# THE UPPER TRIBUNAL
# (ADMINISTRATIVE APPEALS CHAMBER)

## UPPER TRIBUNAL CASE NO: MISC/0576/2020
## [2021] UKUT 20 (AAC)

## THE PENSIONS REGULATOR V HERMES PARCELNET LTD

Decided following a public oral hearing via CVP on 21 January 2021

**Representatives**

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| The Pensions Regulator | Claire Darwin of counsel, instructed by Carl Dowling, solicitor at the Pensions Regulator |
| Hermes Parcelnet Ltd | Christopher Jeans QC and Paul Greatorex of counsel, instructed by Emma King of Eversheds Sutherland (International) LLP |

## DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference: PEN/2019/0489
Decision date: 11 March 2020

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE and RE-MADE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

The decision is:

> This decision replaces the direction given in paragraph 2 of the Chamber President's Directions of 11 March 2020. It does not affect any of the other directions.
>
> The employment tribunal decision in Leyland v Hermes Parcelnet Ltd is admissible before the First-tier Tribunal, as are any other employment tribunal decisions involving Hermes that are produced by a party who considers that they involve any issue relevant to this case.

> Either party may rely on any evidence recorded in any of those decisions. It is not necessary for the witnesses who gave that evidence to be called, although they may be, subject to any direction to the contrary by the First-tier Tribunal.
>
> The First-tier Tribunal is not bound by any findings of fact in any employment tribunal decision and those findings do not raise a prima facie case for either party on any issue.
>
> In making its findings of fact, the First-tier Tribunal will assess the evidence as a whole, including the evidence set out in the employment tribunal decisions.

## REASONS FOR DECISION

1. On the face of it, this case is about a £400 penalty imposed by the Regulator on Hermes. Its effect, though, is much wider. The papers provided to the First-tier Tribunal include 1533 pages consisting of columns of figures, names, dates and other notations. They relate to people who deliver parcels for Hermes but without being employed by the company. Ms Darwin told me that there were 15,000 of them who had not been enrolled in a pension scheme since 2013. They should have been enrolled if they are jobholders as defined in sections 1 and 88 of the Pensions Act 2008. I do not need to set out the definition of that term for the purpose of this appeal, which is concerned with case management issues. Suffice to say that the same or similar definitions apply in other legislation.[1] I mention that, because this appeal involves a discussion of the significance of decisions under other legislation.

### A. History and background

2. This appeal is brought with the permission of the Chamber President of the General Regulatory Chamber of the First-tier Tribunal against one of a series of case management directions she made on 11 March 2020.

3. The case before the tribunal was brought by reference under section 44 of the Pensions Act 2008. Although called a reference, it is in all but name an appeal. The judge referred to it as such, as I will. Hermes challenged a Fixed Penalty Notice issued by the Regulator on 10 September 2019, imposing a penalty of £400 on Hermes for failing to comply with a Compliance Notice. That notice was issued on 3 May 2019. It informed Hermes that it had failed to comply with the employer duties under the Pensions Act 2008 in that it had 'failed to automatically enrol Hermes couriers into an automatic enrolment scheme.' It went on:

> On the basis of the Employment Tribunal ruling of 22 June 2018 in Leyland and [193] others v Hermes Parcelnet Ltd ET/1800575/2017 and the Pensions Regulator's analysis of the contracts which you have provided, we consider Hermes' couriers to be in scope for automatic enrolment purposes.

4. The Regulator's response to the appeal was written by Ms Darwin. She said this about the relevance of the decision of the employment tribunal in Leyland:

[1] Section 296 of the Trade Union and Labour Relations (Consolidation) Act 1992, section 230(3) of the Employment Rights Act 1996, section 54(3) of the National Minimum Wage Act 1998, regulation 2 of the Working Time Regulations 1998 and section 83 of the Equality Act 2010. See also the comment on vicarious liability in *Various Claimants v Barclays Bank plc* [2020] 2 WLR 960 at [29].

> 37. The FtT is fully entitled to have regard to the ET's Judgment in the Leyland Litigation. Whilst it is accepted that the FtT is not bound by a judgment of an Employment Tribunal, where the FtT faces a novel point that has already been decided elsewhere by an Employment Tribunal, the First-tier Tribunal can draw assistance from a judgment of the Employment Tribunal. The ET's Judgment is particularly persuasive given the ET's expertise in issues of employment and worker status; and given that the Appellant has chosen not to appeal it.

