# Newsflash: Government abandons Day 1 unfair dismissal rights in favour of 6-month qualifying period

Following several rounds of debate between the House of Commons and the House of Lords on the Employment Rights Bill (**Bill**), the Government announced in a press release published on Thursday 27 November 2025 that it intends to drop its commitment to giving employees unfair dismissal rights from Day 1.

Instead, the Government has confirmed that they will implement the six-month qualifying period proposed by the House of Lords. The press release also announced that the compensation cap for unfair dismissal will be lifted, and the six-month period will only be able to be varied in future by primary legislation. The Government states that this is now intended to be a "*workable package*".

This move follows considerable pushback from the Lords on the proposal for Day 1 rights in their latest debate on 17 November 2025, in which they expressed concern over the potential impact on employment rates and the Employment Tribunal system.

The question of Day 1 unfair dismissal rights has been a key sticking point for finalisation of the Bill, and this development therefore brings the Bill significantly closer to being passed. The House of Commons is due to consider the

Lords' message on 8 December 2025.

**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 Rose Lim (RoseLim@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.**

---

# Employers continue to be vicariously liable for "detriment of dismissal" claims brought by employee whistleblowers, for now, at least

**The Court of Appeal has ruled that *Timis and Sage v Osipov* binds Employment Tribunals to permit claims brought by employee whistleblowers for the "detriment of dismissal" against co-workers and also against employers on a vicarious liability basis but only on the basis of precedent. They disagreed with the reasoning in *Osipov* and the question may now go to the Supreme Court. For now though this means employees complaining that they have been dismissed for whistleblowing only have to meet a lower legal threshold to succeed and can sue managers in an individual capacity.**

**What protections do whistleblowers have in the workplace?**

Since 1998, whistleblowers at work have been protected from dismissal (employees only) and detrimental treatment (employees and workers). When the law was first introduced, only detrimental treatment meted out by the employer was covered. Further, if the detrimental treatment in question amounted to a dismissal, an exclusion clause in the law meant that employees (but not workers) could not frame it as a detriment claim. Instead, they had to pursue an unfair dismissal claim.

This was significant not least because the threshold for succeeding in a detriment claim is lower than in a dismissal claim. In other words it was harder for a claimant to complain about being dismissed than otherwise being treated unfavourably for being a whistleblower.

In 2013, detriment protection was expanded to cover detrimental treatment committed by co-workers. This change meant that a co-worker could be personally liable, and the employer could be vicariously liable for the actions of the co-worker (although the employer had a defence if it could show that it had taken "all reasonable steps" to prevent the detrimental treatment). However, the exclusion clause which prevented employees from bringing detriment claims about dismissal was left unchanged.

In 2018, in the landmark case of Timis and Sage v Osipov (**Osipov**) in which BDBF acted for the successful Claimant, the Court of Appeal considered whether an employee was entitled to bring a whistleblowing detriment claim against a co-worker, where the detriment was the dismissal, and where the

compensation sought included loss of earnings flowing from the dismissal. In that case the employee did not claim that the employer was vicariously liable for that detriment because the employer was in administration.

The Court of Appeal, agreeing with the Employment Appeal Tribunal (**EAT**) and the Employment Tribunal, ruled that the purpose of the law was to protect whistleblowers, and, therefore, it was appropriate to construe the exclusion clause in such a way as to provide protection rather than deny it.

The Court said the exclusion clause only prevented employees from bringing direct detriment of dismissal claims against an employer. However, it did *not* prevent detriment of dismissal claims against *co-workers*. Nor did it prevent the employer from being vicariously liable for such a claim (albeit that this was not a live issue before the Court because the employer in that case was insolvent). The Court concluded that if employees were prevented from bringing such claims by the exclusion clause, this would lead to an unsatisfactory situation where workers (e.g. independent contractors or LLP members) could bring such claims, but employees could not and that the employee who was treated badly at work but not dismissed had a lower legal threshold to meet than the employee who had suffered the ultimate form of retaliation: dismissal.

