

Harvey on Industrial Relations and Employment Law

This Bulletin covers material available to **1 October**.

Bulletin Editor

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LEGISLATION

Fifth commencement order

The Employment Rights Act 2025 (Commencement No 5 and Transitional Provisions) (Amendment) Regulations 2026 SI 2026/954 brought into force Sch 12 of the Act on 1 October. This makes most of the necessary and extensive amendments of the principal employment law rights to extend the time limits for claiming them before an employment tribunal from three months to six. Transitional provisions are contained in reg 4. These amendments will be made in Divs Q and R in Issue 339. The schedule is not exhaustive and, as noted in **Bulletin 577**, in a topsy turvy way we have already had regulations making amendments in addition to those here, also coming into force on 1 October.

DIVISION DI UNFAIR DISMISSAL

The reason for the dismissal; applying ERA 1996 s 98(4); detriment and the time limit

DI [799], DI [952]; DII [455]

Kristensen v Portman Healthcare Ltd [2026] EAT 127 (3 September 2026, unreported)

This case before Lord Fairley P in the EAT concerned claims for whistleblowing dismissal/detriment and ordinary unfair dismissal. On the latter, it addresses three significant points of interpretation:

- (1) Under the ERA 1996 s 98 Q [722] the first two stages are to determine first the reason (or principal reason) for the dismissal (s 98(1)(a)) and then go on to consider if that reason comes within one of the enumerated categories of potentially fair dismissals in s 98(4)

DIVISION DI UNFAIR DISMISSAL

(s 98(1)(b)). The ET, in rejecting whistleblowing as the real reason, had simply said that the reason was 'conduct'. This was an error of law because it elided the two stages, meaning there was an omission to specify the actual reason before categorising it.

- (2) When s 98(4) poses the test of whether the employer acted reasonably 'in treating it as a sufficient reason for dismissing the employee', the 'it' here is the s 98(1)(a) reason and that alone. Wide as it is, it does not allow the ET to look beyond that at other matters.
- (3) The claimant here had argued for such a wider, freestanding interpretation because he wished to argue that, although he may have been guilty of misconduct (which the ET found the reason), the employer had seized on that because it had been wanting to be rid of him. That, however, was to confuse reason with motive, whereas the latter is irrelevant. This is clearly expressed at [65] where the judgment states:

'Where the reason for dismissal is genuinely held, and is not merely a pretext, the fact that the employer may also have been glad to be rid of the employee is irrelevant to the s 98(4) question'.

One other question that arose concerned the claim for whistleblowing detriment, based on his disciplinary suspension. The question was whether it was in time. If the suspension was a one-off act, it was out of time, but was it continuing over a period under the ERA 1996 s 48(4) **Q [672]**? The ET had gone for a one-off (albeit with continuing effects) but the EAT allowed the appeal on this point, applying *Tait v Redcar & Cleveland BC* UKEAT/0096/08 (2 April 2008, unreported) where such a suspension was held to be an act extending over a period, see **DII [455]**.

DIVISION F TRANSFER OF UNDERTAKINGS

What transfers; tortious liabilities

F [124.02]

ABC v Huntercombe (No 12) Ltd [2026] EWCA Civ 1161

One outstanding issue relating to TUPE, even after all these years, has been whether SI 2006/246 reg 4 **R [2293]** can transfer tortious liabilities of the transferor to the transferee. Ever since *Bernadone v Pall Mall Services Group* [2000] IRLR 487, CA it has been clear that liability *to* an employee can transfer, but the outstanding issue was whether liability *for* an employee can transfer, ie third party liability. One county court case held that it could, but the point only then arose directly in this case. The facts are set out at **F [124.02]** and concerned whether PI liability to a patient claiming to have been injured by hospital A's staff went over to hospital B on a TUPE transfer. The judge at first instance held that it did not and the Court of Appeal have now upheld that decision. This was both as to the interpretation of the regulations themselves in general (including the employee-liability information provisions which would not cover this form of liability if it existed) and in the light of the intent of the backing directive. Although reg 4 uses the apparently wide phrase liabilities 'in connection with' the contract of employment, that is not

unconstrained and third party liability is in effect where it ends. Essentially, TUPE is there to protect the transferring employee, which is why tortious liability to them is covered (as is liability to a fellow employee injured by that employee) but liability to a third party is not covered.

DIVISION K EQUAL PAY

Material factor defence; market forces and cost

K [600]

Next Retail Ltd v Thandi [2026] EAT 130 (7 September 2026, unreported)

The continuing litigation on equal pay in various supermarkets, relating to pay differences between retail workers (primarily female) and warehouse workers (primarily male) reached the Court of Appeal in *Tesco Stores Ltd v Element* [2026] EWCA Civ 580, [2026] IRLR 564 (**Bulletin 575**) and so far it has been going the claimants' way. Articles in the business press have speculated as to how much this could cost overall, if the litigation against other stores goes the same way. It was therefore something of a surprise when this decision of Bourne J in the EAT was reported, because it goes the other way and overturns an ET decision that equal pay had been established.