Just for completeness, Leyland was eventually resolved by a settlement between the parties.

## B. The decision under appeal

5. The Chamber President held a case management hearing on 6 March at which both parties were represented by the same counsel who appeared before me. She gave eleven case management directions, but I need only refer to the one dealing with the Leyland issue. She directed:

> 2. [Hermes's] application to exclude from the evidence the Employment Tribunal's decision in *Leyland and others v Hermes Parcelnet Limited* is refused, but the facts found by the Employment Judge in those proceedings may not be relied on by the Respondent as prima facie evidence in these proceedings; …

6. The President's reasons were almost exclusively devoted to the Leyland issue. They are closely reasoned and it has taken me several readings to understand their precise structure. I will pick up some more of her reasoning when I come to the grounds of appeal. For now, the following lays bare the basic structure.

7. The reasoning begins with an analysis of the nature of the proceedings as a rehearing and an explanation of the significance of that. One feature the judge identified (at [5]) was the need 'to consider what weight to attach to the [Regulator's] reasons for making the decision under appeal and, if the appeal is to be allowed, substituting a fresh decision.' That is why she said (at [10]) that 'it does not seem to me that the Tribunal can do other than give careful consideration to the Employment Tribunal's decision as an undoubtedly significant (although not the only) factor in the Regulator's evaluation of the issues that led it to serve the FPN.' But she went on: 'there is an important issue to be determined about the [Regulator's] reliance on the facts found in that judgment, as opposed to its adoption of the legal principles.'

8. The Chamber President then turned to *Hollington v Hewthorn* [1943] KB 587. She summarised (at 11) the principle established by that case as: 'factual findings made by judges in civil cases are inadmissible in subsequent proceedings.' She cited *Rogers v Hoyle* [2015] QB 265, in which Christopher Clarke LJ explained (at [39] and [40]) the modern foundation of the principle as 'the preservation of fairness' through recognising that 'the trial judge must decide the case for himself on the evidence that he receives' and that 'the opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant'. The judge then referred to the decision of the Court of Appeal in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 at [38], where Sir Andrew Morritt V-C discussed when collateral attacks on a previous decision would be allowed. He said that one of the circumstances in which this would be an abuse of process was if 'it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated'.

9. The President next set out the submissions of the parties, before coming to her conclusion, which she summarised:

> 15. I accept the [Regulator's] submission that the Tribunal has discretion to admit evidence which would be inadmissible in civil proceedings and that this, in principle, would allow it to admit evidence which breached the rule in *Hollington v Hewthorn*. Nevertheless, I am concerned that the importation of the Employment Tribunal's findings of fact into these proceedings would render them unfair.

I attribute the reference to fairness to *Rogers* and *Bairstow* rather than to the overriding objective. The President did not mention the objective, although it is part of every judge's thinking on any procedural matter, or at least it should be. She dealt with the principles she had set out from both those decisions. As to *Bairstow*, she explained that the appeal did not involve relitigating the issue decided in Leyland, so there was no abuse of process in the challenge to the Regulator's notice. As to *Rogers*, she explained that at the substantive hearing

> 16. … the trial judge must make his or her own findings of fact … I rule that the Tribunal may not rely on the Employment Tribunal's findings of fact as prima facie evidence in these proceedings. The tribunal must make a fresh decision on what is appropriate action for the Regulator to take on the basis of facts placed before it at the hearing of the appeal.

I take 'facts placed before it' to mean 'evidence placed before it'.

10. My analysis of that reasoning is this. The Chamber President directed herself correctly in accordance with established authority. She focused, as required, on fairness and her assessment of fairness was not only permissible but the best assessment in the circumstances that she considered. She was entitled to make the decision that she did. There is, though, a problem with the way that the President explained her decision. It requires some close analysis to understand its exact purport and, as a day's argument before me showed, it has the potential to produce uncertainty about exactly what is and is not permissible. That renders its reasoning inadequate, which provides the error of law on which I have set it aside. Although inadequacy was not a ground of appeal, it underlies the criticisms made in some of the grounds.

