Harvey on Industrial Relations and Employment Law

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LEGISLATION

Sixth Commencement Order

The Employment Rights Act 2025 (Commencement No 6 and Transitional and Saving Provisions) Regulations 2026 SI 2026/1065 bring into force on 30 October the next tranche of provisions in the 2025 Act. These are the changes in s 20 (employers to take all reasonable steps to prevent sexual harassment), s 21 (harassment by third parties), s 56 and Sch 5 (seafarers' wages and working conditions), s 59 (right of trade unions to access workplaces), s 60 and Sch 6 (trade union recognition), s 64 (facilities provided to trade union officials and learning representatives) and s 65 (facilities for equality representatives). The changes made to the TULR(C)A 1992 Schedule on recognition are particularly extensive, as are the transitional provisions in the regulations relating to that Schedule and also the changes in ss 64 and 65. The recast Schedule is supplemented by the Code of Practice (Access and Unfair Practices During the Recognition and Derecognition Process) enacted by SI 2026/1129, as from 30 October. These regulations, the amendments within them and the COP will be put into Divs Q, R and S in Issue 340.

Amendments to the EAT rules

The Employment Appeal Tribunal (Amendment) (No 2) Rules 2026 SI 2026/1077 make technical amendments to the EAT Rules 1993 in relation appeals to the EAT from the CAC under the new provisions in the ERA 2025 giving trade unions rights to access workplaces. The amendments come into force on 3 November and will be made in Div R in Issue 340.

Regulations and Code of Practice on TU access to workplaces

The ERA 2025 s 59 comes into force on 30 October (above). Although it is long and complex, it also relies on supplementary regulations for much of the

detail. These have now been passed, as the Trade Unions (Right of Access to Workplaces) Regulations 2026 SI 2026/1101. In turn, these are supplemented by the new Code of Practice on the Right of Trade Unions to Access Workplaces (see SI 2026/1103). The Code is itself fairly comprehensive in explaining the new system and the role of the CAC in running it. Moreover, its final section contains standardised templates for access requests, access responses, agreement notification and agreement variation and revocation. The Regulations and the COP come into effect on 30 October 2026, and will be incorporated into Divs R and S in Issue 340.

Replacement Code of Practice on Time Off

In order to reflect changes made in the ERA 2025, the ACAS Code of Practice on Time Off for Trade Union Duties and Activities last issued in 2010 is superseded by a new version dated 30 October 2026 (see SI 2026/1104). This change will be made in Div S in Issue 340.

Regulations on industrial action detriment

The ERA 2025 introduced new provisions into the TULR(C)A 1992 to fill in a gap in the legal protection from detriment, relating to taking industrial action. Section 236A(1) **Q [479.01]** states that a worker has a right not to be subjected to 'detriment of a prescribed description'. That has now been done by the Protection Against Detriment (Industrial Action) Regulations 2026 SI 2026/1099, as from 30 October 2026. These simply prescribe 'any detriment'. They also affirm that nothing in them affects the common law rules enabling the deduction of pay on account of a worker having taken part in protected industrial action and add the new s 236A to Sch A2 of the 1992 Act (adjustment of awards for failure to comply with a COP). These regulations will be incorporated into Div R in Issue 340.

DIVISION DI UNFAIR DISMISSAL

Misconduct; reasonableness; who should conduct the disciplinary meeting?

DI [1042], DI [1506.01]

***Shing v University of the Arts London [2026] EAT 154* (*12 October 2026, unreported*)**

The text raises the question as to the role that HR should and should not play in a dismissal case. It considers the two leading cases on this, *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [2014] IRLR 227, [2014] ICR 194 and *Ramphal v Department of Transport* [2025] IRLR 985, EAT. The instant case before Bowers DHCJ adds further analysis to this, holding that the claimant's view of the law was too simplistic.

