

Harvey on Industrial Relations and Employment Law

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Bulletin Editor

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DIVISION AII CONTRACTS OF EMPLOYMENT

Termination; summary dismissal; the objective test and the relevance of the employee's motives

AII [443]

XX v YY [2026] EAT 89 (25 June 2026, unreported)

The claimant, a deputy head teacher, was found to have sent an inappropriate message to a minor. When this came to light, she said that it resulted from her being in an abusive relationship, whereby she had feared for her and her child's safety if she had not done as she was told; she had acted under duress. In fact, the message did not come to light for 18 months until disclosed by the ex-partner. The employer investigated and dismissed her summarily. She brought several ET claims which all failed. She was given permission to appeal on the claim for wrongful dismissal.

On this, the ET had accepted that the facts raised the question of principle as to whether the employee's motives can ever be relevant to the common law question whether they had been in fundamental breach of their employment contract, permitting the employer to dismiss summarily. On this, the ET held that fundamental breach is an objective question and that, while an honest/understandable motive may in practice be a reason for an employer to decide against summary dismissal, it cannot affect the legal, objective classification as fundamental. Allowing the appeal, Judge Tayler in the EAT held that this was a misdirection. There has been little direct authority on this point in employment cases, and the judgment cites the commercial case of *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223 where the concept of repudiation was considered generally in contract law. From Etherton LJ's judgment the principle is taken that, while the overall test is objective and motive alone is not necessary, let alone

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decisive, it is the case that ultimately repudiation is fact-sensitive and must be viewed through the eyes of a reasonable person and how they would view the acts of the contract breaker. In that way, motive may in an appropriate case be *evidence* as to how a reasonable person would react. As the ET had not taken that approach and had ruled out consideration of the question of duress, the case was remitted.

This decision is a useful one directly on this point. One thought. Years ago, there was a spate of bank heists where the gang kidnapped the bank manager's spouse and children and made them open up the bank and its safe by threatening the family. On the assumption that acting with a gang of thieves to rob their bank would objectively be a fundamental breach by a manager, would anyone have argued that that manager deserved summary dismissal?

DIVISION BI PAY

The meaning of wages; bonus; when crystallising

BI [342]

Chandrashekarappa v Wipro Ltd [2026] EAT 73 (1 June 2026, unreported)

There was reported in **Bulletin 574** the case of *Kankanalapalli v Loesche Energy Systems Ltd* [2026] EAT 49, [2026] IRLR 459 which raised a common law question on employments subject to conditions precedent or subsequent, and when such a contract starts. In the instant case before Carr DHCJ another separate but not-dissimilar common law question arose as to when a declaration of a bonus under the contract crystallises, so that the employee can sue for it; this arose in the context of a statutory claim for deductions from wages under the ERA 1996 ss 23 and 27 **Q [647], Q [651]**, but at heart it was a matter of offer and acceptance and whether an employer could change the original offer.

The claimant, a highly paid employee, was told that he would be awarded a 'kitty bonus' relating to the eventual worth of a particular contract, at 1% of it. This was expressed to be subject to approval from higher management. This was apparently forthcoming from an immediate superior. However, prior to payment his manager told him that it was still subject to higher approval and that the 1% would now be subject to a £150,000 cap. As the sum eventually becoming payable under the 1% without the cap was £516,082, this made quite a difference. The £150,000 was paid and the claimant brought ET proceedings for the balance as an unlawful deduction.

The ET rejected the claim on the basis that the offer of the bonus had not crystallised until the final approval, including the cap. However, the EAT allowed the claimant's appeal. There is discussion in the judgment of the basic requirement under s 23 that a sum sought statutorily must be quantifiable under *Coors Brewery v Adcock* [2007] EWCA Civ 19, [2007] IRLR 440 (**BI [355]**), but subject to the caveat that the section can apply to a discretionary bonus once sufficiently quantified under *Tradition Securities and Futures*

SA v Mouradian [2013] EWCA Civ 60 (**BI [348]**), and also *Farrell Matthews and Weir v Hanson* [2005] IRLR 160, [2005] ICR 509, EAT (**BI [347]**) on the declaration of bonuses. However, ultimately this case came down to a question of fact as to when this bonus had crystallised. It was held that this was when it was announced to the claimant at the 1% level. This was still to be quantified, but that had been done and it was then too late for the employer to ‘move the goalposts’ and add a bonus cap. As to disposal, the judge took the robust view that on the facts found by the ET there were only two answers as to the claimant’s entitlement, the right one and the wrong one. There was thus no need for a remission and the EAT ordered payment of the full 1% minus the £150,000 already paid.