11. Having set the decision, I have re-made it by restating it in clearer terms that, together with the rest of this decision, should avoid any misunderstanding. Re-making the decision has allowed me to save the First-tier Tribunal from dealing with any application under rule 15(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976) in respect of the other employment tribunal decisions that may be relevant.

## C. The First-tier Tribunal's powers to admit or exclude evidence

12. Before coming to the grounds of appeal, it is worth saying something in general terms about the tribunal's powers in relation to evidence. They are important, because taken together they give the tribunal power to control the evidence that it will consider, tailored either to the jurisdiction or to the individual case, and free from any rules on admissibility that apply in the civil courts.

13. The relevant provision is rule 15. Rule 15(1) authorises the tribunal to control the issues, evidence and submissions that it will consider. More important for this case is rule 15(2):

> **15 Disclosure, evidence and submissions**
>
> (2) The Tribunal may—
>
> (a) admit evidence whether or not—
>
> (i) the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (ii) the evidence was available to a previous decision maker; or
>
> (b) exclude evidence that would otherwise be admissible where—
>
> (i) the evidence was not provided within the time allowed by a direction or a practice direction;
>
> (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
>
> (iii) it would otherwise be unfair to admit the evidence.

14. The result of the Chamber President's direction was that Leyland was admissible evidence, except for the findings of fact, and it could be used for any purpose except to establish a prima facie case for the Regulator. That was within her powers. Rule 5(2) allows a tribunal to admit or exclude in whole or in part, and to admit it for all relevant purposes or for some only.

15. Rule 15(2), like all the rules, must be interpreted and applied to give effect to the overriding objective, which is to deal with cases fairly and justly, including a consideration of proportionality: see rule 2(1) and (3). Evidence is, of course, a matter of substance, not practice or procedure, but rule 15(2) is authorised by paragraph 10(1) and (2) of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007. This requirement of fairness merges with fairness requirement that was discussed in *Rogers* and *Bairstow*. The Chamber President also referred to rule 15(2)(a), although she did not mention the overriding objective. My reading is that she applied the case law rather than the overriding objective, but fairness was the correct issue whatever its source.

16. In theory, a tribunal should first consider whether the evidence is otherwise admissible and only then exercise its powers under rule 15(2) accordingly: the purist approach. That is what the Chamber President did in this case and I do not criticise her for doing so, especially given the way the arguments were presented to her. It may, though, be more convenient to avoid the first stage and just consider whether it would be fair and just for the evidence to be before the tribunal: the practical approach. Whatever the approach, the outcome will always turn on what is fair and just. Assuming the evidence is not admissible, the issue is whether it would be fair and just to admit it. Assuming the evidence is admissible, the issue is whether it would be fair and just to exclude it. Either way, the ultimate issue is always the same. Taking rule 15(2)(a) and (b) as a package in this way has a number of advantages.

17. First, it avoids the need to resolve possibly difficult issues of admissibility.

18. Second, it recognises that it may be a matter of chance whether the issue arises under rule 15(2)(a) or (b). This case illustrates the point. The tribunal could

have been asked for a ruling by Hermes that Leyland be excluded, or by the Regulator that Leyland be admitted. The way the issue comes before a tribunal should not affect the outcome.

19. Third, the approach I have suggested also reflects the reality that a number of distinct issues of fairness may arise when considering whether to admit the evidence (a) in whole or (b) in part, and (c) for some purposes but (d) not for others.

20. Fourth, it avoids the need to reconcile the numerous authorities that I was shown on the use of previous decisions. In particular, counsel cited and analysed a list of cases in which courts and tribunals had taken account of decisions by other bodies. I am not going to repeat the arguments or attempt to provide a reconciliation, if that is possible, of the outcomes and reasoning in those cases. If that task has to be undertaken, it will not be by a tribunal applying a rule in the form of rule 15(2). By focusing on that rule and its application in accordance with the overriding objective, those difficulties fall away. The same is true for the cases that refer to a previous decision or its findings being prima facie evidence. On the approach I have suggested, this is subsumed in the assessment of what is fair and just.

21. Nothing that I have said means that the common law rules on admissibility are irrelevant. It is always relevant to consider the basis of the rule, as that may be relevant to the general issue of what is fair and just. The reasoning that the President quoted from *Rogers* was relevant in that regard by showing the factors relevant to the exclusory rule for findings in previous decisions.