It arose because as part of his challenges to his dismissal, the claimant argued that the organisation's HR person had acted improperly, this in itself making the dismissal unfair. When the ET held against him on the facts, he argued on appeal that it had failed to apply *Ramphal* properly, in that it outlaws any

involvement of HR in decision making in a dismissal case. The point at issue was that there are arguably certain dicta in that case that look rather damning of any 'influence by persons outside the procedure', and in addition *Chhabra* took a strong line on the point. However, in rejecting the appeal, the EAT here held that the position is more nuanced than that. *Chhabra* had particularly strong facts and concerned a very detailed contractual procedure, and what *Ramphal* was really concerned about was *improper* influence on the decision making. There, the EAT had criticised HR for (a) going beyond discussing issues of procedure and laws and (b) discussing 'emerging findings' during the procedure. This is set out at [24] which states:

> 'I think the ratio of the *Ramphal* case is merely that if "undue pressure" is placed on decision making by HR (or indeed anyone outside the proper processes) that could in the appropriate case be weighed as a factor in determining fairness as is stated, in paragraph 48 of the EAT Judgment. The weight of such a factor depends on the facts and circumstances of each case and in para 55 of *Ramphal* the judge was not intending to set down a comprehensive guide to what was and was not permissible or undue. He merely said that the HR department should "avoid straying into areas of culpability".'

In fact, the case here was much weaker, in that the only objection to HR's involvement was that it had drafted a letter of dismissal once the decision taker had by himself taken the actual decision. There was no element of improper pressure or the alteration of an initial decision.

Two points may be noted:

(1) There is a good reason of overall policy for this wider view of the correct HR role. It is that it may be of importance in ensuring consistency of approach between the treatment of different employees charged with similar offences. Just leaving it all to different managers to take separate and potentially inconsistent decisions can be legally dangerous, as seen particularly in *Cain v Leeds Western Health Authority* [1990] IRLR 168, EAT (see **DI [1042]**); consistency must be maintained irrespective of the human agencies through which the employer acts. In this context, HR may have an important role in acting as the 'institutional memory' of the organisation, which may include giving this sort of advice, stopping short of partaking in the decision making itself.

(2) These principles are accepted as applying to any improper interference with the dismissal by a third party. HR is clearly the most important category here, but there could be others.

Compensation; contributory fault; tests to apply

DI [2509], DI [2728.01]

***Khanafer v Single Homeless Project [2026] EAT 138* (*20 August 2026, unreported*)**

It is a commonplace that the tests for contributory fault in relation to the basic award (ERA 1996 s 122(2) **Q [746]**) and the compensatory award (ERA

1996 s 123(6) **Q [747]**) differ. The former poses a general just and equitable test, but the latter has the causative element that the conduct must have caused or contributed to the dismissal. In this case before Judge Barklem in the EAT the actual decision was that the ET had failed to distinguish between these two tests, meaning that the case was remitted for reconsideration on remedy. More importantly, the judgment contains two points of interpretation of some significance.

The first point is that the judgment states clearly that when considering a case such as this an ET should set out and apply the guidance set out in the judgment of Langstaff P in *Steen v ASP Packaging Ltd* UKEAT/0023/13, [2014] ICR 56. This consists of four propositions which are set out at **DI [2728.01]**. The second point is one of timing in relation to the compensatory award. The main complaint against the claimant was that, having been placed on special leave and not requited to do any work for the respondent charity, he had obtained full-time work with another charity during this period, a fact that the respondent did not discover until after this dismissal. As the compensatory award has the requirement that it caused or contributed to that dismissal, that could not be the case where, as here, the employer did not *know* of it at the time. Thus, the ET's reduction of that part of the award could not stand. The judgment goes on to state that the basic award provision refers to 'conduct of the complainant *before the dismissal*', but has no causative element (meaning no requirement of employer knowledge). That meant that here there could be a reduction of the basic award, but this reduction failed because of the first point, ie that the ET had not made the necessary distinction between the two awards.

DIVISION L EQUALITY

Harassment; purpose or effect; the two elements

L [422.01]

***Mcmanus v British Airways plc [2026] EAT 155* (*9 October 2026, unreported*)**

When a case is made that harassment has occurred in the *effect* that the conduct has had, the EqA 2010 s 26(4) imposes two requirements: (1) that that was the perception of the claimant; and (2) that in the circumstances it was reasonable for the conduct to have had that effect. The case law set out in the text makes clear that these are respectively subjective and objective, the latter in particular being there to exclude cases of undue sensitivity. However, the instant case before Judge Auerbach in the EAT explored one potentially difficult aspect of this – in a disability harassment case where the disability is a mental health issue, is that relevant to only the first requirement, or may it be one of the 'circumstances' at play in the second?