Itemised pay statements; what form should the statement take?; electronic form

BI [386.02]

Leedham v Royal Mail Group Ltd [2026] EAT 87 (14 May 2026, unreported)

The text makes the point that the requirement in the ERA 1996 s 8 Q [632] that the itemised pay statement be ‘written’ might raise an issue as to the legality of an electronic statement. However, the instant case before Judge Beard in the EAT raised another concern, namely whether such a statement is ‘given’ to the employee. The result is a decision that largely gives the green light to electronic means, subject to a couple of caveats where its form might contradict the intent of the section.

The claimant objected to a move by the employer from hard copy to electronic form for pay statements. In fact, he could access the new style ones on a phone or otherwise without any cost, but he objected on principle, arguing that ‘given’ meant actually physically provided. The ET held against him, pointing out that electronic statements are now common and do comply with s 8. In doing so, they cited the persuasive authority of the NICA in *Anakaa v Firstsource Solutions Ltd* [2014] NICA 57, [2014] IRLR 941 to like effect.

The claimant appealed, but this was turned down. The judgment does so on two grounds – textual, as to the meaning of ‘given’, and as a matter of the policy of the section, which is to ensure transparency in pay, allowing the worker to understand in an intelligible and reasonably accessible form how pay has been calculated and whether any deductions have been made. Electronic means satisfy this test in principle. There is no further requirement of a physically transferred document. The focus is on substance, not form. At [31] the judgment states:

‘Nor do I accept the claimant’s broader contention that the requirement to utilise a device such as a smart phone of itself constitutes an impermissible condition upon the right. In modern conditions the use of ubiquitous technology of that kind may properly be regarded as no more than an ordinary incident of everyday communication. In that

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respect, requiring an employee to make use of such a device is not materially different from requiring a worker, for instance in the past, to have a letterbox as a means of receiving post. It is a normal and ordinary everyday matter. It does not, without more, amount to the imposition of a legally objectionable condition upon the exercise of the statutory right.’

Note, however, the ‘without more’. The judgment accepts that there may be cases where the use of such means (or, more likely, conditions placed upon them) adversely affects the worker in some practical way to such an extent that it negates the intent of the section. Also, any unacceptable element of compulsion on the worker might also mean a contravention of the section. However, none of these elements had been shown here. Indeed, the facts showed that when introducing the new method the employer had taken into account and provided alternative means to any workers who had established genuine difficulties with it.

DIVISION NI LABOUR RELATIONS

Unfair dismissal on union grounds; not union activities because of the nature of the activities or the way they were done

NI [513]

Young v Royal Mail Group Ltd [2026] EAT 93 (29 June 2026, unreported)

The question of ‘separability’ (ie where the employer argues that its objection was not what the employee had done, but the way that they did it) can arise in several areas of employment law. One major area is automatically unfair dismissal generally, where the dismissed employee may seem to have a clear case given the strength of the statutory protection, but the employer can still argue unacceptable *means* by them. Arguably the most sensitive example here is under TULR(C)A 1992 s 152 Q [386] on dismissal for trade union reasons, where too ready a recourse to separability could be seen as unduly diluting the legislative protection (especially in the rough world of industrial action). This decision of Judge Beard in the EAT is a good example of the line that has to be drawn here, and adds a couple of useful riders to the existing law.

