

# Harvey on Industrial Relations and Employment Law

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Bulletin Editor

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## LEGISLATION

### First commencement order

The Employment Rights Act 2025 (Commencement No 1 and Transitional and Savings Provisions) Regulations 2026 SI 2026/3 serves four purposes. It brought into force on 6 January a raft of provisions in the Act but only for the purposes of making regulations in advance of their full implementation or the issuing of codes of practice. It also brings into force on 18 February four more provisions in Part 4 on trade union law, in addition to those coming into force on that day under the Act itself. It then brings into force on 6 April ss 15–17 on the removal of the qualifying period for parental and paternity leave and on taking paternity leave after shared parental leave. Finally, it contains in its schedules lengthy transitional provisions relating to the changes to paternity and parental leave and Part 4.

In relation to the changes in ss 15–17, the Employment Rights Act 2025 (Parental and Parental Leave) (Removal of Qualifying Periods etc) (Consequential Amendments) Regulations 2026 SI 2026/15 make the necessary consequential amendments to the extensive supporting regulations, as from 18 February or 6 April.

These commenced provisions, operating largely by way of amendment of TULR(C)A 1992 and ERA 1996, will be incorporated into Div Q and the Commencement Regulations themselves into Div R in Issue 331.

## DIVISION AI CATEGORIES OF WORKER

### DIVISION AI CATEGORIES OF WORKER

#### Workers; volunteers

AI [83.02], AI [83.03]

#### *Maritime and Coastguard Agency v Groom [2026] EWCA Civ 6*

This is an important case on the status of volunteers, not just because its outcome affects about three thousand similar volunteer coastguards (CROs) and many more in analogous positions elsewhere, but also because it raises fundamental issues of legal categorisation generally. The facts are set out at **AI [83.04]**. The ET rejected the CRO's claim to be a 'worker' but the EAT allowed his appeal. In doing so, it reviewed the case law and held (contrary to the Agency's arguments) that there is no rule that volunteers are sui generis and so cannot in law be workers (still less employees). A particularly important passage of the judgment is set out in the text. That decision has now been upheld in very clear terms by the Court of Appeal.

The principal judgment is by Bean VP who founded on two recent Supreme Court cases – first, the *Uber* case where it was held that there can still be worker status even if the individual is under no obligation to attend for work at any given time. It is important to remember in the CRO's case that the argument was only that he had that status *while actually on duty*, there being no wider argument for an umbrella contract. The second was the recent tax case of *Professional Game Match Officials Ltd v HMRC Commissioners* [2024] UKSC 29, [2025] IRLR 80, [2024] ICR 1480, where referees were held to have employee status for tax purposes (there being no worker concept there) in spite of the fact that there were still individual contracts for individual matches; once appointed and willing, the referee could not walk off mid-match (however tempted on some occasions!), any more than the CRO could leave a rescue mid-way once called out to it. The principal case relied on by the Agency was, not surprisingly, *South East Sheffield CAB v Grayson* [2004] IRLR 353, [2004] ICR 1138, EAT where a CAB volunteer was held not to have employee status, but that was distinguished because in that case the arrangement was particularly loose and discretionary and there was no provision for payment at all; ultimately it fell on the 'mere volunteer' side of the divide. On the other hand, the two Supreme Court cases, particularly the match officials' case, put the correct answer in the instant case 'beyond doubt'.

There is, however, one slight peculiarity to the decision. Stuart-Smith LJ gave a shorter judgment agreeing with the principal one, but by a slightly different route. He concentrated more on the question of intent to create legal relations and the requirement in the statutory definition for the individual to undertake to do or perform work or services. He said that he had initially had doubts on both scores, but had come to the conclusion that both were present here. Popplewell LJ agreed that the appeal should be dismissed but said that, in so far as there might be any difference, he preferred Stuart-Smith LJ's route, having initially shared his doubts.