The matter arose because the claimant, an employee on long-term sickness absence suffering from depression and anxiety, had a difficult telephone consultation with the employer's occupational health practitioner. The claimant found her abrasive, some of her remarks hard to take and said that she had not allowed him to explain his condition as he wanted to; her evidence

was that she was asking structured questions in a professional manner. Essentially, the ET came down on the practitioner's side and dismissed the harassment claim on the basis that it had not been reasonable for the claimant to have considered the conduct as having the proscribed effect.

On appeal, the claimant argued the ET had failed to take into account his mental health condition on this second element. On the law, the respondent argued a 'purist' view of s 26(4), ie one subjective, and one objective, and ne'er the twain shall meet, so that the mental state could only affect the first However, the EAT approved on this point the recent case of *Harkins v Marks & Spencer plc* [2026] EAT 131 (1 September 2026, unreported) where at [36] Recorder Sean Jones said:

> '… in assessing what degree of robustness may be reasonably expected of an employee with a mental impairment, it will be important to bear that impairment in mind in making the assessment. An employee who is known by an employer to have, say, an anxiety disorder or PTSD, may require to be dealt with in a manner which is characterised by a greater degree of sensitivity and care than an employee might typically require if a finding of harassment is to be avoided. What might be reasonably expected of them in terms of robustness is different. There must, however, be a limit. Some mental impairments may have the effect of making it significantly harder for an employee to view good faith attempts to engage with their performance as being anything other than unjustified persecution. It cannot have been the intention of the legislature to make it impossible for an employer to discuss performance concerns without committing an act of harassment. It follows that there is a balance to be struck in determining what is reasonable. An employee's vulnerability is a factor to be taken into account but equally the tribunal cannot find itself in a position where it is imposing unrealistic expectations upon employers.'

This was not only followed as a matter of practice, but said to be right. It is also in line with para 7.18 of the EHRC Employment Code of Practice **S [503]**. However, before employers' lawyers throw their hands up in despair, the judgment goes on to point out strongly that mental health issues do not in themselves give rise to harassment and on the reasonableness criterion must be weighed alongside the other circumstances such as the purpose of the employer's conduct and, as here, the sensitive nature of the practitioner's enquiries. An employer must be able to make essential enquiries (particularly as to a medical condition), even if an employee subjectively finds them difficult/objectionable. Applying that here, the EAT held that the ET had properly applied the approach in *Harkins* and had come to permissible conclusions on the facts, with which the EAT would not interfere.

DIVISION PI PRACTICE AND PROCEDURE

Importance of pleading the claim; role of the tribunal

PI [293.05], PI [829]

***Nagra v Unipart Group Ltd [2026] EAT 157* (*13 October 2026, unreported*)**

As was commented in **Bulletin 577** when discussing the case of *Cherrington v University of Derby* [2026] EAT 107 (27 July 2026, unreported), the current of opinion is running strongly against any significant inquisitorial approach by an ET, with the emphasis being on adjudication purely on the case as presented. This of course often raises the parallel issue of the extent to which an ET should give any particular assistance to a litigant in person (though subject to the rider that such parties can vary widely and may not all *require* assistance in putting their case). The instant case before Pilgerstorfer DHCJ in the EAT raised these issues yet again and the result was much in line with this modern approach, ie that the ET had not erred in not coming to the litigant's aid in presenting a possible but not pleaded claim.

The case is of interest here for two reasons. First, the judgment contains a thorough review of the case law here. Second, there was a twist in the facts that arguably made the decision against the claimant more likely. The case concerned an agency worker involved in the not-uncommon practice of a tripartite arrangement. The question arose as to who his employer was. On ordinary principles, the claimant (a LIP) was not likely to succeed against the party he named. However (the twist), at a case management hearing the EJ had explained the possible relevance of the EqA 2010 s 41 covering contract workers, but the claimant did not take up this suggestion and proceeded on his initial basis and lost. He then appealed, arguing that the ET should have considered s 41 anyway. The EAT dismissed this argument. It said that, while the s 41 point may have (in the well-known phrase here) 'shouted out' from the parties' cases, on these particular facts the ET had discharged any onus on it at the case management stage and was not required to go back over the point. The judgment begins with this concise statement of the problem here:

