Harvey on Industrial Relations and Employment Law

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DIVISION AII CONTRACTS OF EMPLOYMENT

Recruitment; offers of employment; conditional offers; precedent or subsequent?

AII [9]

Kankanalapalli v Loesche Energy Systems Ltd [2026] EAT 49 **(*20 January 2026, unreported*)**

Offers of employment are one of those areas of employment law that remain largely a question of applying ordinary contract law. This normally involves the basic concepts of offer and acceptance, but this case before Judge Walker in the EAT reminds us that there can also be issues arising in cases of *conditional* offers, where again standard contract law may have to be considered.

Normally, an offer of employment 'subject to X, Y or Z' will be assumed to impose a condition precedent, but there can also be cases of conditions *subsequent*. This may seem like how many employment lawyers can dance on the head of a pin, but in fact it can be of importance – if a condition is precedent, then its non-satisfaction means that no contract arises at all and the individual who has been made the offer has nothing to sue on if the employment does not happen, *but* if a condition is subsequent, then the contract still comes into force, with non-satisfaction becoming a reason to terminate it, but subject to possible rights for the individual in the period of the contract.

This is what happened in the case. In September 2022 the claimant was offered a job by the respondent, to commence on 1 November. It was stated to be subject to satisfactory references, right to work checks and completion of a probationary period. Taking up the job necessitated the claimant

making travel and relocation arrangements which he then discussed. However, before the start date matters changed for the respondent who said to the claimant that it could not continue with 1 November. 3 January was mentioned instead, but when the claimant asked about payment for November and December the respondent said it was no longer able to offer the contract. As it understood that the claimant no longer wished to be considered further it considered the matter at an end. When the claimant commenced proceedings for breach of contract, the respondent argued that, as the conditions had not been met, no contract had arisen.

The ET agreed with the respondent, but the EAT allowed the claimant's appeal. It held that the ET had not properly considered the claimant's argument that these were conditions subsequent and that the true position was that their dealings were sufficient to produce a contract, subject to its being terminated if the conditions were not satisfied. Accepting this, the judgment states that there is no magic to the phrase 'subject to' which only shows that there are conditions, which must still be construed on the facts of the case to decide if they are precedent or subsequent. Here, the requirement of the probationary period could only be subsequent and there was no reason to decide to the contrary with the other two. One specific point here was that the respondent had relied on *Wishart v National Association of CABs* [1990] IRLR 393, [1990] ICR 794, CA (see **AII [9]**) and *Mellors v RPS Tainer* UKEAT/0760/00, but these were held not relevant because they established a different rule that when there is a condition of satisfactory references, whether or not they are satisfactory is a matter for the employer to decide. The decision of the EAT was that a valid contract had come into being, which had to be terminated by notice (not just an email withdrawing the offer); as there was no provision for this at this early stage in the contract, the EAT implied a term of three months, which could be awarded for breach of contract.

The moral of this story is that employers should exercise care in how they phrase any conditions, if they wish to make them clearly precedent. It is of interest that in the *Mellors* case the offer of employment was said to be subject to satisfactory references and a satisfactory police check, followed by the wording 'Once we have received satisfactory clearances we shall be in a position to send you a formal sessional contract of employment'. When he gave no such clearance (he in fact had criminal convictions), the employer did not proceed and his claim for damages for breach of contract failed because here the condition was clearly precedent and there was no contract on which to sue.

DIVISION BI PAY

Deductions from wages; definition of wages; wages payable after termination; PHI payments

BI [338], BI [338.11]; AII [414.01]

McMahon v AXA ICAS Ltd [2026] CSIH 19

The claimant's contract included a permanent health insurance provision (PHI) in case of illness exceeding 26 weeks. She became eligible for this benefit from May 2011, but issues arose as to non-payment. When she was dismissed in September 2013 for ill-health incapability, she sought to recover unpaid amounts up to the end of employment in an ET action for unlawful deductions from pay. The issue in the current appeal, however, arose because she then sought an amendment to her claim to add recovery for PHI amounts into the future from that date of termination. The EJ refused this on the basis that she had no valid claim because termination ended her right to the benefit and so there could be no statutory wages claim; the EAT agreed – it was not 'wages' within the ERA 1996 s 27 and so any claim, if at all, lay at common law, see **BI [338.11]**.

