



St John's Buildings

EMPLOYMENT TEAM NEWSLETTER

Welcome to the St John's Buildings Employment Team Newsletter.

In this edition we are pleased to feature three articles from experienced members of the St John's Buildings team, exploring a range of topical issues in employment law. The articles consider key areas including affirmation and delay in constructive dismissal cases, the scope of protected acts in s27 of the Equality Act 2010, and recent developments in supermarket equal pay cases.



For those of you who are less familiar with the SJB Employment team, we are a group of 22 expert barristers, including recognised senior practitioners and part-time chairs of employment tribunals, offering both breadth and depth of expertise to clients. We offer advisory and advocacy services in the Employment Tribunal, Employment Appeal Tribunal, county and high courts as well as disciplinary hearings before professional regulatory bodies. SJB has five Chambers from which our team primarily operates, covering cases all over the country and beyond. We are clerked by an exceptional team of clerks, led by Senior Clerk Chris Shaw.

I hope that you enjoy the content of this Newsletter and invite you to submit any ideas you have for topics you would particularly like us to address in our next edition. Contact details are available on the back page.

Best regards,

Jason Searle
Head of Employment

AFFIRMATION AND DELAY IN CONSTRUCTIVE DISMISSAL CASES

BY DAVID FLOOD

YEAR OF CALL: 1993



The classic test for constructive dismissal is now to be found in the case of **Kaur v Leeds Teaching Hospital NHS Trust [2018]**, which states that in the normal case where an employee claims to have been constructively dismissed, it is sufficient for a tribunal to ask itself the following questions:

- (i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (ii) Has he or she affirmed the contract since that act?
- (iii) If not, was that act – (or omission) – by itself a repudiatory breach of contract?
- (iv) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation)
- (v) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

This article deals with question (ii), affirmation. If an employee waits too long to resign after the most recent act or omission identified in (i), the respondent can argue that they have affirmed the contract/waived the breach.

An example of this occurring is the unfair dismissal case of **Bashir v Brillo Manufacturing Co [1979] IRLR 295**. The employee was demoted from his position as supervisor after a disturbance involving another employee. The following week he became sick and was paid sick pay for over two months before he eventually resigned. The sick pay was the same for a supervisor as for the alternative job he had been offered, but during his absence his solicitor had made it clear to the company that he was not prepared to accept a job involving a reduction in pay. The tribunal sought to apply the words of Lord Denning in the *Western Excavating* case and concluded that he had affirmed the contract by continuing in the employment for so long. The EAT allowed the employee's appeal. Slynn J, giving judgment for the EAT, held that the tribunal had attached too much importance to the mere passage of time. He commented:

AFFIRMATION AND DELAY IN CONSTRUCTIVE DISMISSAL CASES (CONTINUED)

" ... When the Master of the Rolls is talking about the employee continuing for any length of time without leaving he is referring to a situation where the employee actually does the job for a period of time without leaving, or if he does some other act which can be said to affirm the contract as varied'.

A recent example of a tribunal finding against a claimant on the basis of delay at first instance was in one of my cases, **Leaney v Loughborough University [2023] EAT 155**.

The claimant was a university lecturer/teacher for about 40 years; he was also warden of halls of residence. In relation to the latter, the case of one student had caused concern which the university considered in part reflected on him. His attempts to clear this up, over a considerable period of time, were unsatisfactory to him. His head of department finally said that nothing further could be done. In the light of this, he resigned and claimed constructive unfair dismissal on the basis of loss of trust and confidence over the relevant period. Before the ET however, a problem of timing arose. Using the 'last straw' concept, the Employment Tribunal dated the last possible incident of this to the head of department's communication which was on 29 June 2020, but he did not tender his notice until 28 September. He said that in the meantime there had been negotiations between his solicitor and the university, but the Employment Tribunal said that it had no details of these and in any event the period was so long that it constituted affirmation, especially as he had not expressly said that he was continuing under protest and there was nothing stopping him from resigning in July. His claim was dismissed.

