



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 19
XA17/25

Lord Malcolm
Lord Clark
Lord Ericht

OPINION OF THE COURT

delivered by LORD MALCOLM

in an appeal under section 37 of the Employment Tribunals Act 1996

by

CAROL MCMAHON

Appellant

against

AXA ICAS Ltd (now named AXA Health Services Ltd),

Respondent

Appellant: Party

Respondent: Hay KC: Burness Paull LLP

17 April 2026

Introduction

[1] This appeal raises a novel issue as to whether payments due to an employee under a permanent health insurance scheme set out in her contract of employment continue to be due and payable as “wages” in terms of sections 13 and 27 of the Employment Rights Act 1996 after she was dismissed because illness prevented her from working.

[2] The background circumstances are set out in full in *McMahon v AXA ICAS Ltd* [2025] EAT 8, 2026 SLT (Tr) 51, and can be summarised as follows. In January 2000 Ms Carol

McMahon began employment with AXA ICAS Ltd (then called ICAS Ltd.) In September 2013 she was dismissed because a long- term illness was preventing her from working. Before this Ms McMahon had made a claim for unpaid wages in terms of section 13 of the Employment Rights Act 1996 (ERA) for the period May 2011 to June 2013. That claim was sisted (put on hold) for several years while other claims were addressed.

[3] Ms McMahon's contract of employment provided that if after 26 weeks of absence caused by illness or injury, she remained unable to work, she would be paid 75% of her normal earnings less state benefit, increasing by 5% each year thereafter until she recovered or was 65 years old. The benefits were to be secured by a policy with an insurance company effected by and paid for by her employer. All of this was referred to as "The Sun Alliance Permanent Health Insurance Scheme".

[4] Ms McMahon states that she became eligible for these benefits (the PHI benefits) in May 2011 but has not received any payments under the scheme. As already noted, in September 2013 she was dismissed because of her inability to work. It seems clear that the promised benefits were not secured by an insurance policy. Before the ET, a witness for AXA referred to an administrative error.

[5] A claim of unauthorised deduction of wages under section 13 of ERA for the period prior to Ms McMahon's dismissal came before the ET in July 2022. AXA argued that its only obligation was to arrange and pay for a suitable permanent health insurance policy; a failure in that regard not being capable of triggering a deduction from wages claim under section 13. However, it was held (case no. 4104661/2013, 28 July 2022) that so long as Ms McMahon was an employee and unable to work, AXA itself was contractually obliged to meet the scheme payments. AXA had set up a scheme "which would pay to staff who meet the conditions a proportion of their salary which is (or may be) funded (perhaps) by an

insurance policy”, see paragraph 154. Furthermore, failure to make the PHI payments amounted to an illegitimate deduction from her wages. In January 2025, AXA’s appeal against these decisions was refused by the EAT, and no further appeal has been taken in that regard.

[6] While the said unpaid wages claim was pending, Ms McMahon obtained legal representation. In March 2022, the ET was asked to allow an amendment which would introduce a continuing unauthorised deduction from wages claim for each month from May 2011 up to the present day. Plainly this would greatly increase the size of the claim. It was averred that notwithstanding the termination of her employment in September 2013, Ms McMahon remained entitled to wages as per the permanent health insurance scheme benefits set out in her contract of employment. This was based on a submission that her dismissal was in breach of an implied term in the contract of employment to the effect that, while entitled to these benefits, she would not be dismissed because of an inability to work. Reference was made to *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521. The implied term “negated” the dismissal. It was submitted that her claim was not for damages for breach of contract. It was for sums “payable in connection with” her employment and thus were “wages” in terms of section 27(1) of ERA.

[7] The employment judge stated that she could understand a claim for damages for breach of contract, specifically wrongful dismissal. However, the application was based on a proposition, “unique in her experience”, that after dismissal there may still be a section 13 claim for unauthorised deductions from wages. The judge noted that it was a matter of agreement that the employer/employee relationship was terminated in September 2013. Thereafter there was no obligation to pay wages, thus on the face of it there could be no issue as to improper deductions. The judge referred to passages in the speech of Lord

Browne-Wilkinson in *Delaney v Staples* [1992] 1 AC 687 which she considered indicated that the claim set out in the amendment had little prospect of success. Furthermore, it came very late and would considerably extend the scope of the claim both legally and factually. In these circumstances the application to extend the claim was refused, see case no. 4104661/2013, 11 April 2022.

