010 (EqA), which has been in force since January 2024. This amendment allows individuals to claim indirect discrimination even if they do not share the protected characteristic of the disadvantaged group, provided they suffer 'substantially the same disadvantage'.

Facts

The claimant (GL) was employed by a metropolitan transport company in Italy to supervise an underground station. Her role required rotating shifts, including afternoon and evening work.

As the mother of a child with a recognised disability, GL needed to take her son for medical treatment and rehabilitation programmes at fixed times in the afternoon. She requested a permanent adjustment to her working conditions to meet these caring responsibilities, specifically an assignment to fixed morning shifts and a stable place of work. The employer agreed to temporary measures, including allocating her to a fixed workplace, but refused to make a permanent change to her shift pattern.

GL brought proceedings alleging that this refusal constituted unlawful discrimination. The case was lost in the court of first instance, but GL appealed to the Italian Supreme Court. The case was stayed pending a referral to the CJEU for a preliminary ruling on the following questions:

- whether the Employment Equality Directive 2000/78/EC (the Directive) must be interpreted as prohibiting indirect disability discrimination against an employee who is disadvantaged in employment conditions because they care for a person with a disability
- if so, is the employer required to make adjustments to the caregiver's working conditions in line with the principles of equal treatment
- if either of the above are upheld then how narrowly should the role of care giver be defined?

The national court sought clarification on the interplay between the Directive, the United Nations Convention on the Rights of Persons with Disabilities (UN Convention), and the Charter of Fundamental Rights of the European Union.

Court of Justice of the European Union

The court confirmed that the Directive must be interpreted as prohibiting indirect discrimination on grounds of disability where an employee, who is not disabled, is

placed at a particular disadvantage because they care for a disabled person. The CJEU was influenced by provisions on direct discrimination on grounds of disability in Article 1 and Article 2(1) and (2)(a) of the same Directive, which is not limited solely to persons who are themselves disabled.

The CJEU was influenced by provisions on direct discrimination on grounds of disability in ... [the] Directive, which is not limited solely to persons who are themselves disabled.

> *Where an employer treats an employee who does not himself or herself have a disability less favourably than another employee is, or would be, treated in a comparable situation … based on the disability of his or her child whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down in Article 2(2)(a).* [para 48]

The CJEU goes on to note that the purpose of the Directive is to combat *all* forms of discrimination on grounds of disability in employment, and:

> *Furthermore, the question of the recognition of discrimination 'by association' on grounds of disability arises in the same way whether that discrimination is direct or indirect. In particular, the fact that … the concept of indirect discrimination includes a defence of justification, unlike the concept of direct discrimination, has no effect on the characterisation of an act as discrimination 'by association' for the purposes of that Directive.* [para 54]

Consequently, indirect discrimination may arise where an apparently neutral provision, criterion or practice disadvantages unpaid carers of disabled persons, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In relation to reasonable adjustments to working conditions, the court held that Article 7 of the UN Convention requires the state to ensure disabled children are afforded the same rights as other children.

> *In that regard, point (x) to the preamble ... expressly refers to the need to assist the families of persons with disabilities. It follows that the employee must be able to provide ... the assistance that child requires, which implies an obligation, on the employer, to adapt the working conditions of that employee…* [para 73]

The court further clarified that in such circumstances, the employer may be required to make reasonable accommodation to working conditions, including *'reduction of working time'* and even *'reassignment to another job'* provided that this does not impose a disproportionate burden [para 76].

Finally, the CJEU declined to rule on the definition of 'caregiver', holding that it was already covered by Italian law and that the referring court had not provided a sufficient explanation for why that existing provision needed further clarification.

Comment

G.L. v AB SpA can be used as non-binding yet persuasive guidance for interpreting s19A EqA, in the hope of achieving an outcome akin to associative indirect discrimination on the grounds of disability. Advancement in this direction would, unlike the current statutory framework, directly recognise the unique and crucial roles unpaid carers play in the lives of disabled people. The judgment is likely to reinforce a purposeful approach to equality law that acknowledges the realities of disability and family life.

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To allow, dismiss, or strike out: the consequences of skipping early conciliation

Reynolds v Abel Estate Agent Ltd & Ors [2025] EWCA 1357; October 27, 2025

Implications for practitioners

Section 18A of the Employment Tribunals Act 1996 (ETA) contains the provision regarding mandatory Acas early conciliation, which is a fundamental procedural requirement when it applies. However, the wording of s18A applies to 'instituting' a claim – not 'maintaining' an existing claim which has been validly brought. Amendments to existing claims do not generally require a separate Acas certificate because the process has already been undertaken in relation to the original claim. In this case, however, the original claim was exempt from the early conciliation requirement because it concerned interim relief in respect of automatic unfair dismissal. The amendment was allowed by the ET as the detriment claims had a very close connection to the facts of the dismissal.

Although early conciliation is a mandatory precondition to the commencement of most ET claims, it is not required where a claim for unfair dismissal is accompanied by an application for interim relief.

This case illustrates that the tribunal's power to amend claims creates a useful 'loophole' for claimants, by which a new claim can be introduced as long as it meets the relevant legal tests under *Selkent*. However, practitioners should remember that the vast majority of tribunal claims *do* require early conciliation, and this case does not change the fact that it is a mandatory gateway which will be strictly applied.

Facts

Elizabeth Reynolds (ER) was employed by the respondent estate agents until she was dismissed in April 2023, purportedly due to redundancy. She contended that no genuine redundancy situation existed and that her dismissal was, in fact, a direct consequence of a protected disclosure she had made.

Six days after her dismissal, and without engaging in Acas early conciliation, ER presented claims against her employer under the Employment Rights Act 1996 (ERA 1996), namely automatic unfair dismissal pursuant to s103A, and whistleblowing detriment pursuant to s47B. Three individually named individuals were added as respondents.

