

# Hell hath no fury like an employee scorned?

The High Court has ordered that an employee who was dismissed during his probationary period should be restrained from harassing the Chairman of the company and must return copies of all information that he had taken from the company.

## What happened in this case?

The claimant in this case was the Founder and Chairman of an asset management company (the Company). In 2023, the Company appointed the Defendant to a management position. However, there were a number of complaints about the Defendant's conduct, which resulted in him being dismissed during his probationary period. In response, he brought an unfair dismissal claim in the Employment Tribunal, but the claim was struck out as he did not have the two years' qualifying service needed.

At some point after his dismissal, the Defendant turned up at the Claimant's house and blocked his driveway for three hours. The Claimant invited him into his home and the Defendant pleaded for his job back. The Claimant said this was a matter for HR and not for him. On 31 May 2024 the Defendant sent an email to the Claimant in which he set out the names of several individuals and a company and included hyperlinks to various webpages. The Defendant stated that most, if not all, the names would be familiar to the Claimant and his staff would be interested in hearing about them. The suggestion was that the named individuals and company were

disreputable and were connected to the Claimant and the Company. The email also alleged that the Claimant and Company were involved in multiple frauds and false accounting. The Defendant went on to make various threats including that:

- he had the power to *“completely destroy”* the Company and if the law could not provide him with a remedy that he would *“have to fight dirty”* until the Company financially compensated him for his losses;
- he would email everyone who worked at the Company, the FCA, HMRC and the Serious Fraud Office, as well as others connected to the Company’s projects;
- he had secretly recorded conversations with the Claimant and taken emails and documents from the Company;
- he could, and would, hound the Company *“like a rabid dog”* and that he could, and would, *“completely destroy”* the credibility and *“fragile mental health”* of five individuals at the Company;
- he had run someone over who had threatened him, stating that *“...he didn’t see me coming, there was no witnesses, I’m too smart to leave any evidence behind”*;
- he had engaged in extensive reconnaissance and surveillance of the Claimant *“both in your manor and online”*;
- if he was ignored he would *“light so many fires”* around the Company that the Defendant would only be able to

watch if all *“burn to the ground”*; and

- if he did not receive a settlement by a certain date the Claimant could watch his staff leave and see things *“go up in flames”*.

The next day, the Defendant sent a truncated version of the email to the Claimant three times via WhatsApp. A few days later, the Defendant sent an email to individuals at the Company who were closely connected to the Claimant. The email was substantially the same as the email of 31 May 2024, save that it told the recipients that they too would be damaged by the publicity that he planned to generate. He addressed to them the same demand for money that had been made to the Claimant.

On 6 June 2024, the Claimant made a “without notice” application under the Protection from Harassment Act 1997 for an injunction to restrain the Defendant from approaching him, communicating with him and/or from carrying out his threat to publish material to third parties. The injunction was granted on an interim basis. The Defendant was also ordered to serve on the Claimant’s solicitor (a) copies of all communications already made to any third party about the Claimant, his family, the Company or its staff; and (b) copies of all information obtained by the Defendant from the Company which was in his possession or the possession of a third party.

On 28 June 2024, the Defendant stated that he had nothing to disclose as he had not made any communications to any third party. However, he refused to hand over copies of the

information he had taken from the Company on the basis that he needed to keep it to act as a whistleblower and to bring a counterclaim.

On 12 July 2024, a “return date” hearing was held to consider whether the injunction should be discharged or continue, pending the full trial. The Defendant did not attend the hearing.

### **What was decided?**

The High Court ordered that the injunction should continue until the full trial of the claim.

The Court held that it was likely that the statements made in the email would be found to be “*...deliberate, unacceptable, oppressive, highly objectionable and of a gravity to sustain criminal liability under the Protection from Harassment Act 1997*”. Their tone was intimidating, and they threatened to ruin the Company and damage the Claimant’s reputation. There was also a threat of physical violence and the “*unsettling*” claim that the Defendant had been carrying out surveillance on the Claimant.

The messages were targeted at the Claimant and aimed at extracting money from him. The Defendant was persistent – he had promised to hound the Company like a “*rabid dog*” and appeared to be carrying out the threat. He had since taken to leaving intimidating voice messages with the Claimant’s solicitors and had submitted two job applications to the Company for roles he did not appear to be qualified for.

The threats were also likely to amount to blackmail, given that they constituted demands with menaces and there was no lawful basis for them. This meant that the Defendant's right to freedom of expression did not have much weight and would not stand in the way of a final injunction.

At the hearing the Claimant gave evidence that the Defendant had mischievously, or wrongly, linked him and the Company to parties and online material that had nothing to do with them in order to suggest wrongdoing. The Claimant also denied all the allegations of fraud. If established at trial, this would add to the oppressive nature of the conduct (although, even if the allegations were true, they could be found to have been advanced for an improper purpose, meaning they would still be oppressive and unacceptable).

There was also a strong case to say the Defendant knew (or ought to have known) that his conduct amounted to harassment – any reasonable person in his position would have recognised this. The Claimant had given evidence that he was genuinely frightened of the actions that the Defendant could take to harm him and the Company.

Turning to the Defendant's failure to comply with the order to hand over the documents he had taken from the Company, the Court said that the reasons offered by the Defendant were not good reasons in law. The Court referred to the recent decision of the High Court in *Payone GmbH v Logo* [2024] EWHC 981 (KB) where it was said that *"It is well-established that the Courts will not sanction employees helping themselves to, or retaining, their employers documents for the purposes of future litigation, or anticipated regulatory issues or protected disclosures, or even taking legal advice"*. Accordingly, the Defendant was ordered to comply

with the order, or put forward a valid legal reason for not doing so.

### **What does this mean for employers?**

Although situations like this are thankfully rare, this case reminds us that if a disgruntled former employee wages a campaign of harassment against employees of the company, there is a route available to restrain them. Harassment in this context covers more than just threats of physical violence but includes any action which could cause alarm or distress. For example, things like watching or following someone or threatening to publish or publishing humiliating, offensive or upsetting content about them. Where there have been at least two instances of such harassment, this will count as a course of conduct which could give rise to a claim under the Protection from Harassment Act 1997.

Employers should also be mindful that they can be vicariously liable for the harassment of their employees in the course of their employment under the Protection from Harassment Act 1997. Unlike harassment under the Equality Act 2010, there is no “reasonable steps” defence available to an employer in this situation. Therefore, if an employee has suffered harassment at work on one occasion, employers should take swift action to protect the employee at work to avoid a second incident which could give rise to a claim.

[RBT v YLA](#)

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## **Government presses ahead with its promises to upgrade the National Minimum Wage**

In its General Election Manifesto, the Labour Party promised to upgrade the National Minimum Wage to reflect the cost of living and ensure that all adults received the same rate. Less than a month after being elected, the Labour Government has set the wheels in motion for these changes to take effect in April 2025.

### **What was promised in the Manifesto?**

In its General Election Manifesto, the new Labour Government promised that it would “*make sure the minimum wage is a genuine living wage*”. It planned to do this by changing the remit of the Low Pay Commission (the LPC), the independent body that advises Government about the minimum wage. The expanded remit would mean that the minimum wage rates should account for the cost of living. Currently, the 21 year+ national minimum wage rate sits at £11.44 per hour (also known as the “National Living Wage” rate). If adjusted for the cost of living, it would be brought closer to the pay rates

championed by the charity, the Living Wage Foundation. The Living Wage Foundation recommends that employers pay, on a voluntary basis, a “real living wage” of £12.00 per hour outside London and £13.15 per hour within London.

Labour also promised to remove the “discriminatory” minimum wage rate age bands, so that all adults would be entitled to the same rate. Effectively, this would mean doing away with the 18 to 20 year old rate (currently, £8.60 per hour). However, there were no plans to remove the 16 to 18 year old rate or the Apprentice rate (currently, £6.40 per hour in both cases).

### **What steps have been taken since the election?**

The Government has already taken steps to fulfil these Manifesto promises. On 30 July 2024, the Government wrote to the Chair of the LPC to confirm the update to its remit. The LPC has been asked to recommend a National Living Wage rate to apply from April 2025 which should take into account the cost of living, including the expected annual trends in inflation between now and March 2026. In addition to the cost of living, the remit of the LPC will continue to consider the impact on business, competitiveness, the labour market and the wider economy, as well as ensuring that the rate does not drop below two-thirds of UK median earnings for workers aged 21 and over.

As far as regional differences in pay rates are concerned, the Government has asked the LPC to continue to gather evidence on the differing impact across the United Kingdom of increases to the minimum wage rates, to inform how the minimum wage helps to deliver greater living standards for working

people in all areas of the UK.

On top of this, the LPC has also been asked to recommend a new national minimum wage rate for 18 to 20-year-olds to apply from April 2025. The aim is to narrow the gap with the National Living Wage rate as a first step towards achieving the promise of a single adult rate. The Government says that steps will need to be taken year by year to achieve this, taking into account the effects on employment of younger workers, incentives for them to remain in education or training, and the wider economy.

As far as under-18s and Apprentices are concerned, the Government has asked that these rates should be set “*as high as possible*” without damaging the employment prospects of each group.

