Harvey on Industrial Relations and Employment Law

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LEGISLATION

Fourth commencement order

The Employment Rights Act 2025 (Commencement No 4 and Transitional and Saving Provisions) Regulations 2026 SI 2026/559 bring into force on 1 January 2027 the provisions of s 25 which decrease the qualifying period for unfair dismissal to six months and remove the limit on the compensatory award. To prepare for this, they also bring into force, on 1 July 2026, s 25(5) and Sch 3 para 5 which expand the existing power to make consequential amendments. Regulation 4 contains rules for dismissals spanning 1 January. The regulations will be put into Div R in Issue 336.

DIVISION AI CATEGORIES OF WORKER

Fixed-term employees; rights; detriment; justification

AI [166], AI [169]

***Komeng v National Highways Ltd [2026] EAT 75* (*20 May 2026, unreported*)**

This case on alleged less favourable treatment of a fixed-term employee had the interesting twist that part-way through the claimant had transferred to full-time employment. It raised two general issues, as to the meaning of less favourable treatment and the application of the justification defence.

The claimant entered a fixed-term contract for 18 months in June 2020 in an HR position. In July 2021, he was transferred to a permanent position. In March 2022 he resigned. He brought ET proceedings for unfair dismissal, discrimination and less favourable treatment as a fixed-term employee contrary to reg 3 of the Fixed-term Employees (Prevention of Less Favourable

Treatment) Regulations 2002 SI 2002/2034 **R [1553]**. The ET rejected all of these and the claimant appealed. Judge Auerbach in the EAT dismissed the appeals.

On the question of less favourable treatment, the allegation was that while he was still fixed-term the employer had failed to put him on to a particular training course that other, permanent employees had been put on to. In fact, he had not shown any desire to go on it and had been interested in pursuing his CIPD qualifications instead. The ET had rejected this claim on two separate grounds, which the EAT considered:

(1) As a matter of liability, the employer had not subjected him to less favourable treatment because on these facts he had not suffered a 'detriment'. The EAT held that this was wrong in law. Under reg 3(1) there is a right not to be treated less favourably: (a) as regards the terms of the contract; or (b) by being subjected to a detriment. Regulation 3(2)(b) (relevant here) then says that the right includes in particular the right not to be treated less favourably in relation to the opportunity to receive training. The EAT held that because of this different wording, there is a breach of reg 3(2) simply by subjecting the employee to less favourable treatment *without* any separate requirement of detriment being shown. An analogy was drawn with discrimination law where discrimination is viewed as inherently detrimental. Obviously, the two will normally go together, but that was not so here and so the ET had erred in finding no breach of reg 3(2).

(2) However, the ET had also held that if they were wrong on that the employer had been justified on objective grounds in not offering the training, under reg 3(3)(b). The claimant attacked this on two grounds: (a) it had taken into consideration the employer's argument on the cost of the course; and (b) it had also given weight to the employer's explanation that the refusal was because his then fixed-term contract was due to come to an end. Here, the EAT agreed with the ET. As to (a), it was true that a *simple* argument on cost is not enough, but that (in the jargon) 'cost-plus' can be enough. On the facts, that was so here because the employer had also considered his lack of interest and problems he had been having in lockdown. It is interesting that in applying the cost/cost-plus idea the judgment cites the discrimination case of *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487, [2021] IRLR 132, [2021] ICR 110, as had already been done under the Part-time Worker (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551, see **AI [148]**. As to (b), it is true that *simply* relying on the fact of being fixed-term cannot (as a matter of policy to avoid easy avoidance) be justification, citing *Diego-Porras v Ministerio de Defensa* C-596/14, [2016] IRLR 964, [2016] ICR 1184, ECJ. However, in an echo of cost-plus, that was distinguishable here because again his then-current fixed-term status was accompanied by other factors, including that at the time there had been no progression towards permanent status.

Thus, the result was that reg 3(2) was applicable, but any less favourable treatment was justified.

DIVISION DI UNFAIR DISMISSAL

Compensation; contributory fault; basic and compensatory awards

DI [2509], DI [2727]

***DHL Services Ltd v Ignatowicz [2026] EAT 74* (*22 May 2026, unreported*)**

Most cases on contributory fault tend to be merely examples of long-established rules. However, this case before Judge Tayler in the EAT shows a detailed but possibly important distinction between contributory fault in the basic award and in the compensatory award.