## DIVISION DI UNFAIR DISMISSAL

**Capability dismissal; incompetence; type of work; application of Polkey**

DI [1101], DI [1106], DI [1141], DI [2712]

*Pal v Accenture UK Ltd [2026] EAT 12 (19 January 2026, unreported)*

The ET's decision in this case was overturned by the EAT under Judge Tayler, holding that it had improperly applied a *Polkey* reduction to compensation by using an improper counter-factual and had also, in a linked claim, failed to adjudicate fully whether the claimant's endometriosis qualified as a disability. The case was remitted to a fresh ET.

The judgment is worth reading on those grounds, but it also contains discussion of a rather unusual point on capability dismissal generally on which the judgment points out that there has hitherto been little authority and which arose on the particular facts – incapable of *what* work?

The ERA 1996 s 98, which sets out the heads of potentially fair dismissals, states in sub-s (3) that capability means an employee's capability assessed by reference to his skill, aptitude, health or other physical or mental quality, and it is this that is usually cited in discussions of such cases. However, if one goes back to sub-s (2) it refers to dismissal related to their capability *for performing work of the kind which he was employed by his employer to do*. This has been the hitherto largely unexplored element. What does this phrase mean? The judgment refers to two cases, one old and one unreported. In *Woods v Olympic Aluminium Co Ltd* [1975] IRLR 356 a Scottish industrial tribunal held that it had to mean work that the employee was *contractually* required to do. This case is considered at **DI [1141]** in the context of appraisal reports, which must refer to their performance in that contractual work. There, the employee was dismissed because he was perceived to lack 'management ability' but the industrial tribunal found it unfair because, although in their memorable phrase he may have lacked 'the stuff of which captains of industry are made' (!), he was in fact only employed as an assistant accountant and was to be judged at that level, not for what the employer may have wanted him to become. In *Plessey Military Communications v Brough* UKEAT/0518/84 this issue arose again and Popplewell J held (under the similarly worded predecessor to s 98) that although counsel had agreed by concession that a contractual test is to apply, in his view that concession had been properly made and that 'the words themselves are only capable of being interpreted with reference to what has been described in argument as the 'contractual position', not the 'functional position' (see [59] of the judgment in the instant case). Judge Tayler states that he is of course not bound by an ET level case and this one EAT precedent may have become 'a little dusty' *but* the important point is that he *agrees* with them as a matter of principle.

This should hopefully settle the point, but the next question is why it mattered. The claimant here had been employed as a consultant on what was referred to as an 'up or elsewhere' contract under which an employee is

## DIVISION DI UNFAIR DISMISSAL

expected not only to perform in their present role but must show continuous development towards a higher level (even though not yet promoted to it), failure to reach which after a period would be viewed as underperforming. This, however, can now be legally dubious if pushed too far. At [63] the judgment states:

‘The consequence is that dismissal under an “up or elsewhere” progression model may not be for the potentially fair reason of capability, to the extent that the dismissal is because of a lack of readiness to be promoted to the next level. It is difficult to see how that would generally be a reason that relates to the capability of the employee to do work of the kind which she was employed by the employer to do. It would appear to be a reason that relates to work that the employee would be employed to do, *should she be promoted.*’ (emphasis added)

Why has this point (contractual, not actual work) not featured in more mainstream cases? The judgment goes on to point out that naturally many contracts are not static and people move/are promoted contractually, so that their new position/responsibility becomes the ‘new normal’ and their performance *can* be judged by that new standard. Further, a contract could provide, if clearly enough, that the nature of the hiring is that the work they are employed to do *includes* demonstrating the ability for promotion after a period of time in the role. Ultimately, however, the judgment holds that none of that employment reality can contradict the principle that capability is to be assessed in relation to the work that the employee was employed by the employer to do pursuant to the contract.