### **Next steps?**

The LPC has been asked to provide its recommendations to the Government by the end of October 2024. In due course, the Government will confirm the new rates, which will come into force in April 2025. Employers who have workers paid at a rate on or around the national minimum wage will need to take care to ensure that the new rates are applied on time. Care must also be taken not to inadvertently fail to pay in line with the new rates, since this can lead to action by HMRC who can demand underpayments going back six years, issue fines and publicly “name and shame” the employer. For example, many employers operate salary sacrifice arrangements as a way of providing benefits, such as pensions, to staff in a tax efficient way. However, it is the *post* salary sacrifice pay that counts for national minimum wage purposes.

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## **New law on tipping due to come into force on 1 October 2024**

The Government has introduced regulations which will bring the Employment (Allocation of Tips) Act 2023 into force on 1 October 2024, applying to tips paid on or after that date. The Act will require employers to ensure that workers receive tips in full, and that they are allocated in a fair and transparent way. Our briefing note provides a quick reminder of what the new law is all about.

### **What will the new Act do?**

Under the new Act, employers will be required to ensure that all qualifying tips, gratuities and service charges over which an employer exercises control or significant influence are

allocated fairly to workers (including eligible agency workers). This means tips, gratuities and service charges received directly by the employer (e.g. those paid to an employer by a customer using a credit or debit card) *and* those received by the worker where the employer directs what happens to them. However, the Act does not apply to cash tips paid directly to workers and which are kept by them or shared out between the workers on their own terms.

Tips must be paid to workers in full by no later than the end of the month following the month in which the customer paid the tip. If this is not done, the worker will have the right to bring a claim for unlawful deductions from wages. An employer may arrange for all or part of the qualifying tips, gratuities and service charges to be allocated between workers by an independent *tronc* operator.

Employers may not require workers to agree to give up their rights under the Act, nor can they get around the new rules by reducing wages by an amount equivalent to the tips (or otherwise asking the worker to reimburse them for the amount of the tips). Workers will also have the right to complain to an employment tribunal where an employer fails to allocate fairly and/or pay tips in line with the new rules. An employer can be ordered to revise its allocation of tips and/or make a payment to the worker (and other workers). It may also be ordered to pay compensation of up to £5,000.

In addition, those employers that pay tips, gratuities and service charges on more than an occasional and exceptional basis will be required to have a written tips policy which is given to all workers. Further, such employers must keep records of tip allocation for three years and make those records available to workers on request. Workers will have the

right to complain to an employment tribunal about a failure to comply with rules on policies or keeping records.

## **Statutory Code of Practice**

Accompanying the new Act will be a statutory Code of Practice on the Fair and Transparent Distribution of Tips (the Code). The Code has five sections covering:

- qualifying tips and qualifying workers;
- the factors and methods relevant to fairness;
- transparency;
- addressing problems; and
- a glossary of terms.

Non-compliance with the provisions of the Code does not give rise to a legal claim in itself. However, as a statutory code, it will be admissible in evidence in employment tribunal proceedings and will be taken into account where relevant.

**Next steps?**

Employers operating in sectors where staff receive tips will need to familiarise themselves with the new rules and Code, devise a fair system for distributing tips, prepare a written policy and ensure it maintains appropriate records. Although the new rules apply to employers in all sectors, in practice, it is most likely to affect employers operating in the following areas:

- the hospitality sector, in relation to bar and restaurant staff;
- the beauty sector, in relation to hairdressers and beauticians;
- the hotel sector, in relation to valets, doorman, porters and maids; and
- the transport and delivery sector, in relation to taxi drivers and take-away delivery drivers.

[Employment \(Allocation of Tips\) Act 2023](#)

[Statutory Code of Practice on fair and transparent distribution of tips](#)

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contact Principal Knowledge Lawyer Amanda  
Steadman ([amandasteadman@bdbf.co.uk](mailto:amandasteadman@bdbf.co.uk)) or your usual BDBF  
contact.

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# The King's Speech triggers the start of the Labour Government's workplace law reforms

The King's Speech was delivered in Parliament on 17 July 2024, setting out the Labour Government's legislative agenda. The speech promised that two new pieces of employment legislation will be introduced: an Employment Rights Bill and an Equality (Race and Disability) Bill.

Although the draft Bills have not yet been published, the background briefing notes to the King's Speech suggest that they will take forward many of the Labour Government's Manifesto promises on workplace law reform.

## The Employment Rights Bill

This Bill will deliver the following manifesto promises:

- **Banning exploitative zero-hour contracts** and ensuring that workers have a right to a contract that reflects the number of hours they regularly work and that all workers get reasonable notice of any changes in shifts with proportionate compensation for any late cancellations or changes.
- **Ending 'Fire and Rehire'** by reforming the law to provide effective remedies and replacing the previous Government's statutory Code of Practice on Dismissal and Re-engagement (which came into force on 18 July 2024).
- **Making parental leave, sick pay and protection from unfair dismissal available from day 1 on the job**, but with employers permitted to operate probationary periods to assess new hires. We discussed the impact of making unfair dismissal a Day 1 right in our briefing [here](#).
- **Strengthening Statutory Sick Pay** by removing the lower earnings limit to make it available to all workers and removing the waiting period.
- **Making flexible working the default from day 1 on the job**, with employers required to accommodate this as far as is reasonable.
- **Strengthening protections for new mothers by making it unlawful to dismiss a woman who has had a baby** for six months after her return to work, except in specific circumstances.
- **Establishing a new Single Enforcement Body**, also known as a "Fair Work Agency", to strengthen enforcement of workplace rights.

- **Establishing a Fair Pay Agreement in the adult social care sector** and, following review, assess how, and to what extent, such agreements could benefit other sectors.
- **Reinstating the School Support Staff Negotiating Body**, to establish national terms and conditions, career progression routes, and fair pay rates.
- **Updating trade union legislation** by removing restrictions on trade union activity – including the previous Government’s approach to minimum service levels – and ensuring industrial relations are based around good faith negotiation and bargaining.
- **Simplifying the process of statutory recognition** and introducing a regulated route to ensure workers and union members have a reasonable right to access a union within workplaces.

## **The Equality (Race and Disability) Bill**

This Bill will deliver the following manifesto promises:

- **Enshrining in law the full right to equal pay for ethnic minorities and disabled people**, making it easier for them to bring unequal pay claims. We discussed the potential impact of these new equal pay rights in our briefing [here](#).

- **Introducing mandatory ethnicity and disability pay reporting for larger employers (i.e. those with 250+ employees).**

## **What's missing?**

Although ambitious in scope, many of Labour's promises for workplace law reform are missing from these two Bills. In some cases, this is because the nature and impact of the proposals needs to be explored in greater depth (e.g. by way of a "call for evidence" and public consultation) before setting them out in legislation. For example, the proposals to introduce a single worker status and a right for workers to disconnect outside their normal working hours.

In contrast, other proposals may be taken forward by way of secondary legislation (i.e. a statutory instrument) and do not need to be included in a new Act of Parliament. For example, the dual discrimination provisions and public sector socio-economic duty provisions are already contained in the Equality Act 2010 and just need to be enacted. It is possible that other proposals which require relatively minor drafting changes to existing legislation could also be taken forward by way of secondary legislation. For example, the proposals to require employers to publish gender pay gap action plans and to increase the time limits in statutory employment claims from three to six months.

It remains to be seen how, and when, other proposals will be taken forward, including plans to:

- strengthen the new duty to prevent sexual harassment and introduce protection from third party harassment;
- change equal pay law to permit comparisons with outsourced workers and introduce a new enforcement unit;
- regulate the surveillance of employees;
- introduce a right to bereavement leave;
- strengthen the law on whistleblowing and TUPE;
- require employers to publish “menopause action plans”;  
and
- change the trigger for collective redundancy consultation.

## **Next steps?**

Labour promised to introduce legislation on workplace law reform within 100 days of coming into power, meaning drafts of the two Bills should be published on or before 12 October 2024. We will produce a further update once the draft Bills are available.

In the meantime, if you would like a refresher on Labour’s plans for employment law, you can revisit our webinar from last month [here](#).

[The King's Speech 2024](#)

[The King's Speech 2024 – Background Briefing Notes](#)

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## **Gross misconduct dismissal of City trader who had applied industry guidance was unfair**

In *Weir v Citigroup Global Markets Ltd*, an Employment Tribunal has held that the dismissal of a City trader for misleading the financial markets was unfair because he had been operating in line with industry guidance and his managers knew of his approach. Further, the employer's lengthy disciplinary process was unacceptable, unreasonable and caused significant stress and worry to the employee.

**What happened in this case?**

Mr Weir worked for Citigroup as a Sales Trader on its Asia-

Pacific High Touch trading desk (the **APAC desk**) in London. His role involved providing professional and large-scale investors with market updates, trade ideas and sourcing buy and sell trade ideas in relevant stock. Part of his role involved the identification and publication of “indications of interest” (**IOIs**). IOIs are indications that a client has an interest in buying or selling particular stock in a particular quantity. The IOIs are published on Bloomberg’s financial trading platform with the aim of attracting a counterparty.

Following a regulatory investigation into the activities of the Hong Kong office, Citigroup reviewed the practices of the APAC desk in London. As a result, disciplinary allegations were raised against Mr Weir, chiefly, that he had misled the financial market by publishing certain IOIs without a genuine client interest and that he had failed to tell his line manager that he knew or suspected that misleading IOIs were being published.

Mr Weir maintained that the methodology he used meant that the IOIs he published were supported by a “reasonable expectation of interest” from specific clients, drawn from his own knowledge and experience of those clients and orders already in progress. Mr Weir argued that his approach was in line with industry-wide guidance in place at the time and Citigroup had not provided any training on IOIs, nor issued any internal policy or guidance to the contrary.