22. Three factors to consider in applying rule 15(2) are the extent to which the evidence would be relevant, reliable and helpful. They are not the test, which is whether it is fair and just to admit or exclude evidence. Nor are they thresholds that must be met before evidence is admitted or excluded. They may have that effect in a particular case, but not necessarily. That point is well illustrated by a common occurrence in social security appeals. Claimants often produce a GP's letter in support of an appeal. It is not unusual for such letters to: (a) set out the claimant's family and financial difficulties; and (b) report later developments in their medical condition. Strictly, (a) has no bearing on the legal issues and (b) is excluded from consideration by statute, so the contents are irrelevant. These letters are often no more than reports from the claimant, so their reliability may be doubtful. So it is unlikely that the letter will be helpful to the tribunal. Despite all this, such letters are routinely admitted, and they are admitted and considered as a matter of fairness to the claimant. The letters are often the most independent evidence that the claimants can obtain without spending money they cannot afford on fuller reports, and enhance the claimant's ability to participate in the proceedings. They may be more than support for a claimant's case; they may be the claimant's case. The lesson to draw from this example is that the application of rule 15(2) does not necessarily involve an assessment of the quality of the evidence. That may be necessary, depending on how the issue arises and the nature and volume of the evidence. The Chamber President did not analysis the potential probative worth of Leyland. Having listened to counsel lobbing points and counter points across the virtual court room, it is clear to me that there is much to be said on both sides about the employment tribunal decisions that I saw. That experience shows how assessing the relevance and quality of the evidence can all too quickly become a dress rehearsal for the final hearing and disproportionate for a case management hearing.

## D. The grounds of appeal

23. I will take the grounds of appeal in the order set out in Ms Darwin's skeleton argument, quoting her own words. There is a lot of overlap and repetition. The reality, as I suggested at the hearing, is that they are in large part different ways of saying the same thing. There are seven grounds. Ground 1 is just 'an overall complaint that the judge's decision was in error' and needs no further comment.

*Ground 2: The FtT erred in law in directing that the FtT at the final hearing could only make a decision 'on the basis of the facts placed before it at the hearing of the appeal'.*

24. Ms Darwin argued that the judge was wrong to direct that the tribunal's decision must be based exclusively on evidence presented at the hearing, as if conducting a civil trial. She should have allowed the Regulator to rely on any material that was logically probative, by which she meant the findings in Leyland.

25. This argument is based on a misreading of what the judge wrote. The point she was making was that it was for the tribunal at hearing to make findings of fact based on the evidence. That is why she referred to the tribunal being like a court. She was not distinguishing between the different ways that courts and tribunals operate. What she was distinguishing, expressly distinguishing, was the position of the tribunal from that of the Regulator, who was free to rely on material that could not properly be used in a tribunal. Her reason for excluding the findings in Leyland was based on fairness, not any difference between court and tribunal proceedings. She was not explaining why she had excluded the findings in Leyland. She was explaining one of the consequences of doing so.

*Ground 3: The FtT erred in conflating 'prima facie evidence' with conclusive evidence.*

*In particular:*

*(1) The FtT erred in considering that if the Leyland Decision was treated as prima facie evidence then this would mean that the ET's findings of fact were 'imported' into the FtT proceedings. In particular, the FtT noted that '… I am concerned that the importation of the Employment Tribunal's findings of fact into these proceedings would render them unfair.'*

*(2) The FtT erred in considering that if the Leyland Decision was treated as prima facie evidence then the FtT at the final hearing would not be able to make its own findings of fact.*