The appeal was allowed by the EAT on the basis that the Employment Tribunal had placed too much emphasis on the passage of time and to the exclusion of other factors such as the claimant's length of service, the fact that the period in question was over the summer vacation and that there were continuing negotiations during the period between the claimant's solicitor and the respondent. The EAT noted:

"In oral submissions [counsel for the claimant] said that the parties obviously were not talking about the weather. Those were his words, not ours, but in the view of the judge and industrial members of the present panel, they capture a feature of the facts found in this case that the Tribunal failed to grapple with sufficiently when considering the question of affirmation. As discussed in [Brooks v Leisure Employment Services Ltd, para [523.05] above] at [30], where an employee postpones resigning in order to pursue a contractual grievance procedure which might lead to a resolution of their concern, that will generally not amount to an affirmation. Rather, the employee should be treated as continuing to work and draw pay for a limited time while giving the employer the opportunity to put matters right. So, in the present case, some consideration needed to be given to whether, although he did not say in terms that he was working under protest, the claimant could be said to have been working on while he allowed the respondent some opportunity to try to address his concerns in some way through these negotiations, before deciding whether to resign."

AFFIRMATION AND DELAY IN CONSTRUCTIVE DISMISSAL CASES (CONTINUED)

The case was remitted for the Tribunal to reconsider the point, and the claimant was successful in his claim.

This was a case of the employee who continued working, but a similar approach was adopted in **Barry v Upper Thames Medical Group [2025] EAT 146** (25 September 2025, unreported) in the case of an employee on sick leave but hoping to be able to return if things were resolved.

David Flood
Barrister
October 2026

THE SCOPE OF PROTECTED ACTS IN S27 EQUALITY ACT 2010

BY TOM WOOD

YEAR OF CALL: 2017



The list of protected acts for the purpose of victimisation is well-known. s27 Equality Act says as follows:

- (2) Each of the following is a protected act —
- (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

This article concerns the scope of the third of those acts: “any other thing for the purposes of or in connection with this Act” and in particular, whether denying an accusation of discrimination or harassment (itself a protected act) can fall within the scope of that definition.

This was the situation that arose in one of my recent cases. An employee was accused by a colleague of harassment contrary to s26 Equality Act 2010. The claimant, (“C”) gave a statement effectively seeking to disprove the allegation by undermining the surrounding facts. She also accompanied the employee to a disciplinary hearing relating to the harassment at which she made further representations as to the credibility of the accuser. Later, the employer (“R”) carried out a redundancy exercise, which C said was a sham, resulting in C’s dismissal. C said that at least part of the reason R dismissed her was her defending her colleague. In order to succeed in any such complaint, the basis had to be that R had victimised C, and in order for that to have been the case, her actions had to have been protected acts within the meaning of s27(2)(c) (given they could not be protected as any of the other acts).

There is no authority directly on the point, and what authority does exist is not particularly illuminating. For example, in *Aziz v Trinity Street Taxis Ltd* and *ors* [1988] ICR 534 the issue was whether the making of secret recordings was “by reference” to the Race Relations Act 1976 although the employee did not have the Act in mind. It was held that the sweep-up phrase “done anything” (as it was in that Act) should be given wide interpretation and that gathering evidence to assist discrimination proceedings could be protected. Beyond authority stating that “any other thing” or the equivalent is a wide phrase, the context in which that is stated has always been that of an employee preparing a claim of

THE SCOPE OF PROTECTED ACTS IN S27 EQUALITY ACT 2010 (CONTINUED)

discrimination or otherwise putting forward concerns about discrimination that do not meet the requirement of s27(2)(d).

So, at first glance of both the provision and the limited case law, there does not appear to be scope for a denial of a contravention of the Act to amount to a protected act. The provision appears to be geared towards the positive assertion of discrimination (or harassment). This would make sense. An employee must be able to allege discrimination without reprisal. Further, the majority of people facing such an accusation are likely to deny it or seek to allege credibility issues on the part of the accuser. Were an employee to deny an accusation, which is later upheld at a disciplinary hearing, the employee might then argue that their own credibility was questioned by the employer, and that it follows from that that, given the employer believed the alleged act took place, therefore disbelieved the employee, any disciplinary sanction was influenced by the denial itself. Convoluted but not entirely without merit. At the very least a headache for employers if every accusation and denial were protected and the choice becomes simply which employee to (potentially) victimise.

