SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

EMPLOYMENT TRIBUNAL HAD JURISDICTION TO CONSIDER CLAIMS FROM PERIPATETIC EMPLOYEE

Summary: The Employment Appeal Tribunal (EAT) confirmed that a British journalist employed by a US company with a UK subsidiary, who had worked mainly in Asia but had recently moved to London, had a sufficiently close connection with Great Britain to bring employment tribunal claims here (*Cable News International Inc v Bhatti*).

Key practice point: Employers with a mobile workforce will note the point that an employee's base can change during the course of employment, with the result that the employee can move, quite quickly, from being very unlikely to be in any of the categories who fall within the territorial scope of the Employment Rights Act 1996, to having a sufficient connection to be able to bring tribunal claims. Even though the employer had declined the employee's request to move to the London office, her existing contacts here were enough to satisfy the connection test.

Facts: The claimant, who was British, was employed by a broadcast media organisation domiciled in Atlanta, Georgia, under a contract of employment governed by the law of the state of Georgia. The organisation had a subsidiary based in London. In March 2017, having lived in Bangkok and worked on assignments mainly but not entirely in Asia, the claimant returned to London, seeking to become London based and also receiving treatment for a foot injury. Her request to become London based was declined, and, after she had worked for one day on an assignment in London, the subsidiary was instructed not to deploy her without permission from the Atlanta headquarters. She was dismissed later that year at the subsidiary's offices. She brought claims for discrimination, unfair dismissal, equal pay and outstanding holiday pay.

The Employment Tribunal found that the claims fell within the territorial scope of the Employment Rights Act 1996, although only in respect of events from the date when she returned to London. As well as "territorial jurisdiction", the Tribunal also decided that it had "international jurisdiction"; in other words, an English court or tribunal rather than a foreign court could hear the claims. The employer appealed.

Decision: The EAT rejected the appeal. The Tribunal had been entitled to conclude that the claimant's employment had a sufficient connection with Great Britain from March 2017 onwards. From that point, London not Bangkok was her main base.

The employer argued that the claimant was an expatriate worker – assigned to work in international locations with no principal place of work - and therefore, according to the Supreme Court in *Lawson v Serco*, within a class of employees who were "very unlikely" to fall within the territorial scope of the legislation. The EAT agreed that, before March 2017, when she was working primarily in Asia with her base in Bangkok, she was in the "very unlikely" category. However, the strength of a connection is not necessarily immutable throughout the employment; the base of a peripatetic employee can change over time. The claimant had two work bases – Bangkok and London. From March 2017 the main base became London and ceased to be Bangkok.

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It was relevant that the claimant had connections with London before March 2017; she was a frequent visitor to the London bureau, she had a pass, ID card and phone issued by the bureau and was on its email distribution list. She offered her availability when in London and was deployable directly by the bureau. The governing law of the employment contract was not relevant because there was no question of a close connection with Atlanta.

NON-DISCLOSURE AGREEMENTS WILL BE UNENFORCEABLE TO THE EXTENT THEY PREVENT CERTAIN DISCLOSURES BY VICTIMS OF CRIME

Under section 17 of the Victims and Prisoners Act 2024, non-disclosure agreements (NDAs) signed on or after 1 October 2025 will be unenforceable to the extent that they seek to prevent certain disclosures by victims of crime. The Ministry of Justice has issued (non-statutory) guidance: Victims and Prisoners Act 2024: changes to non-disclosure agreements.

It is already the case that an NDA cannot validly seek to prevent a person from reporting a crime to the police, or from whistleblowing (making a "protected disclosure") about wrongdoing at work. Under section 17, an NDA that prevents a disclosure of information by a victim, or person who reasonably believes they are a victim, to certain individuals, for specific purposes (generally for support in relation to the crime) will be void. "Victim" is widely defined as a person who has suffered "harm" (including physical, mental or emotional harm and economic loss) as a direct result of being subjected to criminal conduct, including where the person has directly experienced the effects of criminal conduct at the time it occurred.

The permitted disclosures are to the following:

- those with law enforcement functions
- qualified lawyers
- individuals regulated to provide professional support or providing victim support services
- regulators
- a child, parent or partner of the victim.

The Ministry of Justice guidance explains that disclosures which are not for the purposes specified in section 17 (such as disclosures about commercial or financial information) will not be permitted disclosures. In addition, an NDA which prevents a disclosure made for the primary purpose of releasing the information into the public domain will not be void under section 17. The guidance gives an example: talking about the conduct to a lawyer with the intention of the lawyer acting as a spokesperson to publicise the information.

The guidance notes that best practice will be to make clear on the face of the NDA (in a settlement agreement, for example) what the parties are able to disclose in particular circumstances. If you would like further information or advice on this, please speak to your usual Slaughter and May contact.