[8] This decision was challenged in the EAT, albeit this was addressed after the time limited claim was determined, see paragraph 5 above. Counsel for Ms McMahon submitted that the PHI benefit payments were payable “in connection with” the qualifying employment all in terms of the definition of “wages” in section 27(1) and thus were wages for the purposes of a section 13 claim. They were consideration for work done up to the point when eligibility under the scheme crystallised. AXA should not be able to rely upon its breach of the implied term to defeat a legitimate claim for wages. *Delaney v Staples* was different in that it concerned a claim for wages in lieu of notice. It was argued that the amendment did not add to the legal or factual complexity of the claim.

[9] The EAT held that the employment judge’s decision and reasoning when refusing the proposed amendment were correct. The contract made it clear that eligibility to receive the scheme benefits was restricted to “employees”. The term “wages” in this part of ERA is confined to sums which fall due under a subsisting contract of employment. That was consistent with the decision of the House of Lords in *Delaney v Staples*. Assuming that the dismissal was indeed in breach of the said implied term, the appropriate remedy was damages for breach of contract, not for payments under the contract. Furthermore, the view was taken that the judge correctly self-directed on what were called the *Selkent* considerations.

[10] Subsequently the EAT granted Ms McMahon permission to appeal against that decision to this court on the basis that it would raise “novel issues about whether payments due to an employee under a permanent health insurance scheme continue to be due and payable as ‘wages’ under sections 13 and 27 of the Employment Rights Act 1996 even after termination of the contract of employment.”

Sections 13 and 27 of the Employment Rights Act 1996

[11] In terms of section 13(1) of ERA, and subject to certain specified exceptions, an employer shall not make an unauthorised deduction from the wages “of a worker employed by him”. Various types of payment are expressly included or excluded from the definition of “wages” for these purposes, all as set out in section 27. While there is no mention of monies due under a PHI scheme, such payments can be seen as falling within either the over-arching definition in the first subsection, namely being sums payable “in connection with (her) employment”, or as an “emolument referable to (her) employment” as per section 27(1)(a).

[12] In a contract of employment, the employee promises to work for the employer who in turn promises to pay wages. The mutuality of these obligations is a core element of the bargain. The detail of the reciprocal duties can be complex. For example, the employer may offer additional benefits designed to attract and retain staff such as occupational pensions and share ownership schemes. The definition of “wages” in section 27 of ERA is broad enough to cover these and also payments under a PHI scheme. If dissatisfied with an employee’s performance, an employer might withhold all or part of their wages. The statute provides some protection for the worker, with section 23 allowing for a complaint to an ET

regarding any unauthorised deduction. The issue for the court is whether Ms McMahon can rely on these protections in respect of payments said to be payable after her dismissal.

Discussion

[13] Once again Ms McMahon is representing herself in this appeal. It is not difficult to understand her grievance. In her contract AXA promised her significant benefits should she be incapacitated and unable to work. They were to be secured by an insurance policy. Having become eligible to receive them, nothing was paid to Ms McMahon. Then, presumably because the liability was falling on it rather than an insurance company, AXA decided to terminate her employment. The argument that no benefits were payable prior to that event has been unsuccessful. However, so far AXA has been successful in the contention that thereafter there was no duty to pay the promised benefits, thus there can be no section 13 claim.

[14] To date, the argument presented on behalf of Ms McMahon has focussed on an alleged breach of an implied term not to dismiss her because of the consequences of her health problems. The difficulty is that the remedy for breach of contract is a claim for damages, and no such remedy has been sought. This problem would not arise should the proper analysis be that Ms McMahon's entitlement under the scheme was unaffected by her dismissal.