The decision hinges largely on whether, in the light of prima facie equality of value, Next had established the defence of material factor, under the EqA 2010 s 69 **Q [1511]**. The ET had held that it had failed to do so, effectively relying on a simple business need/cost argument. However, this was disapproved on appeal. Next had relied on need to recruit and retain warehouse staff at rates necessary in a specific labour market, which did not apply to retail workers. Market forces are not a silver bullet, but can establish the defence on the facts, and the ET had erred in not giving a fairer interpretation of this argument. Here, it was capable of being a legitimate aim. Moreover, the ET had further erred on proportionality in concentrating on why the store had not dealt with it by raising retail wages and whether it could have afforded to do so. This was not the test, which instead required consideration of the reasons for the higher warehouse rates. At [181] the judgment states:

'For those reasons it seems to me that "trump card" was not a fair characterisation of Next's case. This was not a case where warehouse workers were paid more simply because warehouse workers tend to be paid more. That sort of application of market factors no doubt could cause discriminatory practices to be embedded. But paying more to warehouse workers for recruitment and retention reasons – as per the ET's finding at paragraph 247 – was different. It might coincidentally help to preserve higher levels of pay in a sector which at one time had been male-dominated, but the point is that that was not all that it was doing. And the fact (if it was a fact) that Next could have afforded to equalise the pay of the retail workers did not, in my judgment, mean that the business need for the higher pay was not sufficiently great to outweigh its discriminatory effect.'

DIVISION K EQUAL PAY

On one level, this case demonstrates that each equal value case depends on its own facts, but on a wider canvas it may look odd alongside *Tesco Stores*, a point seized on in the business press. Two points on that. Is this case likely to go to the Court of Appeal and, if so and if it is upheld, will there then be a real need for these cases to go to the Supreme Court? Secondly, in the meantime will we see urgent attempts to mine the judgments to decide on which side of an apparent line other stores' claims will lie?

DIVISION L EQUALITY

Disability discrimination; reasonable adjustments; proper respondents

L [384]

Merriman v 1st Staff Ltd [2026] EAT 128 (4 August 2026, unreported)

This short decision of Judge Barklem in the EAT put right a mistake of law by the ET as to, not what are reasonable adjustments (the usual bone of contention), but a preliminary question as to *who* can be sued for an alleged failure to make them.

The claimant claimed that reasonable adjustments had not been made to her work as a tutor when she was disabled in such a way as to make personal attendance difficult. The point at issue was that she brought her action against the respondent employer *and* four named individuals in the organisation. The ET allowed her claim against the employer to proceed but struck out her claims against the individuals. It did so on the *a priori* reasoning that the duty to make adjustments lies on the employer and therefore not on individuals.

The EAT disagreed and allowed these claims to proceed. While the duty *prima facie* is on the employer, the ET had overlooked the vicarious liability/liability of employees and agents provisions of the EqA 2010 ss 109 and 110 **Q [1527], Q [1528]** which reflect the fact that normally an organisation acts through its employees or agents, who can on appropriate facts be held liable too. Liability is extended and that extension applies to the s 20 duty to make adjustments, as well as straightforward discrimination claims. In support for this the judgment cites para 10.55 of the EHRC Employment Code **S [561]** which, discussing the extension of liability on to individuals, gives a case of failure to make adjustments in its example.

DIVISION PI PRACTICE AND PROCEDURE

ET time limits; conduct extending over a period; several actors

PI [113]; L [822]

KJ v British Council [2026] EAT 46, [2026] ICR 777, EAT

Whether a claimant, potentially out of time in a discrimination claim, can come under the 'conduct extending over a period' exception in the EqA

s 123(3) Q [1535] is normally a question of fact for the ET, the parameters of its discretion being clearly set out in the case law considered in the text. However, this case in the EAT is of interest because of the form it took. Often the question revolves around whether one particular event (eg a disciplinary suspension) is a continuing act or merely a one-off (albeit with continuing effects), see *Kristensen* above, in a different context. This case however concerned actions taken against the claimant over a period, by several *different* fellow employees.

The claimant complained that she had been sexually harassed by one fellow employee from October 2020 to April 2021. In July 2021 she raised a grievance. This took a long time to be investigated and decided by other employees and she only received the result in November 2021. This laid the blame on her, in the light of which she resigned and in February 2022 she brought ET proceedings, having gone through ACAS early conciliation. This was in time from the grievance result, but eight months after the last act of harassment. However, the ET allowed the claim under s 123(3) and the EAT held that this was a decision open to it on the facts. Clearly, where several people act against the claimant over time, there will often be an argument that these were separate events, but here there was sufficient evidence that these were all linked and so time could run from the last of them; there was sufficient *proximity*.