26. Ms Darwin argued that the judge had confused prima facie evidence with conclusive evidence. This was based on the judge's comment that 'the importation of the Employment Tribunal's findings of fact into these proceedings would render them unfair.' This is a form of argument that is often made. It proceeds by taking a passage and arguing that the language shows that the tribunal misdirected itself. It is important to keep in mind, when assessing this sort of argument, that a tribunal's reasons have to be read as a whole. One of the reasons for this is that there is a distinction between how a tribunal directs itself and how it explains the way that it applied that direction. A direction is by definition a proposition of law, which by its

nature is a statement in general terms. Legal accuracy is essential. The explanation of how the tribunal applied that direction is different. The judge is no longer setting out a general proposition, but is explaining how the direction applied to the case. That explanation will by its nature be specific to the circumstances of the case. Those circumstances will include the way an issue arises on the evidence and in the context of the case, and what arguments were put to the tribunal. Those circumstances will justify, and may even require, the use of different language. *Elbrook Cash and Carry Ltd v Revenue and Customs Commissioners* [2019] 4 WLR 117, which was cited to me for a different point, provides an example of the Upper Tribunal drawing this distinction. The First-tier Tribunal said in its decision that redaction of witness statements 'is not strictly necessary.' Counsel argued that that was the wrong legal test. The Upper Tribunal rejected that argument:

> 18. … While the FTT referred to 'strict necessity' in [24] of the Decision, it was not applying some different legal test; that was simply the language used to describe the result of its consideration.

Drawing this distinction is, I admit, not always easy, because tribunals do not always make clear whether they are recording a direction or providing an explanation. Despite the difficulty, the distinction has to be drawn.

27. I have approached this argument with this question in mind: was the President directing herself in law or merely explaining how she applied the law? The answer, when the reasons are read as a whole, is that this was an explanation particularised to the circumstances of the case. Read in that way, there is nothing objectionable in the judge's use of the word 'importation'. In the context, it is clear that she meant 'allowing the Regulator to rely on the findings in Leyland would be unfair'. That does not confuse prima facie evidence and conclusive evidence. I can find nothing in the decision to suggest that the judge may have confused the two, let alone that she did so.

28. Ms Darwin also relied on the judge's remark that the tribunal 'will not be assisted by evidence and argument from either party as to why the *Leyland* decision should be regarded as right or wrong.' This is another example of not reading the reasons as a whole. The remark was made in a separate paragraph and makes the separate but related point that, since the findings are not admissible, there is no scope for arguing about the correctness of the outcome. This does not show any misunderstanding of the Regulator's argument or any confusion between prima facie and conclusive evidence.

29. As to sub-ground (2), the point was that the tribunal had to make its own findings. If it had to accept facts from Leyland, even on a prima facie basis, they would not be its own findings, but those of the employment judge. The tribunal at the hearing would have to evaluate findings made by another judge as part of the evaluation of the evidence as a whole. That is what the President wanted to avoid.

*Ground 4: The FtT has wrongly constrained its jurisdiction to determine a reference under the Pensions Act 2008.*

30. The Chamber President said that the Regulator had been entitled to rely on the findings in Leyland when acting as decision-maker, but that the tribunal could not. Ms Darwin argued that this prevented the tribunal from 'standing in the shoes of' the decision-maker with the effect that the tribunal would have to 'start all over again'

rather than treat the decision as the 'starting point'. The flaw in this argument is to misunderstand what is meant by statements like 'stand in the shoes of'. They are attempts to condense into a simple phrase complex notions of the nature of proceedings. They are helpful in the context in which they were first made to convey the essence of a simple truth. But it is a mistake to treat them as if they were the whole truth. The same words may be used in a range of jurisdictions, but the way in which they operate in practice varies from jurisdiction to jurisdiction, and even within a jurisdiction. Section 103(3) of the Pensions Act 2004 is a good illustration that such statements cannot be taken literally. It provides that a tribunal 'may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the Regulator at the material time.' If the tribunal takes account of evidence that was not available to the Regulator, it is obviously not 'standing in the shoes' of the Regulator in the literal sense.

31. Judges may use expressions like these, but it is always important to identify what they mean in operation in a particular context. That was what the Chamber President was trying to explain. The flaw in this ground of appeal is that labels do not control content. They are a shorthand for the content. The content gives meaning to the label, not the reverse. Criticising the content because it does not fit the label misses the point. It is not only counsel who must avoid arguing by reference to a label. The same applies to tribunals. It is especially so when the tribunal is exercising its powers, as it was in this case. It must do so in the proper context, which is determined by the nature of the proceedings and not by catch phrases. That is what the President was trying to avoid; she has been misunderstood.