That said, the following propositions of mine were accepted by the tribunal, and the tribunal agreed that a protected act had taken place:

- (1) It was not the mere denial of discrimination that was sought to be protected. What C had done was to positively assert, and/or give evidence in support of the assertion, that the accuser had given false evidence in bad faith;
- (2) Whilst giving false evidence is not strictly a contravention of the Act, it is of similar quality. It is specifically referenced as negating an otherwise protected act. To assert bad faith is to seek to remove the protection that an accuser illegitimately seeks to gain, which is to an extent aligned with infringing the Act;
- (3) It would be proper to protect an employee from detriment where they seek to advise their employer that another person was seeking their own protection illegitimately. An employer will not necessarily be aware that an allegation is false without it being pointed out to them. Plainly, attempting to demonstrate a false allegation in bad faith is something that is likely to lead to retaliation, thus protection would be required;
- (4) There is apparently no restriction on "giving evidence...in connection with proceedings" to "giving evidence in support of discrimination". On the strict wording of the provision, there is no reason someone giving evidence that there was no discrimination is not protected. Likewise, there is no reason someone alleging bad faith is not protected.

The first point is important to note. The difference in this case was that there was a positive case being put forward that the accusation was false. It was that which was protected, and not the general denial of harassment, although that might be an available argument in another case depending on the circumstances.

A major point is that the assertion that someone has attempted to gain protection from victimisation through false accusation is at least broadly the same type of act as assertion of an infringement of the Act itself, or it could be seen as an abuse of the Act.

THE SCOPE OF PROTECTED ACTS IN S27 EQUALITY ACT 2010 (CONTINUED)

Of course, a great deal of effort can be expended on establishing a protected act, but that does not make a successful complaint, and in the case in question, causation was not made out on the facts.

Finally, it is always to be stated that the decision is a first-instance decision only and is therefore not binding. However, it does illustrate the potential breadth of the provision.

Tom Wood
Barrister
October 2026

NEXT EAT APPEAL

BY MATTHEW TODD
YEAR OF CALL: 2021



Every so often, one of the supermarket equal pay cases re-enters the news with a judgment that promises to take it ever-so-slightly closer to a conclusion. The latest to surface is the case against Next, with the retailer winning a major (if partial) victory in the EAT this month.

For those who don't know or have forgotten, there are a number of gargantuan equal pay cases currently progressing through the Tribunal system against major UK retailers such as Next, Asda, Sainsbury's and Tesco. These cases concern the differences between shop floor workers (mainly women) and warehouse staff (mainly men), and the claimants number in the tens of thousands.

Unsurprisingly for anyone who practices in the Employment Tribunal, these cases have progressed at a pace rivalling that of tectonic plates – the first litigation against Asda began in the early 2010s, and had its origins even earlier.

The latest judgment in the Next case however brings it that bit closer to resolution, and may well have significant implications for the other cases.

Equal Pay – How does it work?

Sections 64 – 71 of the Equality Act 2010 set out how an equal pay case must be considered. Essentially, there are three types of work where men and women must be treated the same:

1. Like work;
2. Work of equal value;
3. Work rated as equivalent.

If an Employment Tribunal finds that a man and woman are employed in one of these kinds of work, but one or the other enjoys more favourable terms, s 66 operates to create a 'sex equality clause' in their contracts which modifies the less favourable terms to be equal to the more favourable terms.

This can also include creating a term where it does not exist in one contract: for example, if one enjoys enhanced pay on Sundays but the other doesn't, that term may be added into the contract where it was previously lacking (see *Reading Borough Council v James* [2018] IRLR 790, EAT).

NEXT EAT APPEAL (CONTINUED)

Two people are regarded as doing like work if (1) they do work of the same or a broadly similar nature, and (2) there is no difference or no important difference in the tasks they actually perform (EqA 2010, s 65(1)).

This will require an analysis of the work that both are actually required to do, not the work which they could in theory be required to do: a duty which is never required in practice cannot justify more beneficial terms (Capper Pass Ltd v Allan [1980] IRLR 236, [1980] ICR 194, EAT).

The test of whether any differences are of no importance is a question of fact, but has been interpreted narrowly. For example, in British Leyland (UK) Ltd v Powell [1978] IRLR 57, EAT, a man sometimes driving outside the bounds of a factory was not found to be an important difference compared with a woman who only drove within the factory, but in Maidment and Hardacre v Cooper & Co (Birmingham) Ltd [1978] IRLR 462, [1978] ICR 1094, EAT, a woman employed as a packer but who also undertook clerical work was not found to be on 'like work' to a man who was employed as a packer but also undertook storeroom work.

