Misleading employees can amount to a repudiatory breach of contract

Wainwright v Cennox Plc **concerned an employee who resigned after discovering she had been misled about whether she had been replaced on a permanent or temporary basis during cancer-related sick leave and claimed constructive unfair dismissal and discriminatory dismissal. The Employment Appeal Tribunal found that the Employment Tribunal had strayed in its analysis and reasoning by failing to consider whether the employer's discriminatory acts, including providing misleading information, amounted to fundamental breaches of contract that contributed to her resignation.**

What happened in this case?

The Claimant was diagnosed with cancer and went on sick leave for treatment. While she was absent, the employer appointed a colleague to her role on a permanent basis but told the Claimant that this was only a temporary arrangement. The Claimant discovered that the replacement was permanent and that her own job title and responsibilities had been altered, which she perceived as a demotion. Following disputes over her role, the handling of a grievance she raised, and her treatment during her illness, she resigned.

She brought constructive unfair dismissal and disability discrimination claims, including that the dismissal itself was discriminatory. The Employment Tribunal upheld part of her discrimination claim but dismissed her claims in relation to

the dismissal (including that her dismissal was discriminatory).

The Claimant appealed to the Employment Appeal Tribunal (**EAT**) in relation to the decision to dismiss her claims for constructive dismissal and discriminatory dismissal.

What was decided?

The EAT upheld the appeal and remitted it to a differently constituted Tribunal to be reconsidered.

The EAT held that the Tribunal had gone wrong in both its analysis and its reasoning in determining the constructive unfair dismissal and discriminatory dismissal claims.

The Tribunal had accepted that discriminatory acts occurred, but had failed to explain adequately why these did not also amount to repudiatory breaches of contract, or form part of Ms Wainwright's reasons for resigning. Given that her resignation letter and witness evidence referred directly to those acts, the EAT said an explanation was required.

The Tribunal had also misapplied the law by assuming that there could only be one cause of resignation. It did not consider whether the discriminatory acts were repudiatory breaches or whether they materially contributed to the Claimant's resignation.

The EAT further held that the Tribunal had failed to analyse

whether misleading the Claimant about whether her replacement was permanent or temporary could itself amount to a breach of the implied term of trust and confidence. The EAT noted that providing untrue statements can be a contractual breach and should have been addressed.

What does this mean for employers?

This decision offers a number of key learning points for employers:

- **Handle reorganisations carefully**: where roles are restructured during an employee's sickness absence, consult openly, explain business reasons clearly, and avoid actions that could reasonably be seen as sidelining or demoting the individual.

- **Adopt a transparent and honest approach: e**ven where an employer believes it is acting protectively or "softening the blow" for employees, providing inaccurate or misleading information may amount to a repudiatory breach of contract allowing employees to treat themselves as constructively dismissed.

- **There can be multiple reasons for resignation**: an employee may resign for more than one reason. Employers should be aware that discriminatory treatment, even if not the only factor, may still materially contribute to the resignation and lead to liability on the employer's

part.

- **Address grievances promptly and fairly**: delays or poor handling of grievances may increase the risk of constructive dismissal claims.

Wainwright v Cennox Plc

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Emma Burroughs (emmaburroughs@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Employer's correspondence with lawyer could not be relied upon by Claimant under the iniquity exception to legal privilege

In Shawcross v SMG Europe Holdings Ltd and ors, Ms Shawcross argued that email correspondence between her former employer

and its legal advisers, which she had been accidentally copied into, was not legally privileged meaning she could rely on it to support her claim.

What happened in the case?

The Claimant was dismissed by SMG Europe Holdings Ltd (**SMGEH**) on 28 April 2023. Two days prior to her dismissal, the Claimant was copied into an email chain between SMGEH and its legal advisers by mistake. There were seven emails in the chain, one of which had a draft dismissal letter attached to it. The dismissal letter had been drafted by SMGEH's solicitors. All of the emails were sent on either 25 or 26 April 2023.