After an extremely lengthy investigation and disciplinary process spanning more than two years, Mr Weir was summarily dismissed for gross misconduct. His appeal against his dismissal was rejected. Mr Weir claimed he had been unfairly dismissed.

## What was decided?

The Employment Tribunal upheld Mr Weir's unfair dismissal claim. Although Citigroup genuinely believed that Mr Weir had committed acts of misconduct, the Tribunal found that it did not have reasonable grounds for this belief.

As to the allegation that he had published IOIs without a genuine client interest, the Tribunal held that Mr Weir had acted properly in following industry guidance on IOIs at the time, which required the existence of a reasonable expectation of client interest. Further, the methodology Mr Weir had used was legitimate and ensured that there was a reasonable expectation of client interest. The Disciplinary Committee had failed to grapple with the methodology he had used in full. Further, they had misunderstood the industry guidance or, alternatively, had *"unreasonably and unwarrantedly"* sought to apply a higher standard of genuine client interest, something which had never been communicated to Mr Weir.

As to the allegation that he had failed to tell his line manager what was happening, the Tribunal held that it was unreasonable to find that this amounted to misconduct given that Mr Weir had believed he was behaving appropriately and in line with industry guidance. Further, it was unreasonable in light of the fact that Mr Weir's "matrix" managers based in Hong Kong had been aware of the methodology being used by the APAC desk. Mr Weir's direct line manager in London conceded that she did not know which matters needed to be reported to matrix managers and which to line managers, since no formal policy or guidance on this matter had ever been issued by Citigroup.

The Tribunal also held that Citigroup had failed to carry out a reasonable investigation. The process started in September 2019, when Mr Weir was given just two minutes' notice of an initial "fact-finding" meeting. There was a hiatus until March 2020, when Mr Weir was invited to a same-day investigation meeting. Seven people attended the meeting on behalf of Citigroup, which spanned two days. Mr Weir was questioned for over 10 hours, on top of his usual workload. The Tribunal was critical about this stage of the process, noting that it was an *"...unreasonable way of conducting an investigation and (Citigroup) demonstrated inadequate regard for the likely impact upon (Mr Weir)"*. The Tribunal said that it was inevitable that a panel interview carried out in such an intensive manner and over a consecutive two-day period would feel hostile and make it more difficult for Mr Weir to explain his actions.

At end of investigation meeting, Mr Weir was told that the investigation process would be completed by the end of March 2020, however, this was not the case. Again, there was a hiatus. Between March and November 2020, Mr Weir asked for updates about the process and was repeatedly told that a resolution was "coming soon". The Tribunal found that the investigation process and lack of information had caused Mr Weir's mental health to deteriorate, leading him to go off sick with work-related stress. By February 2021, Mr Weir felt better and asked to return to work on a phased basis. Citigroup responded the next day by suspending him and notifying him that a decision had been taken to pursue disciplinary proceedings against him.

The Tribunal had this to say about the investigation process: *"The length of time taken to complete the investigation was unacceptable and unreasonable, causing significant stress and worry for (Mr Weir)"*. They also firmly

rejected Citigroup's explanation that Covid had contributed to the delays noting that: *"We do not find it credible that a global organisation such as (Citigroup) with all its human and technical resources, was unable to progress the...situation in a timely manner or respond to...requests for updates in an accurate or timely manner"*.

The disciplinary process eventually began in April 2021. Before the disciplinary hearing took place, the in-house lawyer who had led the investigation met with the Disciplinary Committee and inaccurately represented Mr Weir's position on the disciplinary allegations. The disciplinary hearing took place on 7 April 2021. The Disciplinary Committee was made up of a four-person panel, contrary to the terms of the Disciplinary Policy that had been given to Mr Weir (which said that two people would attend from Citigroup). The hearing lasted for 90 minutes and focussed on one allegation, which was ultimately not upheld. The hearing was adjourned and reconvened a few days later. It was at this second hearing that the two allegations which went on to be upheld were discussed. That hearing lasted for just 30 minutes.

After the hearing, one of Citigroup's Employee Relations specialists was tasked with undertaking further investigations on a particular issue. She met with Mr Weir on 21 April 2021, but used the incorrect "script template", with the result that she told him the meeting was a further disciplinary hearing, rather than an investigatory meeting. At the meeting, she failed to probe the particular issue in any detail and later misrepresented Mr Weir's position to the Disciplinary Committee (suggesting he had been definitive when, in fact, he had been equivocal). Mr Weir was dismissed for gross misconduct on 10 June 2021.

An appeal hearing took place on 2 September 2021 but was adjourned for over four months before reconvening on 22 January 2022. On 16 February 2022, the appeal officer upheld the Disciplinary Committee's decision to dismiss. Yet the Tribunal held that the appeal conclusion was at odds with what had been said in the dismissal letter, reached conclusions that were unsupported by evidence and demonstrated an acceptance of the in-house lawyer's inaccurate representations of Mr Weir's position (despite the fact that minutes of meetings which had been available to the appeal officer showed Mr Weir's true and consistent position).

The compensation to be awarded to Mr Weir is yet to be decided. However, the Tribunal held that Mr Weir had complied with industry guidance and had been co-operative throughout the investigation and disciplinary process. Therefore, it could not be said that his conduct had contributed his dismissal, meaning there will be no reduction in his compensation. Nor was there any prospect that Mr Weir would have been dismissed fairly had Citigroup conducted the process in a reasonable manner, again, meaning there will be no reduction to his compensation.

### **What are the learning points for employers?**

This decision underlines the importance of employers not allowing disciplinary decisions to be clouded by wider external events, such as regulatory censure. The evidence must be assessed objectively, and employers should look for and consider evidence which supports the employee's position, and not focus only on evidence which would support the issuing of a disciplinary sanction. This is all the more important where the employee stands to lose their job (and, in regulated professions, potentially their career).

It also illustrates the importance of keeping internal policies and practices under review to ensure that they comply with the law and any regulatory rules and expectations. Such policies and practices should be set down in writing, communicated to staff and training offered as appropriate. Failing to stay on top of this and simply hoping for the best may mean your hands are tied when it comes to disciplinary action later down the line. As seen in this case, trying to change the rules after the event will not justify a disciplinary sanction.

Crucially, this decision reminds employers of the importance of getting the investigation and disciplinary process right. As seen here, Tribunals will have little patience for employers who have plenty of expertise and resources at their disposal but get things wrong. The key takeaways from this case are:

- **Deal with the issues promptly and without unreasonable delay.** This is a core principle set down in the statutory Acas Code of Practice. To the extent that there is a legitimate delay, tell the employee the reason for it and be clear about when the process will resume. And be prepared to “think outside the box” – could the process be accelerated in a different way? For example, by way of a virtual meeting, conference call, or by allowing the employee to make written representations.
- **Know your own policies and procedures and apply them**

**correctly.** This may seem like an obvious point, but this case demonstrates how even an extremely well-resourced employer can get it wrong. Make sure meetings are labelled accurately and are convened in the right way. Be mindful just how stressful the situation is for the employee. Where appropriate, be flexible about the process, for example, allow the employee to be accompanied by a friend or family member.

- **Conduct the meetings in a reasonable manner.** Give reasonable notice of meetings and keep them to a sensible length. Equally, don't rush through important meetings. The best approach is to try to agree the length of the meeting with employee in advance but, again, stay flexible. If the employee is upset, offer to take a break or adjourn to another day. Do not turn up to meetings "mob-handed" since this is quite likely to intimidate the employee and have a negative impact on their evidence.

- **Make sure all parties involved in the process understand the scope of their role.** Investigators are there to gather evidence in an even-handed way and report it neutrally to the disciplinary panel. It is not their role to construe the information in a certain way or lobby for a particular disciplinary outcome. The decision on outcome is for the disciplinary and appeal panels. Those decision-makers should weigh up the

evidence carefully and take care not to adopt a broad-brush approach in order to get to a desired outcome.

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## **Maternity leave and redundancy: the risks of assuming an internal reorganisation justifies a redundancy dismissal.**

An internal reorganisation which led to an employee's part-time role being subsumed within a broader full-time role did not necessarily mean the role was redundant. Given that the employee was on maternity leave, if the role was not redundant, it raised the prospect that the process was a sham motivated by the maternity leave.

## **What happened in this case?**

Ms Ballerino began working for The Racecourse Association as a part-time Financial Accountant in August 2018. She was engaged to work from home for 40 days per year, although she felt that the role really needed her to work more than double that amount. The employer agreed to review the role when a new Chief Executive was in post the following year. As Ms Ballerino was pregnant when she started employment, she began a period of maternity leave in December 2018.

In February 2019, the new Chief Executive, Mr Armstrong, came on board. He undertook a review of the business and decided that a new full-time, office-based role of "Finance Manager and Business Analyst" should be created. The new role would subsume Ms Ballerino's duties. In late June 2019, two candidates attended second-round interviews for the new role.

Around the same time, the employer contacted Ms Ballerino (who was on maternity leave) to inform her that she was at risk of redundancy because of the decision to amalgamate her duties within the Finance Manager and Business Analyst role. She was provided with a job description for the new role and invited to apply for it, but, at the same time, was given a draft settlement agreement governing the terms of her exit from the business. Ms Ballerino did not apply for the new role and, after settlement negotiations had broken down, she was dismissed.