The Court acknowledged that its interpretation did not produce *"a particularly elegant result"* insofar as it meant that a dismissed whistleblower who was an employee could claim the employer was directly liable for their dismissal under the unfair dismissal provisions and vicariously liable for the detriment of dismissal under the detriment provisions. The inelegance was inherent in the fact that the causation test

differs between the two claims (being higher in unfair dismissal claims), as does the possible compensation (with no injury to feelings award available in an unfair dismissal claim). However, the Court said these *"awkwardnesses"* were insufficient to justify a construction that would result in more serious anomalies, and which would be contrary to the underlying policy of the law.

**What happened in these cases?**

The key facts of Rice v Wicked Vision Ltd (**Rice**) and Barton Turns Developments Ltd v Treadwell (**Treadwell**) are the same. Both claimants were dismissed allegedly after having blown the whistle. Both brought unfair dismissal claims against the employer. As the litigation unfolded, both sought to amend their claims, arguing that they had been subjected to the detriment of dismissal by their co-workers and that their employers were vicariously liable for such detriments. In neither case did the claimants seek to bring the detriment of dismissal claim against the co-workers as individual respondents. The aim of the amendment in each case was presumably to benefit from the lower threshold for liability in detriment claims. In *Rice*, the employer opposed the amendment on the basis that a vicarious liability claim for detriment of dismissal could not proceed where no claim had been made against the co-worker.

*Decisions of the Employment Tribunal*

In *Rice*, the Tribunal took a wide view of Osipov, holding that it permitted the amendment. It also held that it was *not* necessary for a detriment of dismissal claim to have been brought against a co-worker in order to bring to bring the

vicarious liability claim against the employer.

In *Treadwell*, the Tribunal refused the amendment on the basis that the exclusion clause meant that a detriment claim against an employer had to be about something *other than* a dismissal. The Tribunal's view was that the decision in *Osipov* was confined to the potential liability of individuals only and the exclusion clause prevented a claim that the employer was vicariously liable for the detriment of dismissal. As such, the Tribunal took a narrower view of *Osipov* than the Tribunal in *Rice*.

*Decisions of the EAT*

In *Rice*, the employer appealed to the EAT, again arguing that the claim could not proceed without a concurrent claim against the co-worker. The EAT considered that it was not necessary to bring a detriment claim against the co-worker. However, the EAT overturned the decision of the Tribunal, concluding that the exclusion clause prevented the vicarious liability claim against the employer. Notably, the EAT said it would be odd if Parliament had banned detriment of dismissal claims directly against employers but, at the same time, allowed them to be vicariously liable for the detriment of dismissal by a co-worker, since in virtually every case a dismissal has to be executed by a co-worker. As such, the EAT took a narrow view of *Osipov*, holding that it only determined that detriment of dismissal claims may be brought against co-workers.

In *Treadwell*, the EAT allowed the employee's appeal, taking a wide view of *Osipov* as meaning that detriment of dismissal claims could be brought against co-workers *and* against employers on a vicarious liability basis. It held that the

exclusion clause only excluded direct detriment of dismissal claims against employers.

Unsurprisingly, both decisions were appealed to the Court of Appeal, and the appeals were heard together.

**What did the Court of Appeal decide?**

Delivering a unanimous judgment, the Court of Appeal ruled that *Osipov* was binding authority for the proposition that employers could be vicariously liable for detriment of dismissal claims. Accordingly, the Court ruled that the amendments should have been allowed in both claims. However, the Court reached this decision with a great deal of reluctance, suggesting that a further appeal to the Supreme Court may lie ahead.

*The meaning of the exclusion clause*

The Court's reluctance was rooted in the fact that it considered the exclusion clause was unambiguous in preventing detriment claims about dismissal. Where a detriment amounts to a dismissal within the meaning of the legislation, the exclusion clause disapplied the *entire* detriment provision, meaning that detriment of dismissal claims are not possible against *anyone*, whether employer or co-worker.

