

Insights

THE EAT'S STRICT APPROACH TO NEW EVIDENCE, AND WHEN PROCEDURAL FLAWS DON'T AFFECT A DECISION TO DISMISS

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SUMMARY

Our November employment law update covers two recent cases: one on the limited circumstances in which the EAT will consider new evidence, and another on how procedural shortcomings are treated when they do not affect the reason for dismissal. We also include a general news round-up on developments in the Employment Rights Bill and the House of Lords' report on remote and hybrid working.

NO CLOSURE TILL FULL DISCLOSURE

Late disclosure of a single document drastically changed the outcome in this case.

The claimant said he had been offered and had accepted a job with the respondent. The respondent denied any offer, stating only that the claimant had been told he was the preferred candidate. It argued that references provided by the claimant revealed misleading statements in his application, so recruitment did not proceed.

The claimant brought claims for discrimination, breach of contract, and racial harassment. All failed at the tribunal, which doubted his credibility, particularly his claim that an offer had been made. £2,000 costs were awarded against him.

The claimant applied for a reconsideration of the costs decision. His covering email suggested that the application related only to costs, but the application itself sought reconsideration of the main judgment too. The tribunal reconsidered costs only.

As part of that application, the claimant produced new evidence: an email from the respondent stating, *"I'm pleased to say we'd like to offer you the job"*. The tribunal admitted the evidence,

noting it could have been disclosed by the claimant earlier with reasonable diligence. On seeing the email, the tribunal accepted that its earlier finding - that the claimant's contractual claim was factually untrue and that he knew this - could not stand. It also said costs would not have been awarded had the email been available.

The costs order was varied so that the sum was reduced to £200 but, despite the new evidence, the tribunal did not change its position on the overall outcome of the claim.

The claimant appealed and asked the EAT to consider the new email. This raised a procedural issue: the EAT rarely admits new evidence. When it does, it considers whether the evidence:

- could have been obtained with reasonable diligence at tribunal stage;
- is relevant and likely to have had an important influence on the tribunal's decision; and is credible.

Despite ambiguities in the claimant's covering email, it was clear that the claimant was seeking reconsideration of both the overall outcome of the claim and the costs award. The tribunal permitted the claimant to rely on the new evidence in setting aside part of the costs judgment, and consistency required considering it for liability too.

The EAT noted that the inability of the claimant to produce evidence of the job offer was critical to the issue of his credibility.

Bearing all this mind, the EAT set aside both the overall judgment and costs award and remitted the claim to a new tribunal, to avoid any preconceptions as to credibility.

WHY THIS MATTERS

The case emphasises the importance of full disclosure and how documentary evidence can shape credibility. Documentary evidence is likely to become even more significant as tribunal delays mean witness testimony may be given years after events take place. It also highlights the EAT's strict approach to admitting new evidence.

Mr J Mayanja v City of Bradford Metropolitan District Council

PROCEDURAL SHORTCOMINGS NOT RELEVANT TO DECISION TO DISMISS

This case shows that procedural shortcomings only affect the fairness of a dismissal if they actually influence the decision to dismiss.

The background can be summarised briefly - after a lengthy disciplinary process, the claimant was summarily dismissed for misconduct towards another employee. The allegations centred on the

claimant sending an anonymous harassing email and later breaching confidentiality by referring to a confidential investigation and its outcome.

The claimant brought claims for unfair dismissal, discrimination, victimisation and, as part of his unfair dismissal claim, an allegation that the search of his work computer breached his right to privacy under Article 8 of the European Convention on Human Rights (ECHR).

The claims were dismissed. Although the claimant may have carried out protected acts, these were not the basis of his dismissal, which was also not unfair. As to the claimant's arguments regarding his right to privacy, it was lawful for the employer to search his work computer. The harassing email had been sent anonymously and a search was justified under the employee handbook. In broad terms, the claimant could have no legitimate expectation of privacy over emails and other documents stored on a work computer.

The claimant appealed to the EAT, focusing in particular on procedural issues:

- the claimant argued that he should have been provided with transcripts of interviews conducted with the employee who was the subject of the acts of harassment. However, the EAT found that, in reaching a decision to dismiss, the respondent had only relied on emails which had been provided to the claimant. The transcripts were not relied on to justify the dismissal, and were not relevant;
- the claimant asserted that the "script" prepared by HR for the disciplinary meeting reflected the final disciplinary decision - the outcome was therefore a *fait accompli*. The script contained wording to the effect that the anonymous email had been "*one of the most unpleasant emails [I've] read*". However, the tribunal (which had heard direct evidence from the decision-maker under cross examination), had been satisfied that the decision-maker had had formed his own conclusion after hearing the claimant's account;
- the EAT upheld the tribunal's approach to Article 8 of the ECHR. This could not be a separate claim before the tribunal, but could be relevant to assessing fairness. In this case, even if the email search was overly broad and amounted to a breach of Article 8, there was no basis for concluding that this made the dismissal unfair;
- the EAT acknowledged that the tribunal's delay in issuing a written judgment (the hearing was in May 2023 and the judgment issued in February 2024) was unacceptably long, but the reasons for this had been fully explained by the tribunal. In addition, the tribunal had convened the day after the hearing to deliberate and reach a decision while the matter was fresh in their minds.