Ms Ballerino claimed that the redundancy process was a sham designed to exit her from the business because of her maternity leave or sex. In the alternative, she argued that if there had been a genuine redundancy situation, the

dismissal was automatically unfair because the employer had failed to allocate the new role to her, which it should have done given that it was (she said) a suitable alternative vacancy and she had been on maternity leave at the time.

The Employment Tribunal rejected the discrimination claims, finding that there was an acceptable business reason for the reorganisation and the redundancy was not a sham. It also rejected the automatic unfair dismissal claim, finding that the new role was not a suitable alternative vacancy because its main focus was on business analysis rather than financial accounting. Further, it was a full-time, office-based role rather than a part-time, home-based role. As such, the employer had not been obliged to offer it to her ahead of other potential candidates.

Ms Ballerino appealed to the Employment Appeal Tribunal.

### **What was decided?**

The EAT upheld the appeal.

On the automatic unfair dismissal claim, the Employment Tribunal had formed the impression that there was a genuine redundancy situation and had then jumped straight to the question of whether the new role was a suitable alternative vacancy. Yet, the Tribunal had failed to interrogate the legal question of whether the employer's need for employees to carry out financial accounting work had, in fact, ceased or diminished or was expected to do so. Although that short-cut may be permissible in some situations, that was not the case here. Ms Ballerino's role was still relatively new and there

had been a debate about how many working hours the role really required. In these circumstances, the fact there was some internal reorganisation and a need for additional tasks to be performed, did not necessarily mean that her role was no longer required.

On the discrimination claims, the Employment Tribunal had accepted the employer's explanation for the dismissal at face value i.e. that she was redundant. However, this decision was problematic because the Tribunal had not properly scrutinised the question of whether her role was, in fact, redundant. That question needed to be answered – because if her role was *not* redundant then this would bolster her argument that the dismissal was a sham.

The case has been remitted to the Employment Tribunal to examine the question of whether the role was genuinely redundant.

### **What are the learning points for employers?**

This decision reminds employers (and Employment Tribunals) of the need not to make assumptions in business reorganisations. Expanding a role in terms of hours and/or duties does not necessarily mean that the requirement for the original duties has ceased or diminished. This is particularly so where the original role is relatively new, fluid and subject to review, as was the case here.

In internal reorganisation situations, the best advice for employers is to take care to undertake the necessary groundwork. Create a job specification for the new role

setting out its scope and duties in full. This is especially important where duties are to be reallocated from existing roles to a new role. Having proper documentation in place helps to overcome suggestions that the whole exercise is a sham designed to exit specific employees. Ensure that appropriate redundancy consultation is undertaken, and that careful consideration is given to whether any new role amounts to a suitable alternative vacancy for a woman on maternity leave, who will have priority for such vacancies (as do certain other employees). If an employee who has priority is denied such a role, they may be able to claim that they have been automatically unfairly dismissed and/or they have suffered pregnancy and maternity or sex discrimination.

### [Ballerino v The Racecourse Association Ltd](#)

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman ([amandasteadman@bdbf.co.uk](mailto:amandasteadman@bdbf.co.uk)) or your usual BDBF contact.

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**Trainee solicitor left unsupervised and given the workload of two qualified**

# Lawyers was unfairly dismissed for blowing the whistle

A Tribunal has ruled that a trainee solicitor left unsupervised in a chaotic working environment was unfairly dismissed for blowing the whistle on the way the firm was run. Although she only had ten months' service, she was able to claim automatic unfair dismissal and was awarded over £36,000 compensation.

## What happened in this case?

Ms Kaur was employed as a trainee solicitor by Gillen De Alwis Solicitors (**the firm**). Before she even started work, the firm began to hand case files over to her to work on. Upon starting employment, she received no meaningful induction. The day after she started, Ms De Alwis, one of the founding partners of the firm, handed over to her the caseload of two qualified lawyers. During her first few weeks of employment, Ms De Alwis put pressure on Ms Kaur to complete tasks, despite the fact that she had sustained a back injury and was in pain. Ms Kaur was told that her training contract would be in jeopardy if she did not get things done.

Ms Kaur's back injury caused her to take sick leave between 19 July and 24 September 2021. During her sickness absence the firm required her to carry out work in order to be paid Statutory Sick Pay. She was not paid her normal salary for the time that she worked. When she returned to work, the department was still operating in a chaotic manner. There was

no appropriate management or supervision and Ms Kaur and an intern were frequently left unsupervised to deal with matters and approve contracts without them being checked by a qualified lawyer.

After her return to work, Ms Kaur was also subjected to bullying and harassing treatment. She was criticised for not completing work which she had, in fact, completed. She was unreasonably blamed for delays on client matters. She was screamed at on the telephone and spoken to in a belittling, rude and insulting way. She was also moved between departments with no notice.

Ms Kaur raised her concerns about the way the practice was being run to senior colleagues and partners within the firm on numerous occasions between October 2021 and February 2022. She also contacted the Solicitor's Regulatory Authority (SRA) by telephone on three occasions and eventually made a written report to them. In early March, Ms Kaur told the firm's newly appointed HR manager that she wished to raise a formal grievance and that she was considering raising the matter with the SRA (when, in fact, she already had). Around the same time, Ms Kaur saw a doctor in relation to work-related stress and anxiety and went on to take two weeks' sick leave.

She submitted a grievance on 11 March 2022 but received no response. She submitted a data subject access request on 5 April 2022. Three days later, she was summarily dismissed without any investigation or disciplinary procedure having been followed. Various reasons were given including that she had failed to follow reasonable instructions and was incapable of being trained or meeting the practice skill standards. Ms Kaur claimed that she had been automatically unfairly

dismissed for blowing the whistle. The firm went into voluntary liquidation at the end of 2023.

### **What was decided?**

The Employment Tribunal found Ms Kaur to be committed to her profession and an intelligent and diligent person. She had not been given proper training or supervision and had been held to an unreasonably high standard. It found that any failures in the service provided to clients were primarily down to the firm's failure to manage its practice appropriately or to train and supervise its staff. The Tribunal concluded that Ms Kaur had not been guilty of gross misconduct entitling the firm to summarily dismiss her.

The Tribunal went on to find that the disclosures that Ms Kaur had made amounted to protected disclosures. They contained information and Ms Kaur reasonably believed that they tended to show that the firm was in breach of its duties (in particular, certain sections of the SRA's Code of Conduct for Solicitors). She also reasonably believed that it was in the public interest to raise these matters. In particular, she was concerned about the negative impact on clients of the firm who were receiving a poor service.

Having found that she had made protected disclosures, the question was whether they were the principal reason for her dismissal. In light of the fact that the firm did not carry out an investigation or disciplinary process, and the finding that Ms Kaur was not guilty of misconduct, the Tribunal drew an inference that the firm did not genuinely consider this to be a misconduct case. Coupled with the timing of the dismissal, the Tribunal was satisfied that it was more likely

than not that the real reason for the dismissal was the protected disclosures.

The Tribunal awarded compensation of £36,062, which included an uplift to compensation of 25% to reflect the firm's "complete failure" to comply with the Acas Code of Practice on disciplinary and grievance procedures. The compensation award was relatively low as a result of the fact that the firm went into voluntary liquidation, meaning Ms Kaur's employment would have come to an end around that time in any event.

### **What are the learning points?**

Whilst the facts of this case are at the more extreme end of the scale, it does demonstrate the need for employers to have effective practices for managing and supervising junior staff in place, including inductions, workload management and day to day supervision. A failure to do is likely to generate a stressful working environment, leading to disengagement, sickness absence and employment claims. Here, the claimant was able to rely on breaches of a regulatory code in order to qualify as a whistleblower. However, non-regulated employees could argue that an unmanageable and chaotic working environment and/or bullying endangers the health and safety of staff, and this may well be enough to get them over the hurdle of qualifying as whistleblower.

The decision also underlines the need for employers to follow proper dismissal procedures for new staff in appropriate cases. Here, the claimant had under two years' service and so could not bring an ordinary unfair dismissal claim. As a result, it appears that the firm dispensed with any form of investigation or disciplinary procedure prior to dismissal and

ignored the minimum requirements in the Acas Code. However, the firm failed to spot that the claimant had unlocked the door to bring an “automatic” unfair dismissal claim as a whistleblower – a claim which may be brought from Day 1 of employment. Employers wishing to dismiss employees with under two years’ service should always check that there are no aggravating factors present which may mean the employee could still bring claims about the dismissal. It should also be remembered that the new Labour Government has indicated that it plans to remove the two-year service requirement for unfair dismissal claims. If this happens, proper dismissal procedures will need to be followed in every case.

Although it is unlikely that the claimant will ever recover her compensation, the outcome of this case is still extremely valuable to her. She gave evidence to the Tribunal that the stigma of having been dismissed directly contributed to her being turned down for employment. This decision means she may now say that she was unfairly dismissed, and, indeed, that she was commended by the Tribunal for her professionalism and ability.

[Kaur v Gillen De Alwis Solicitors Ltd \(in Creditor’s Voluntary Liquidation\)](#)

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# **New duty to prevent sexual harassment at work coming into force on 26 October 2024**

The Equality and Human Rights Commission (EHRC) has confirmed that the new duty for employers to take reasonable steps to prevent sexual harassment at work will come into force on 26 October 2024. The EHRC has opened a consultation on new guidance which will govern how the duty will operate in practice. In this briefing, we explain the duty in full and consider the recommendations set out in the guidance.