Although early conciliation is a mandatory precondition to the commencement of most employment tribunal claims, it is not required where a claim for unfair dismissal is accompanied by an application for interim relief. As the claimant sought interim relief under s128 ERA 1996 in respect of her automatic unfair dismissal claim, that claim was properly exempt from the early conciliation requirement. However, the same exemption does not apply to detriment claims, which *do* require an early conciliation certificate. Notwithstanding this procedural defect, the ET did not identify the omission when the claim was presented and did not reject the detriment claim.

ER's application for interim relief was heard in May 2023. By that date, none of the respondents had filed a response to the application, nor did any of them attend the hearing. In the absence of opposition, the ET ordered that the claimant's contract of employment continue and made consequential orders for the payment of arrears of pay. As the respondents remained entirely non-responsive, the tribunal entered judgment in default of a defence in July, and listed a remedy hearing for three days in August.

It was only after judgment had been entered that the respondents applied for an extension of time to present a defence. This was followed by a further letter requesting orders setting aside or varying the ET's decision on interim relief and seeking reconsideration of the default judgments.

Employment Tribunal

The respondents' applications were considered at a case management hearing in September 2023, at which the tribunal set aside the decisions made regarding interim relief and granted an extension of time for the defence. The judge further determined that, pursuant to Rule 12 of the then Employment Tribunal Rules of Procedure (now Rule 9), the detriment claim should be rejected.

However, the tribunal then exercised its discretion to permit ER to amend her claim so as to re-present an identical detriment claim against each of the individual respondents, thereby curing her failure to engage in early conciliation in respect of those claims. The respondents subsequently appealed the decision allowing the amendment.

Employment Appeal Tribunal

The respondents contended that the ET judge ought to have struck out the detriment claim for lack of jurisdiction and followed the Court of Appeal (CA) decision in *Clark v Sainsbury's Supermarket Ltd* [2023] ICR 1169, which had been handed down just over five months before the case management hearing.

Clark concerned a large multiple claim in which a number of ET1s were found to have mistakenly referenced the wrong Acas certificate numbers. The CA outlined the approach that ETs should follow when claims that are not procedurally compliant are mistakenly accepted. The judgment suggested an ET judge has the power to remedy the situation at a later stage of case management. Such claims can be struck out on various grounds, including lack of jurisdiction and non-compliance with the rules.

...the requirements for early conciliation did not apply to amendments for existing claims. Instead, the test in *Selkent Bus Co Ltd v Moore* ... should be applied.

On behalf of the respondents, counsel contended that it is the 'presentation' of a claim that confers jurisdiction on the ET. Accordingly, where a claimant is prohibited from presenting a claim in the absence of an early conciliation certificate, that prohibition was said to go to jurisdiction. As ER had not contacted Acas and did not possess an early conciliation certificate, counsel argued that the ET had no jurisdiction to entertain her detriment claim.

The EAT judge (Mr Justice Swift) accepted that, if the ET had followed Clark, the correct course would have been to dismiss for lack of jurisdiction rather than to belatedly reject the claim. However, he considered that the early conciliation regime was never intended to operate as a punitive barrier. The judge acknowledged that had the procedural defect been identified at the outset, ER would have been able to obtain an early conciliation certificate. He also took into account that she was representing herself and faced a seven-day deadline to present her interim relief claim. Finally, the respondents had suffered no prejudice from the error. Accordingly, the EAT held that the failure to comply with the early conciliation requirement did *not* deprive the tribunal of competence (jurisdiction) to hear the case, and remitted the case to the ET for consideration of the merits of the detriment claim alongside the automatic unfair dismissal claim.

Court of Appeal

The respondents appealed on a single ground – the EAT was wrong in law to hold that s18A ETA gave an ET any power to allow jurisdiction for the detriment claims in the absence of an early conciliation certificate. The claimant cross-appealed on the basis

that even if the claim should have been dismissed or struck out, it was still open to the ET to reinstate the detriment claims by way of amendment.

...the vast majority of tribunal claims do require early conciliation, and this case does not change the fact that it is a mandatory gateway which will be strictly applied.

The CA agreed that the statutory requirements under the ETA were fundamental to the issue of jurisdiction; if that were not the case, parliament would not have seen fit to bring them in. However, the requirements for early conciliation did not apply to amendments for existing claims. Instead, the test in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 should be applied. This involves a balancing exercise that includes the nature of the amendment, consideration of time limits, and the balance of hardship between the parties. In the present case, the ET had already identified that ER's detriment claims were closely related to her substantive unfair dismissal claim, and found that it was in the interests of justice to add the individual named respondents. The CA upheld the ET's original order giving permission to amend, and the detriment claim was allowed to proceed.

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Time limits and continuing acts

Ahmed v Capital Arches Group Limited [2025] EAT 133; September 17, 2025

Implications for practitioners

The EAT confirmed that the orthodox distinction between conduct extending over a period and a one-off act with continuing consequences remains firmly established for the purposes of s123(3)(a) Equality Act 2010 (EqA). This sets a demanding threshold for claimants seeking to rely on continuing acts involving changes in duties, transfers and demotions, as these will ordinarily be treated as discrete acts, even where their effects persist over time. Practitioners should therefore pay careful attention to whether the pleaded treatment reflects the ongoing application of a discriminatory policy or practice, rather than the continuing impact of a single managerial decision. A helpful guide in this respect may be to consider whether the employer must continue to act for the treatment to persist, or whether the alleged detriment endures simply because a past decision remains in place.

Facts

The claimant, Mr Nawaz Ahmed (NA), was employed from May 2018 as a crew member at a McDonald's restaurant owned by the respondent, Capital Arches Group Limited (CAGL). In mid-2018, NA alleged that Muslim colleagues subjected him to unwanted comments related to race and religion or belief, arising from his refusal to participate in Muslim religious practices during Ramadan. He complained to his line manager about these comments. In October 2018, NA was moved from his kitchen role to a role in the lobby area, where he was assigned to cleaning duties. NA was periodically signed off sick from 2019 due to a shoulder condition and went on long-term sick leave in 2021.