The Claimant claimed that her dismissal was, amongst other things, an act of victimisation for having raised a grievance on 29 November 2022. She sought to rely on the email chain in support of her victimisation claim. Specifically, the Claimant argued that the emails contained a discussion about fabricating the reason for her dismissal and disguising the true identity of the dismissal decision-maker.

SMGEH argued that the emails were subject to legal advice privilege, since they were communications between SMGEH and its solicitors. The Claimant argued that legal advice privilege did not apply to the emails because they fell within the "iniquity exception". The iniquity exception to legal advice privilege arises where correspondence has come into existence in furtherance of fraud, crime or other iniquity.

What was decided?

In the first instance, the Employment Judge held that, on the balance of probabilities, the emails were not evidence of iniquitous conduct. As such, the iniquity exception was not engaged, and the emails remained subject to legal advice privilege and could not be relied upon by the Claimant.

The Claimant appealed to the EAT. She argued that the emails showed that her dismissal was a sham and that the decision to dismiss had been taken by 25 April 2023, meaning the Judge had erred in law in finding that the iniquity exception did not apply.

The EAT dismissed the appeal. It held that the Employment Judge had not erred in law in finding that the iniquity exception did not apply, as he had carefully scrutinised the terms of the correspondence as a whole before reaching his decision.

The EAT also made substantive findings as to the nature of the emails. It found that SMGEH's solicitors had provided advice on the risks that the dismissal might be considered unfair or an act of victimisation, but that there was no mention in any of the emails that the Claimant's grievance formed part of the decision to dismiss her. Therefore, read as a whole, the emails were properly characterised as legal advice provided that SMGEH should review the decision to dismiss the Claimant as it would need to be able to justify the decision before an employment tribunal if necessary.

Further, the EAT said that even if the emails *had* shown that SMGEH and its solicitors considered there to be an overwhelming likelihood that the Claimant would be dismissed, this would not have crossed the threshold required to

establish the iniquity exception. This was said to be the sort of advice which employment lawyers regularly give to their clients and which falls within the normal scope of professional engagement.

The EAT also agreed with the Employment Judge's observation that the advice contained in these emails was similar in nature to the advice in *Curless v Shell International Ltd*. In that case, the emails in question related to whether an individual who had submitted a disability discrimination claim could be dismissed on the grounds of redundancy. Similarly to the correspondence in this case, those emails were considered to be the sort of day-to-day advice which employment lawyers provide to their clients and the iniquity exception did not apply.

What does this mean for employers?

As a general comment, employers should be careful to ensure that legal advice and other potentially sensitive correspondence is not inadvertently forwarded to unintended recipients to avoid this situation arising in the first place.

This case also highlights that the threshold for establishing the iniquity exception is high. Therefore, correspondence between employers and their legal representatives will be subject to legal advice privilege in the majority of cases, provided the advice cannot be seen to be fabricating a position or acting in a genuinely underhand or iniquitous way.

As such, employers should continue to feel comfortable discussing tricky areas of employment law with their advisers,

including consulting advisers on decisions to dismiss employees. In fact, consulting with specialist employment advisers who understand the complexities of the law is usually the most advisable way forward to mitigate an employer's risks.

Shawcross v SMG Europe Holdings Ltd and ors

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Abdullah Ahmed (AbdullahAhmed@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Lifelong anonymity granted in Tribunal proceedings where Claimant had made an earlier allegation of sexual offences in unrelated proceedings

In the case of *AYZ v BZA*, the EAT granted lifelong anonymity to the Claimant in circumstances where she had filed a police report alleging a sexual assault by the Respondent in earlier unrelated proceedings. The EAT was persuaded that this was necessary to comply with the requirements of section 1 of the Sexual Offences (Amendment) Act 1992 (SOAA).

What happened in this case?

The Claimant sought anonymity in Employment Tribunal proceedings. The Employment Judge denied the application on the basis that it would derogate from the principle of open justice. However, in reaching that decision, the Judge was not aware that the Claimant had previously made a report to the police that she had been sexually assaulted by the Respondent. The allegation concerned events that were not related to the Employment Tribunal proceedings.