**Do employers currently have to take steps to prevent sexual harassment?**

The current position is that sexual harassment in the workplace is unlawful, and employers and individual perpetrators may be found liable in claims brought in the Employment Tribunal. However, employers can avoid being found vicariously liable for harassment committed by their workers if they can show that they took *all* reasonable steps to prevent such harassment from occurring – this is known as the “reasonable steps defence”. In this context, reasonable steps include things like implementing an anti-harassment policy; providing good quality and regular training to staff; and dealing with complaints effectively.

In practice, most employers elect to take such steps, but

there is no legal obligation to do so. However, from 26 October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 (**the Act**) will introduce a mandatory duty on all employers to prevent sexual harassment, regardless of whether they wish to be able to rely on the reasonable steps defence.

### **What is the new duty to prevent sexual harassment?**

The new duty to prevent will require all employers to take reasonable steps to prevent sexual harassment of workers in the course of their employment. In this context, “sexual harassment” means unwanted conduct of a sexual nature which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Importantly, the duty does *not* extend to either:

- less favourable treatment of an individual because they had either rejected or submitted to sexual harassment; or
  
- harassment related to any protected characteristic, including sex-based harassment (i.e. where an individual suffers harassment related to the fact that they are a man or woman, but the unwanted conduct in question is not of a sexual nature).

The new duty extends to sexual harassment occurring “in the course of employment”. Naturally, this covers sexual harassment occurring within the workplace, but it also covers harassment occurring at work-related events such as conferences, off-sites, parties or leaving drinks. Importantly, the duty requires employers to anticipate the situations when workers might be exposed to sexual harassment and take action *in advance* to prevent it from happening. Employers must not wait until an incident has occurred before taking action.

In one respect, the new duty is less stringent than the reasonable steps defence, in that it only requires employers to “take reasonable steps” rather than to “take *all* reasonable steps”. When the Act was on its passage through Parliament, it was envisaged that it would require employers to take all reasonable steps. However, this was watered down due to fears that it would be too onerous for employers. Yet the new Labour Government has promised to strengthen the duty by reinstating the requirement for all reasonable steps to be taken. However, this would need an amendment to the Act, and it is not yet known when this change will be made (but it seems unlikely that it will be made before the duty comes into force).

**Will the new duty cover sexual harassment committed by third parties?**

Until October 2013, the Equality Act 2010 contained express provisions making employers liable for harassment of their staff by third parties (e.g. contractors, clients, delegates at a conference or members of the public), although liability

only arose where the worker had been harassed on at least three occasions. These provisions were repealed by the Coalition Government on 1 October 2013, with the result that it became much more difficult for workers to bring claims against their employer where they had been harassed by a third party.

When the Act was on its passage through Parliament, it was envisaged that it would make employers directly liable for the sexual harassment of workers by third parties, from the first time that the harassment occurred. However, the third-party harassment provisions were dropped, again, out of a concern that they would be too onerous for employers, particularly those in the hospitality sector.

Therefore, the position regarding employer's liability for third party harassment will remain unchanged. There is no specific legal protection, however, workers who are sexually harassed by third parties may be able to bring other claims against their employer in certain circumstances. For example, individuals could argue that their employer's failure to take reasonable steps to protect them from third party sexual harassment amounts to:

- a serious breach of contract entitling them to resign and claim constructive unfair dismissal (currently, an employee would need two years' service to bring this claim); or

- direct or indirect discrimination on the grounds of a protected characteristic such as sex, sexual orientation or disability (there is evidence to show that women, LGBT and disabled people are more likely to suffer sexual harassment at work).

Putting aside the risk of direct claims against the employer, the EHRC makes it clear that the new duty to prevent requires employers to take steps to prevent sexual harassment committed by third parties. A failure to do so would give rise to a breach of duty, which could lead to enforcement action by the EHRC (this is discussed further below).

It should also be noted that the new Labour Government has promised to introduce direct legal protection from third party harassment. Again, this would need an amendment to the Act, and it is not yet known when this change will be made (and, again, it seems unlikely that it will be made before the duty comes into force).

### **What information is there for employers on how to comply with the new duty?**

On 9 July 2024, the EHRC opened a consultation on changes to its Technical Guidance on Sexual Harassment and Harassment (the **Guidance**) to reflect the new duty. The consultation will run for four weeks, closing on 6 August 2024. The Guidance explains the new duty and, crucially, sets out the steps that employers are expected to take to discharge the duty.

It is important to note that the Guidance is just that – it does not have the status of a “Statutory Code”. This means that Employment Tribunals are not obliged to take it into account in relevant cases. That said, it may still be used as evidence in legal proceedings. For that reason, employers would be wise to apply the recommendations in the Guidance as far as possible. Separately, the EHRC has said it intends to update its existing Employment Statutory Code of Practice “in due course” to reflect the new duty.

### **When will a preventative step be “reasonable”?**

The Guidance explains that employers are required to take reasonable steps and what is reasonable will vary from employer to employer and will depend on factors including, but not limited to, the following things:

- the employer’s size;
  
- the sector it operates in;
  
- the working environment;
  
- particular risks present in the workplace; and

- the likelihood of workers coming into contact with third parties, and the types of third parties that they might come into contact with.

Taking these factors into account, an employer must consider the risks of sexual harassment arising in the course of employment and the different steps that it could take to prevent it from happening. It must then assess which of those steps would be reasonable for it to take and implement them. When making this assessment, the time, cost, potential disruption and likely effectiveness of the proposed steps are all relevant considerations. However, it is important to remember that it may still be reasonable to take a step even if it might *not* be effective in preventing the harassment.

### **What kinds of steps should employers consider taking in order to discharge the duty?**

The Guidance recommends that employers should take the following types of preventative steps:

- **Have a good suite of policies in place.** Employers should have separate policies for sexual harassment and other forms of harassment (or have one clearly delineated policy). Such policies should also cohere with other relevant policies such as disciplinary, social media and health and safety policies.

- **Raise awareness of the anti-harassment policies amongst the workforce and third parties.** This could mean requiring employers to provide copies to staff at regular intervals and before events where harassment has occurred in the past (e.g. Christmas parties). The policies should be adapted as appropriate and also shared with third parties such as clients and contractors. Third parties should be alerted to the employer's expectations around the treatment of staff and the consequences of any harassment (e.g. in any contractual terms with the third party, or by way of a sign visible in the workplace).
- **Review the anti-harassment policies on a regular basis.** Policies should have an annual health check and be updated to reflect any legal changes and trends apparent from internal complaints, staff surveys and/or exit interviews. Policies should also be reviewed after any significant incident of sexual harassment occurs.
- **Put in place methods to detect harassment (including third party harassment).** This could include informal one-to-ones, sickness return to work meetings, exit interviews and external reporting systems which allow anonymous reports. We have previously [reported](#) on how some employers are making use of apps which permit real time and anonymous reporting of sexual harassment.
- **Provide high-quality and regular harassment training to staff.** As an important EAT [decision](#) highlighted, an

employer will not have taken reasonable steps if the training it provides to staff does not pass muster.

This training should cover both prohibited conduct and encourage staff to engage in respectful and safe behaviours at work. Such training should also be tailored to the sector and audience, with more comprehensive training provided to those in leadership and HR roles.

- **Assess the risk of sexual harassment.** Employers must interrogate the risk of sexual harassment in their organisation and the steps that could be taken to eliminate or minimise such risks. Common risk factors include: job insecurity, lone working, the presence of alcohol, customer-facing duties, gender imbalanced workforces and workers being placed on secondment.
- **Take steps to address power imbalances.** Harassment often takes place and goes unreported where there are power imbalances in the workplace. For example, between senior and junior workers, where workers with particular protected characteristics are in a minority in the workplace or where workers are in insecure employment. Employers should consider what actions they can take to reduce such power imbalances.
- **Deal with harassment complaints effectively.** This includes taking appropriate and consistent disciplinary action against the perpetrators of harassment. Those who engage in unlawful conduct should not be protected,

rewarded or promoted, regardless of their importance to the organisation. Where the perpetrator is a third party, in some cases this may mean ending the relationship with them.

### **What other steps could employers consider taking?**

There are, of course, many other steps that employers could consider taking to help discharge the new duty. Australia has had a similar duty to prevent in place since 2022 and the Australian Human Rights Commission has issued extensive [guidelines](#) on the steps needed to discharge that duty. Some of the most interesting suggestions are set out below.

- Require senior leaders to be involved in the development and oversight of a compliance plan, including regular reviews of whether the chosen steps have been effective.
- Require senior leaders to lead on workplace communications about the duty, to act as role models and to be responsible and accountable for compliance with the duty (with consequences for failure built into their employment contracts and remuneration packages).

- Consult with staff to obtain their views on where the risks lie and what measures would be effective to prevent sexual harassment.
- Encourage staff to call out both positive and unacceptable behaviour and recognise those who do so, for example, in appraisal and promotion processes.
- Make support options available for staff. This can include both internal support options (e.g. a named member of HR or a mental health champion) and external support options (e.g. an Employee Assistance Programme or free advice line).
- Have multiple reporting pathways (e.g. online, in person, anonymously, externally) and ensuring that these are communicated to staff in a variety of ways.