NA presented a claim to the ET in October 2022, alleging age, race, disability and religion or belief discrimination and harassment. He acted as a litigant in person throughout the proceedings.

Employment Tribunal

Following a series of preliminary hearings, Employment Judge Snelson partially allowed an application to amend, limiting the surviving complaints to allegations of direct discrimination and harassment on grounds of race and religion or belief relating to events in 2018.

At a further preliminary hearing, Employment Judge Klimov held that the claims were presented out of time and that it was not just and equitable to extend time. The tribunal found that the alleged discriminatory acts occurred no later than October 2018, when NA's duties were changed. The delay of almost four years was described as 'very long' by EJ Klimov [para 22].

The tribunal rejected NA's explanations for the delay and found that allowing the claim to proceed would cause serious prejudice to CAGL. This was due to the time that had passed since the events, and the difficulty of tracing former employees to respond to allegations of verbal harassment. The claim was dismissed for want of jurisdiction.

Employment Appeal Tribunal

NA was permitted to appeal to the EAT on grounds that the ET had:

- erred in identifying when time began to run for the purposes of time limits
- incorrectly assessed the prejudice caused to CAGL in extending time
- acted unfairly because his line manager was not called as a witness.

The judgment has reaffirmed the now well-established distinction between conduct extending over a period and a one-off act which may have continuing consequences.

The EAT (His Honour Judge Auerbach) dismissed the appeal on all three grounds. On the principal issue of time limits, it held that the tribunal had been correct to identify the live complaints as limited to conduct ending in October 2018. NA's attempt to characterise the change in duties as conduct extending over a period – particularly where this change in duties had the effect of worsening his shoulder condition – was rejected.

The judgment has reaffirmed the now well-established distinction between conduct extending over a period and a one-off act which may have continuing consequences. Applying *Sougrin v Haringey Health Authority*[1] and *Parr v MSR Partners LLP*[2], the EAT held that the decision to change NA's duties was analogous to a demotion (as in *Parr*) or failure to promote (*Sougrin*): namely, a discrete managerial decision with continuing effects. The absence of any pleaded or evidenced ongoing discriminatory policy was decisive. NA's argument that the change was not truly a demotion did not alter its legal characterisation as a one-off act.

The EAT also rejected the contention that the live complaints extended to further discriminatory conduct after 2018 as *'discrete incidents strung out over a period of time…together amounting to conduct extending over a period'*[3] [para 40]. Earlier case-management decisions had clearly confined the permitted claims, and any challenge to that limitation should have been pursued at the time. The ET had therefore been entitled to treat October 2018 as the end point for time limits purposes where no continuing act is found.

In rejecting the assertion that the hearing was unfair because CAGL did not call NA's line manager as a witness, the EAT emphasised that time limit hearings are jurisdictional rather than merits-based, at which it is common for respondents not to call witnesses. The line manager had produced a witness statement for an earlier preliminary hearing, but neither CAGL nor the tribunal relied on it at the time limit hearing, and no procedural application was made by NA. In those circumstances, there was no unfairness.

In light of its conclusions on limitation and procedural fairness, the EAT held that the ET had been entitled to its assessment of prejudice, so this ground of appeal also failed.

Comment

Ahmed reaffirms the tight boundary drawn in case law between one-off acts and conduct extending over a period. The EAT applied that boundary strictly, treating NA's change in duties as a discrete managerial decision whose continuing effects did not extend time. On its face, this seems an unjust outcome for NA, given the longevity and consequences of the working arrangements which followed the initial decision.

It is notable in this case that earlier preliminary hearings had confined NA's detriments to events in mid-2018. Had those case management decisions not been so tightly framed,

1 [1992] ICR 650 (CA)

2 [2022] ICR 672

3 Citing the principle from *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530

NA may have been able to seek evidence of conduct extending over time, rather than relying on the continuing effects of a single act.

If there was any tension between the approach to continuing acts after *Parr* and earlier decisions, such as *Hale v Brighton and Sussex University Hospitals NHS Trust*[4], in which the decision to instigate disciplinary procedures was treated as creating a continuing state of affairs, the EAT in *Ahmed* did not endeavour to resolve it through a more forensic analysis of the authorities.

It did, however, clarify that a detrimental change of duties is properly characterised as a one-off act which will ordinarily fall within the category of 'decisions with continuing effects' rather than conduct extending over a period.

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4 UKEAT/0342/16

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Time limit points in the employment tribunal: preliminary issue or strike out?

Mesuria v Eurofins Forensic Services Ltd [2025] EAT 103; July 24, 2025

Implications for practitioners

This case provides a helpful reminder that consideration of a substantive preliminary issue is a very different exercise from consideration of a strike-out application. For instance, where disability is determined as a substantive preliminary issue, the ET is often required to review medical documentation, and the claimant will give evidence and be cross-examined. That is because the tribunal must make findings of fact and apply the law to those facts in order to decide the point, which cannot then be revisited at the full merits hearing of the case.

If significant facts are in dispute, it is rarely appropriate for a tribunal to decide a matter at a preliminary hearing. A strike-out hearing certainly should not become a mini-trial.

In contrast, a strike-out application requires the ET to consider whether a party is likely to succeed at a full merits hearing once *all* the evidence is available. If a strike-out application fails, it does not mean the issue is decided in the claimant's favour: it just means the issue remains live and will be determined at a final hearing.

By definition, then, the tribunal must decide a strike-out application on the basis of *partial* evidence. That is why the bar is set high: it requires the ET to find that whatever the remaining evidence shows, there is no reasonable prospect of the claim succeeding at a final hearing. If significant facts are in dispute, it is rarely appropriate for a tribunal to decide a matter at a preliminary hearing. A strike-out hearing certainly should not become a mini-trial.