[15] After the hearing, and while a judgment was under preparation, the court asked the parties for written submissions addressing three matters. First, any implications of the decision of the UK Supreme Court in *Geys v Société Générale* [2012] UKSC 63, [2013] 1 AC 523. Secondly, a passage in Gloag and Henderson, *The Law of Scotland*, 15th edition at paragraph 17.15:

“Since a repudiatory breach on the part of an employer will not automatically terminate the contract of employment, it continues to subsist and so, it is possible for an employee to attain a decree of specific implement to enforce the contract or an interdict to restrain the employer from dismissing him. At the time of writing, it is not wholly clear whether this is also the law of England.”

Thirdly, the parties were asked to comment on a discussion in Lord Sumption’s judgment in *Geys* at paragraph 141 where he differentiated between obligations in the contract of employment which depend on the continued existence of the employment relationship and collateral obligations therein which do not.

Geys v Société Générale

[16] AXA has submitted that the decision in *Geys* has no implications for this appeal. We consider that the detailed discussions in the leading judgments, including the dissent from Lord Sumption, do have relevance for its resolution. At issue was whether an employee could affirm his contract of employment notwithstanding an express and immediate dismissal. In other words, did the dismissal automatically terminate the contract? It was held that the initial dismissal was wrongful, and thus a repudiatory breach of the contract, and that it had no effect unless the employee elected to accept the repudiation. Had it been effective at the date of dismissal that would have had significant financial benefits for the employer and equivalent adverse consequences for the employee. Lord Hope of Craighead stressed that the law should seek to avoid the injustice of a wrongdoer benefitting from his own wrong, see paragraph 15. At paragraph 19 his Lordship observed: “Manifest justice favours preferring the interests of the innocent party to those of the wrongdoer”.

Lord Wilson offered similar comments at paragraph 66 of his judgment. There may be many cases where the employee has little choice but to accept a repudiation, but not so in the present case, AXA being contractually committed to Ms McMahon receiving the PHI

benefits for so long as she fulfilled the eligibility criteria. As to an acceptance of a repudiation, Lord Hope observed that it has to be real. There must be “a conscious intention to bring the contract to an end, or the doing of something that is inconsistent with its continuation”, see paragraph 17.

[17] A particular feature of the present circumstances is that enforcement of the scheme benefits would not require AXA to take Ms McMahon back into the active workforce, something the courts have been reluctant to order. Here the scheme benefits sought by Ms McMahon are only “wages” in the statutory extended sense; they are not a *quid pro quo* for services to the company. They can be analysed as a simple promise to make payments under the scheme for so long as its conditions are met. The parties would not require to maintain the mutual relationship of trust and confidence traditionally involved in an employment relationship, sometimes referred to as *delectus personae*.

[18] Lord Wilson conducted a detailed analysis of the authorities at home and abroad on the “elective” as opposed to the “automatic” theory in this area of the law. In some, in respect of when a dismissed employee can still enforce a contractual claim, a distinction is drawn between those cases where it is important that the employment relationship in the sense of personal co-operation between master and servant is at an end, and those where this is not a significant factor. In other words, would the proposed enforcement of the contract involve specific performance of such a status? Obligations not dependent on the survival of it (arguably such as the PHI benefits here) might continue to be enforceable. At paragraph 141 of his judgment Lord Sumption said: “In many contracts of employment, and perhaps in most modern ones, there is a large number of obligations which do not depend on the existence of the employment relationship.”

[19] One can understand a riposte that if the employment relationship is ended, so must the contract of employment. There are at least three possible answers to this. First, in the absence of an acceptance of the repudiation of the kind spoken to by Lord Hope, the contract simply continues. Secondly, the parties are to be taken as having agreed that enforcement of the obligation in question would not be dependent on the employee continuing to work for the employer. (A restrictive covenant is the classic example.) Thirdly, and this may come to much the same thing, it might be declared that the dismissal had no legal impact on the particular obligation concerned, perhaps on the footing that it and the right to enforce it are collateral to the employment relationship. In *Thomas Marshall (Exports) Ltd v Guinle* [1978] ICR 905, the repudiation of the contract came from the employee halfway through a fixed term. While the court could not force him to continue working for his employer, by way of injunctions he was made subject to confidentiality and non-competition clauses which were effective only during the continuance of the contract.