> 'How far should an Employment Tribunal go to assist a litigant in person who may be advancing the wrong legal case? The Tribunal must provide such assistance as fairness requires, which may include raising for clarification a claim or issue which "shouts out" from the material before it. It must, however, remain impartial. It may clarify a case, identify an apparent issue and explain the potential relevance of a statutory provision. It cannot, however, take responsibility for choosing the case which a party should advance. The boundary between those functions is sometimes a fine one.'

Unless orders, requirement of proportionality

PI [390]

***Chowdhury v Secretary of State for Health and Social Care [2026] EAT 151* (*2 October 2026, unreported*)**

This decision of Pilgerstorfer DHCJ in the EAT is an interesting read on the making and enforcing of unless orders. It places heavy emphasis on the potentially drastic effect of such an order if not complied with, likening it to a contingent strike out. In that light, it considers the importance of a full consideration of the proportionality of an order in all the circumstances, before making it. It also contains a useful summary of the factors an ET should consider.

The judgment considers the principal case law here and emphasises the three stages: (1) whether to make an order, (2) whether there has been material failure to comply, and (3) in a case of such failure, whether there can be relief from sanctions. The significance of this is that it is *only* at stage 1 that the question of the proportionality of the consequence of non-compliance can be considered, hence the importance of it as a major matter at that stage. It is not enough for the ET only to consider the perceived need for an order and any previous history (as in this case) of failure to comply with ordinary orders.

Giving guidance of this, at [31] the judgment states:

> 'The proportionality assessment is necessarily fact-sensitive and it is neither necessary nor appropriate to prescribe an exhaustive set of factors or checklist for consideration in every case. Some or all of the following considerations may, however, be relevant depending on the circumstances:
>
> i. The scope of the stipulated dismissal. Would material non-compliance result in dismissal of the whole claim, response or reply, or only the part affected by the requirement?
>
> ii. The nature of the requirement being imposed under the unless order and the time allowed for compliance. What is the relevant litigant being required to do? When, and how burdensome is the obligation in terms of practical compliance? Are third parties (e.g. experts) likely to be involved? Is there any vulnerability or disability which might affect the party's ability to comply?
>
> iii. The importance of compliance with the requirement to the fair and efficient determination of the proceedings, including whether, and to what extent, non-compliance would impede a fair hearing.
>
> iv. The history (if any) of non-compliance. Has the litigant failed to comply with relevant orders previously? If so, why? Was the non-compliance deliberate or persistent, what explanation was given, and what attempts were made to comply?

v. Whether the legitimate purpose of the proposed order would adequately be achieved by a less drastic measure. Depending on the circumstances, that might comprise a further ordinary case management order, an unless order confined to the affected part of the proceedings, or a conditional order providing for a consequence other than dismissal.'

REFERENCE UPDATE

Bulletin	Case	Reference
573	*Omooba v Michael Garrett Associates Ltd*	[2026] ICR 841, CA
575	*DHL Services Ltd v Ignatowicz*	[2026] ICR 931, EAT
576	*Costco Wholesale UK Ltd v Nash*	[2026] ICR 905, EAT
576	*Leedham v Royal Mail Group*	[2026] ICR 921, EAT
577	*Wolfe v Taka Mayfair Ltd*	[2026] ICR 952, EAT
577	*Jeffery v Givandan UK Ltd*	[2026] ICR 962, EAT
577	*Geeks Ltd v Watts*	[2026] ICR 975, CA
577	*AB v GH*	[2026] IRLR 728, EAT
577	*Mokhammed v General Medical Council*	[2026] IRLR 759, EAT
577	*LNER v Jiwanji*	[2026] IRLR 764, EAT
577	*Cherrington v University of Derby*	[2026] IRLR 773, EAT
578	*Edward v North London NHS Foundation Trust*	[2026] IRLR 719, EAT
578	*University of Bristol v Miller*	[2026] IRLR 736, EAT
578	*ABC v Huntercombe (No 12) Ltd*	[2026] IRLR 796, CA

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