The Court rejected the argument that "dismissal" only covers dismissals by the employer, and that there exists the possibility of a dismissal by a co-worker, which would sit outside the exclusion clause (because it would not be a

"dismissal" within the meaning of the legislation). The Court rejected this approach for three reasons:

- First, the Court rejected the argument that the exclusion clause only applied to dismissals by the employer as meaningless because it said a dismissal is *always* the act of the employer – it ends the contract between the employer and employee. Where the employer is a limited company the dismissal can only ever be effected by a co-worker, and the Court did not accept there was a relevant legal distinction between a dismissal by the employer and a dismissal by a co-worker.

- Second, the Court observed that under the vicarious liability provisions anything done by a co-worker is treated as having been done by the employer. The legal effect of this is that the employee is, therefore, dismissed by the employer and, in turn, that act will "amount to a dismissal" within the meaning of the legislation and so the exclusion clause applies.

- Third, the question is not about primary or vicarious liability, the correct question is simply: what does the act amount to? If it amounts to a dismissal then the employer is liable for it and *all* detriment claims about the dismissal are barred, including against a co-worker.

*The decision in Osipov*

Although it considered the exclusion clause was abundantly clear, the Court had to grapple with the decision in *Osipov*, which had permitted detriment of dismissal claims. The Court disagreed with the decision in *Osipov* for several reasons including:

- It ignored the clear and unambiguous statutory wording and improperly downplayed the statutory text in favour of a perceived purpose.
- It wrongly assumed that Parliament or the draftsman made mistakes.
- It misconstrued the statutory purpose and ignored the fact that Parliament deliberately chose to have distinct remedial schemes for employees and workers.
- It wrongly treated dismissal by a co-worker as distinct from dismissal by an employer.
- Its conclusion that the exclusion clause only barred direct detriment of dismissal claims against an employer because the "identical remedy" of unfair dismissal was available was fundamentally flawed.

However, the Court said that, despite its own construction of the legislation, it was bound by the decision in *Osipov*. Importantly, it concluded that *Osipov* had ruled that detriment

of dismissal claims are permissible against co-workers and that employers may be vicariously liability for such claims (thus taking a wide view of the decision unlike the Tribunal in *Treadwell* or the EAT in *Rice*). The Court said it was bound by the doctrine of precedent to give the same interpretation to the exclusion clause as was given in *Osipov*, even though the context in the present cases was slightly different.

Accordingly, despite the Court's own view of the meaning of the law, it ruled that the exclusion clause did not prevent detriment of dismissal claims against the employer on a vicarious liability basis. Therefore, the employees succeeded, and their claims were allowed to proceed.

The Court observed that it was "plainly unsatisfactory" that the construction of the legislation had produced conflicting decisions at three levels of court, but noted that this could only be resolved by the Supreme Court or through a change to the legislation.

**What does this decision mean for whistleblowers and employers?**

This decision underlines the impact and importance of *Osipov*, for now at least. It continues to bind Tribunals to permit detriment of dismissal claims against co-workers *and* against employers on a vicarious liability basis. The exclusion clause does not bite to prevent either type of claim. Further, as the Court identified in this case, no concurrent claim against a co-worker is needed in order to bring a vicarious liability claim.

Of course, the Court of Appeal has fired a warning shot about

the validity of the decision in *Osipov*. In light of the Court's profound misgivings about *Osipov*, it seems likely that permission to appeal to the Supreme Court would be given if sought. Whether there will be a further appeal remains to be seen (and it should be noted that Wicked Vision Ltd is currently in administration). However, even if there is no further appeal in this case, it seems inevitable that the point will arise in another case in due course. And when it does, there is a good chance that we will see a "leapfrog appeal" from the EAT to the Supreme Court, given that the remedies available to whistleblowers is a matter of general public importance.