*Ground 5: The FtT was wrong to find that the present proceedings before the FtT do not involve relitigating the same issues or the determination of the same range of issues as the Leyland case and/or that the correctness of the Leyland decision was not relevant to the FtT's decision at the final hearing.*

32. In essence, Ms Darwin's argument was that Hermes should not be allowed to go behind the conclusion in Leyland. If that is correct, I do not immediately see how it is consistent with her argument that the findings in that case were prima facie evidence only and so rebuttable, but leave that aside.

33. The legal position was set out in *Bairstow*. The issue is whether challenging the outcome of an earlier decision is an abuse of process. The judge found that the appeal in this case did not involve relitigating Leyland. She was entitled to come to that conclusion. I do not need to elaborate on that, because it has been overtaken by the need to consider other employment tribunal decisions.

34. Mr Jeans provided copies of six employment tribunal decisions, some with reasons, others without, which he said were the only ones of which Hermes was aware. The First-tier Tribunal had these by the time the Chamber President made her decision. I do not know whether she was personally aware of them; she certainly did not refer to them in her decision. They are, though, relevant to the re-making of the decision and they would certainly have affected her reasoning, although not her conclusion, if she had been aware of them. Some of them come with reasons and Mr Jeans argued that they were relevant to Hermes' case and contrary to Leyland. If Leyland is before the tribunal, it is only fair that those cases must be also. And if they are excluded, so must Leyland. There is no basis on which I can distinguish treating some differently from others and no indication that the Regulator might want to

abandon Leyland. I come back to this later. For the present, it is enough to say: one in, all in.

35. This is significant for this ground of appeal. It is impossible to accept conflicting decisions. If they are all before the tribunal, it is inevitably that the tribunal's findings in this case are likely to involve a choice.

*Ground 6: The FtT was wrong to find that permitting TPR to rely on the facts in the Leyland Decision as prima facie evidence would cause unfairness to Hermes.*

*Ground 7: The FtT's direction will prevent TPR from having a fair hearing in the First-tier Tribunal.*

36. It is convenient to take these together.

37. Ms Darwin's argument, in short, is that admitting the facts in Leyland as prima facie evidence is not unfair to Hermes, because the company was a party to that case and is able to call evidence in rebuttal. On the other hand, it was unfair to exclude the facts as the Regulator would have the burden of proving a case again, with limited resources, against Hermes which has no duty of full disclosure. The result would be to hamper the Regulator and to encourage companies to avoid the effects of employment decisions by bringing appeals against the Regulator's decisions.

38. These arguments overstate the problems that the Regulator will face and overlook how much of value the Regulator has obtained by the Chamber President's direction. The direction allows the Regulator to make any use of the employment decision other than to rely on the facts as prima facie evidence. On my reading of the President's direction, the Regulator can rely on the evidence recorded by the judge in Leyland as evidence in this case. She certainly did not prohibit it being used. What she did was to refuse to exclude the decision and only barred reliance on its findings of fact as a prima facie case. That left the parties free to make any other use of it they wished, including relying on the evidence recorded in the decision. In other words, the Regulator may make any use of the contents of the decision with the sole exception of the judge's conclusions of fact. Ms Darwin argued that this would mean calling the witnesses to give evidence again, if they could be found. That is, of course, possible, but it is not necessary. Viscount Simon LC explained the position in *General Medical Council v Spackman* [1943] AC 627. The General Medical Council had relied on a finding in divorce proceedings that a doctor had committed adultery to show 'infamous conduct', but had not allowed the doctor a chance to prove otherwise. The House of Lords decided that the Council was required to make 'due inquiry' and by refusing to allow evidence in rebuttal it had failed to do so. Lord Simon said:

> The decree provides a strong prima facie case which throws a heavy burden on him who seeks to deny the charge, but the charge is not irrebuttable. (Page 635)
>
> … the accused should not be condemned without being first given a fair chance of exculpation. This does not mean the council has to rehear the whole case by endeavouring to get the previous witnesses to appear before it, though in special circumstances the recalling of a particular witness, in the light of what the accused or his witnesses assert, may, if feasible, be desirable. (Page 636)

See also *Chaudhari v General Pharmaceutical Council* [2011] EWHC 3433 (Admin) at [71].

39. Although the Regulator may not rely on the findings, it will be possible for him to adopt as his own in argument any points made by the employment judge when assessing the evidence. That comes very close to allowing the facts in as well. So, why not just admit them? That leads to my next point.