The claimant was employed by the respondent. During industrial action, he made two posts on the union WhatsApp group to which the employer took exception. The first invited it to go forth and multiply and the second referred to named individuals, telling them to decide whose side they were on, or risk having their cars bombed. With regard to the second, he claimed it was a joke but at least one individual took it as a threat. He was dismissed for gross misconduct and claimed automatically unfair dismissal under s 152. However, the ET rejected his claim, accepting the employer’s argument that his posts fell outside the industrial action itself and were subject to the separability concept.

The EAT rejected his appeal. Citing the leading case as set out at **NI [513]–NI [516.01]**, the judgment holds that applying the section is an evaluative matter of fact for the ET, which here had not misinterpreted the case law and had come to a permissible decision on the facts. In doing so, it holds, contrary to arguments before it, that: (1) there is no legal threshold that separability only applies to conduct which is ‘wholly unreasonable, extraneous or malicious’; and (2) conversely, there is no rule that certain forms or levels of language used cannot in law come under the section. In the classic lawyer’s explanation, it all depends on the facts and circumstances.

DIVISION PI PRACTICE AND PROCEDURE

Extension of time for presenting a response

PI [344]

Costco Wholesale UK Ltd v Nash [2026] EAT 85 (11 June 2026, unreported)

The EAT under Judge Tayler here upheld a decision of an ET not to grant an extension of time for the employer to present a response out of time. To that extent it is a decision on its facts, especially given that the ET had found as a fact that the employer had actually received the relevant paperwork and had deliberately ignored it during the primary time period.

The leading authority on time extension under the ET Rules SI 2024/1155 r 21 **R [3618]** is *Kwik Save Stores Ltd v Swain* [1997] ICR 49, EAT which is considered at **PI [346]**. The judgment in the instant case discusses this and the factors outlined in it for an ET to consider, but with the oft-made caveat that even in the case of such an important authority, it is not a statute and an ET has a wide discretion to apply it to the particular facts. However, at [18] the judgment makes this overall comment (echoing a point made in the text):

‘One point that Mummery J did not expressly state is that a more generous approach is generally taken when considering an extension of time in which to submit a response to a claim than to an extension of time for the submission of the claim itself. The time limit for the submission of a claim is jurisdictional whereas the time limit for a response is essentially procedural. A respondent does not initiate litigation and should not ordinarily be shut out from advancing an arguable defence as a result of honestly admitted and explained procedural default, unless that default has caused significant prejudice to the other party or demonstrates wilful disobedience in compliance with the ET Rules or directions of the Employment Tribunal. While not stated expressly, this point is implicit in the judgment.’

The reference to Mummery J is of some incidental interest because earlier in the judgment there is a comment that, as in so many of Mummery J’s cases, his judgment in *Kwik Save* is a paradigm of clarity and concision, running to only 9 pages, but setting out the relevant law. Readers might perhaps sense a certain irony in this, in an 18-page judgment only concerned with that

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authority's application, and more generally in these days of not-uncommon 50-page judgments in the EAT. Nostalgia indeed.

One final point. Rule 21 also featured in *Hypervolt Ltd v Jackson* [2026] EAT 45, [2026] IRLR 465, EAT. This was largely a decision on its particular facts, concerning papers allegedly going missing over a move of premises by the employer respondent. However, the main ground for allowing the respondent's appeal against the REJ's refusal of an extension of time was that when applying the basic rules in *Kwik Save* it is necessary to make clear the reasoning; it is not enough just to pose the question and announce an answer. Here, the decision was not *Meek* compliant.

REFERENCE UPDATE

Bulletin	Case	Reference
570	<i>L and Dunn v Ministry of Defence</i>	[2026] ICR 534, EAT
571	<i>Mulumba v Partners Group (UK) Ltd</i>	[2026] ICR 516, CA
572	<i>Mulrine v DHL Services Ltd</i>	[2026] ICR 571, EAT
574	<i>Kankanalappalli v Loesche Energy Systems Ltd</i>	[2026] IRLR 459, EAT
574	<i>Boeteng v Moss Bros Group Ltd</i>	[2026] IRLR 470, EAT
574	<i>McMahon v AXA ICAS Ltd</i>	[2026] IRLR 478, EAT

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