In the meantime, it is business as usual for whistleblowers and employers. Employees who are dismissed for having blown the whistle should continue to bring unfair dismissal claims against their employer and should always explore the possibility of detriment of dismissal claims as well, pleading them where appropriate.

Employers wishing to avoid vicarious liability for such claims should take all reasonable steps to prevent such detriment. In practice, this will mean taking steps to ensure that anyone involved in the dismissal of a whistleblower is not materially influenced by the whistleblowing (essentially, the causation test in detriment claims). Codes of conduct should set out the standards expected from managers and emphasise the importance of honest and ethical behaviour in all dealings, and the consequences of failure. Ideally, a programme of whistleblowing training should support and reinforce this. In some sectors, relevant training may be mandatory. For example, the FCA requires financial services firms to provide tailored whistleblowing training to various stakeholders, including managers, which should explain that victimisation of whistleblowers is prohibited.

(1) Rice v Wicked Vision Ltd (Protect Intervening); (2) Barton Turns Developments Ltd v Treadwell

**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.**

---

# Employment Rights Bill: First Consultations Launched on Trade Union Rights

**On 23 October 2025, the UK Government launched the first of their consultations on the new rights set out in the Employment Rights Bill (Bill), which is expected to be passed into law imminently.**

The Bill provides the framework for numerous changes to employment law but much of the substance of the new rights will be set out in regulations. As promised earlier this year, the Government has now published a series of consultations to help shape those regulations and determine exactly how the Bill's provisions will be implemented.

Below we will briefly cover two of the consultations which look at changes to trade union rights, each of which is due to

close on 18 December 2025. These changes are vital for all employers to understand as, even if their workforce is not currently unionised, they will nevertheless be impacted by the new duties.

**Duty to Notify**

The Bill introduces a new duty on employers to give their employees a written statement of their right to join a trade union from October 2026. The consultation paper is said to be aimed at ensuring the duty is effective, proportionate and workable for workers and employers.

The key questions considered as part of the consultation are:

- **Content:** What information needs to be included in the statement, and whether the statement should be drafted by the employer (in line with any minimum content requirements) or be based on a government standard.
- **Manner:** Whether information needs to be given directly or indirectly, and whether this should be different for new workers compared to existing workers.
- **Timing:** How often the information needs to be given, and whether this standard should be the same for all organisations regardless of sector or size.

**Right of Access**

The Bill sets out that trade unions will have a new right to access workplaces and engage with workers for the purpose of meeting, recruiting, supporting, representing or organising them, as well as for facilitating collective bargaining. This is expected to take effect in October 2026.

Access for these purposes means both physical access and digital communications.

Under the Bill's framework, unions and employers are expected to work together to voluntarily agree access arrangements, which will then be recorded by the Central Arbitration Committee (**CAC**). Where they are unable to agree, either the union or the employer can make a referral to the CAC to determine whether (and how) access should be granted. The CAC will also have the power to enforce agreements in line with the five 'access principles' set out in the Bill, with the ability to issue fines for non-compliance.

The substantive questions asked by the consultation are as follows:

- How access requests need to be made, including whether they should follow a standard government template (provided via a new Code of Practice on Trade Union

Right of Access), and the level of information that must be included in the request and employer's response.

- How notification should be made to the CAC of successful agreements and any variations.

- The appropriate length of response and negotiation periods, and the maximum duration of an access agreement. The government proposes a relatively short initial 5 working day period for the employer to respond to a union's request, a 15 working day period to negotiate, and a maximum of 25 days from the request for a referral to be made to the CAC. The latter requirement is said to be aimed to ensure that employers are not left in a position of uncertainty about whether a referral will be made. Once an agreement is in place, the government proposes a maximum duration of two years.

- Whether small employers with fewer than 21 workers should be exempt.

- What factors the CAC will consider when assessing a request, with the government proposing that requests are likely to be unreasonable if there is already a recognised union, it would use a disproportionate level of resource, or if it would give the employer less than 5 working days to prepare. For the terms of agreements, the government suggests that weekly access may be reasonable, with a minimum of two working days' notice required.