40. Fairness requires that Leyland should be admissible before the First-tier Tribunal. It was a major factor in the Regulator's decision. The Chamber President decided, in accordance with authority, that the tribunal should have the chance to evaluate the basis on which the decision was made. It would also be fair to allow the Regulator to rely on the evidence contained in it, because it is a decision involving a significant number of people on the issue that arises in this case, albeit under different legislation. But treating the findings of fact as prima facie evidence would make the judge's task of assessing the evidence more difficult than it need be, with little or no practical benefit to the decision-making process or to the Regulator. With the addition now of further employment tribunal decisions with findings of fact, it would be unworkable, as they would all have to be treated as prima facie evidence of their findings.

41. I am also sceptical about how admitting the facts of Leyland as prima facie evidence would work in practice. Prima facie is used in a variety of meanings. I have appended a copy of the entry in Jowitt's Dictionary of English Law to illustrate something of the range, but it still does not capture quite the way that the evidence would be used in this case. This is an appeal by Hermes against the Regulator's decision that relied in part on Leyland. There is no need for the Regulator to use Leyland to force Hermes to produce evidence. The company will naturally wish to win the appeal and the best way to do that will be to produce the best evidence and arguments it can. With Leyland in evidence, the pressure is already on Hermes to produce evidence that overcomes it. Treating the findings as prima facie evidence will not need to come into play until the judge comes to assess the evidence. Normally, a judge assesses the evidence as a whole. The argument here would be that the judge should attach additional probative worth and significance to the findings in Leyland. I have tried to put myself in the position of the judge at the end of the case. With all the evidence then available, it seems to me likely that special status for the facts in Leyland would have little practical effect, if any. The only effect that I can predict with any confidence is that it would make the judge's task of finding facts and then explaining how those facts were found more difficult. I put this to Ms Darwin, but her answers did not allay my concerns.

42. There may seem to be a flaw in my reasoning in the previous paragraph. It assumes that Hermes would produce any evidence it had, including evidence against its position. That would be a good point, except for this. The Regulator applied to the Chamber President for a direction that Hermes make full disclosure. She refused the application, saying it was not appropriate for Regulators who had statutory information gathering powers. There has been no appeal against that decision.

43. This point, though, is now academic, because there are more employment tribunal decisions that have to be considered. I have already referred to the additional six employment tribunal decisions. They are relevant to the re-making of the decision. Some of them come with reasons and Mr Jeans argued that they were relevant to Hermes' case and contrary to Leyland. If Leyland is before the tribunal, it is only fair

that those cases must be also. And if the facts found in Leyland were to be accorded the status of prima facie evidence, so must any findings made in the other cases. That would mean that the judge would be required, in effect, to apply a presumption of fact for the Regulator in one case and for Hermes in other cases with (at least) some similarities. Whatever the theoretical possibilities, that would be an impossible position to put a judge in. It is neither fair nor just to do it, and I am not going to do it.

44. It is easy to be wise after the event, but it is possible that the existence of other, possibly conflicting, decisions is a factor that the Chamber President should have anticipated. Had she done so, it would have provided further justification for the approach she took.

45. There is also this point. Ms Darwin pointed out that the judge in Leyland will not necessarily have recorded all the evidence. That is a valid point, but not in Ms Darwin's favour. Nor will the judge have recorded every factor that affected the assessment of the evidence. These points apply to all the employment tribunal decisions. The senior courts have recognised that 'expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression' (quoted in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372) and that judges may have reasons that are not expressed (*In re F (A Minor) (Wardship: Appeal)* [1976] Fam 238 at 266). Those considerations provide further justification for not allowing findings to be admitted as evidence in other cases, in addition to the issues of opinion evidence and fairness that were mentioned in *Rogers*. Allowing the Regulator to rely on the findings of fact would mean that the judge who eventually hears this case would be unaware of all the evidence and the full range of factors that the judge in Leyland had taken into account when assessing it. It would not be fair to require a judge to make an assessment of the probative worth of findings without knowing the basis on which they were made.

## E. A final word

46. It is no fault of the parties that the intervention of the pandemic has meant that it is now close to a year since the Chamber President made her decision. It is not my role to intervene in the listing arrangements for the First-tier Tribunal, but I hope that Hermes' appeal will now quickly come on for hearing.