The Inner House of the Court of Session have allowed her further appeal. The primary ground was that this claim did come within the s 27 definition. It differed from wages in lieu or future wages which required continued work. The PHI benefit did not require this and was collateral to the core employment relationship which had terminated. Thus, it came within the category of rights which may continue after termination (citing *Geys v Société Générale* [2012] UKSC 63, [2013] IRLR 122), one analogy being a restraint clause. Here, this meant that an ET action could lie. The court then added a second reason for this. It relied on 'the PHI cases' as exemplified by *Aspden v Webbs Poultry and Meat Co Ltd* [1996] IRLR 521 where a term could be implied that the contract would not be terminated (on otherwise lawful notice) in order to evade the PHI liability (see **AII [415.02]**), pointing out that this approach has recently been approved by the Supreme Court in *Tesco Stores Ltd v USDAW* [2024] UKSC 28, [2024] IRLR 998. On either analysis, the claimant's rights were amenable to statutory enforcement and the court permitted the amendment to be made.

DIVISION DI UNFAIR DISMISSAL

The compensatory award; mitigation and social security benefits; deduction of PIP benefits

DI [2703]

***Foat v Department of Work and Pensions [2026] EAT 61* (*23 April 2026, unreported*)**

This decision of Mansfield J in the EAT addressed a point not hitherto covered in relation to deductibility of state benefits, namely whether personal independence payments (PIPs) fall to be deducted from compensation for unfair dismissal/discrimination. The claimant was constructively dismissed

and won claims for unfair dismissal and disability discrimination. He had a history of mental vulnerability which worsened after the termination of employment in relation to depression, anxiety and fibromyalgia, effectively ending his earning capacity and future prospects. When assessing compensation, the ET applied a 30% discount on that basis, given his previous history.

Several issues arose from the calculations on appeal, but for present purposes the key one was that the EAT took into account the fact that since termination he had successfully applied for both the care and mobility elements of PIP, and deducted the amounts received. Before the EAT, the claimant argued that PIP is not connected to the termination of employment and is not to be treated in the same way as replacement income. Further, it was argued that it should never be set off against compensation for loss of income (as here), but only against any heads of loss themselves relating to care or mobility costs. It was also pointed out that as a recent form of benefit, PIP is not specifically covered in statutory provisions such as the Employment Protection (Recoupment of Benefit) Regulations 1996 SI 1996/2349. In spite of these arguments, the EAT held that there is *no* rule of law that PIP can only be deducted from damages from cognate heads such as care and mobility. Instead, the answer lies in applying common law principles, mostly arising from personal injury cases, but also seen in *Puglia v C James & Sons* [1996] IRLR 70, EAT where it was held that invalidity benefit is to be deducted, if the claimant is not to be doubly compensated. At [68] the judgment states: 'The Claimant was in receipt of PIP only because of the Respondent's unlawful act. The Respondent caused the Claimant's injuries, and it was only because of those injuries that the Claimant received PIP'. The deduction had thus been correct.

DIVISION E REDUNDANCY

Collective redundancies; proposing redundancies; contingent proposals

E [874], BI [887]

Ellard v Alliance Transport Technologies Ltd [2026] EAT 169 **(*22 October 2025, unreported*)**

This decision of Judge Tucker in the EAT emphasises that a proposal to make the requisite number of redundancies in the relevant period can be a contingent one, provided it has gone beyond a mere possibility. It also stresses the importance of the statutory language in the TULR(C)A 1992 s 188 **Q [422]** which refers to 'proposing', not any specific 'proposal'.

The claimants were employed by the respondent company which was in financial difficulties. On 2 May 2023 it entered administration and the claimants were among 15 made redundant. There was some prospect of a purchase but when that disappeared on 5 May most of the rest of the employees were also dismissed. When they all claimed protective awards for failure to consult, the ET granted these to the 5 May cohort, but not to the claimants because at that stage there was not 'a proposal' to make 20 or more

redundant. The claimants appealed and the EAT upheld their appeals and, deciding the case on its merits, ordered awards for them too.

The judgment has a discussion of the longstanding contemplating/proposing controversy (from the Directive and the Act respectively) accepting that the EAT is bound to apply the latter even if it is narrower that the EU version. However, the ET's decision was still wrong because it had focussed on whether there was 'a proposal' on 2 May, rather than applying the correct, wider approach of deciding that, overall, the employer had been proposing the necessary redundancies within a 90-day period, even if that was only one outcome at the time. Here, the possibility of avoiding redundancies by a sale was pretty marginal and the correct test was satisfied. At [34] the judgment states that the difference between proposing and a (or the) proposal is not 'mere semantics' but reflects what an employer must consider when determining whether or not the duty to consult arises. Having considered the leading case law as set out in the text, it says at [49] that 'established authority reveals that what is required in order to trigger the duty is something more definite than a mere possibility that it would occur, yet something less definite than a concluded certainty or decision'. In a closure case, it was said (instancing the facts of *E Ivor Hughes Educational Foundation Trust v Morris* [2015] IRLR 696, EAT) that it was sufficient that there was a fixed, clear, *albeit provisional*, intention to close.