The EAT dismissed the appeal. Although there were some procedural shortcomings in the employer's investigation and overall process, the evidence in question did not form part of the

employer's decision-making. Finally, although there was a delay on the part of the tribunal in issuing the written judgment, this did not undermine the tribunal's decision.

Alom v The Financial Conduct Authority

WHY THIS MATTERS

Claimants often argue that flaws in a disciplinary process mean the outcome is unfair. This case shows that such concerns must be assessed in the context of overall reasonableness, and in particular whether the flaws were relevant to the reasons for dismissal. Procedural errors alone do not necessarily result in a finding of unfairness.

NEWS ROUNDUP

EMPLOYMENT RIGHTS BILL – LAST MINUTE DELAY

The passage of the Employment Rights Bill (ERB) has been delayed again, as the House of Lords continues to reject key provisions.

On 17 November the Lords made further amendments to critical areas of the ERB, including day one unfair dismissal rights, zero-hours contracts, seasonal work, political fund arrangements and industrial action thresholds.

Two highly contentious issues are:

- **Day one unfair dismissal rights:** the Lords are insisting on a six-month qualifying period before employees can bring an unfair dismissal claim. This challenges a key element of Labour's 2024 employment reform programme, although concerns have been raised that day-one rights could create practical and legal uncertainty and influence business decisions on recruitment.
- **Zero hours contracts:** the Lords want to retain an "opt-out", giving employers the right to give employees the option to refuse a guaranteed hours contract at the end of each reference period, rather than granting guaranteed hours automatically. An automatic entitlement is central to Labour's original 2024 reform proposals, making compromise difficult.

The Lords' concerns, echoed by the CBI and other outlets/organisations, is that the proposed reforms will have an adverse effect on employers, the labour market generally and will exacerbate current market uncertainty. The government, meanwhile, will be very concerned about compromising its position further as it tries to strike a delicate balance between trade union and business interests.

The government can continue to overturn amendments, but the Lords' continued refusal to budge places political pressure on the government to compromise if the deadlock is to be broken.

The ERB had originally been expected to received Royal Assent in early October, and we are now nearly in December and the ensuing Christmas/New Year break. Any delay will not only affect Royal Assent and the ERB coming into force, but it will also delay the four sets of consultations scheduled for various parts of the ERB, including fire/re-hire, zero-hours contracts and unfair dismissal and statutory probation periods. If Royal Assent is pushed into 2026, it could affect Labour's "implementation roadmap" and might push back proposed implementation dates.

The Lords and Commons break on 18 December and return in early January 2026, so watch this space.

The situation is changing (literally) from day-to-day so the deadlock may even have been broken and/or the situation may have changed by the time this is published.

HOUSE OF LORDS REPORT ON REMOTE AND HYBRID WORKING

Earlier this month, following its inquiry into the impact and future of remote and hybrid working, a House of Lords Committee published a report titled *"Is Working from Home Working?"*

Despite a perceived trend of employers calling for more office attendance (including in financial services, where initiatives aim to make workplaces more appealing), remote and hybrid working remain significant. Currently, around 26% of the adult workforce works in a hybrid model, with 13% working entirely from home. These figures have remained broadly unchanged since 2023.

The report covers a wide range of issues and makes several key recommendations:

- the government should publish updated guidance on home working and best practice for managing hybrid and fully remote arrangements. It should also highlight the mental health benefits and risks of home working, promoting equitable access to remote and hybrid working and taking into account the needs of disabled people;
- the Employment Rights Bill includes a provision stating that flexible working requests can only be refused if it is "reasonable" for employers to do so. A clear definition of "reasonable" would help avoid delays and litigation; and
- the proposed "right to switch off" should be qualified – there may be instances where employers genuinely need to contact their employees; any Code of Practice should account for emergencies, urgent communications, and employees working across multiple time zones. Guidance should be framed in term of whether employees need to respond outside of agreed working hours, rather than whether employers should contact them.

The report also addresses transport challenges linked to remote and hybrid working. Surveys suggest that commuting is a major reason employees hesitate to return to offices. Even with attractive workplaces, commuting remains a barrier unless working hours change; a difficult

adjustment for financial and professional services, which typically follow traditional business hours.

RELATED CAPABILITIES

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MEET THE TEAM



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