The case concerned a series of rather odd social media posts by the employee, to which the employer took objection. He was dismissed after a disciplinary hearing and an unsuccessful appeal. His claim for unfair dismissal was upheld by the ET, largely because it appeared that the employer's social media policy had not been made known to him. On remedy (which included reinstatement) the ET held him 10% liable for contributory fault. On appeal by the employer, resulting in a remission, a question of timing arose, in turn raising a difference in wording in s 122 on the basic award and s 123 on the compensatory award **Q [746]**, **Q [747]**. The point was that several of his posts were in issue, including some that had been made between the date of his dismissal and the date of his unsuccessful appeal. Could these count? In relation to the basic award, s 122(2) contributory fault is subject to a general just and equitable test *but* the conduct in question must have taken place 'before the dismissal (or, where the dismissal is with notice, before the notice was given)'. By contrast, s 123(6) on the compensatory award contributory fault applies 'where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant', ie a causative test without any temporal limitation. Moreover, this is backed by the well-known authority of *West Midlands Co-op Society Ltd v Tipton* [1986] IRLR 112, [1986] ICR 192, HL that an appeal is an integral part of a dismissal procedure which can be taken into account in deciding on overall fairness. Thus, conduct between the initial dismissal and the appeal cannot be taken into account on the basic award, but can on the compensatory award. This may seem a rather technical distinction but it is required by the different drafting of the two sections.

DIVISION K EQUAL PAY

Like work; equal value; the stage 2 hearing

K [208], K [307.01]

Tesco Stores Ltd v Element [2026] EWCA Civ 580

Two recent cases in this major litigation have now reached the Court of Appeal, namely the decision of Judge Tayler [2025] EAT 45 and that of

Stacey J [2025] EAT 112. In a sense, the case is rather odd. The principal judgment is by Laing LJ; it is long and very detailed, clearly addressed to the parties and their representatives, as to how to proceed (though specifically accepting that there is no end in sight currently). However, as matters of law, there were really only three issues of substance and it is Underhill LJ's short judgment that cuts to the chase on these.

The first concerned the question as to what is 'work' in the equal value context. There was argument whether this meant that which the contract (and/or other documentation) required, or whether it could be shown on evidence to have been what the employee was actually doing in practice. Both judgments accept that this is a false dichotomy. They go back to basics that what an ET has to look for is the true work/wage relationship and normally there will be no significant divergence between contract and reality. Laing LJ considered three main cases here: *Shields v E Coombs (Holdings) Ltd* [1978] IRLR 263, [1978] ICR 1159, CA; *Brunnhofer* C-381/99, [2001] IRLR 571, ECJ; and *Beal v Avery Homes (Nelson) Ltd* [2019] EWHC 1415 (QB). In these, regard had been had to what happened in practice, but here they were construed as cases where there was evidence that the contracts, etc did *not* reflect reality, in which case an ET or court is entitled to look to actual practice. They do not *mandate* such an approach in all cases.

Second, and following on from this, in this case the ET was dealing with employments (in the supermarket's distribution centres and on the tills) that were heavily centralised and standardised as a matter of policy. In the light of this, the ET had placed prima facie emphasis on the employer's documentation relating to their extensive training for the roles. What this facilitated in this immensely complex litigation was taking a *generic* approach to the respective roles, rather than trench warfare in relation to each individual employee. This was attacked on appeal, but the Court of Appeal held that it was justified in the light of its interpretation of the above case law.

The decision of the ET on this fundamental approach was thus upheld, but a third issue arose as a matter of statutory interpretation, on which the ET had erred and the appeal was allowed. Coming to the stage 2 hearing, the parties had agreed certain facts to go to the expert, but the ET had reopened these and made its own findings. Under the ET Rules SI 2024/1155 Sch 3 r 6 **R [3704]** the function of the ET at this stage is to 'make a determination of facts on which the parties cannot agree …' This means that an ET cannot simply reopen mattes in this way. It was commented that if an ET sees real problems with certain agreed facts it could at least raise this with the parties, but that is all.

DIVISION L EQUALITY

Qualification bodies; instructing, causing or inducing discrimination

L [522], L [307.01]

***Truman v SPL Powerlines UK Ltd [2026] EAT 54* (*1 May 2026, unreported*)**

The claimant had had a long career on the railways. When this came to an end, he applied for a job with Powerlines which provided services for Network Rail; this was a safety-critical post to which he was provisionally appointed, subject to various checks, including for alcohol/drugs because of Network Rail requirements. The problem that arose was that he suffered from a permanent condition which caused continuous pain, which was lawfully treated with medicinal cannabis. The checks were carried out for Network Rail by Express Medicals. Not surprisingly, these showed up his cannabis use and in spite of his assurances that this was lawful and medicinal, their report concluded that he had failed the test. This resulted in the withdrawal of the job offer and his being banned from safety-critical work on railways for five years.