### **Misconduct; reasonable investigation; question of fact DI [1482]**

#### ***Lamb v Teva UK Ltd [2026] EAT 8 (12 January 2026, unreported)***

A fundamental truth about the requirement of a fair investigation into allegations of misconduct in order for there to be a fair dismissal is that, while there are certain well-known factors that an ET will probably take into account when adjudicating on this, ultimately these are *only* factors; there are no hard and fast rules or absolute requirements. It is for the ET to evaluate the procedure adopted and decide on fairness or otherwise in the light of all the facts of the particular case. Their decision is unlikely to be upset on appeal.

This decision of Judge Tayler in the EAT is a good example of this, for the decision was to uphold the ET’s finding of fair dismissal in spite of evidence that: (1) the person conducting the investigation provided a witness statement as part of the investigation; (2) the note taker in the investigation also provided a witness statement; (3) evidence possibly increasing the seriousness of the conduct was only provided less than 24 hours before the disciplinary hearing; and (4) it was possible that the person conducting the investigation had been overheard saying that the employee was unlikely to be back in the business. In other circumstances, any of these (particularly in combination) could have been material factors, but the ET had weighed them up and found

## DIVISION F TRANSFER OF UNDERTAKINGS

the dismissal fair overall, had explained its decision properly and had made no error of law. At [45] the judgment states, in a potentially useful summary:

‘So what can be expected of a disciplinary process? When dealing with misconduct employers cannot be expected to set up their own Police force to investigate the allegations, an equivalent of the Crown Prosecution Service to decide whether to bring charges or to conduct the disciplinary process as if it were the Crown Court, with a right of appeal to an equivalent of the Court of Appeal. Nor is an employer expected to conduct the process with the full rigour required in civil court proceedings. What is required is substantive industrial fairness, that takes account of the seriousness of the allegations and ensures that the allegations are investigated fairly, looking both for material that may support or undermine the allegation.’

### DIVISION F TRANSFER OF UNDERTAKINGS

#### **Relevant transfer; administrative transfer; NHS commissioning body**

**F [28.06]**

#### ***Bicknell v NHS Nottingham and Nottinghamshire Integrated Commissioning Body [2026] EWCA Civ 21***

This case concerned the borderline between economic activities which transfer under TUPE and administrative functions which do not transfer. It can be seen as a follow up from the hitherto leading EAT case of *Nicholls v London Borough of Croydon* [2018] IRLR 988, EAT, which is considered in detail at **F [28.05]**.

The claimant was a doctor employed by a clinical commissioning group; when there was a major reorganisation and the group’s functions were given to the predecessor of the respondent, he lost his employment. He claimed automatic unfair dismissal under TUPE SI 2006/246 reg 7 and his representative body the BMA claimed failure to consult. The preliminary question, however, was whether there was a TUPE transfer at all. The ET held that there was not, applying *Nicholls* to the effect that the commissioning in question was not an ‘economic activity’ under reg 3 **R [2292]**. The claimants appealed to the EAT that this was an error of law but, as set out at **F [28.06]**, Sheldon J upheld the ET; they had properly applied *Nicholls* (which also concerned public sector commissioning) and found that the exercise here did not involve the actual provision of goods and services. It is true that the judge expressed some reservations about the use of competition law cases in employment ones and about the rationale of *Nicholls*, but decided that this was not an occasion to depart from it.

The Court of Appeal have now upheld the ET and EAT, and without the reservations. There is an extended analysis of *Nicholls* at [30]–[39] of Laing LJ’s judgment, following consideration also of the ECJ competition law case of *FENIN v European Commission* C-205/03, [2006] CMLR 7 at 13–29. The key points are that:

## DIVISION F TRANSFER OF UNDERTAKINGS

- (1) It is proper to apply EU competition cases (such as *FENIN*) in the employment sphere because they both use the concept of an economic activity; it is desirable to use it consistently and there is no hint in the ECJ case law to the contrary.
- (2) Contrary to the claimants' arguments, it was not open to the court to hold that *FENIN* was wrongly decided, or that it had been wrongly interpreted.
- (3) The EAT in *Nicholls* had properly understood and applied *FENIN* and that case was not wrongly decided. The ET here had applied it properly and come to a permissible decision.
- (4) In a case on the borderline such as this, two principles apply – there must have been an economic activity and TUPE does not apply to an administrative transfer. Either is enough potentially to rule out a claim and so in an appropriate claim it is enough for the ET to hold that there was no economic activity to rule out the claim, without going on separately to decide whether there was an administrative transfer. The ET here had been correct therefore to decide only on no economic activity, without then going through the ten factors for an administrative transfer set out in *Nicholls* (see F [28.05]).