CONDUCT OF DISCIPLINARY PROCESS BREACHED DUTY OF CARE TO EMPLOYEE

Summary: The High Court found that an employer was liable for psychiatric injury caused by a breach of its duty of care to an employee in the handling of disciplinary proceedings. The employer had failed to inform the employee that certain complaints against him had been dismissed and had attempted to restart the disciplinary process while he had been unfit (*Woodhead v WTTV Limited*).

Key practice point: Once on notice that a disciplinary process may exacerbate existing health issues, an employer is likely to be in a difficult position in trying to make adjustments whilst continuing to address serious allegations. The Court found that, in this case, it would have been a reasonable step for the employer to have made it clear to the employee that, after investigation, the scope of the disciplinary procedure had narrowed.

Facts: In November 2019, the claimant was given six months' notice of termination by reason of redundancy. Later that month, at a meeting with two HR directors, he was told that sexual harassment complaints had been made by a freelance writer who had worked with him and he was suspended while further investigation took place. After the meeting, the claimant, who suffered from long-standing psychiatric conditions, became very unwell. He was signed off work from 3

December; the next day his psychologist wrote to the employer to explain that the meeting had caused a relapse of his depressive illness, requiring treatment, and highlighted the need for that treatment to be provided before any disciplinary process could be continued. The employer put the disciplinary process on hold on 11 December when it became apparent that the claimant would be hospitalised. His employment terminated by reason of redundancy in May 2020.

The claimant brought a negligence claim in relation to the conduct of the disciplinary process, and a claim of misuse of his private information.

Decision: The negligence claim succeeded, the High Court finding that the employer had breached its duty of care in its conduct of certain aspects of the disciplinary process. The Court found that it was reasonably foreseeable that the claimant could suffer an injury to health attributable to stress at work and there was therefore an obligation take reasonable care to prevent or reduce the harm. Although an employer can generally assume that an employee will be able to withstand the usual pressures of a job, this does not apply where the employer knows of a particular problem or vulnerability. From 4 December, when the extent of the claimant's ill health became apparent as a result of the letter from the psychologist, the employer was on notice of the risk that his health could be affected by continuing the disciplinary process.

The Court considered that some aspects of the process constituted breaches of the duty of care:

- The claimant was not informed that, following investigation, it had been decided that no further action should be taken in respect of some of the matters raised as complaints. The Court agreed with the claimant that, had he been given that information, it would have demonstrated that his response to the complaints was being heard and understood.
- Whilst the claimant was on sick leave, he was asked for his response to the complaints, in circumstances where there was no urgency.
- Attempts to arrange an occupational health assessment were found to be pointless, because of the claimant's ongoing ill health and the limitations (due to the pandemic) of conducting the assessment via video call.

The Court also accepted that there were flaws in the handling of the November meeting. It was conducted as an investigatory meeting rather than one at which the claimant was informed of the existence of serious complaints, notified of the matters relied on against him, and then suspended pending formal investigation (which would have allowed him to respond at a later meeting). However, this was not a breach of the duty of care because the events took place before 4 December, the date when the risk of harm had become reasonably foreseeable.

The High Court dismissed the misuse of private information claim, finding that the disclosure of private information about the claimant, and the steps the employer took in reliance on it, had been justified under its workplace policy, which covered harassment of non-employees in connection with their engagement with the company.

OWNERS OF PUB NOT LIABLE FOR ACTIONS OF CONTRACTOR'S DOOR STAFF

Summary: The High Court decided that the owners of a pub were not vicariously liable for an assault on a customer carried out by door staff who were employees of a security company contracted to work for the pub. The security company was an independent contractor providing specialist services under a commercial arrangement, a relationship that did not satisfy the established test for vicarious liability (*JD Wetherspoon Plc v Burger*).

Key practice point: This decision confirms that, where a business genuinely engages an independent contractor, it is unlikely to be found to be vicariously liable for the actions of that contractor's staff. The comprehensive details of the contractual relationship between the pub and the contractor were essential in convincing the High Court that there was a true independent contractor.

Background and Facts: There is a well-established two-stage test for employers' vicarious liability for the actions of personnel:

1. There was a sufficient relationship (employment or a relationship "akin to employment") between the "employer" and the person who committed the negligent act.

2. The act was sufficiently closely connected with that relationship.

The claimant had been restrained by two door supervisors outside a pub, with such force that he suffered a dislocated hip. The door staff were employees of a contractor engaged by the pub to provide door security on three nights of the week, under a Security Services Agreement. In the County Court, where the claimant brought his personal injury claim, the Recorder found that it was an "unprovoked and appalling" attack.