Time limits in the ET are strictly applied, and can certainly be grounds for striking out a claim, but the tribunal has discretion to extend time if it considers it would be 'just and equitable' to do so. In addition, s123(3)(a) of the Equality Act 2010 (EqA) also provides that

> *conduct extending over a period is to be treated as done at the end of the period...*

This is often referred to as a 'continuing act', but it can also include multiple separate acts which are connected so they form a course of discriminatory conduct. Under this provision, events that are long past can be brought in time so long as they are relevantly connected to something else which is in time.

Clearly, then, if a claim alleges continuing conduct and the relevant facts are disputed, determining whether each piece of conduct is in time may require a wide range of evidence. The authorities make clear that striking out a claim on such an issue at a preliminary hearing should be approached with extreme caution.

The facts

The disabled claimant (KM) worked for the respondent as a senior document examiner. She began a period of sick leave in August 2018, from which she did not return. KM brought disability discrimination claims in the ET in September 2021 and again in May 2022. These claims included various allegations about a lack of support throughout her sickness absence, a delay in applying the respondent's group income protection policy, and the terms on which she was re-engaged in November 2019.

Employment Tribunal

In December 2022, an ET judge listed a one-day preliminary hearing in March 2023. The notice of hearing said its purpose was to decide

> *If any complaint [was] presented outside the time limits, and if so should it be dismissed on the basis that the tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason) should any complaint be struck out … on the basis that it has no reasonable prospects of success…? Dealing with these issues may involve consideration of ... whether there was 'conduct extending over a period'; whether it would be 'just and equitable' for the tribunal to permit proceedings on an otherwise out of time complaint...* [para 25]

At the remote hearing, KM was represented by her sister, Ms Baria, who was not legally qualified and had never attended a preliminary hearing in the ET before. Ms Baria told the judge that she had only prepared to deal with the time point, but the judge recorded, *'It was however clear that the hearing had been listed to consider strike out...'* [para 29]

...the ET judge had taken the merits of the complaints into account in deciding to strike out, despite the fact that both the case management order and the notice of hearing limited the strike out issue to the time limits point.

The ET found the first claim involved no continuing acts without considering whether the complaints could be connected. It concluded the first claim was out of time and the tribunal had no jurisdiction to hear it. Following a consideration of the merits, rather than time limits, the second claim was struck out as having no reasonable prospect of success.

Employment Appeal Tribunal

KM appealed on various grounds, including that at the hearing the ET judge had not given clear directions or guidance on which issues were being discussed, when they finished, and which came next. This had created confusion.

At the EAT, Judge Tayler found that the ET judge's own notes showed she had not clarified at the outset whether she was going to consider the time point as a matter of substance or as an issue of strike out. As a result, she had not explained whether or how findings of fact would be made.

Judge Tayler also found that the ET judge had taken the merits of the complaints into account in deciding to strike out, despite the fact that both the case management order and the notice of hearing limited the strike out issue to the time limits point, and that Ms Baria explicitly said she was not adequately prepared to deal with strike out.

Finally, the EAT found the tribunal had failed to ensure the parties were on an equal footing and, by not allowing KM's representative to re-examine, had deprived the claimant of a fair hearing. Judge Tayler set all the decisions aside and remitted the matter for reconsideration by a different employment tribunal.

Comment

Mesuria reminds us that it is essential to read both case management orders and hearing notices carefully. A useful discipline when preparing for any hearing is to check that you know what decisions the tribunal is going to make, what rule or statutory provision gives it the power to make each decision, and what factors it must consider when doing so. The case also underscores that, throughout a hearing, a judge must ensure that both parties understand what issue is before the tribunal at that moment, and what kinds of evidence and submissions will be relevant. If this has not been done, litigants should not hesitate to ask for clarification and explanation before proceeding.

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Anonymity orders on mental health grounds

DBP v Scottish Ambulance Service [2025] EAT 147; October 13, 2025

Implications for practitioners

This case clarifies how tribunals should approach applications for post-hearing anonymity where mental health risks are raised. It makes plain that fairness requires giving someone a realistic opportunity to obtain medical evidence before deciding their application. The EAT held that the ET's decision to refuse anonymity simply because medical evidence had not yet been obtained was 'plainly wrong'. If an applicant explains that an assessment is needed, is already being arranged, and sets out how it will be obtained, fairness may require allowing time for that evidence and, where appropriate, listing an oral hearing to explore the concerns.

When deciding [applications], the tribunal must give full weight to 'open justice' and freedom of expression and then balance those factors against the risk and impact described by the applicant.

Anonymity and other privacy measures are currently governed by Rule 49 of the Employment Tribunal Rules of Procedure. Applications may be made at any stage by written request. No prescribed form is required, but the request should specify what is sought (for example, anonymising a party's name in the judgment and on the register) along with reasons justifying the order. When deciding, the tribunal must give full weight to 'open justice' and freedom of expression and then balance those factors against the risk and impact described by the applicant.

Available measures include:

- anonymisation of parties or witnesses in judgments and public lists
- private hearings for sensitive parts of evidence, restricted reporting orders in defined categories
- practical steps to reduce identifiability in open court.

Case law makes clear that anyone asking a tribunal to depart from open justice must provide well-defined, specific and convincing evidence showing that the restriction is both necessary and proportionate. This principle was confirmed in *R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 and *L v Q Ltd* [2019] EWCA Civ 1417 and requires any limitation to be narrowly justified and kept to the minimum needed.

Practitioners advising vulnerable clients should prepare the application as they would any significant interlocutory step: define the harm, explain the causative link to publication, identify the evidence needed, and set out how and when it will be obtained. Where distress or risk is asserted, a short oral hearing can be a practical and fair way to test concerns and ensure the claimant's voice is heard.