## DIVISION L EQUALITY

### Exceptions; armed forces

L [94.03], L [738.01]

#### *Rubery v Ministry of Defence [2026] EWCA Civ 8*

The facts and decision of the EAT in this case are set out at L [738.01]. The problem that arose in it was that by virtue of EqA 2010 s 121 Q [1533] a complaint of discrimination by a member of the armed forces must go through a service complaint procedure, but the legislation on such complaints rules out a complaint about the procedure itself. That was what the claimant here wished to do and so was prima facie ruled out under s 121. Her complaint was heard by the ET where the Ministry sought to have that part of it struck out. The ET, however, refused that application, holding that this apparent gap in protection was contrary to the European Convention and that s 121 could be read down to fill the gap. The Ministry appealed and the EAT disagreed and approved the strike out on the alternative grounds that: (1) the exclusion in s 121 was deliberate and justified under the Convention; and (2) even if that was not the case it was not possible to read down the deliberate policy of the section without negating it. The Court of Appeal have now upheld that decision and again affirmed the strike out on similar grounds – s 121 is part of a deliberate and coherent scheme in the legislation and any differential treatment was justified; moreover, it was not possible to amend it as the ET had done. It was added that, on the question of differential treatment, it was not possible to draw an analogy with civilian employees in the services because of differences in relation to applicable law, discipline and morale.

## Special cases; contract workers

L [724]

### *Anne v Great Ormond Street Hospital for Children NHS Foundation Trust [2026] EAT 15 (21 January 2026, unreported)*

The case of *Boohene v The Royal Parks Ltd* [2024] EWCA Civ 583, [2024] IRLR 668 is the leading one on the interpretation of the EqA 2010 s 41 on contract workers and the liability of a principal. However, it involved a difference of opinion between the EAT and the Court of Appeal. The EAT thought that it meant that the principal could be liable for the acts of its contractor if it merely had de facto influence over the contractor, in particular in the wage rates it set. However, the Court of Appeal held that that went too far and the principal was not liable for the rates determined by the contractor, even if they differed from those paid by the principal to its own employees. That difference can be seen played out in this case before Sheldon J in the EAT which was on similar facts.

The claimant and 79 other cleaners were employed by outsourcing company C to work at the respondent hospital (GOSH). They were employed on the London Living Wage (£10.75 ph), not the Agenda for Change (AFC) rate for GOSH's own employees (£11.50 ph). In August 2021 the service contract expired and GOSH took the function back in house, taking on the cleaners. They were not put on to the AFC terms for some time. As there was a significant difference in racial composition between the ex-C employees and GOSH's own, they claimed indirect race discrimination.

The case split into the pre-transfer and post-transfer periods. With regard to the former, the ET applied the EAT judgment to hold that GOSH had sufficient influence over Co C to make them potentially liable under s 41, but rejected the claim on its view as to what the relevant PCP should be. That also affected the post-transfer period. The claimants appealed, but in the meantime the decision of the Court of Appeal had been published. Before the EAT the claimants argued that that decision was *per incuriam*, but that got nowhere and, applying it, the EAT held that the pre-transfer claim could not succeed anyway because s 41 cannot now apply to wage rates paid by the contractor with whom the employees had their contracts. However, that development did not apply post-transfer because by that time they were direct employees. Once the correct PCP was determined on appeal (ie that receipt of the higher AFC rate was dependent, directly or indirectly, on not having transferred to GOSH from an outsourced contractor under a relevant transfer) there was no further impediment to that part of the claims going ahead and, indeed, the EAT held that on the facts found by the ET it was one of the rare cases where the EAT was able to take the decision itself that those claims succeeded.