### **What are the consequences of breaching the duty?**

#### *Enforcement action by the EHRC*

Where an employer fails to comply with the duty (or there is a suspicion that this is the case), the EHRC will be able to take enforcement action against them. This includes powers

to:

- investigate the employer;
  
- issue an “unlawful act notice” which confirms that the employer has breached the duty and requires it to prepare an action plan setting out how it will remedy the breach and prevent future breaches;
  
- enter into a legally binding agreement with the employer to prevent future unlawful acts; and/or
  
- ask the court for an injunction to restrain an unlawful act.

The EHRC’s enforcement action is in the public domain, with details of their current and past investigations held on their [website](#). This raises an important point for employers to note when it comes to settling claims of sexual harassment. Employers are not allowed to use settlement agreements to gag workers from blowing the whistle about various forms of malpractice. The EHRC is a “prescribed body” for whistleblowing about breaches of equality law, which means

that workers are entitled to make whistleblowing disclosures to them about such breaches. Therefore, even after a settlement agreement has been signed, a worker will remain entitled to blow the whistle to the EHRC about a breach of the duty which, in turn, could lead to enforcement action attracting negative publicity.

### *Uplift to compensation*

Where an individual brings a claim against their employer and the Employment Tribunal finds that they were subjected to sexual harassment it must consider whether, and to what extent, the employer has breached the legal duty to prevent sexual harassment. Where a Tribunal concludes that the employer has breached the duty, it may award an uplift to the compensation award. Any uplift must correlate to the extent of the employer's breach but may not exceed 25%.

Where there is no claim before an Employment Tribunal, it will not have jurisdiction to rule on whether an employer has breached the duty to prevent. In this situation, the employer's duty may only be enforced by the EHRC as discussed above.

### **Next steps for employers?**

Employers wishing to respond to the EHRC's consultation can do so [here](#) before 6 August 2024. The final Guidance should be published in good time before the duty comes into force on 26 October 2024. In the meantime, employers should consider how to address the risk of sexual harassment of staff and assess which steps would be reasonable for it to take. A good

starting point – and one almost all employers will need to take – would be to review and update internal policies and refresh training for all staff.

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[EHRC – Consultation on changes to the Technical Guidance on Sexual Harassment and Harassment at Work \(9 July 2024\)](#)

[EHRC – Technical Guidance on Sexual Harassment and Harassment at Work \(January 2020\)](#)

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# **The Labour Party's Manifesto: five key proposals that employers need to know about**

The Labour Party's 2024 Manifesto promises root and branch reform of employment law, with legislation to be launched within 100 days of taking office. In this briefing, we examine the five proposals that we think will have the greatest impact for the majority of employers.

## **Background:**

Following the announcement that the General Election will take place on 4 July 2024, Labour published its "[Plan to Make Work Pay](#)", setting out its extensive proposals for workplace law reform. It promises that Labour "*...will deliver the biggest upgrade to rights at work for a generation*". This is underlined in the [Labour Party Manifesto](#) – published on 13 June 2024 – which says that Labour will implement Make Work Pay *in full* and will introduce legislation within 100 days of entering Government (so by 12 October 2024).

Despite the promise of legislation within 100 days, Make Work Pay attempts to manage expectations about exactly what can be delivered and when. It provides that there will be full consultation with businesses and workers on how to put the plans into practice before any legislation is passed. Only then would the legislation begin the Parliamentary process in both Houses, and once passed, there may be an implementation period. It also points out that much of the detail will be based in regulations and where those regulations are substantial there will be a need for further consultation.

Therefore, while employers need to brace themselves for some root and branch reform of workplace rights, the truth is that it is not going to all come into force with a bang on 12 October 2024. It will probably take many months, and in some cases, maybe even years. In this briefing, we take a look at the five proposals that we think will have the greatest impact for the majority of employers, regardless of size or sector.

## **Key proposal 1 – the creation of a single “worker” status:**

Currently, we have a three-tier approach to employment status in the UK: “employee”, “worker” and “self-employed”. Worker status covers employees and a wider group of workers who are engaged under a contract where they are required to work personally, and the employer is not merely a client of the individual’s business. Workers have some employment rights, but these are inferior to the rights of employees, for example, they do not have the right to claim unfair dismissal or to take various forms of statutory family leave.

The Labour Party argues that this state of affairs is confusing for workers, who often find it difficult to get a clear picture of their status and what employment protections they have. It is also said that some employers do not label staff properly, sometimes inadvertently and sometimes deliberately. To resolve this problem, Make Work Pay proposes that employee status should be abolished, and a new single employment status of “worker” should apply to everyone, save for the genuinely self-employed. Under the proposed new system, all workers would be afforded the same employment rights, for example, sick pay, holiday pay, parental leave, protection against unfair dismissal *“and more”*.

This change would radically alter our employment law landscape. Yet the consultation process is going to take time, not least because the various knock-on effects of the change will need to be addressed, for example:

- Currently, some LLP members qualify as workers, but they cannot be employees. If they are still workers under the new framework, would this mean that they would gain full employment rights?

- Would the tax status framework be aligned? If so, would all workers become subject to PAYE (and surely this must be the logical consequence of giving full employment rights to all workers)? If this happens this would increase employer costs as a result of higher employer NICs.

### **Key proposal 2 – unfair dismissal to become a Day 1 right for workers:**

It is proposed that the two-year qualifying period for unfair dismissal claims should be removed – meaning the right to claim unfair dismissal will become a Day 1 right (for all workers and not just employees as is currently the case). Currently, only “automatic” unfair dismissal for certain narrow prohibited reasons, such as whistleblowing, is a Day 1 right.

Labour says that this will not prevent fair dismissals, nor the use of probationary periods – although it is not clear whether it will, in fact, be easier to dismiss someone within their probationary period, or whether the full rules on dismissal will apply even then. If it is easier to dismiss during probationary periods this could encourage employers to use them routinely, perhaps for longer periods of time than is currently the case. And query then whether Labour would place an upper limit on the length of probationary periods?

Either way, removing the qualifying period is certain to generate more grievances and Tribunal claims, some of which

will be justified and some not. But all of which will take time and money to deal with. In terms of impact on claims, we think the most likely outcome is that claimants with automatic unfair dismissal or discriminatory dismissal claims (especially if higher paid) will continue to bring those claims but will plead ordinary unfair dismissal as an alternative or additional claim. In future, employers will wish to be more cautious when it comes to recruitment so as to limit the risk of a bad hire.

Also, as discussed below, the plan is that the time limit for bringing this claim will be increased from three to six months. Therefore, employers will have increased exposure to unfair dismissal claims and will also have to live with the uncertainty about whether a claim will be brought for a longer period of time. However, one silver lining for employers is that the proposal to remove the caps on compensation in employment claims appears to have been dropped. Neither Make Work Pay, nor the Manifesto, makes any mention of this. That said, it may yet appear as a question in any future consultation on the reform of unfair dismissal law.

### **Key proposal 3 – changing the trigger for consultation on collective redundancies:**

Currently, collective redundancy consultation is triggered when there is a proposal to dismiss as redundant 20 or more employees assigned to one “establishment” within a 90-day period. The question of what an establishment has been ventilated in litigation, with employees arguing it should mean the business as a whole rather than the local place of work. This would mean that collective consultation would be triggered more frequently as redundancy numbers would have to be counted across the whole business. After some to-ing and

Following the senior Courts concluded that establishment means the local unit where the employee works, not the business as a whole.

Labour proposes to reverse this, so that collective consultation is triggered where there are 20 proposed redundancies within 90 days across the entire business rather than in just one local workplace. If taken forward, this will mean that multi-site employers will need to have a system in place to ensure that they keep track of proposed redundancies across the business. It will also mean that:

- Collective consultation will be triggered more frequently.
- The process will be administratively more burdensome as employers would need to have appropriate representatives in place for all affected workers no matter where they are based.
- The consultation itself may be more disjointed as employers may be consulting about several small pockets of unrelated redundancies.

If employers get it wrong, they are exposed to protective award claims of up to 90 days' gross pay.

**Key proposal 4 – introducing a new right for workers to disconnect outside of working hours:**

For the first time, it is proposed that UK workers be given the “right to disconnect” from work outside of normal working hours and to not be contacted by their employers. Make Work Pay says that this is needed in response to the growth in flexible and remote working practices which has “*inadvertently blurred the lines between work and home life*”. Are these concerns justified? To some extent, yes. That said, this right is clearly potentially very disruptive to employers, especially if implemented badly.

The plan is to follow similar models to those that are already in place in Ireland or Belgium. In fact, the models used in these two countries are quite different and it is not clear where the Labour proposal will sit on this spectrum. In Belgium, since 1 April 2023, private sector employers with 20 or more employees have been required to implement a right to disconnect for all employees via either a collective bargaining agreement or work rules. In Ireland, a voluntary Code of Practice on the Right to Disconnect has been in place since April 2021. Although only voluntary, workers who regularly work outside their agreed hours may refer to the Code of Practice before the Labour Court or Workplace Relations Commission.

Make Work pay does state clearly that “*We will bring in a right to switch off*”, which suggests that the Belgian model is the one that we will mirror. A consultation would, of course, be needed, including on important issues such as:

- Whether workers will be permitted to “opt out” of the right.
- What, if any, exceptions there might be (e.g. by

reference to job role, sector and/or size of employer).

- What the consequences would be if a worker was mistreated or dismissed for asserting the right to disconnect.