He brought ET proceedings against Powerlines and Network Rail under the EqA 2010 ss 15 (direct disability discrimination) and 20 (failure to make reasonable adjustments), and against Express Medicals under s 111 (instructing, causing or inducing contraventions). The action against Network Rail was on the basis that it was a qualification body under s 53. The ET held principally that the ss 15 and 20 claims failed on the facts (in spite of a finding that the test should have been a pass), but also that, had it been relevant, Network Rail was a qualification body, though it came within the 'competence standard' provision of s 53(7). It further held that if Network Rail had been liable, Express Medical would have been liable under s 111.

The claimant appealed and Soole J in the EAT held that there were errors in the ET's approach to ss 15 and 20, resulting in a remission for reconsideration as against Network Rail. However, this then led to questions as to the relationships between the three bodies and the claimant, on which Network Rail and Express Medical had cross-appealed. The result was that in Network Rail's case the cross-appeal was dismissed – the ET had been correct to consider that it did qualify as a qualification body, especially in the light of evidence that a positive clearance led to the issuing of a certificate (a 'sentinel card') that the holder was qualified to do safety-critical work. Moreover, (1) it could not escape that liability by outsourcing the testing and (2) although it did indeed come within s 53(7) on competence standards, a question could still arise as to any reasonable adjustments that might arise in relation to applying those standards. In the case of Express Medicals, however, the EAT upheld their cross-appeal – they were prima facie liable under s 111 for inducement but did not satisfy s 111(7) which states that the section does not apply unless the relationship between A and B (Express Medicals and Network Rail) is such that A is in a position to commit a basic contravention

in relation to B, which was not the case here, as Express Medicals had no controlling power or influence over Network Rail.

Enforcement; burden of proof and drawing of inferences

L [806]

***Clifton Diocese v Parker [2026] EAT 68* (*12 May 2026, unreported*)**

Question – when is guidance not guidance? Answer – when it is a 'sense check'. (Discuss)

In this case concerning a very unfortunate falling out in a religious organisation, unfair dismissal was fairly clear, but the allegations of discrimination and harassment on religious grounds were less so, and the ET's decision for the claimant on these matters was remitted for reconsideration. Much of this revolved around the reversal of the burden of proof. Having gone through the provisions of the EqA 2010 s 136 **Q [1548]** and the case law in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258, *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] IRLR 870, and *Efobi v Royal Mail Group* [2021] UKSC 37, [2021] IRLR 811, Judge Tayler added this at [96]:

> 'Where the burden of proof provisions are applied, the main focus should be on the statutory wording. While yet further guidance on the burden of proof may be the last thing that anyone wants or needs; there are a few common-sense questions that may provide a helpful sense check when considering whether to draw an inference of direct discrimination:
>
> (1) What is the act, or are the acts, of alleged discrimination done to B. Sometimes it may be possible to analyse more than one act together. Whether it is appropriate to do so will depend on matters such as whether the acts were allegedly committed by the same person, are similar in nature and their timing ….
>
> (2) In respect of the Act, who is the alleged discriminator, or discriminators, A.
>
> (3) Did A do the Act to B
>
> (4) Are there facts from which the Employment Tribunal could decide, in the absence of any other explanation, that A did the Act to B because of the relevant protected characteristic. Generally, things said or done by another person or other people, C, are unlikely to assist in analysing whether A did the Act to B because of the relevant protected characteristic. There may be cases where a lack of proper equal opportunities policies, poor compliance with relevant policies or the EHRC Code of Practice and/or a culture in which discriminatory language or practices are allowed to develop, may make it more likely that A discriminated against B, but that will generally require some analysis.
>
> (5) If, on a logical analysis, there are facts from which the Employment Tribunal could decide, in the absence of any other explanation, that

A did the Act to B because of the relevant protected characteristic, then the inference of discrimination must be drawn unless "A shows that A did not contravene the provision", in other words, A proves that the Act was not done to B because of the relevant protected characteristic.'