### **Enforcement; burden of proof and drawing inferences**

L [806.01]

*London Ambulance Service NHS Trust v Sodola* [2026] EAT 6  
(9 January 2026, unreported)

Ever since the leading judgment of Elias J in *Bahl v Law Society* [2003] IRLR 640, EAT, a fundamental of discrimination across the board is that bad treatment is not discrimination; it must be *worse* treatment. The actual decision in the instant case before Judge Tayler in the EAT is an application of this in the context of the statutory reversal of the burden of proof in the EqA 2010 s 136. The claimant claimed race discrimination relating to two matters – the failure to appoint him to a post he had applied for and a delay in providing him with adequate feedback. The ET held that the burden had passed to the employer but in relation to the first the employer had shown that he was not the best candidate. However, the second was upheld because the employer had not shown a non-discriminatory reason. The employer appealed against this and the EAT allowed the appeal. On the facts, all that the ET had found was poor administration of the feedback, which was only descriptive without any element of worse treatment on racial grounds which might justify the reversal under s 136.

Going beyond the specific facts, the judgment is of interest for the discussion of the interpretation of the section and in particular how an ET is to apply the two-stage approach to the reversal, ie (1) whether there are facts from which the ET could infer discrimination and then (2) whether the employer has shown that it did not act in a discriminatory manner. This is considered in detail at L [806.01] and the question here related to how to deal with evidence that the employer has given false reasons or no reasons for its actions. Is that irrelevant altogether at stage 1, only arising at stage 2? The key case here is *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] IRLR 811, [2021] ICR 1263, which drew a distinction between facts and explanations. Stage 1 is about the former and so should not consider any explanation that the employer may deploy at stage 2. However, the judgment in the instant case seems to wish to adopt a more nuanced approach. It draws a further distinction between a case where no explanation has been given and one where inconsistent or false reasons have been given. The idea is that *Efobi*, being a no reason case, only applies there; where reasons have been given, there is arguably no reason to exclude that at stage 1. Moreover, the judgment picks up on an element of *Efobi* where it talked of ‘outward conduct’ as opposed to ‘subjective motivation’ with the latter being what needs to be excluded at stage 1. It will be interesting to see how this wider interpretation of s 136 fares in subsequent cases.

**DIVISION PI PRACTICE AND PROCEDURE**

**Withdrawal of claim; must be unequivocal; relationship with dismissal of claim**

PI [625], PI [627.14]

*McCrory v Healthwatch Stockport Ltd [2026] EAT 3 (8 January 2026, unreported)*

In this case before Judge Tayler in the EAT the claimant, a litigant in person, in different emails seemed to wish to withdraw the claim for fear of incurring costs if they lost, but then to ask the ET what level of costs they might incur in order to decide whether to proceed. On the basis, it appeared, of only the first, a legal officer made an order dismissing the claim. While it is true that, as the judgment states, the claim generally had had a complex history, the facts show how difficulties can arise in this area.

The EAT allowed the appeal. In doing so, the judgment contains guidance as to the relationship between withdrawal under (now) SI 2024/1155 r 50 and an order for dismissal under r 51. It cites the judgment of Langstaff J in *Segor v Goodrich Actuation Systems Ltd* UKEAT/0145/11 (10 February 2012, unreported), considered at **PI [627.14]**, where he said that to be valid a withdrawal must be ‘clear, unequivocal and unambiguous’. The judgment then also cites at length the judgment of Simler P in *Campbell v OCS Group Ltd* UKEAT/0188/16 (11 April 2017, unreported), doing so because ‘rather surprisingly’ it had not been reported and it contains guidance on fitting the two provisions together, specifically approving Langstaff P’s test. Applying that, on the facts here the test was not satisfied, the dismissal judgment was revoked and the case sent back to the ET for consideration.