### **Key proposal 5 – extending the time limit for bringing Employment Tribunal claims:**

It is proposed that time limits for employment claims will be increased from three to six months. It appears that this will be for all statutory employment claims. Labour says that this will allow more time for internal procedures to be completed (and also settlement discussions), potentially decreasing the number of Employment Tribunal claims. We think that employers may well see a drop in claims as a result of employees not being forced to act quickly to protect their position. Of course, the downside is that employers will have the threat of claims hanging over their heads for a significantly longer period of time.

Conspicuous by its absence is the question of introducing fees in the Employment Tribunals. Earlier this year, the Conservative Government opened a consultation on the question of bringing back “modest” fees in the Employment Tribunal and EAT. That consultation closed in March 2024 and the response is awaited. However, it seems very unlikely that a Labour Government would reintroduce Employment Tribunal fees, even at a modest level.

## What else is proposed?

While these five proposals are important, they are merely tip of the iceberg. Make Work Pay promises wide-ranging reforms in almost all areas of employment law as follows:

- **Employment status:** introducing better rights for the self-employed and regulating internships.
- **Contracts:** banning “exploitative” zero-hours contracts, giving zero-hours workers the right to a regular hours contract after 12 weeks and requiring employers to give reasonable notice of changes to working time.
- **Pay:** reflecting the cost of living in the national minimum wage rate, removing the national minimum wage age bands so adult workers receive the same rate, legislating to ensure the fair allocation of tips and making changes to the treatment of travel time as paid working time in certain circumstances.
- **Harassment:** strengthening the new duty to take reasonable steps to prevent sexual harassment at work (due to come into force in October 2024) and introducing protection from harassment at work by third parties.
- **Discrimination and equal pay:** enacting the dual discrimination provisions in the Equality Act 2010, changing equal pay law so that comparisons in pay may be made with outsourced workers and introducing the right to bring equal pay claims based on race and disability (in addition to sex).

- **Work life balance:** strengthening flexible working rights so that it becomes a “genuine default” and regulating the surveillance of workers.
- **Family leave:** reviewing the entire parental leave framework, removing the qualifying period for parental leave (it is unclear whether this means the one-year qualifying period for unpaid parental leave only or any parental leave rights which have a qualifying period), introducing a statutory right to bereavement leave and consideration to be given to introducing paid carer’s leave.
- **Other workplace rights:** strengthening whistleblowing and TUPE rights, reviewing health and safety law and guidance and improving access to Statutory Sick Pay.
- **Mandatory employer reporting:** requiring employers to publish and implement gender pay gap actions plans, introducing ethnicity and disability pay reporting and requiring employers to publish Menopause Action Plans.
- **Disputes and dismissals:** giving workers the right to raise collective grievances via Acas (this proposal is unclear as it stands), restricting the dismissal of pregnant workers and maternity leave returners and restricting the use of fire and rehire practices, save in limited circumstances.
- **Enforcement:** introducing a state Single Enforcement Body to enforce certain areas of employment law and introducing a new enforcement unit for equal pay.
- **Collective rights:** wide-ranging measures aimed at strengthening the role of trade unions and introducing

sectoral collective bargaining on pay.

To learn more about all of these proposals, you can view our recent webinar, Labour's Big Plans for Employment Law, presented by BDBF's Managing Partner Gareth Brahams and Principal Knowledge Lawyer Amanda Steadman. You can view the webinar [here](#).

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## **EAT holds that future discrimination claims may be waived in a settlement agreement**

In *Clifford v IBM UK Ltd* the EAT upheld a decision to strike out a discrimination claim, holding that a waiver of future discrimination claims contained in an earlier settlement agreement was effective.

## What happened in this case?

The claimant, Mr Clifford, started working for IBM in 2001 and began a period of extended sick leave in 2008. In 2012, he raised a grievance about the fact that IBM had not increased his salary or paid holiday pay to him during his sickness absence. He said this amounted to disability discrimination and he asked to be moved onto IBM's disability plan (**the Plan**). Under the Plan, Mr Clifford would be paid 75% of his former salary until the earlier of recovery, retirement or death.

In 2013, Mr Clifford and IBM entered into a settlement agreement under which IBM agreed to:

- pay a sum to settle the complaint about the unpaid holiday pay, however, no payment was to be made in respect of the unawarded pay rises;
- place Mr Clifford on the Plan, under which he would receive around £54,000 per year until retirement (and the terms of the Plan stipulated that any pay increases were to be at IBM's discretion); and
- pay employer pension contributions based upon his full salary of around £72,000.

In exchange, Mr Clifford agreed:

- to waive his rights to bring claims about the matters raised in his grievance or any other claims that he had against IBM;
- to waive his rights to bring any *future* claims that he may have connected to the matters set out in the grievance and/or the transfer to the Plan; and
- to waive his rights to bring a long list of other possible claims;

Yet, in 2022, Mr Clifford brought claims against IBM, alleging that it was discriminatory (and also a breach of working time rules) to have paid only 75% of his previous salary to him throughout the year. He said he was entitled to 100% of pay in respect of periods of annual leave, which meant that IBM owed him around £69,000. He also claimed that it was discriminatory not to have awarded pay increases to him while he was on the Plan. He argued that the Plan was intended to give security to disabled employees, but inflation had reduced the real value of the benefit.

IBM applied to have the claims struck out arguing, amongst other things, that they were precluded by the waivers contained in the settlement agreement, which extended to *future claims* concerning similar matters raised in the grievance or the transfer to the Plan. Mr Clifford sought to resist the strike out, pointing to the EAT's decision in *Bathgate v Technip UK Ltd*, which said that settlement agreements *cannot* settle unknown future claims. Mr Clifford also argued that both the blanket waiver (which purported to

waive all and any claims) and the kitchen sink waiver (which purported to waive all claims set out in a long list of claims) were ineffective. Therefore, Mr Clifford said that the waivers in the settlement agreement were invalid and did not prevent him from pursuing the claims.

The Employment Tribunal Judge struck out the claims, holding that future claims about holiday pay and pay increases had been expressly waived in the settlement agreement and that waiver was effective. The Judge distinguished the EAT's decision in Bathgate, which was directed at future claims which had not yet arisen and were truly unknowable. By contrast, in this case, the issues of holiday pay and pay increases were known about at the time of entering into the settlement agreement and had been raised in Mr Clifford's grievance and subsequent appeal. The settlement agreement was clear that he could *not* bring future claims arising out of similar matters to those that had been settled.

Mr Clifford appealed to the EAT.

### **What did the EAT decide?**

It is worth noting that between the Employment Tribunal and EAT hearings in this case, the EAT's decision in Bathgate (which had been relied upon by Mr Clifford) was overturned by the Scottish Court of Session. The Court of Session held that the Equality Act 2010 permitted the settlement of unknown future claims, provided that the claims are clearly particularised and the objective meaning of the word used encompasses settlement of the relevant claim. However, a general waiver of all claims would not be sufficient. You can read our full briefing on the Court of

Session's decision [here](#).

The EAT dismissed Mr Clifford's appeal, holding that his claims were precluded by the waiver in the settlement agreement. The EAT reached the following conclusions:

- The EAT agreed with the Court of Session in Bathgate that there was nothing in the Equality Act 2010 which precluded the settlement of unknown future claims, provided that clear language was used. Here, the waiver wording *had* clearly covered future discrimination claims connected to Mr Clifford's grievance and/or transfer to the Plan.
  
- Although the Equality Act 2010 stipulates that settlement agreements must relate to "particular complaints", Bathgate (and previous authorities) had made it clear that this requirement does not mean the parties must have known about the complaint or that its grounds were in existence at the time of entering into the agreement. If Parliament had intended to prevent the settlement of unknown future claims then it could have spelt this out in the Act, but it had not done so.
  
- Nor was there any basis for distinguishing Bathgate from Mr Clifford's case – both concerned future discrimination claims that had not arisen at the time the settlement agreement was entered into. The fact that Mr Bathgate's employment had ended, and Mr

Clifford's employment was continuing, was not pertinent.

- The EAT also noted the Court of Appeal's decision in *Arvunescu v Quick Release (Automotive) Ltd*, where it held that future claims may be settled by way of a COT3 agreement. The EAT held there was no sensible basis upon which to distinguish COT3 agreements and settlement agreements in this respect. You can read our full briefing on the Court of Appeal's decision in *Arvunescu* [here](#).

In any event, even if the waiver had not been valid, the claims had no reasonable prospect of success on the basis that a failure to increase an already very generous benefit would not have amounted to discriminatory treatment.

### **What are the learning points for employers?**

This decision makes it clear that unknown future discrimination claims may be settled by way of a settlement agreement, provided the claims are particularised in the agreement, either by way of a generic description of the claim or by reference to the relevant statutory provision. Helpfully for employers, this decision is binding on Employment Tribunals, whereas the similar decision of the Scottish Court of Session in *Bathgate* was only persuasive.

However, employers should take care not to rely on general

waivers of all claims – these continue to be unenforceable.

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[Clifford v IBM UK Ltd](#)

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## **Failure to consult over proposed redundancy pool meant dismissal was unfair**

In the recent case of *Valimulla v Al-Khair Foundation*, the EAT held that an employer's failure to consult with an employee about a proposed redundancy pool meant the dismissal was procedurally unfair. Further, the decision not to pool the employee with four other employees who performed the same role as the employee had to be looked at again by a new Employment Tribunal.