Facts

The claimant (DBP) brought multiple employment-related complaints against the Scottish Ambulance Service. After a full merits hearing, in which she represented herself, all claims were dismissed. The ET's written reasons included elements of the claimant's personal medical history discussed in evidence, notably previous self-harm and a suicide attempt; the judgment was published on the public register.

More than a year later, again as a litigant in person, DBP applied for permanent anonymisation, explaining that ongoing online publication of those details caused her

distress and posed a risk of further self-harm or suicidal ideation. She said she intended to obtain an expert psychological report and asked for an oral hearing to explain matters.

Employment Tribunal

DBP made three anonymity applications. Each was determined on the papers by the same employment judge, and each was refused. The ET's core reasoning was that anonymity was not justified because medical evidence had not yet been provided to substantiate the risk. No oral hearing was listed despite her repeated requests. Those refusals were made against the background of the publicly available register and the tribunal's view that, in the absence of medical material, open justice should prevail.

Employment Appeal Tribunal

On appeal, Judge Barry Clarke allowed the appeal and held the ET's approach was an error of law. The EAT found it was unfair to refuse the application solely because medical evidence had not yet been produced when the claimant had set out a concrete intention to obtain it and had even explained the steps she would take to fund an expert report. Fairness required giving DBP a reasonable opportunity to gather the material before deciding the application.

...open justice remains fundamental. Any restriction must be justified, necessary and carefully tailored so that interference with transparency is no greater than required.

The EAT further observed that an oral hearing may be necessary in such circumstances, given the sensitivity of the information and the claimant's request to be heard.

The case was remitted to a different employment judge to reconsider the anonymity application. Pending that fresh decision, the EAT made a temporary order, anonymising DBP in public documents and setting out a framework for reviewing the temporary order after the new decision, along with any appeal window.

Comment

The judgment sits in a wider context of permanent online publication of ET decisions since 2017, which has heightened the consequences of disclosure for vulnerable parties and increased the volume of post-hearing anonymity requests.

The outcome in this case should recalibrate day-to-day case management of anonymity requests. Tribunals and representatives ought to treat such applications as a structured exercise in proportionality, not a binary choice tied to whether medical evidence is already in hand.

At the same time, the case underscores that open justice remains fundamental. Any restriction must be justified, necessary and carefully tailored so that interference with transparency is no greater than required. Early identification of privacy risks, consideration of proportionate proposals, and the production of a credible plan for evidence can make the difference between refusing an application and issuing a fair, defensible order. With online judgments now a permanent feature, the stakes are high. DBP offers a clear reminder that procedural fairness is integral to striking the right balance.

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Employment tribunal jurisdiction; equality claims by members of the armed services

Curtis v Ministry of Defence [2024] EAT 161; September 30, 2024

Implications for practitioners

The decision is a reminder of the carefully defined structure through which serving members of the armed forces can bring a claim under the Equality Act 2010 (EqA). Section 121 provides that such a complaint must first be raised as a 'service complaint', which is then investigated internally and is not withdrawn. However, if any part of the complaint is deemed inadmissible, the EAT clarified that the complainant must be notified and afforded the right to seek a review by an independent body (the ombudsman or tribunal).

Facts

Ms H Curtis (HC), an RAF corporal, passed a promotions board in 2017 making her eligible for promotion to the rank of Sergeant, subject to holding a full fitness certificate. Due to a previous injury, HC had been medically downgraded and was scheduled for a medical board assessment in August 2017 to hopefully obtain the required certificate.

Prior to the assessment, HC discovered that she was pregnant, which resulted in the cancellation of the medical board, purportedly because of her pregnancy. This meant she was unable to apply for her preferred promotion when it became available. HC contended that the cancellation of her medical assessment had long-term, negative consequences for her career.

In January 2019, HC made a service complaint pursuant to the process set out in the Armed Forces Act 2006 (AFA). She was interviewed by a 'Specified Officer' in February 2019 and received a 'Notification of admissibility of a formal service complaint' in March. The letter summarised, in the view of the specified officer, the heads of complaint under which HC's grievances could be identified, but omitted to mention the cancellation of the medical board. There was no notification that any part of the complaint was not admissible. The letter additionally stated that the *'grievances may be defined under a number of heads of complaint'*.

In December 2020, HC was provided with the outcome of the investigation into her complaint. It included the following passage:

> *You will have noted from the Specified Officer's … letter of admissibility … that your complaint regarding the scheduled medical board to assess recovery from an operation was not included. Therefore, I have not considered it in this [decision letter].*

The outcome letter made no reference to any part of the complaint not being admissible.

Employment Tribunal

HC brought claims in the ET for maternity and pregnancy discrimination, and indirect sex discrimination. The Ministry of Defence (MoD) applied to strike out the claim on two grounds: that the claims were out of time, and that the ET lacked jurisdiction to hear the complaint regarding the cancellation of the medical board as it had not been investigated internally.

At a preliminary hearing, the judge determined it was just and equitable to extend time under s123(2)(b) EqA, but accepted the MoD's argument on jurisdiction. The ET concluded that the cancellation of HC's medical board appointment had not been pursued as part of her service complaint, as required under s121(1) EqA, and so the claim was struck out.

Employment Appeal Tribunal

HC appealed to the EAT. She submitted the judge had erred in:

- failing to consider and apply regulation 5(4) of the Armed Forces (Service Complaints) Regulations 2015
- failing to understand the evidence, stating that he had not seen the letter sent to HC, whereas, in fact, it was in the bundle and indeed referred to in one paragraph of the judgment
- determining that HC should have applied for a review of the decision not to include the medical board complaint. She could not do so until she was told it was not admissible, and the reason for that non-admissibility
- wrongly holding that the tribunal was bound by the decision in *Molaudi v Ministry of Defence* [2011] UKEAT/463/10/JOJ. That was a decision in connection with a different statutory scheme and was not binding in respect of the current and revised statutory scheme
- concluding that the tribunal lacked jurisdiction to hear the complaint because it was deemed withdrawn. It was submitted that the deemed withdrawal provisions in s121(2) EqA did not apply, as there had been no positive decision on non-admissibility by the specified officer, and HC had not expressly withdrawn the complaint.