**Procedure at hearing; witness discussing case part way through; application to legal representation**

PI [802.04]

*Oduşanya v Pennine Care Foundation Trust [2026] EAT 5 (16 January 2026, unreported)*

A witness must not discuss their evidence during breaks in the hearing and the EJ will usually give a warning not to do so. Breach of that warning may have serious consequences, including a possible strike out; see **PI [802.04]**. However, this case before Judge Beard in the EAT shows that there may be a qualification here in the case of a witness seeking legal representation (though even here the basic rationale still applies that even a legal representative must not be consulted in order to ‘improve’ the evidence).

The claimant was originally represented by her union but became a litigant in person shortly before the hearing. While still under oath mid-hearing, she instructed a new representative and communicated with him and her sister. She had been repeatedly warned not to discuss her evidence during adjournments.

## DIVISION PI PRACTICE AND PROCEDURE

The respondents successfully applied to strike out the entire claim on the basis that a fair trial was no longer possible.

The claimant appealed and the EAT allowed it in relation to the new representative. The claimant had a statutory right to representation under ETA 1996 s 6(1) and this had been infringed by preventing her from consulting her representative before responding to a potentially case-ending strike-out application. While a witness under oath may not discuss evidence, fairness requires permitting a litigant to obtain advice on procedural or legal issues arising mid-hearing. Further, to have then required her to explain her conduct without legal advice was procedurally unfair and a breach of natural justice. Other grounds of appeal were dismissed and the case was remitted for reconsideration by a new ET.

In discussing this decision, the commentary by the Lexis+ employment team makes the following practical points:

- (1) A party's right to representation includes the right to receive advice, not just advocacy. Even a witness under oath may need legal advice on procedural or legal matters arising unexpectedly mid-hearing. Tribunals must take particular care where a litigant in person faces a sudden high-stakes application (eg strike-out).
- (2) Warnings should be precisely framed: the purpose is to prevent influence on evidence, not to ban all case-related discussion. A blanket 'do not discuss the case' instruction risks being overbroad; judges should explain the purpose and limits.
- (3) To determine whether justice has been imperilled and whether a fair trial remains possible, ETs should generally ascertain what was discussed, evaluate whether it could influence evidence, and consider alternatives to strike-out (eg recalling the witness, case management steps).
- (4) Natural justice requires that if an ET intends to determine disputed conduct facts, the party must be allowed to call evidence (including lay participants), unless compelling reasons exist, and should have a fair chance to obtain representation or advice.

### **Decisions and reasons; considering the evidence**

PI [971]

*Anea v OCS UK&I Ltd [2026] EAT 21 (28 January 2026, unreported)*

The question in this case before Judge Tayler in the EAT was whether the ET had taken too 'blanket' an approach to assessing the reliability of the parties' evidence where there were clear conflicts of fact. In a passage on credibility the EJ said 'Where there is a factual clash between the evidence given by the claimant and that given by the ... respondents we prefer the evidence of the ... respondents and have made our findings of fact accordingly.' Was this too sweeping?

The weighing of evidence is very much within the purview of the ET, with the EAT loath to intervene. However, the judgment states that there is considerable guidance in cases across jurisdictions as to how a judicial body should approach its task, and also on some beartraps along the way. This is considered at para [9], ending up with citation of the employment case of *Matondo v Kingsland Nursery Ltd* [2024] EAT 123 (27 June 2024, unreported) which is discussed at **PI [971.01]**. What is the status of this guidance? It is of course *only* guidance but at [13] the judgment states:

‘Because the comments made about witness evidence ... are observations rather than rules of law, does that mean that they can safely be ignored? It would be foolish to ignore the condensed wisdom of so many judges who have heard the evidence of so many witnesses over so many years. The observations provide guidance that can help prevent a judge making an error of law, such as failing to take account of material evidence that would, or could, have changed the outcome of the case. In a very extreme case, if for no good reason the evidence of all of the respondent’s witnesses is found to be wholly credible and reliable; and that of the claimant to be of no value whatsoever, that could create an appearance of bias.’