Views are also being sought on the proposed £75,000 maximum

standard cap on fines from the CAC, with a higher amount of £150,000 for repeated breaches, as well as the factors that the CAC should consider when assessing the fine.

**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 Rose Lim (RoseLim@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.**

---

# Employment Rights Bill: Consultation on expanding protection from dismissal for pregnant women and new mothers

**Last month, the Government opened a consultation on enhancing protection from dismissal for pregnant women and new mothers during a protected period. At its most restrictive, the proposed protection would ban capability and SOSR dismissals altogether, permit redundancy dismissals only where a business is closing and allow conduct or illegality dismissals in very limited circumstances.**

**What is the current legal position and what did the Employment Rights Bill propose?**

In the UK, there is already extensive protection from dismissal for pregnant women, new mothers and other parents. It is unlawful to:

- treat an employee unfavourably because of her pregnancy or maternity leave during the “protected period” (which begins when a woman becomes pregnant and ends when she returns from maternity leave);

- treat an employee less favourably than a male comparator for reasons to do with her pregnancy or maternity leave outside the protected period;

- dismiss an employee for a reason connected to her pregnancy or maternity leave (or to certain types of other family leave including adoption, shared parental and neonatal care leave);

- make an employee redundant during pregnancy or maternity leave (or adoption leave, shared parental leave or neonatal care leave) where there is a suitable alternative vacancy available; or

- make an employee redundant who has recently returned to work from a period of maternity leave (or adoption leave, shared parental leave or neonatal care leave) where there is a suitable alternative vacancy available.

Despite this wide protection, the Government is concerned that pregnant women and new mothers remain especially vulnerable to mistreatment and dismissal. This is supported by a 2016 report from the Equality and Human Rights Commission which indicated that up to 54,000 mothers leave their jobs each year, including approximately 4,100 dismissals.

Accordingly, the Employment Rights Bill (the **Bill**) (currently on its passage through Parliament) provided that regulations would be introduced to allow enhanced protection from dismissal during pregnancy, maternity leave and following the return from maternity leave. This would mean that such employees could not be fairly dismissed at all, save where the law allowed for an exception. The Bill does not specify how long the protection would apply following the return from leave, however, the Government has said it should be at least six months.

The Bill also proposed extending the enhanced protection to those returning from certain other forms of extended family leave, namely, adoption leave, shared parental leave, neonatal care leave and bereaved partner's paternity leave (the latter of which is not yet in force).

**What does the consultation paper propose?**

On 23 October 2025, the Government published a consultation paper entitled *"Enhanced dismissal protections for pregnant women and new mothers",* seeking views on how the enhanced dismissal protection should work in practice. The Government says it wishes to strike a fair balance between strengthening the protection for employees and preserving the ability to dismiss *"…in cases where continuing employment would have serious consequences for the employer or other staff".* It is also concerned to avoid unintended consequences, such as employers becoming hesitant to hire women of child-bearing age if the protections are overly restrictive.

The consultation proposes two broad options:

- **Option 1 – Introduce a stricter fairness test:** one option is to introduce a stricter test to assess the fairness of such dismissals for any of the existing five fair reasons for dismissal (i.e. conduct, capability, redundancy, illegality or some other substantial reason (**SOSR**)).

- **Option 2 – Narrow the five fair reasons for dismissal:** an alternative option is to narrow the existing five fair reasons for dismissal (and/or potentially remove some of them entirely) when applied to pregnant women or new mothers. The proposals to narrow down the scope of each reason are as follows:

- **Conduct:** the options put forward range from permitting conduct dismissals only where the employee commits gross misconduct (as defined by the employer), to allowing dismissal only for a much narrower band of serious misconduct where continuing employment would either (i) pose a health and safety risk to a third party, (ii) have a serious negative impact on the wellbeing of others, or (iii) cause significant harm to the business.