The Claimant appealed to the EAT on the basis that she should be granted lifelong anonymity in relation to the Employment Tribunal and EAT proceedings according to section 1 of SOAA. She argued that lifelong anonymity was necessary because she had reported an allegation of a sexual offence to the police. Without anonymisation in both the Employment Tribunal and EAT proceedings, there was a significant risk that a keen-eyed reader of the judgments may be able to piece together relevant information to ascertain her identity and/or the Respondent's identity.

What was decided?

The EAT decided to grant permanent anonymity to the Claimant in both the Employment Tribunal and EAT proceedings.

This decision was based on the requirements of section 1 of SOAA which mandates anonymity for those who have made allegations of certain sexual offences covered by the Act. Even though the Respondent had not been questioned, arrested or charged, the Claimant's complaint still amounted to an

“allegation” of a relevant sexual offence.

The EAT concluded that the only way to ensure compliance with SOAA was to anonymise the Claimant’s name in all related proceedings, even though this meant she was gaining permanent anonymity through a “side-wind”.

In reaching its decision, the EAT was also keen to point out that it considered the Employment Judge’s decision correct based on the circumstances of the case as it stood at the time. However, the new information about the police report, when read alongside other case law, meant that the EAT was compelled to grant permanent anonymity.

What does this mean for employers?

For employers, this case underscores the importance of understanding the legal requirements for anonymity in cases involving allegations of sexual offences. Employers should be aware that even where an allegation is not part of the Employment Tribunal proceedings, it may still impact those proceedings if it involves a sexual offence.

The case highlights the need for employers to handle such allegations with sensitivity and in compliance with legal standards to protect the identities of those involved.

AYZ v BZA

BDBF is a leading employment law firm based at Bank in the

City of London. If you would like to discuss any issues relating to the content of this article, please contact James Hockley (JamesHockley@bdbf.co.uk) or Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

The unpaid intern-ship: sailing or sinking?

Last month the Government launched a Call for Evidence on unpaid internships and other similar roles, such as voluntary roles, unpaid work trials and work shadowing, to identify whether Government action is needed to ensure compliance with National Minimum Wage law.

What is the Call for Evidence about?

Currently, there is no legal definition of the term "intern" or of similar types of roles such as "trial work period", "volunteer" or "work shadowing". Historically, many employers have not paid individuals for carrying out internships and similar roles. However, where someone performing such a role meets the legal definition of "worker", they are entitled to be paid at least the National Minimum Wage and benefit from certain other basic employment rights.

The Government is concerned that some employers are not complying with the law and misclassifying interns and possibly others in order to avoid making payment. The Government has

said it wishes to crack down on non-compliance with the National Minimum Wage legislation.

In October 2024, the Government published Next Steps to Make Work Pay, which set out plans to take forward workplace law reform commitments not covered by the Employment Rights Bill. This included a promise to issue a Call for Evidence on unpaid internships.

On 17 July 2025, the Government published the promised Call for Evidence, which seeks to understand the circumstances in which interns are not paid (or paid below the National Minimum Wage) and the reasons for this. Evidence is also sought on how similar roles operate in practice (namely, work trials, voluntary work, volunteers and work shadowing) in order to understand whether further work is required to ensure compliance with the law.

The Call for Evidence sets out various questions for employers including asking for the reasons for not paying an intern and whether unpaid internships (or those paid below the National Minimum Wage) should simply be banned altogether.

What does this mean for employers?

Currently, this is just a Call for Evidence, so employers will not be affected for some time. However, it is implied that after the evidence has been reviewed there will be some reform on internships. Businesses who offer such roles should, therefore, keep track of further developments in this area.

The Call for Evidence closes on 9 October 2025, with the Government's response expected early in 2026.

Call for Evidence on Unpaid Internships

With thanks to our work experience student, Shaan Kailey, for his assistance in producing this article.

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.