[20] At paragraph 92 of *Geys* Lord Wilson notes judicial observations that just because it will often be in a wrongfully dismissed employee's interests to accept the repudiation and claim damages, it does not follow that this is the only option. In the present case, on the face of it, a continuing right to the PHI payments so long as Ms McMahon meets the eligibility criteria may well be regarded as a more attractive remedy than a claim for damages. One might ask – why should the innocent party be deprived of that by AXA's wrongful act?

[21] That question contains the premise that the dismissal was wrongful. We have no difficulty with the proposition that, standing the terms of the contract, AXA could not treat Ms McMahon's inability to work as a sufficient reason for her dismissal. In any event, if the obligation to pay the PHI benefits is not dependent on the continuation of the employment relationship, questions such as whether the repudiation was accepted, may not be critical. In

that case the dismissal is of no direct relevance to what is really at issue, namely (1) was there a continuing unauthorised withholding of the sums claimed by Ms McMahon, and (2) can they be classified as within the meaning of section 13 of ERA? The latter issue has been determined in the affirmative and there has been no appeal against that decision.

However, we record our agreement with it. Thus, the key issue as we see it, is whether AXA can rely on the dismissal as terminating the obligation to pay the PHI benefits.

The ET's refusal of the attempt to extend the wages deduction claim

[22] At this stage it is helpful to return to the decision of the ET to reject the amendment seeking to extend the unpaid wages claim beyond the date of dismissal to the present day.

The proposal was to add averments to the effect that the unauthorised deductions started on 28 May 2011 and occurred on the 28th of each month thereafter. It was averred that AXA was not entitled to dismiss Ms McMahon, it being in breach of an implied term, thus the entitlement to the scheme benefits continued beyond termination of her employment. The tribunal would be asked to order payment of all the unauthorised deductions occurring prior to the date of its decision.

[23] Though the matter arose at a procedural case management hearing, the potential merits of what was proposed were a relevant consideration. For AXA it was submitted that rather than add to the existing more limited section 13 claim, in reality a claim for breach of contract was being advanced. It would be capped at £25,000 and might well be time barred. A section 13 claim presupposed an employer/worker relationship where services were being performed and remunerated. Any such remedy ended when the employment was terminated.

[24] The judge stated that she could not enforce specific performance of the contract of employment; Ms McMahon's remedy for a wrongful express dismissal was damages for breach of contract. It had been made clear by the solicitor representing Ms McMahon that no such claim was being presented. It would not be in the interests of justice to allow the amendment if it had no or little prospects of success. Relying on certain passages in *Delaney v Staples*, the view was that the sums claimed post dismissal did not fall within section 13 because they were not payments for work done by Ms McMahon and hence were not "wages". The judge considered that in truth the amendment proposed a claim for damages for breach of contract. It would be "very difficult" for Ms McMahon to get past the decision in *Delaney*. Refusing the application caused her little prejudice since the new claim was very unlikely to succeed.

[25] The EAT upheld the reasoning of the ET as to the poor prospects of any amended claim. Given that it was so influential, it is appropriate to discuss the *Delaney* decision in some detail.

Delaney v Staples

[26] In our view the decision in *Delaney v Staples* is not harmful to the proposed amended claim. Indeed, in so far as a broad approach was taken to the phrase "in connection with" employment, it is helpful to its prospects. The case can be distinguished from the present circumstances. With regard to the identical terms of the legislation preceding ERA, the question for the Judicial Committee was whether "wages" included a payment in lieu of notice to be paid by an employer when terminating employment without notice. If it did, and given that the payment was withheld, Ms Delaney could bring an unauthorised

deduction of wages claim before what was then the Industrial Tribunal. If not, at that time her only remedy lay in the County Court for breach of contract.

[27] In his speech Lord Browne-Wilkinson vouched the unsurprising proposition that the normal or ordinary meaning of “wages” is consideration for work done or to be done under a contract of employment and does not cover payments to be made after termination of the employment. If an employer summarily dismisses an employee and tenders a payment in lieu of proper notice, the dismissal “is effective to put an end to the employment relationship whether or not it unilaterally discharges the contract of employment” (692H). His Lordship continued by observing that the relationship having ended, no further services are to be rendered by the employee. “It follows that the payment in lieu is not a payment of wages *in the ordinary sense* since it is not a payment for work done under the contract of employment” (emphasis added).