- **Capability (covering both performance and ill-heath):** again, various options are put forward, ranging from permitting capability dismissals only if there is no suitable alternative role available (or where one was offered and refused), to allowing dismissal only for a much narrower band of incapability where continuing employment would either (i) pose a health and safety risk to a third party, (ii) have a serious negative impact on the wellbeing of others, or (iii) seriously harm the business. An even more restrictive proposal of banning capability dismissals altogether is also given.

- **Redundancy:** two options are proposed. First, permitting redundancy dismissals only where there is no suitable alternative vacancy available and where termination would mitigate any financial difficulties that were affecting (or likely to affect in the immediate future) the employer’s ability to continue the business. The

second and more restrictive option is to permit redundancy dismissals only where the business ceases to exist (and where any suitable alternative vacancy that is available has been offered).

- **Illegality:** only one possible change is put forward: to allow dismissal for illegality only if there is no suitable alternative role available (or where one was offered and refused).

- **SOSR:** various options are put forward, ranging from permitting SOSR dismissals only where there is no suitable alternative role available (or where one was offered and refused), to allowing SOSR dismissals only for a much narrower band of dismissals where continuing employment would either (i) pose a health and safety risk to a third party, (ii) have a serious negative impact on the wellbeing of others, or (iii) seriously harm the business. An even more restrictive proposal of banning SOSR dismissals altogether is given.

Additionally, in each of the above cases, the option of either making no changes to the law, or of making some other type of unspecified change are given (and in the latter case, the respondent is asked to set out what change they think should

be made).

**When should the protection start and end?**

The existing dismissal protections for pregnant women and new mothers are all “Day 1” employment rights. The consultation paper asks whether an employee should also be entitled to benefit from the proposed enhanced protections from Day 1 of employment. Set against that, it is acknowledged that this could require an employer to retain and pay an employee throughout pregnancy, maternity leave and for at least six months thereafter, and that this might be considered an unreasonable burden on employers especially in respect of new employees who may not have demonstrated their capability for the role. Therefore, the consultation gives the alternative option of only affording these rights to women who have completed a qualifying period of employment of somewhere between three to nine months. It is said that such a qualifying period could help to mitigate unintended consequences, such as reluctance to hire women of childbearing age.

In terms of when the enhanced protection should end, the consultation paper proposes either 18 months from the birth of the child (which has the benefit of aligning with the redundancy priority rules) or six months after the return to work from maternity leave, whenever that is. The first option would mean that all new mothers would have an 18-month window of protection – regardless of when they returned to work. The second option would mean that women taking less than 12 months maternity leave would have a shorter overall window of protection. However, it would be simpler for employers to navigate, since they would know that all returners have six months protection after their return from maternity leave. No

individual calculations would be needed.

**Should the enhanced protection be available where certain other types of family leave are taken?**

The consultation paper goes on to seek information and views on the extent to which parents taking either adoption, shared parental or neonatal care leave are subjected to unfair treatment, including dismissal. It goes on to ask whether the proposed enhanced dismissal protections should be extended to employees taking these forms of leave (and also bereaved partner's paternity leave) and, if so, when the protection should start and end. For adoption leave, it is proposed that the protection should end 18 months after the birth of the child or placement for adoption. For the other three types of leave, it is proposed that the protection should end either on the last day of the leave (where less than six weeks of continuous leave was taken), or 18 months from the birth or adoption placement (where more than six weeks of continuous leave was taken).

**Other points and next steps**

The consultation paper asks whether various unintended consequences could arise from the enhanced protection including increased discrimination, delaying dismissal decisions and unrealistic asks of small businesses. Finally, the consultation asks what the main causes of pregnancy and maternity discrimination are and what more the Government should be doing to tackle it.

The consultation closes on 15 January 2026, after which the

Government's response and final position will be published. The measures are due to be implemented some time in 2027.