**What happened in this case?**

The employer is a faith-based charity, with a head office and six branch offices. Team members moved between offices

frequently. Mr Valimulla started working for the employer in February 2018 as a Liaison Officer and his role involved fundraising in the community, for example, through schools and mosques. Four other Liaison Officers were employed nationally. Mr Valimulla was the only Liaison Officer who was not branch-based and worked from home.

During the coronavirus pandemic, charitable contributions decreased due to the fact that places of worship were closed. As a result, all Liaison Officers assigned to collect revenue from places of worship were placed on furlough, including Mr Valimulla. Eventually, the charity decided to make redundancies. Mr Valimulla was the only Liaison Officer who was identified as being at risk of redundancy.

Three redundancy consultation meetings took place. At the first meeting, Mr Valimulla was told that it had been decided that his role would “disappear” with the closure of branches and the retention of just two regional hubs. At the second meeting, Mr Valimulla put forward a business case as to how his role could continue, which was considered but rejected. After the final meeting, Mr Valimulla was dismissed by reason of redundancy.

Mr Valimulla claimed that he had been unfairly dismissed. Amongst several criticisms of the process, he argued that the employer had not identified a redundancy pool nor applied selection criteria before selecting him for redundancy. However, the Employment Tribunal accepted the employer’s argument that his role was unique, and he was in a self-selecting pool of one.

Mr Valimulla appealed.

## **What was decided?**

Mr Valimulla argued that the Employment Tribunal had failed to deal adequately with two questions. First, the employer's decision not to pool him with the other four Liaison Officers and, second, the failure to consult with him about the proposed pool of one.

On the decision not to pool him with the other Liaison Officers, the EAT noted that the Tribunal had found a redundancy situation had arisen because the employer had a reduced requirement for employees to carry out Liaison Officer work, but this was not tied to work being performed in a specific location. Yet the Tribunal gave no reasons why it had accepted the employer's assertion that Mr Valimulla's role was unique, meaning he should be in a pool of one, rather than a pool of with all of the other Liaison Officers employed nationally.

Although the EAT accepted that there is no one prescribed process for selecting employees for redundancy, Tribunals must scrutinise an employer's approach when considering the fairness of a dismissal. This requires an assessment of whether the employer had genuinely applied its mind to the question of pooling and to determine whether the chosen pool was reasonable. Here, the Tribunal needed to consider whether the employer's response came within the band of reasonable responses, which required consideration of Mr Valimulla's role, the similarities and differences between the roles of all five Liaison Officers, how the employer had approached pooling and the rationale for its ultimate decision.

On the question of consultation, the EAT held that redundancy

consultation needs to be “meaningful”. It was unclear how this could be the case here, when consultation had only started *after* Mr Valimulla had been placed in a pool of one. Meaningful consultation does not simply mean informing staff about a decision or proposal, giving them an opportunity to make representations and then putting the original decision or proposal into effect. Instead, it means setting out a provisional proposal, along with its rationale, and providing an opportunity for feedback. The decision-maker should consider such feedback and decide whether to alter the original proposal (and if not, why not) before making a decision.

The EAT upheld the appeal. The question of the failure to pool with the other Liaison Officers was remitted to a new Employment Tribunal to consider. However, the failure to consult about the pool meant that the dismissal was procedurally unfair, although the question of what the outcome would have been had consultation taken place (i.e. would the pool have changed and, if so, what are the chances Mr Valimulla would have still been made redundant?) was remitted to the new Tribunal.

### **What does this mean for employers?**

This decision serves as a useful reminder for employers of two essential ingredients of a fair redundancy dismissal.

First, employers must identify the appropriate pool of employees from which to select potentially redundant employees. This involves interrogating which roles are the same or sufficiently similar to justify being pooled

together. The fact that roles are different in some ways may or may not be enough to justify different treatment. Importantly, employers must be able to show they applied their mind to the question and reached a reasonable conclusion. Getting the pool wrong may mean any subsequent redundancies are procedurally unfair and it could also lead to claims of discrimination in certain circumstances.

Second, employers must consult with employees on the provisional pool for selection (and any selection criteria to be used) before making the final decision. This consultation should take place when the proposals are still at a formative stage, so that employees have the opportunity to influence outcomes. The need to consult about the proposed pool was critical in this case, given that the employee was to be placed in a pool of one, meaning his dismissal was almost inevitable. However, consultation on the proposed pool should take place in all cases where pooling is being used.

[Valimulla v Al -Khair Foundation](#)

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# Removal of senior employee's core responsibilities and plan to change her job role without consultation justified constructive dismissal

In a recent case, the High Court decided that a CEO's decision to reassign a senior employee's core responsibilities to others with the intention of moving her into a new role in future amounted to repudiatory breaches of contract entitling the employee to constructively dismiss herself.

What happened in this case?

Dr McCormack was employed by Medivet Group Ltd (**Medivet**) as its Director of Clinical Operations. She reported to directly to the Chief Executive Officer (**CEO**) and maintained responsibility for day-to-day operations and a number of central functions including pricing, procurement, laboratory, practice development and property. Dr McCormack's service agreement provided that Medivet was entitled, through its board of directors, to appoint other persons to act jointly with her or change her executive office or responsibilities.

In October 2021, Medivet was acquired by CVC Advisers Ltd who removed the CEO and appointed a Mr Cools as the company's new CEO. Mr Cools was unimpressed with Dr McCormack, quickly

concluding that her role was too broad, she was poorly organised, and that she could not stay on top of the areas for which she had responsibility.

At a meeting on 6 April 2022, Mr Cools advised Dr McCormack that he intended to re-organise Medivet's management structure and showed her a new organisational chart. Under the new structure, she was to be appointed as Chief Clinical Officer (**CCO**). This was quite different to her existing role and would involve the reallocation of her operational responsibilities to other employees. The process of reallocating those responsibilities began straight away.

Dr McCormack was unhappy about the proposed CCO role. She felt that her existing role was more closely aligned to the role of Chief Operating Officer (**COO**), a role which would be created under the new structure. Moreover, she believed that she was not properly qualified to take on the CCO role given that she had not been involved in frontline veterinary practice for a long time. On 16 June 2022, Dr McCormack raised a grievance arguing that she was being forced out of her role and the restructuring was a sham.

The new organisational structure came into force on 1 July 2022, although the CCO was never formally allocated to Dr McCormack, given that she went off sick. On 8 July 2022, she gave notice terminating her employment with immediate effect. She issued a breach of contract claim in the High Court, seeking damages for loss of salary and benefits.

**What was decided?**

The critical questions for the Court were whether Medivet was in repudiatory breach of contract and, if so, whether Dr McCormack had accepted the breach and terminated her employment in response.

The Court acknowledged that Medivet had expressly reserved rights to vary Dr McCormack's role and responsibilities. However, these reserved rights were not without limit. It was implicit that Medivet would exercise such powers honestly, rationally and for the purpose for which they were conferred (namely, good management). Here, rationality imported a requirement of good faith, a requirement that there should be some logical connection between the evidence and the reasons for the decision and an absence of arbitrariness, capriciousness or perversity.

The Court held that the decision to reallocate some of Dr McCormack's responsibilities with immediate effect exceeded these limitations. The decision was taken on an *ad hoc* basis and had not been properly canvassed with Dr McCormack in advance. No interim solutions were explored with Dr McCormack before the decision was made and no good management reason could be discerned for making the decision at that stage. Mr Cools had only had a limited opportunity to evaluate Dr McCormack's contribution by that point and his assessment of her was based, primarily, on his view of her during their discussions.

Further, the decision to allocate the CCO role to Dr McCormack at an unspecified future date also exceeded these limitations. She was told that the role would be allocated to her, but, in fact, the board's specific decision-making powers could not have been engaged since the role was not allocated or scheduled to be allocated to her before the termination of

her employment.

Therefore, the decisions amounted to breaches of contract. The next question was whether they were repudiatory in nature. The Court held that they were. By taking away and transferring core responsibilities to other employees, Medivet had eroded the essential nature of her role. Although the CCO role was never formally allocated to her, the CEO intended to allocate that role to her in future come what may and there was no room for her to resume her original responsibilities since these had already been taken away. Therefore, once it had been communicated that she was to be placed in the CCO role, she was entitled to treat that as an anticipatory breach of contract.

The Court also held that Medivet's conduct overall was likely to destroy or seriously damage the relationship of trust and confidence. This included the failure to consult with her about the proposals prior to the meeting on 6 April 2022, taking away her responsibilities with immediate effect, the way in which the CCO role had been communicated to her and the failure to assess and accommodate her views in the period leading up to termination, including the failure to deal with her grievance. Accordingly, there had also been a breach of the implied term of trust and confidence, which was repudiatory.

Finally, it was held that Dr McCormack accepted these repudiatory breaches and terminated her employment in response. Therefore, she was entitled to damages for breach of contract, which are yet to be determined.

**What does this mean for employers?**

This decision illustrates the limitations of contractual clauses which purport to give employers flexibility to change an employee's role. Such clauses are subject to a requirement to exercise them honestly, rationally, for the purposes for which they were conferred and not in an arbitrary or capricious way.

To limit the risk of breaching the contract, employers wishing to rely on flexibility clauses to vary an employee's role should consider the evidence for making the change, for example, the employee's performance over time and the needs of the business under the proposed new structure. Further, an employer should conduct meaningful consultation with the employee in advance of the proposed change and consider any responses before making any final decision.

[McCormack v Medivet Group Ltd](#)

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