[28] This was not sufficient for resolution of the case, which turned on the special definition of “wages” in the then equivalent to section 27 of ERA, namely section 7 of the Wages Act 1986. The “critical question” was whether a payment in lieu of notice was a payment payable to an employee “in connection with his employment” (694D). These words were very wide, “quite wide enough to include a payment in lieu”, even if they were to be regarded as payments of damages for breach of contract (694H – 695A).

[29] The problem for Ms Delaney was that in several respects the Act could not be made to work if payments in lieu were included in the term “wages”. The various reasons for this are explained at 696F – 697E (none of which are relevant or applicable to payments under a PHI scheme such as that in Ms McMahon’s contract). Thus, his Lordship was “thrown back” to the basic concept of wages as payments for services rendered (697E-F). The payment due to Ms Delaney related to the termination of her contract, not to services under

it, thus could not be regarded as “wages” in terms of the Act. None of the critical analysis in *Delaney* bears on the issue in Ms McMahon’s case. In it, no difficulty is caused by reliance on the extended statutory meaning of “wages” in section 27. Before leaving *Geys*, it is worth noting again that Lord Browne-Wilkinson expressly recognised that the “employment relationship” might be over yet the contract of employment remains undischarged (692H).

Discussion continued

[30] Sprinkled throughout the narrative so far is the notion that the employment relationship and the contract of employment are two different things. This was the focus of an article entitled “Employment contracts, conditions, and the relationship of employment”, LQR 2024, 140, author Professor Jordan English. It was acknowledged that the proposition is controversial. However, we have found the analysis to the effect that the two concepts are separate and distinct to be persuasive and of assistance in the circumstances of this case. The author argues that termination of the employment relationship ends the core obligation of the payment of wages (in the ordinary sense) in return for work done by the employee. Generally, the court will not order specific performance of the employment relationship. The author cites a passage in the judgment of Brightman LJ in *Gunton v Richmond-upon-Thames LBC* [1981] Ch 448 at 474/5. In summary his Lordship stated that if a servant is wrongfully dismissed, plainly he is no longer his master’s servant and can no longer sue for wages, only for damages. But it does not follow that the contract of service has terminated. Only the status or relationship has ended. “An obligation which is not of necessity dependent on the relationship of master and servant may well survive”. Though not agreeing with it, in *Geys* Lord Sumption described this as an important analysis, see paragraph 137.

[31] The tribunals below interpreted the concession that the dismissal terminated the employment as necessarily ruling out any continuing duty on AXA to pay the PHI benefits. Given that the whole purpose of the proposed amendment was their enforcement, we understand the concession as being limited to recognition that the traditional relationship of employee and employer was ruptured, but without prejudice to any rights and obligations collateral to it set out in the contract.

[32] Counsel for AXA has drawn attention to Ms McMahon's unfair dismissal claim made at an early stage (it was refused when she failed to attend a hearing), and to section 97 of ERA which provides for the date of a dismissal without notice being the "effective date of termination". It is suggested that it is arguable that *Geys* may not apply to breach of contract claims in the ET. However, in the said article the author quotes Browne-Wilkinson J in

Robert Cort & Son Ltd v Charman [1981] ICR 816:

"[T]he draftsman of the section does not refer simply to the date of the termination of the contract, but to the date on which the termination 'takes effect'. As we have pointed out, even on the acceptance view [i.e. the elective theory of termination] the status of employer and employee comes to an end at the moment of dismissal, even if the contract may for some purposes thereafter continue . . . We therefore consider it to be a legitimate use of words to say . . . that the termination of the contract of employment 'takes effect' at the date of dismissal . . . "

We respectfully agree with this analysis.

Aspden v Webbs Poultry & Meat Group (Holdings) Ltd

[33] Mr Aspden was entitled to the benefits of a PHI scheme aimed at directors and senior managers. Any benefits payable would end on certain events, including dismissal on any ground. His contract contained a clause entitling the employer to dismiss an employee in the event of prolonged illness. While on sick leave Mr Aspden was given notice of dismissal. He sought damages for breach of contract based on an implied term that he could

not be dismissed while incapacitated for work. The company contended that such was contrary to an express term thus could not be implied.