Consultation paper – Enhanced dismissal protections for pregnant women and new mothers

**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.**

---

# Tribunal considers reasonable adjustments to standard processes and the application of "zero tolerance" policies for neurodivergent employees

**In *Halstead v JD Wetherspoons plc*, the Employment Tribunal has considered whether an employer failed to make reasonable adjustments to their processes and the way in which they applied a "zero tolerance" policy to an employee with autism, and whether that failure amounted to disability-related harassment.**

**What happened in *Halstead*?**

*Facts*

Mr Halstead started his employment with Wetherspoons as a kitchen porter in late 2018 in Berkhamsted. Although he left for a short period, he returned to work for the same branch in May 2019 and later, in 2021, moved to the Wetherspoons in Trowbridge. He had been diagnosed with autism at the age of two and had informed the Berkhamsted branch of this, however this information was not shared with Trowbridge at the time of his transfer.

In August 2023, Mr Halstead and his mother went for a family meal at a Wetherspoons pub along with five visiting family members. Mr Halstead, assisted by his mother, place the order through the Wetherspoons app and ticked the box to confirm that he accepted the employee discount policy and privacy policy. As a result, Mr Halstead's employee discount of 20% was applied to the entire order, even though the policy said the discount was only permitted to be used for groups of up to four people.

Mr Halstead was investigated and subjected to a disciplinary process in relation to his use of the discount and potential breaches of Wetherspoons' data protection and confidentiality policies (because he permitted his mother to access the app). During the investigation, the impact of Mr Halstead's autism on his day-to-day activities was discussed, including a requirement that someone directs him to read necessary documents (ideally sitting him down to go through any document with him). They explained that delay would highly impact his anxiety and that the process was causing him significant

distress. Despite this, Wetherspoons did not make any adjustments to the disciplinary process.

Mr Halstead subsequently went off sick from work, and a long-term sickness meeting was arranged prior to obtaining the outcome of his occupational health referral. The occupational health report set out clear adjustments that should be made. These included giving 1-2-1 explanations of important documents, and confirming the extent to which his mother needed to be involved in his meetings and day-to-day tasks. It also emphasised the need for additional notice and other adjustments to meetings.

Contrary to the occupational health advice, no adjustments were made to the meeting for Mr Halstead's grievance, which he had raised about his treatment. An adjusted meeting was eventually arranged, following his mother's objections. There had also been no update on the disciplinary process, Mr Halstead had not been having his appraisals, and had not been paid correctly, all of which contributed to his anxiety.

In December 2023, Wetherspoons invited Mr Halstead to a "some other substantial reason" (**SOSR**) hearing to discuss what they asserted was a breakdown in the employment relationship and his apparent failure to attend meetings about his long-term sickness and his grievance. For this hearing, Wetherspoons offered numerous adjustments including the questions being sent in advance, an option for written submissions, an option to change the meeting time and location, confirmation of his mother's eligibility as companion and an open invitation to suggest any other adjustments in advance. This meeting was successful and in January 2024, Wetherspoons ended the SOSR process and instead invited Mr Halstead to an informal meeting to enable his return to work. In March 2024, Mr Halstead

returned to work with several practical adjustments to support him.

Mr Halstead had approached ACAS for early conciliation during his grievance process and, whilst he had successfully returned to work, Wetherspoons had declined to offer him any financial compensation for the prior treatment. He therefore brought a claim under the Equality Act 2010 (**EqA**) for a failure to make reasonable adjustments (Section 20 and 21) and disability-related harassment (Section 26). It was accepted that his condition amounted to a disability under Section 6 EqA, and that Wetherspoons had known about it at the relevant time.

*Tribunal's Decision*

The Tribunal upheld Mr Halstead's claim of a failure to make reasonable adjustments, but did not find that Wetherspoons' actions had amounted to harassment. Their key observations were as follows:

- Wetherspoons had failed to adjust its investigation, disciplinary, grievance and long-term sickness processes to accommodate Mr Halstead's needs as an autistic person. In each case they had applied their standard process, including standard notice periods, template letters and options of companion at meetings, and had not permitted the Claimant's mother to attend the majority of the meetings with him. They had also applied their standard categorisation of the breach as gross misconduct and suspended him during investigation,

despite there being no apparent risk to the company of him working.