**Signed on original**
**on 1 February 2021**

**Edward Jacobs**
**Upper Tribunal Judge**

**APPENDIX**

Jowitt's Dictionary of English Law 5th edition, entry for 'prima facie evidence'.

Lit. evidence 'on the face of it', recurs frequently in legislation and court judgments, and was already in use by the late 18th century (see, e.g. R. v Inhabitants of Darlington (1795) 6 Term Rep. 468; 101 ER 652). It refers to evidence constituting proof for the time being, or in a preliminary sense: at any rate, evidence which may be subject to rebuttal by other evidence**.** Prima facie evidence is not, yet, conclusive evidence, but may become so if left uncontradicted. Prima facie evidence has both strict and looser connotations. In its strict sense, prima facie evidence is evidence which, unless actually rebutted, will be sufficient to satisfy the burden of proof resting upon the proponent of the evidence in relation to a particular fact in issue. It carries this strict connation when employed, as it frequently is, by legislators in relation to the formalities of proof. In the context of bankruptcy, for example, by virtue of s.289(4) of the Insolvency Act 1986 '[a] report by the official receiver under this section shall in any proceedings be prima facie evidence of the facts stated in it'. Section 3 of the Bankers' Books Evidence Act 1879 supplies a second, more venerable illustration: 'a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded'. The parliamentary draftsman sometimes utilises 'prima facie evidence' as the functional equivalent of a presumption of fact in favour of the prosecution in criminal proceedings. Thus, where the accused is charged with interfering with an electricity meter contrary to para.11 of Sch.7 to the Electricity Act 1989, 'the possession by him of artificial means for causing an alteration of the register of the meter or, as the case may be, the prevention of the meter from duly registering shall, if the meter was in his custody or under his control, be prima facie evidence (or in Scotland sufficient evidence) that the alteration or prevention was intentionally caused by him'. As the Scottish equivalent 'sufficient evidence' renders more explicit, 'prima facie evidence' (in fact, a statutory presumption) is enough to establish the accused's criminal liability unless, and until, rebutted by exculpatory evidence. Courts and commentators also frequently invoke the concept of 'prima facie evidence' in a looser sense, meaning only something like 'evidence on first acquaintance' or temporarily subsisting evidence, a judgement on what is known before the matter has been subjected to more thoroughgoing scrutiny. Indeed, prima facie evidence may be in itself sufficient to trigger more searching judicial inquiries. When employed in this looser way, prima facie evidence is capable of degrees of cogency. Courts variously refer to 'good prima facie evidence' (e.g. Zouzou v Family Welfare Association [2004] EWHC 557 (Ch) at [30]), 'strong prima facie evidence' (e.g. Jones v University of Warwick [2003] 1 W.L.R. 954 CA at [15]), and even 'very strong prima facie evidence' (e.g. Johnston v Duke of Westminster [1986] A.C. 839 HL at [845] per Lord Griffiths). However, Lord Halsbury L.C. doubted that 'one gets to any more definite idea of what the proposition is by calling it prima facie evidence, or by calling it by any other name which appears to diminish the value and the cogency of the evidence itself. . . . Prima facie evidence may be very weak, or prima facie evidence in the ordinary sense of the words may be very strong': Henry Smith & Co. v Bedouin Steam Navigation Company [1896] A.C. 70 HL at [75]. A sliding scale of probative value cannot coherently be applied to prima facie evidence in the strict sense, which is a bivalent concept: either the relevant standard of proof is satisfied,

or it is not. When employed in the looser sense, by contrast, prima facie evidence does not necessarily discharge a burden of proof, even for the time being and subject to later reconsideration, because the court itself may be under a duty to undertake further, more extensive inquiries. Strong prima facie evidence may nonetheless be sufficient to warrant judicial action, such as granting an interlocutory injunction: Columbia Picture Industries Inc. v Robinson [1987] Ch. 38; Anton Piller KG v Manufacturing Processes Ltd. [1976] Ch. 55 CA. In consequence of the European Arrest Warrant, prima facie evidence is no longer required for extradition purposes within the EU: see, e.g. Pilecki v Circuit Court of Legnica, Poland [2008] UKHL 7; [2008] 1 W.L.R. 325.