The question therefore became whether the ET here had diverged improperly from the suggested approach. Ultimately, on consideration of the whole of the judgment, it was held that the ET had adopted a proper approach to credibility, though clearly the passage cited above could have been better expressed. This conclusion is neatly summed up in para [31] where it is said that ‘On a fair reading of the judgment the overall assessment of credibility was made because of the findings of fact, rather than the findings of fact being made because of overall assessment of credibility’. However, the case may be a warning to EJs not to make such a priori statements as a matter of *overall* credibility in the first place.

### **EAT; institution of appeal; extension of time; minor mistakes**

**PI [1444], PI [1446]**

#### ***Mulumba v Partners Group (UK) Ltd [2026] EWCA Civ 30***

When the EAT 1993 rules were amended in September 2023 to remove the requirement in r 3(1)(b) (documents to be included with the appeal) and to add r 37(5) (power to disregard a minor error) there was a curious mismatch between these two – the former, being a substantive change was only prospective, applying to cases arising from that date, whereas the latter, being adjectival, applied to any case coming before a tribunal after that date regardless of when the facts arose. This case was one that fell into that mismatch category, the facts having occurred in 2018. To that extent it is of historic interest.

It concerned two attempts to appeal to the EAT against the ET’s dismissal of the claimant’s case. In each, she lodged her appeal hours late and in one case without all the (then) necessary documentation. The Registrar refused to

## DIVISION PI PRACTICE AND PROCEDURE

accept her appeals and an EAT judge upheld that decision. That in turn has now been upheld by the Court of Appeal. She had relied on her LIP status, mental problems and technical issue, but these were held not sufficient. In the case of missing documentation, she had sought to add an explanation for this, but the rules do not allow for this. Moreover, her argument that she faced major difficulties was undermined by the fact that she had in fact complied a couple of days later. Case law set out in the text shows that there is now at least a marginally greater chance of lateness or an error being overlooked under either the inserted r 37(5) or the decision in *Ridley v H B Kirtley* [2024] EWCA Civ 884, [2024] IRLR 845 (see **PI [1444.02]**) but on these facts neither helped the claimant – under r 37(5) this was not an ‘error’ at all because she had provided an explanation for what she had done, and under *Ridley* this was not a case of a timely appeal not having all the documents (to be looked on more benignly) because both appeals were in fact out of time in the first place.

Two incidental matters were raised in the judgments that are worth noting. The principal judgment was by Laing LJ, with a short concurring judgment by Lewison LJ. Both commented, in relation to her mistake as to appending reasons for her failure, that form EAT1 may be misleading on this point and may need revisiting. In addition, Lewison LJ (while agreeing with the result ‘with some reluctance’) commented on the disparity between the harder line to time limits taken by the EAT than that taken elsewhere (including in other tribunals and indeed in the Court of Appeal itself) but held that that is now well established, especially in *Green v Mears Ltd* [2018] EWCA Civ 751, [2019] ICR 771 where the matter was fully argued and which was binding on the present court.

### **Costs in the EAT; relevance of passing the sift**

**PI [1699]**

#### ***Gurney v Randall* [2026] EAT 4 (12 January 2026, unreported)**

The claimant’s appeal failed completely and the respondent applied for costs under r 34A of the EAT Rules 1993 **R [747.01]**. In her defence, the claimant pointed out that her application to appeal the original judgment had passed the EAT’s sift system, and argued that that meant that the appeal should not be viewed as having been misconceived. Rejecting this, Judge Tayler cited the existing authority of *Iron and Steel Trades Confederation v ASW Ltd* [2004] IRLR 926 where Burton J held that there is *no* rule that passing the sift protects the appellant from costs or that they should only be ordered in exceptional cases in these circumstances. There was, however, one point about that case as an authority, namely that at the time there was no specific head of costs that the appeal was ‘misconceived’. Now that the rules have been amended to include it, does *Iron and Steel* apply to it? The answer in the judgment here is very clearly that it does. It follows Burton J in holding that passing the sift may be a *factor* in a costs determination, but on the other hand cites Judge Clark’s warning in *Takavarasha v London Borough of Newham* UKEAT/0077/12 (7 June 2013, unreported) that even if a case

passes the sift it might look very different once the respondent has had a chance to respond and/or other steps have been taken on the appeal that may have ‘altered the landscape’.