DIVISION PI PRACTICE AND PROCEDURE

Striking out; intentional and contumelious behaviour

PI [657]

***Tedd v Surrey CC [2026] EAT 66* (*12 May 2026, unreported*)**

Under ET Rules SI 2024/1155 r 38(1)(d) **R [3635]** a claim can be struck out for failure to actively pursue it. One subset of this is where that failure is due to what the ET finds to have been intentional and contumelious behaviour by the claimant. The key case on this is *Rolls Royce plc v Riddle* [2008] IRLR 873, EAT which is considered at **PI [657.01]**. The instant case before Burns DHCJ considered one particular aspect of this – how does it fit with the normal 'two stage' approach to r 38 generally?

This approach is that the ET must normally consider two questions, namely whether one of the grounds for striking out in the rule has been shown *and* separately whether it is just to proceed to a strike out. This second question requires the exercise of a discretion and means that there can be a breach of the rule but the ET may still decide not to go for the nuclear option. Often questions of whether there can still be a fair trial will be relevant. What, however, is the position with intentional and blameworthy conduct?

The ET here found that the claimant, who had failed to comply with its orders or appear, had lied about alleged medical reasons for this. The ET struck out under r 38(1)(d). The claimant appealed, arguing that the ET had erred by only considering his failure to actively pursue, without then exercising its discretion. In fact, the EAT held that on a fair reading of the judgment the ET had in fact exercised its discretion properly and so the appeal failed. However, after a discussion of *Rolls Royce* it was also held that in any event in a case of intentional conduct showing contempt for the tribunal system there is a much more restricted role for the second stage, which is more to do with whether it would be just to allow the case to proceed at all. In particular, a case may be struck out on this basis, even if a fair trial would still have been possible.

EAT; the sift; r 3(10) hearings

PI [1503]

***Harkins v Marks & Spencer plc [2026] EAT 70* (*7 May 2026, unreported*)**

This short judgment by Judge Tayler in the EAT reinforces a general rule (see the EAT Practice Direction section 5.4.2 **PI [1905]**) that where an appellant's appeal has been rejected and they apply for this to be reconsidered in a

r 3(10) hearing, the respondent will not usually be allowed to take part in this, certainly to the extent of making substantive submissions. At [9] it states:

> 'It is not desirable that Rule 3(10) hearings should turn into a dress rehearsal for the appeal. If a respondent attends wishing to make detailed observations on the grounds of appeal they will almost certainly be disappointed. It is very unlikely that the respondent will be asked by the Judge to contribute. The respondent will generally waste their time and costs. An attempt by a respondent to argue matters of substance is likely to make the appellant's point that the appeal is arguable. In very limited circumstances the respondent might ask to be heard. Any request to be heard should be carefully limited to knock out points that demonstrate that a ground is unarguable because, for example, there is a fundamental error in a ground of appeal, that can be demonstrated to be such without any need to look at detailed documentation or to ask the Employment Tribunal about what happened.'

EAT; grounds of appeal; perversity

PI [1642]

***Deans v RBL Law Ltd [2026] EAT 76* (*22 May 2026, unreported*)**

The head of appeal called perversity has long been the most controversial. Warnings that this must not be used as cover for an appeal simply against a disliked ET judgment go back years. In this case rejecting amendments to an appeal, the EAT under Judge Tayler returned to the point strongly. The tone for this is set out in para [29]:

> 'The EAT has long struggled to persuade appellants to limit their appeals to grounds that raise arguable errors of law, and not to dress up disputes of fact in an attempt to make them look like challenges asserting errors of law. It is not a struggle we will give up. Parties are required to abide by the overriding objective and should only assert arguable errors of law in appeals and cross-appeals.'

The judgment goes on to consider this in detail (and the law on amending appeals) and the overall decision shows it in operation.

REFERENCE UPDATE

Bulletin	Case	Reference
570	*Micro-Focus Ltd v Mildenhall*	[2026] ICR 411, EAT
570	*Bailey v Stonewall Equality Ltd*	[2026] ICR 440, CA
571	*Pal v Accenture (UK) Ltd*	[2026] ICR 482, EAT
571	*MOD v Rubery*	[2026] IRLR 428, CA
572	*Ngole v Touchstone Leeds*	[2026] IRLR 387, EAT

Bulletin	Case	Reference
572	*Tesco Stores Ltd v Element*	[2026] IRLR 410, EAT
572	*Milvine v DHL Services Ltd*	[2026] IRLR 419, EAT
572	*Dr MN v NHS Foundation Trust L*	[2026] IRLR 440, CA
572	*Omooba v Michael Garrett Associates*	[2026] IRLR 451, CA

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