[34] Sedley J held that, despite the express terms of the contract, it was the mutual intention of the parties that the power to dismiss could not be used to remove an ongoing entitlement to the PHI benefits. This did not impinge on the employer's ability to accept any repudiatory conduct on the part of the employee as ending the contract and said entitlements. However, Mr Aspden had been arbitrarily dismissed when ill. He was neither malingering nor doing a job at home on the side.

[35] It is of interest that the judge noted that Mr Aspden did not contend that the notice of dismissal was a nullity, see paragraph 12. He also mused that the facts

“would have supported the pleading of a collateral contract created by the plaintiff's agreement to sign the written contract of employment in return for the defendant's agreement that it would keep up the insurance premiums and that its contractual powers of dismissal would not be used where their use would frustrate an accruing or accrued use under the insurance scheme”, see paragraph 23.

An earlier plea of the English equivalent of personal bar had been withdrawn. Alternative approaches might have involved fewer “doctrinal problems”; however, the judge was prepared to uphold the implied term submission and damages were awarded. He considered that how the remedy was analysed was of much less importance to lay persons than to lawyers.

[36] The *Aspden* and other PHI cases were discussed in *USDAW v Tesco Stores Ltd* [2024] UKSC 28, [2025] ICR 107, a case mentioned in AXA's submissions in response to the court's note. It is another decision worth noting.

USDAW v Tesco Stores Ltd

[37] The UK Supreme Court held that a term was necessarily implied in the claimants' contracts of employment which prevented their employer from exercising a power to terminate their employment on notice if it was done with the purpose of defeating an important contractual right pertaining to the level of their remuneration. To encourage their relocation to new places of employment and thereby helping Tesco's business plan, they had been permanently guaranteed a particular level of pay. Their contracts also entitled Tesco to end their employment on notice. Many years later Tesco told them that any who insisted on retaining the enhanced pay would have their contracts terminated, with an offer of re-employment in their current posts on lower wages.

[38] Tesco argued that the right to a particular wage could not survive termination of the employment relationship. However, the view was taken that it was inconceivable that the mutual intention was that the employer could unilaterally end their contracts simply to avoid paying the enhanced wage. In the circumstances, a term was implied which prevented the exercise of the unqualified right to terminate on notice if it was designed to allow the employer to revoke the promised long-term benefits consequential on the employees' agreement to re-locate. Lord Reed observed: "No reasonable person in the position of Tesco or the relevant employees could have intended the contract to have that effect", see paragraph 148. A permanent injunction was granted preventing the threat being realised.

[39] The parallels with the present case are obvious, albeit AXA has purported to dismiss Ms McMahon, thus the time for an interdict has passed. Importantly for present purposes, in *USDAW* reference was made to what were described as analogous cases, namely to *Aspden* and other PHI and similar decisions, see paragraphs 51-56 and 130-136. Lord Leggatt

noted that the *Aspden* implied term had subsequently been refined to a requirement “that the employer will not dismiss the employee on the grounds of continuing incapacity to work”, paragraph 131. This operated as a restriction on an otherwise unqualified power to terminate the contract on notice. (It can be noted that Ms McMahon’s contract has a similar clause, albeit she was summarily dismissed.)

[40] In *USDAW* the injunction was granted notwithstanding that it forced Tesco to keep the claimants on the workforce. This was appropriate since it was clear that there had been no breakdown in mutual trust and confidence, demonstrated by the offer to re-employ them on lower pay in the same positions. While this issue does not arise in exactly the same way here, it can be said that there has been no suggestion that if fit and well Ms McMahon would nonetheless have been dismissed.

Discussion continued

[41] AXA has contended that Ms McMahon’s position is and has always been that the dismissal terminated her contract of employment. We do not agree. A key submission for Ms McMahon has been that the implied term “negated” the dismissal. While we may not couch the notion in those exact terms, we consider that the general idea has been too readily dismissed. Essentially, AXA placed itself in the position of an insurer promising to pay certain benefits for so long as the eligibility conditions were met by Ms McMahon. Since incapacity for work was one of those conditions, it makes little sense if that alone allowed the payments to stop. If the implied term prevents dismissal on the grounds of incapacity, why should a dismissal for that reason receive effect, thereby precluding enforcement of the contractual PHI entitlement it is designed to thwart? Is it not more satisfactory and in tune with the justice of the case if the employer cannot rid itself of the contractual promise? If it

could do this, the employee would be left to attempt to formulate and quantify a claim for damages; an unsatisfactory remedy which necessarily involves speculation as to the future, most obviously the duration of the unfitness. If so, how can this best be explained in a manner satisfactory to those interested in the legal niceties?