...where a decision against the complainant was made ... they had a right to be told of that decision along with the reasons, and then a right to seek review to an independent body.

The EAT considered all the grounds of appeal together and found in favour of HC.

Turning first to the relevant statutory provisions, it was considered that the combined effect of the relevant laws[1] set out a structure through which serving members of the armed forces could only bring an Equality Act claim before an ET when they had first raised that complaint by way of a service complaint, and allowed the military authorities to address it through internal investigation.

However, at each stage of that procedure, where a decision against the complainant was made (including those on inadmissibility of a service complaint), they had a right to be told of that decision along with the reasons, and then a right to seek review by an independent body, namely the ombudsman or the ET.

Regarding the application of *Mouladi*, the EAT held that a valid service complaint under the then-applicable legislation meant a complaint which could be considered substantively by the military authorities. Consequently, a complaint rejected by military authorities for being brought out of time did not fall within that definition.

The judge further determined that when considering the issue of jurisdiction, the question is not whether the complaint is 'valid' (which has connotations of being 'well founded'). Rather, the question is whether the complaint presented to the tribunal was one which could be considered as a matter of substance by the military authorities.

The EAT agreed with the broader policy decision outlined in *Mouladi* that military personnel should first address their complaints internally before commencing a claim

1 s304A and s340B Armed Forces Act 2006; the Armed Forces (Service Complaints) Regulations 2015; and s120 to s121(2) EA

in the ET. A service complaint must be raised through the applicable internal procedure and must be one which is capable of being considered as a matter of substance by the military authorities. However, in this case neither the MoD admissibility letter from March 2019, nor any subsequent communication, provided clarity on the decision regarding the admissibility of the medical board complaint, nor did they clearly state they had deemed it inadmissible. Further, this failure to notify the claimant prevented her from seeking a review.

The judge concluded that the lack of notification and reasons meant the issue could not be deemed withdrawn under the relevant statutory provisions. HC's complaint was, therefore, one capable of being considered on its merits by the military authorities, allowing jurisdiction for the ET.

Comment

This case clarifies and, importantly, strengthens procedural protections for service personnel, especially when bringing claims under the EqA.

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Reasonable prospects of success – awarding costs in the ET

Huntley v Siemens Healthcare Ltd [2025] EAT 152; October 23, 2025

Implications for practitioners

This case concerns the circumstances in which an ET may award costs under the Rules of Procedure. The appeal raised an issue of wider importance about timing: whether the assessment of reasonable prospects for costs purposes must be confined to the start of proceedings, or whether it may properly focus on a later stage in the litigation. The decision illustrates the risks associated with continuing discrimination claims beyond the point at which their prospects have been expressly and repeatedly called into question by the ET.

Facts

The claimant had been employed by the respondent as a field service engineer from 1992 until his dismissal in August 2020. He brought a series of claims in the ET, including discrimination arising from disability, failure to make reasonable adjustments, victimisation, automatic unfair dismissal, and unfair dismissal. The disabilities relied upon were a spine injury, together with depression and anxiety.

Employment Tribunal

The final merits hearing was conducted in two parts, in April and November 2022. During the April hearing, the claimant appeared in person. The judge repeatedly raised concerns about fundamental difficulties in the way the claims were framed, in particular the absence of evidence linking alleged detriments to matters arising from disability and, in relation to whistleblowing, the lack of any causal connection between protected disclosures and the treatment complained of. The ET encouraged the claimant to reflect carefully on whether it was appropriate to continue with his claims and suggested that he obtain legal advice before the hearing resumed.

Following the April hearing, the respondent sent a costs warning letter drawing attention to the tribunal's observations and indicating that it considered the remaining claims to have little prospect of success.

When the hearing resumed in November 2022, the claimant was represented by counsel. Despite this, the tribunal's concerns remained unresolved, and further warnings were given. The claimant ultimately narrowed his case late in the proceedings and withdrew a number of his claims. All his remaining claims were dismissed in a liability judgment given in November 2022.

The respondent then applied for a costs order, seeking £7,500 to reflect counsel's fees for the five days in the November hearing. The application was advanced on two grounds: that the claimant had acted unreasonably in continuing his claims after the April hearing, and that by that stage the claims had no reasonable prospects of success.

The ET granted the application. It concluded that, at the latest by the start of the November hearing, it should have been clear that the claims no longer had reasonable prospects of success. The tribunal relied on the repeated judicial warnings given in April, the subsequent costs warning letter, and the fact that, despite being legally represented in November, the claimant continued to pursue claims which did not hold up under cross-

examination. It rejected the argument that the respondent's failure to apply to strike out the claims prevented a costs order, and found it was unreasonable for the claimant to continue at the adjourned hearing. Having considered discretion and the claimant's means, it awarded the full sum sought.

The claimant appealed to the EAT, advancing five grounds. The central argument was that, as a matter of construction, rule 76 (1)(b) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 only permits an award of costs where a claim had no reasonable prospect of success from the outset of proceedings. It was submitted that assessing prospects at a later stage was impermissible and inconsistent with authorities on striking out claims mid-hearing, including *Williams v Real Care Agency Ltd* [2013] ICR D27, and *Timbo v Greenwich Council for Racial Equality* [2013] ICR D7.

Employment Appeal Tribunal

...the ET had been entitled to conclude that the claimant's claims no longer had reasonable prospects by the time of the November hearing, and that it was unreasonable for him to continue.

The EAT dismissed the appeal. The judge held that nothing in the wording of rule 76(1)(b), which refers to whether a claim or response 'had' no reasonable prospect of success, confines the assessment to the beginning of proceedings. While cases seeking the entirety of a party's costs will often require an evaluation of prospects at the outset, the rule does not preclude an award of costs in respect of part of the proceedings where a claim initially had some merit but later ceased to do so.