DIVISION PI PRACTICE AND PROCEDURE

Striking out; no longer possible to have a fair trial; excessive delay

PI [663.01]

Boateng v Moss Bros Group Ltd [2026] EAT 50

In *Bailey v Aviva Employment Services Ltd* [2025] EAT 109, [2025] IRLR 831 Judge Auerbach gave guidance as to the application of the strike-out rule (now SI 2024/1155 r 38) in relation to whether there can still be a fair trial generally (see **PI [648]**). In the instant case, he has considered that provision in the particular circumstances of a lengthy delay in proceedings, not the fault of the claimant.

The claimant was dismissed in 2019. He began proceedings for discrimination and unfair dismissal in 2020, with some elements of the former going back to 2017. However, this was overtaken first by COVID-19 and then by the fact that the respondent was under a CVA. A final hearing was not due until February 2024. In 2023 at a preliminary hearing the ET struck out the discrimination claims on the basis that a fair trial was no longer possible. The key fact was that the post-2017 allegations were against 23 individual fellow employees, 22 of whom were no longer in the employment, of whom 17 were uncontactable or unwilling to co-operate.

The claimant appealed but the EAT affirmed the ET's decision. It was accepted that the claimant was not at fault and that delay alone is not always a good ground for a strike out. At [15]–[29] the judgment considers first the

history of the strike-out rule, through several sets of ET Regulations, the claimant's right under art 6 of the Convention and then the leading case law. Applying that, it could not be said that the ET had erred here because of the length of the delay and the problem of lack of witnesses. The claimant had argued that witness orders could be used or that it might be possible to resolve the case on the burden of proof, but both of these were rejected. It was accepted that it was hard on the claimant, even though he had managed to recover some recompense through the CVA. One other point to note is that the ET did not strike out the unfair dismissal claim because that did not involve multiple witnesses and there was documentary evidence available; the delay alone did not stop this claim proceeding.

Admissibility of evidence; confidentiality or pre-termination negotiations in unfair dismissal cases

PI [929]

***Tarbuc v Martello Piling Ltd [2026] EAT 58* (*28 April 2026, unreported*)**

The provisions of the ERA 1996 s 111A **Q [735.01]** on 'protected conversations' prior to dismissal have been subject to case law explanation, in particular in *Faithorn Farrell Timms LLP v Bailey* [2016] IRLR 839, EAT, see **PI [930]**. However, the instant case before Judge Stout in the EAT shows that one fundamental point can still be missed, namely that the exclusion of such evidence only applies to an unfair dismissal claim; other types of claim are unaffected, even if brought alongside an unfair dismissal claim.

The claimant claimed unfair dismissal, wrongful deductions and less favourable treatment as a part-time worker. Prior to his dismissal for redundancy, he had had a conversation with his manager who had offered a financial deal to go as an alternative to going through the redundancy procedure. The manager (who had taken HR advice) had stated that this was a protected conversation. When the claimant brought his actions, the employer argued that evidence of this conversation could not be adduced at all and the ET agreed. The claimant appealed and the EAT upheld his argument that the exclusion only applied to his unfair dismissal claim and that it could be adduced in relation to the other two (and another he wished to add). The judgment points out that there had been *some* dispute in the case law as to whether the s 111A(1) exclusion could apply more widely, but there is now no viable argument to that effect.

There was, however, another challenge on the appeal. The claimant had argued that even in relation to unfair dismissal the evidence could still be used because the manager had been guilty of 'improper behaviour' which, under ERA 1996 s 111A(4), removes the exclusion. The ET had rejected that argument, but the claimant won on appeal on it too. The ET's decision was not perverse, but was vitiated because the ET had only looked at what the manager had said and how he had said it (in effect preferring his evidence) without taking into account wider points made by the claimant as to his impression of being 'ambushed', having little time to respond and not being

able to be accompanied, some of which arguably came within the guidance on what is improper in the ACAS COP on Settlement Agreements para 18 **S [308]**.

One final point to note about this case is that, when you read the facts, it can be seen as an object lesson in the problems that an ET may have in applying the improper behaviour rule where it concerns what was said on the occasion in question. There was some dispute as to the actual wording, but there was serious dispute about what it *meant*. To the claimant it constituted oppressive pressure being put on him to agree (or else be put into a redundancy exercise which would be much less advantageous) but the manager's version was that it was pointing out (albeit in rather direct terms) the economic realities of the company's position and that given his work record he was likely to be the first to go. In the words of a well-known phrase from recent history, 'recollections may vary'.