Case management; striking out for non-compliance; effect of disability

PI [420.01]

Grantham v Bournemouth, Christchurch and Poole Council [2026]
EAT 135 (10 September 2026, unreported)

The text at PI [420.01] cites the leading case of *Bryce v Trident Group Security Ltd* [2022] EAT 137 (8 February 2022, unreported) on the interaction between the application of the normal rules on strike-outs (especially the interests of justice element) on the one hand and any relevant disabilities that the party may have (possibly requiring reasonable adjustments). That case is followed in the instant decision of Judge Joffe in the EAT, but with an important sting in the tail.

The claimant, who has autism, had on a considerable number of occasions failed to comply with case management orders, including an unless order. In the instant case this led to all of his claims being struck out. He appealed, arguing that the ET had not taken properly into account a letter from his psychologist explaining his condition and the effects it could have on various functions such as planning and dealing with information, which might require more time than normal. He said that this should have led to more consideration of other arrangements in order to allow a fair hearing. The decision of the EAT was in two parts. It firstly held that under *Bryce* the ET had not done enough to take this medical evidence into account. However, that did not decide the appeal in the claimant's favour because secondly the EAT held that this failure had actually made no difference because the

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evidence was too *general*, only describing his condition, without explaining *how* it could have affected his history of non-compliance. The only possible adjustment that seemed to arise would have been more time, but this had already been granted. The key to this is that if such evidence is to be used it should go on from description to an explanation for any factual failures and possible adjustments.

EAT; skeleton arguments; use of AI

PI [1559]

Hancox v Sutherland [2026] EAT 139 (17 September 2026, unreported)

The perils of the use of AI in the employment context have been much discussed lately, partly in relation to scattergun grievance submissions which may or may not contain a gold nugget somewhere within them, if only HR look hard enough. On top of this has been examples of the technology making up spurious ‘authorities’. The matter has now surfaced in the EAT.

The claimant’s several complaints were struck out by the ET. When he appealed, he submitted an AI-generated skeleton argument only two days before the hearing. It ran to 300 pages and 132,000 words and was accompanied by an invite to the respondents to identify any factual inaccuracies, wrong passages or wrong dates by the next day.

In fact, one ground of appeal was allowed to proceed, but Pilgerstorfer DHCJ gave the following shot across the bows on the use of AI:

‘All litigants and their representatives, including litigants without representation, should be mindful of the risks posed by the use of generative AI when creating documents for submission to the EAT. They must take personal responsibility to ensure, at a minimum, that documents (i) comply with applicable procedural rules, (ii) have been checked as thoroughly as the litigant or representative is reasonably able for accuracy, ensuring that the factual, evidential and legal position is not misstated and the EAT is not misled, and (iii) contain only relevant points, with the focus being on the central or best arguments, presented in an easily comprehensible manner and avoiding undue repetition. It is not acceptable to submit documents created by generative AI without them being checked, or to attempt to place the onus for checking them on the opposing party.’

The appeal here was not struck out on these grounds but now that parties are on notice the result in a future similar case may be different, as the judgment specifically cites para 11.6.6 of the EAT Practice Direction **PI [1911]** on skeleton arguments, non-observance of which may lead to an appeal being rejected or other sanctions imposed.

REFERENCE UPDATE

Bulletin	Case	Reference
573	<i>Omooba v Michael Garrett Associates Ltd</i>	[2026] ICR 573, CA
575	<i>Hawkins v Marks and Spencer plc</i>	[2026] ICR 774, EAT
575	<i>Komey v National Highways Ltd</i>	[2026] ICR 819, EAT
576	<i>XX v YY</i>	[2026] IRLR 649, EAT
576	<i>Young v Royal Mail Group</i>	[2026] IRLR 654, EAT
577	<i>Sheikholeslami v University of Edinburgh</i>	[2026] IRLR 660, EAT
577	<i>Wolfe v Taka Mayfair Ltd</i>	[2026] IRLR 669, EAT
577	<i>Jeffrey v Givandan UK Ltd</i>	[2026] IRLR 674, EAT
577	<i>Geeks Ltd v Watts</i>	[2026] IRLR 680, CA
577	<i>Crabb v Tui Airways Ltd</i>	[2026] IRLR 689, CA
578	<i>Argence-Lafon v Art Syndicate Management Ltd</i>	[2026] IRLR 698, CA
578	<i>Augustine v Data Cars Ltd</i>	[2026] IRLR 706, SC

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