Work rated as equivalent must be rated as such by a job evaluation scheme. It will usually be known prior to a claim being presented whether such a scheme has taken place. Note that the evaluation must exist before presenting the claim to the ET: a claim seeking an evaluation will be dealt with under the provisions concerning work of equal value.

To be accepted by the ET, a job evaluation study must be "a study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skill and decision-making, the jobs to be done by some or all of the workers in an undertaking or group of undertaking" (EqA 2010, s80(5)). Beyond this broad definition, there is no prescribed form that an evaluation must take.

An employer looking to use a job evaluation scheme as a defence to an equal pay claim will have the burden of proving that it meets the definition in s 80(5).

Finally, in the absence of the other two arguments, the prospective claimant may argue that their job is of equal value to that of their comparator. This is a complex process and necessarily involves the tribunal taking on the role of evaluator.

In order to do this, the tribunal may in fact make an evaluation themselves, however in all but the most simple cases will likely decide to appoint an independent expert to produce an evaluation of both the claimant and comparator.

The retailer equal pay cases proceed on the equal value basis.

NEXT EAT APPEAL (CONTINUED)

The employer's defence

If the claimant(s) establish that one of the three types of work applies, the employer will have a last line of defence to defeat the claim: that the difference in terms is because of a genuine material factor which is not tainted by sex. In considering whether the material factor is capable of justifying the difference in pay, the Tribunal will consider whether it is a proportionate means of achieving a legitimate aim.

The case against Next is now at the material factor stage, the claimants having succeeded in establishing equal value.

Next's argument is, in summary, that there are market forces which require them to pay warehouse staff more. Next argue that it is necessary for them to offer increased pay in order to maintain recruitment and retention of warehouse workers, and that if they did not, their ability to operate their 24/7 warehouse function would be affected. The success (or otherwise) of this argument has broader implications across the retail equal pay claims, as other respondents are expected to run similar arguments.

The first instance decision and the appeal

The ET applied *Heskett v Secretary of State for Justice* [2021] ICR 110, which sets out that adopting a measure solely to save costs will not, without more, be considered a legitimate aim in order to justify a potentially discriminatory pay disparity.

The ET held that Next genuinely needed to pay warehouse workers at the level they did because of market forces, and had they not, that would have had an adverse effect on their recruitment and retention. However, the ET then asked whether Next could justify paying retail workers less, and concluded that the only possible explanation for not increasing retail pay was cost saving. This led to the conclusion that the disparity was a cost saving measure and applying *Heskett* was not a legitimate aim.

The EAT found that the ET had been asking the wrong question. In the EAT's view, the ET should have considered the legitimate aim as a whole, rather than separately considering the aim and the material factor.

In the view of the EAT, the correct approach was to focus on the reason why one set of workers was paid more, as that is the decision that the material factor applied to. Given that the ET had accepted that Next did need to pay more to warehouse workers, the EAT substituted its view that Next did in fact have a legitimate aim which was not just the saving of costs.

The ET had also expressed concerns that the 'market forces' defence could, if too broadly applied, act to entrench historic pay differences in the jobs markets for roles seen as 'women's work'. The EAT seemed to move away from this, concluding that the proper consideration was on whether Next's reason was genuine, and so whether Next had shown that market conditions did create a situation which necessitated a higher rate of pay.

NEXT EAT APPEAL (CONTINUED)

On the basis of the above, the ET's finding in relation to basic pay was overturned. However, the EAT upheld findings in relation to some terms, such as night time and overtime premiums and paid rest breaks, which it did not find were justified by market forces.

What happens next?

It is almost certain that this matter will progress to another appeal, and if the history of these cases is anything to go by, to the Supreme Court. However, this is an indicator of where the key battlegrounds are likely to be. Many large employers with in-house logistics operations have watched these cases for some time, and the 'market forces' defence has long been seen as one of the stronger arguments against.

This decision will provide some comfort to those employers although, as noted above, the matter is far from settled yet.

See you in a couple of years for the next instalment!

Matthew Todd
Barrister
October 2026

THE TEAM

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"St John's Buildings fields a good clerking team that is quick to reply and clear on fees."

"The clerks are excellent and go above and beyond – nothing is too much trouble."

– Chambers UK Bar 2025

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