The terms of the Services Agreement between the pub and the contractor included a term that the contractor had sole responsibility for the direction, management and control of its employees and was required to have employers' liability insurance for the actions of door staff. The pub had the power to request the removal of door staff in the event of a breach of the Services Agreement, but the Recorder found that this was not a right to "hire or fire". Nevertheless, the Recorder decided that both stages of the test for vicarious liability were satisfied and therefore the pub was vicariously liable for the actions of the door staff.

Decision: The High Court allowed the pub's appeal. The Recorder had been entitled to find that the conduct of the door staff was sufficiently closely connected with their authorised activities to meet stage 2 of the vicarious liability test – the assault was an excessive and wrongful mode of performing their duties. However, stage 1 was not satisfied. This was genuinely a relationship with an independent contractor carrying on its own business, under a standard commercial arrangement for the provision of specialist services. As a result, vicarious liability did not arise, and the analysis of factors for relationships "akin to employment" was unnecessary.

The High Court found that, although there was some interaction and control between the pub and the door staff, this was entirely consistent with a business engaging a specialist independent contractor to perform services on its premises for pragmatic commercial reasons. The employment relationship was between the contractor and the door staff. The Services Agreement explicitly stated that the contractor retained control over its employees. The only control the pub had consisted of setting service standards under the Services Agreement – something the pub had to do in order to avoid the risk of liability for failing to engage a competent contractor.

HORIZON SCANNING

What key developments in employment should be on your radar?

Before 22 July 2025	Publication of the Equality (Race and Disability) Bill, to extend pay gap reporting to ethnicity and disability for employers with more than 250 staff, extend equal pay rights to workers suffering discrimination on the basis of race or disability, and ensure that outsourcing cannot be used to avoid equal pay
2025	Some provisions of the Employment Rights Bill relating to trade unions and industrial action may come into force
1 September 2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations in force
1 October 2025	Section 17 Victims and Prisoners Act 2024: NDAs signed on or after 1 October 2025 unenforceable to the extent they prevent certain disclosures by victims of crime
2026	Earliest date for the majority of Employment Rights Bill provisions to come into force, including on dismissal for failing to agree contractual variation, collective redundancies, zero hours contracts, flexible working, protection from harassment, family leave, equality action plans, tribunal time limits

Autumn 2026	Earliest date on which Employment Rights Bill changes to the law on unfair dismissal expected to come into force
Uncertain	• Extension of employer right to work checks to working arrangements other than under a contract of employment • Three-month limit on non-compete clauses in employment and worker contracts proposed by previous government

We are also expecting important case law developments in the following key areas during the coming months:

Discrimination / equal pay: *Bailey v Stonewall Equality Limited* (Court of Appeal: whether third party had caused employer to discriminate); *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *University of Bristol v Miller* (EAT: whether anti-Zionist beliefs were protected philosophical beliefs and summary dismissal was discriminatory); *Dobson v North Cumbria Integrated Care NHS Foundation Trust (No 2)* (EAT: whether dismissal of for refusal to work at weekends because of childcare responsibilities was objectively justified and not discriminatory); *Corby v Acas* (EAT: whether opposition to critical race theory was a protected belief); *Ngole v Touchstone Leeds* (EAT: whether the withdrawal of a conditional job offer for a Christian mental health support worker because of Facebook posts was discriminatory); *Legge v Environment Agency* (EAT: whether employee discriminated against for not holding feminist belief); *Thandi v Next Retail Ltd* (EAT: whether there was a general material factor defence to an equal pay claim by shop floor sales staff seeking to compare themselves with warehouse staff)

Employment status: *Ryanair DAC v Lutz* (Court of Appeal: whether pilot contracted through intermediary was an agency worker); *Groom v Maritime and Coastguard Agency* (Court of Appeal: whether volunteer could be worker in relation to remunerated activities)

Industrial relations: *Jiwanji v East Coast Main Line Company Ltd* (EAT: whether a pay offer directly to staff during collective negotiations was an unlawful inducement)

TUPE: *Bicknell v NHS Nottingham* (Court of Appeal: whether merger of NHS commissioning groups was a TUPE transfer)

Unfair dismissal: *Sandhu v Enterprise Rent-A-Car Ltd* (Court of Appeal: whether dismissal without prior warning was within band of reasonable responses)

Whistleblowing: *William v Lewisham & Greenwich NHS Trust* (Court of Appeal: whether the motivation of another person could be brought together with the act of the decision-maker to make an employer liable for whistleblowing detriment); *Rice v Wicked Vision Ltd* (Court of Appeal: whether an employer could be vicariously liable for the acts of a co-worker where the alleged detriment was a dismissal); *Barton Turns Development Ltd v Treadwell* (Court of Appeal: whether employer could be vicariously liable for whistleblowing detriment of dismissal).

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