As an entirely tangential point, while citing *Iron and Steel*, the judgment emphasises a beautifully crafted aside by Burton J – after saying that his judgment was only this long ‘in deference to the lengthy argument of experienced and senior Queen’s Counsel’, it should be borne in mind that ‘simply because a matter has been argued for some time does not mean that it was arguable’. Ouch.

## DIVISION PIII JURISDICTION

### State immunity; tribunal claims involving personal injury; psychiatric injury

PIII [194]; PIII [1432]

*Government of the State of Kuwait v Mohamed [2026] EAT 20 (28 January 2026, unreported)*

This decision of Cavanagh J in the EAT has about it an air of awaiting further developments and providing an answer in the meantime in the instant case. The claimant was an employee of the Kuwaiti embassy who claimed discrimination and harassment under the EqA 2010, arguing that he had suffered personal injury including psychiatric injury in consequence. The ET upheld his claim, but the embassy appealed on the basis that it had state immunity.

This raised the known problem of the interaction of two provisions in the State Immunity Act 1978, namely s 16 which grants state immunity in cases arising from a person’s contract of employment and s 5 which removes it in cases of personal injury caused by acts or omissions within the UK. The embassy’s appeal was on two grounds:

- (1) The ET should have found that s 5 does not apply to personal injury arising in employment-related cases, which are governed only by s 16. On this, the problem is that there are three cases at EAT level agreeing that s 5 can apply here; they are set out at **PIII [194]**, the most important being the judgment of Underhill J in *Ogbonna v Federal Republic of Nigeria* UKEAT/0585/10, [2012] ICR 32. So far, so good, but the complication was that recently when the Court of Appeal heard the appeal in *Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali* [2025] EWCA Civ 1162, [2025] IRLR 918 (see **Bulletin 567**), although it was not necessary to decide this point, Bean LJ said obiter that he considered these cases (especially *Ogbonna*) to be wrong on the point. What was the EAT here to do, faced with inconsistent views of two such noted employment lawyers? The judgment states that Bean LJ’s view is indeed obiter and so there is no obligation to follow it and not the EAT cases. Turning to those three EAT decisions, the question became whether the EAT here *should* depart from them. Applying the leading authority on EAT precedence, *British Gas Trading*

## DIVISION PIII JURISDICTION

*v Lock* [2016] IRLR 316, [2016] ICR 502, EAT, it was held that there were no grounds to do so, and so the existing line was maintained, though with a strong indication that this now needs sorting out by the Court of Appeal.

- (2) In the alternative, it was argued that if s 5 did apply generally, it should not include psychiatric injury. The problem for the embassy here was that in *Shehabi v Bahrain* [2024] EWCA Civ 1158, [2025] KB 490 (a non-employment case) the Court of Appeal held to the contrary. That case is currently before the Supreme Court, having been heard in November, but in the meantime the Court of Appeal's decision was to be followed and the embassy's appeal was dismissed on this ground too.

### REFERENCE UPDATE

Bulletin	Case	Reference
565	<i>Mesuria v Eurofin Forensic Sciences Ltd</i>	[2025] ICR 1668, EAT
565	<i>Taylor's Services Ltd v Revenue and Customs Commissioners</i>	[2025] ICR 1685, CA
568	<i>Reynolds v Abel Estate Agents Ltd</i>	[2026] IRLR 106, CA
569	<i>Secretary of State for Business and Trade v Sahonta</i>	[2026] IRLR 81, EAT
569	<i>Rice v Wicked Vision Ltd</i>	[2026] IRLR 120, CA

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