National security cases; effect of the rule; Investigatory Powers Act 2026

PI [1184]

***National Crime Agency v DP [2026] EAT 52* (*15 April 2026, unreported*)**

In national security cases, there can be a closed procedure, excluding the claimant from proceedings and normally involving a special advocate (though still with limitations on what may be disclosed to the claimant). Whether to adopt this major exception to open justice lies with the ET which must balance national security, open justice, fairness and any alternative (less drastic) alternatives. In this case, however, that general position had to be considered in the light of the Investigatory Powers Act 2026. This permits the interception of communications in certain circumstances, and contains in s 56 restrictions on what can be disclosed in legal proceedings, especially where evidence 'tends to suggest that any interception-based conduct has or may have occurred or may be going to occur'. Workers in security organisations generally retain employment rights, but how does s 56 apply in any ET proceedings brought by them if they have handled such material?

The respondent Agency argued for an absolute approach, ie that s 56 is in mandatory terns, so that the closed procedure *must* be adopted. The ET agreed but Judge Tayler in the EAT upheld the claimants' appeals and remitted the matter for rehearing. The EAT accepted their argument that s 56 cannot be given this interpretation in the light of art 3 of the European Convention and the normal ET balancing approach, which could not operate at all in such cases. How was the circle to be squared? Adopting the interpretation role contained in the HRA 1998, the judgment states that s 56 (and the mandatory closed procedure) is to be restricted to cases where what is involved is evidence of *particular* interception-based conduct, by reading that word into s 56(1)(b). This is set out in para [53], which is set out here in full:

'Having regard to the Section 3 HRA interpretative obligation, I consider that the problem can be resolved by limiting Section 56(1)(b) IPA, in this employment law context, to apply to particular interception-related conduct. I use the term "particular" rather than "specific", as was suggested by the claimants, to provide a broader protection than would apply if Section 56(1)(b) IPA only covered "specific" interceptions of communications. The term is designed to be sufficiently flexible so that it will be for a Court or tribunal to determine in the factual circumstances of the case whether there is, or is not, particular interception-related conduct. Particular interception-related conduct could include the interception of a specific communication or group of communications, interception-related conduct targeting specific individuals or groups and various different types of interception-related conduct. It would be for the Employment Tribunal to determine whether there is particular interception-related conduct having regard to factors such as the seriousness of the prejudice to national security if the existence of the interception-related conduct were to become known and the risk of that occurring. The Employment Tribunal can have regard to the prejudice to the fair trial rights of the employee if Section 56(1)(b) IPA applies and to the other options available to ensure that sensitive information does not get into the public domain. Cases which involve interception related conduct would be dealt with in a manner similar to other national security cases, the Employment Tribunal being under an obligation pursuant to Rule 94 (ETR 2013 (now Rule 93 ETR) to "ensure that in exercising its functions, information is not disclosed contrary to the interests of national security". The Employment Tribunal would balance the relevant interests in a similar manner to how it does generally when deciding whether to order that a hearing takes place in CLOSED. The Employment Tribunal can ensure that the degree of intrusion on the employee's participation in the hearing is not greater than is justified by the objectives which Section 56 IPA is intended to serve.'

REFERENCE UPDATE

Bulletin	Case	Reference
569	*Rice v Wicked Vision Ltd*	[2026] ICR 286, CA
570	*Chaudhry v Paperchase Products Ltd*	[2026] ICR 268, EAT
571	*Maritime and Coastguard Agency v Groom*	[2026] ICR 310, CA
571	*Ministry of Defence v Rubery*	[2026] ICR 326, CA
571	*McCrory v Healthwatch Stockport Ltd*	[2026] ICR 353, EAT

Bulletin	Case	Reference
571	*Government of Kuwait v Mohamed*	[2026] IRLR 309, EAT
571	*Anne v Great Ormond Street Hospital for Children NHS Foundation Trust*	[2026] IRLR 354, EAT
571	*Bicknell v NHS Nottingham and Nottinghamshire Integrated Commissioning Board*	[2026] IRLR 367, CA
571	*Mulumba v Partners Group (UK) Ltd*	[2026] IRLR 378, CA
572	*A-G for Scotland v Ministry of Defence*	[2026] IRLR 330, CA
573	*Turner v Western Mortgage Services Ltd*	[2026] ICR 257, EAT

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