The judge endorsed the staged approach to costs applications articulated in *Radia v Jefferies International Ltd* [2020] IRLR 431: first, determining whether a costs threshold is crossed; second, considering whether, in the exercise of discretion, it is appropriate to make an order; and third, assessing quantum. Where costs are sought only for a defined period, it is legitimate for a tribunal to ask whether, at a particular point in time, the claim had ceased to have reasonable prospects of success.

The EAT further rejected the submission that the ET was required to treat the absence of a strike-out application as decisive. While a failure to apply for strike-out may be a relevant factor depending on the circumstances, it does not prevent a tribunal from concluding that a claim lacked reasonable prospects for the purposes of rule 76(1)(b). Nor did the case law on striking out claims undermine this approach. Those authorities address the appropriateness of terminating proceedings before all evidence has been heard, rather than the retrospective assessment of prospects for costs purposes after a full merits determination.

On the facts, the EAT was satisfied that the ET had been entitled to conclude that the claimant's claims no longer had reasonable prospects by the time of the November hearing, and that it was unreasonable for him to continue. The tribunal had properly considered the claimant's status as a litigant in person earlier in the proceedings, including his access to legal advice and the warnings he had received. Its reasons disclosed no error of law.

Comment

This decision confirms that claimants and their advisers must keep the viability of claims under review as proceedings develop, particularly where tribunals have clearly identified structural or evidential defects. It also highlights that there is no requirement to pursue strike-out applications in order to preserve the possibility of a later costs award.

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1164

Unless orders: clarity, not punishment

Peposhi v Go Crisis Ltd [2025] EAT 27; February 18, 2025

Facts

The claimant brought disability discrimination claims in the ET against two respondents. It was common ground at the final hearing that he was disabled due to a complete loss of hearing in his left ear. The hearing was listed over three days in September 2023 and conducted remotely via the Cloud Video Platform (CVP), with earlier case management conducted by telephone.

Employment Tribunal

On the first day of the hearing, the claimant made an anonymity application and an application to amend his claim, both of which were refused with reasons provided orally. On day two, the claimant applied to postpone the hearing to obtain written reasons and take advice, citing difficulties following the oral reasons because he relied on lip-reading.

The EAT reiterated that unless orders are draconian, require precision in drafting, and must be capable of clear and unambiguous understanding.

Technical issues then arose with the claimant's CVP connection. Attempts to contact him were made, and he informed the tribunal that he could not proceed by telephone due to his disability and lack of a suitable device. The hearing was adjourned, and the employment judge issued an 'unless order' requiring the claimant to provide a written statement with supporting evidence, explaining why he had been unable to rejoin by CVP or telephone. The claimant emailed shortly before the deadline for compliance with a witness statement from his sister and attachments, including call logs, WhatsApp messages, a laptop loan statement, an IT repair receipt, and historical medical records.

Nevertheless, by letter dated 21 December 2023, the tribunal judge concluded there had not been material compliance with the order, and the claim was dismissed under rule 38 of the Employment Tribunal Rules of Procedure 2013. The judge held that the documentation provided by the claimant did not adequately explain why he had been unable to rejoin the hearing by telephone, that the statement prepared by his sister was not a statement produced by the claimant, and that the medical records did not establish disadvantage by telephone participation.

Employment Appeal Tribunal

The EAT allowed the claimant's appeal and overturned the decision to dismiss the claimant's disability discrimination claims. The judge (His Honour Judge Tucker) found that the ET had applied the incorrect test in assessing compliance by asking whether the claimant's explanation was 'good enough' rather than whether he had taken the steps the order required. Objectively, the unless order required a written statement explaining the inability to rejoin the hearing by CVP or telephone and submission of any relevant documents. The claimant sent a written statement (including his own email) and provided documents within the time limit, thereby meeting the order's terms.

Any ambiguity in those terms, such as whether an explanation was required for CVP or telephone, or both, had to be resolved in favour of the party required to comply. The EAT reiterated that unless orders are draconian, require precision in drafting, and must be capable of clear and unambiguous understanding. They should not be used to test credibility or dispose of weak claims where other case management tools are available.

Judge Tucker also identified procedural concerns, namely that the order had originally been made by a panel of three, yet compliance was determined later by the ET judge alone without inviting submissions. The EAT considered that further submissions by the parties and deliberations by the original panel would have been preferable for fairness.

Implications for practitioners

Where a tribunal proposes to use an unless order to address concerns about conduct, parties can suggest alternative case management tools that are better tailored and less draconian.

This case provides important guidance on the proper construction of unless orders and the approach for assessing compliance.

Compliance with rule 38 is an objective question: what did the order require, what did the party do, and did those actions meet the order's terms? Unless orders must be drafted with clarity so that it is easy to determine material compliance, along with the consequences of partial compliance. When assessing the extent of non-compliance, the ET should focus on material compliance, adopt a facilitative approach, and resolve ambiguities in favour of the party required to comply.

As claimant representatives, practitioners should scrutinise orders for ambiguity and invite clarification, including the precise subject of any required explanations and the standard of detail expected.

Where a tribunal proposes to use an unless order to address concerns about conduct, parties can suggest alternative case management tools that are better tailored and less draconian. In disability cases involving remote hearings, representatives should use the preliminary stages to press for concrete adjustments and technology access planning, including device availability, screen size, ability to see speakers for lip-reading, and simultaneous document access. Where a tribunal gives notice of non-compliance without hearing from the parties, *Peposhi* supports submissions that fairness may require representations, and in particular, that where a panel made the order, the same panel should ordinarily determine compliance.