[42] As we hope is demonstrated above, a number of potential legal analyses might justify this outcome. One is that mentioned by Sedley J in *Aspden*, namely that the PHI scheme obligations are collateral to the employment relationship created by the contract. Yes, they could be repudiated by conduct of the employee, such as feigning incapacity, but illness itself has no adverse impact upon them; it triggers the obligations undertaken by AXA. Contrary to the view of the ET and the EAT, the proposed amendment does not present a claim in damages. It is a legitimate attempt to enforce the PHI benefits promised in the contract. AXA argue that we should not make any findings of fact. However, this would be a finding in law open to us on the uncontested key facts emerging from the submissions and the material before us.

[43] Under reference to Lord Sumption at paragraph 120 in *Geys and McNeill v Aberdeen City Council* 2014 SC 335 at paragraphs 24-27, AXA's submissions recognise the distinction between "core" and "collateral" obligations in a contract of employment. It is contended that wages comprise one of the core obligations and thus cannot be the subject of a section 13 claim after dismissal. This is an echo of the reliance placed on observations in *Delaney v Staples*. We have answered the point above. A dismissal may end the employment relationship, and if the employee cannot insist on working for the employer, he cannot insist on payment of wages in return for a consideration not delivered. However, here Ms McMahon is not asking for wages in the ordinary sense discussed in *Delaney*. She complains that the PHI benefits have not been paid, benefits not dependent on her providing

services to AXA. They do, however, fall within the extended definition of “wages” for these purposes set out in section 27 of ERA.

[44] Another route to the same outcome would build on the judgments issued in *USDAW*. Borrowing the phraseology of Lord Reed at paragraph 148, it was impliedly agreed that AXA could not terminate the contract for the purpose of depriving Ms McMahon of the PHI benefits. Given the content of the implied term, AXA had no power to dismiss Ms McMahon because of her incapacity. The attempt to do so was invalid; in effect it was a nullity. As it is sometimes put, it was “writ in water” and had no impact on the contractual obligation to honour the PHI payments.

[45] Of the above, we see force in the collateral obligation analysis, primarily on the view that it reflects the notion of what is in effect an insurance scheme designed to operate when the employment relationship is ruptured, or at least interrupted, by illness or injury. It is in line with observations of Lord Sumption in *Geys* where he distinguished between core and collateral obligations in a contract of employment, see paragraphs 120 and 141. That said, in our view the discussion in the immediately preceding paragraph provides a rational and respectable solution. It may be more in tune with the reference to an unauthorised “deduction from wages of a worker employed by (an employer)” in section 13(1), though we have already mentioned that the employment relationship is not synonymous with the underlying contract of employment. In addition, we note that the two approaches are not mutually exclusive.

[46] We are not overlooking the possible analysis that the wrongful dismissal was never accepted by Ms McMahon and thus on the “elective” theory approved by the majority in *Geys*, the contract continued unaffected. It does however raise issues of fact difficult to resolve in the context of this appeal.

Disposal

[47] We appreciate that when refusing the proposed minute of amendment, the ET had regard to factors other than the potential merits of extending the scope of the claim, including its timing and issues of respective hardship and injustice. However, they were either neutral or of secondary importance. Standing our finding that the dominant reason for refusal of the amendment was erroneous in law, we shall uphold the appeal and remit the matter to the ET under a direction that the amendment should be allowed. Given the scope of our decision, this only leaves a need for Ms McMahon to demonstrate that she continues to meet the eligibility criteria and for the quantification of her claim. If these are not agreed, the tribunal will require to address these matters. If the criteria are being met at present, AXA will be under a continuing obligation to make the payments. At the hearing we questioned whether there remained a process to be amended, but counsel for AXA assured us that given ET procedure, this was not a problem.