- In the disciplinary letter, Wetherspoons had also referred to Mr Halstead's conduct as "dishonesty" and "abuse", which had caused Mr Halstead undue distress. They remarked that this was notable given that a typical feature of autism was a strong desire to adhere to rules, and that there was no evidence of dishonesty; Mr Halstead had admitted to the breach, had explained the misunderstanding, and had confirmed it would not happen again now that he understood the rule.

- Mr Halstead had therefore been placed at a substantial disadvantage in these procedures compared to someone without his condition. The Tribunal considered that once it had been established that the breach had been caused by his condition, the matter should have been dealt with informally and not as a disciplinary matter at all.

- From December 2023 onwards, it was clear that the company had taken on board their positive duty to make adjustments. The Tribunal described their approach from this point on as "exemplary".

- Whilst it had clearly been distressing for Mr Halstead, the Tribunal did not consider that Wetherspoons' conduct had amounted to harassment. The company had addressed the conduct in a standard manner which was inherently stressful and challenging for those involved, but this did not meet the threshold of intimidation (otherwise employers would never be able to conduct performance management).

Mr Halstead was awarded £25,412, the majority of the award being made for injury to feelings.

**What can employers learn from this case?**

The decision in *Halstead* offers a clear demonstration of the positive impact that making reasonable adjustments can have and, conversely, the negative impact that a failure to make them can have on a neurodivergent employee's wellbeing and their ability to participate in standard processes.

Given the Tribunal's commentary regarding the "exemplary" nature of the approach taken by Wetherspoons from December 2023 onwards, the judgment can serve as a helpful guide for employers as to the type of adjustments which can be made to support neurodivergent employees. Examples include:

- Providing longer notice periods for meetings, including investigation meetings. If notice would not usually be given for fact-finding meetings, consider whether this can be adjusted to allow them sufficient time to prepare without compromising the investigation.

- Giving clear explanations of the purpose of meetings, allegations made and the potential consequences (including agendas for meetings, where possible). Ensure that the employee understands the nature of the meeting and (if applicable) the seriousness, including the next

steps after the meeting and potential outcomes.

- Allowing flexibility with the options of who can accompany the employee to meetings. This may require the employer to go beyond the standard categories of trade union or colleague companions.

- Minimising delays as much as possible and offering regular updates.

- Carefully wording allegations to ensure that they do not inappropriately presume guilt, dishonesty or cause unnecessary distress.

- Remaining open to any other adjustments suggested by occupational health providers or the employee themselves, and implementing them unless there is a very good reason not to.

Adjustments should also be considered more widely during employment to ensure that neurodivergent employees are placed on an equal footing with their colleagues. Employers should ensure that, where they know an employee has a condition that affects them at work, this is tracked through their employment journey and information is shared (with their consent) to enable proper support. This will be particularly relevant for employees whose conditions may lead to challenges in asking for support.

In addition, this case highlights for employers the danger of enforcing “zero tolerance” policies. The Tribunal was critical

of such policies, suggesting that they can be problematic if applied on a blanket basis because they fail to consider the diverse needs of employees. Whilst the employer may consider a policy breach to be serious enough for suspension and potentially dismissal, they may nevertheless need to consider adjusting the standard applied to employees whose conditions may affect their understanding of the relevant policy or ability to comply with it. This may be surprising to some employers, as the concept of reasonable adjustments is commonly thought of in terms of processes rather than substantive expectations. However, it is clear from this case that applying policies in a one-size-fits-all manner could result in a failure to make necessary adjustments for disabled employees.

Finally, employers should note that it will not always be sufficient to rely on a contractual requirement to abide by all of their policies. They need to take active steps to ensure their policies are understood: this could include training, written communication and, where necessary, individual explanation.

Halstead v JD Wetherspoons 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 Rose Lim (RoseLim@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.**