Comment

Unless orders are not intended to investigate honesty or credibility, or to penalise perceived obstructiveness. Other powers, such as deposit orders, are better suited to that purpose. In relation to remote hearings and reasonable adjustments, tribunals must case-manage proactively to ensure parties, especially disabled and unrepresented litigants, have the technology and adjustments needed to participate on an equal footing.

Peposhi refocuses tribunals and practitioners on the importance of precision in drafting orders, objective assessment of compliance, and restraint in imposing draconian sanctions. In discrimination litigation, where disability and participation barriers are common, the decision is a timely reminder to identify and communicate any disability and need for adjustments at an early stage in proceedings. It also highlights the importance of careful drafting of unless orders, being conscious of the potential for ambiguity when orders are made, and consideration of whether clarification may be required to avoid inadvertent or perceived non-compliance.

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Closing the door: non-binary identity is not protected under the Equality Act 2010

Lockwood v Cheshire and Wirral NHS Foundation Trust and Others [2025] ET 2401211/2024 & 2407178/2024; October 27, 2025

Implications for practitioners

Whilst a first-instance decision and therefore not binding, this case provides insight into how courts might consider non-binary or gender-fluid identities in a post-*For Women Scotland*[1] world. Despite acknowledging that the Equality and Human Rights Commission (EHRC) has yet to finalise its guidance, and that earlier case law allows some room for these identities, in this instance, the ET limits the scope of gender reassignment as a protected characteristic. The tribunal found that those who identify as non-binary are not covered by s7 EqA, unless they have a future intention to fully transition to the sex not assigned at birth. Regardless of this ruling, employers would be wise to react with empathy in such situations and show a genuine intention to put things right going forward.

Facts

Haech Lockwood (HL) commenced employment with the respondent NHS Trust in November 2021. HL identifies as non-binary, but was assigned 'female' at birth; they use they/them pronouns, and do not intend to transition to their sex not assigned at birth (ie, male), by medical means or otherwise. The respondent had been aware of HL's non-binary identity since their initial employment application. HL alleged a series of unwanted conduct in interactions with the IT department, the mail service, the vaccination service and other colleagues employed by the respondent. Specifically, the allegations concerned the use of the wrong pronouns, and their deadname 'Heather' instead of 'Haech'.

Having had their name changed by deed poll, HL requested that their records on the respondent's email and network services be amended accordingly, but this was given a 'low urgency' status. Changes were eventually put into effect, but there were still occasions when HL was referred to by their deadname or as 'she' instead of 'they'. In each instance, the respondent's employee immediately apologised, and steps were swiftly taken to rectify the situation. HL accepted that the actions were not deliberately intended to cause any offence or harm, but alleged they had the effect of violating their dignity and/or creating the requisite hostile environment under s26 EqA.

Employment Tribunal

The ET reviewed existing law interpreting gender reassignment under s7 EqA. In another first-instance decision, *Taylor V Jaguar Land Rover Ltd* ET/1304471/2018, the tribunal considered the words *'proposing to undergo'* in s7 as ambiguous but deduced from the Hansard record that *'parliament intended gender reassignment to be a spectrum moving away from birth sex and that a person could be at any point on that spectrum'.* Thus, the claimant, who identified as gender-fluid, was considered covered.

1 *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 0016

The decision in *Taylor* was endorsed by the High Court in *R(AA) v National Health Service Commissioning Board (NHS England) & others* [2023] EWHC 43 (Admin), but unlike in *Taylor*, the court did not find the words *'proposing to undergo'* to be ambiguous. Mr Justice Chamberlain said the definition of s7 EqA did not require the attributes of sex that were undergoing change to be medical, and could include changing one's name; that the process could be done in a variety of ways; and that protection could begin before any process had started. The court found a child, who had *'taken a settled decision to adopt some aspect of the identity of the other gender',* was therefore protected under the EqA.

When considering the ruling in *For Women Scotland*, the ET noted the Supreme Court restated that *'there is no legislation in the UK which recognises a non-gendered category of individuals … the statute book assumes that all individuals can be categorised as belonging to one of two sexes or genders'.* In determining there was no distinction between an individual who would be transitioning between male to female or female to male, the ET said the Supreme Court had clarified it was the *process of reassignment* and not sex which was protected.

The ET then asked itself what journey s7 requires the claimant to be on for them to have the protected characteristic of gender reassignment. In the particular case, the tribunal found there was no doubt the claimant embarked on a journey by changing their name, living under that name and asking others to use their preferred pronouns of 'they' and 'them'. However, in analysing s7, the ET said according to the dictionary, the word 'reassigning' means *'a move from one thing to another'* (emphasis in original).

Since, according to *For Women Scotland,* sex is binary, the tribunal held it was not sufficient for the claimant to be moving away from the female sex to qualify for protection within s7; they also needed to have the purpose of reassigning their sex to male.

Agreeing there was no ambiguity in the wording of s7, the ET also thought both *Taylor* and *R(AA)* were unhelpful as while the focus in those cases was on the 'proposing to undergo' provision and 'moving away' from the sex assigned, the judgments were before *For Women Scotland,* and relied on a part of the EHRC Code which is now undergoing revision. The tribunal concluded that in s7 the *'process still requires the purpose of the reassignment of sex'* which carries a binary definition, and therefore a claimant who was not moving from one sex to the other, but instead to a non-binary identity, could not be considered covered.

Comment

As noted above, this is a first-instance decision on what the ET called an *'emotive and sensitive matter'.* It is based on the specific evidence and facts, and it is possible that, in different circumstances, another ET might take a different view. This decision does, however, highlight the impact of *For Women Scotland* on those who do not identify as fitting into a binary definition of sex (male/female). Although there was previously considered to be ambiguity in the interpretation of s7 EqA, which allowed an individual to define themselves as holding a transitioning point on a non-binary/gender-fluid spectrum, this decision emphasises that transition must include an ultimate destination of the sex not assigned at birth, as defined in a binary manner. The focus arguably shifts from the individual's identity to the journey's endpoint.

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