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Insights

PRIVILEGE AND INIQUITY, WHISTLEBLOWING REPORTS, DISCRIMINATION AS A REPUDIATORY BREACH AND A NEWS ROUND-UP

UK HR TWO-MINUTE MONTHLY: AUGUST 2025

Aug 27, 2025

SUMMARY

Our employment law update for August covers a case about the iniquity exception to legal privilege, a whistleblowing case involving a long-delayed judgment and third party reports, and a case on whether discriminatory actions are treated as repudiatory breaches of contract for constructive dismissal purposes. We also have a general news round-up covering a legal challenge to the Supreme Court's decision in *For Women Scotland* and selected recent developments in the Employment Rights Bill.

INIQUITY EXCEPTION TO LEGAL PRIVILEGE – WHERE IS THE LINE DRAWN?

Last month we covered a case (*Sinclair Pharmaceuticals Ltd v Burrell*) which touched on the "iniquity" exception to legal privilege. *Sinclair* was more about where matters should be decided, as opposed to considering the scope of the exception.

This new case is squarely about whether solicitor/client correspondence covered by legal advice privilege is subject to the "iniquity" exception, and as a result could be used openly, in this case by the claimant, to support her claim.

The claimant was dismissed in April 2023. Two days earlier, she was accidentally copied into an email chain between the respondent and its solicitors, which included several emails and a draft dismissal letter. The claimant alleged that the chain of emails and draft letter evidenced, at least, a sham dismissal and victimisation contrary to the Equality Act 2010 (EqA). The claimant argued that the emails were not privileged because they fell within the "iniquity exception". The respondent argued there was no iniquity.

The tribunal held that the claimant had not established that the emails were within the iniquity exception. The claimant appealed to the Employment Appeal Tribunal (EAT), arguing that the judge erred in law. The claimant said that the emails revealed that the respondent dismissed her by a dishonest and sham process, and that this was enough to establish iniquity.

The EAT held the tribunal had not erred in law for the following reasons:

- The tribunal's consideration of the law on the iniquity exception was correct. It had recognised the need to give careful scrutiny to the terms of the correspondence as a whole;
- The correspondence, objectively and read as a whole, did not amount to a discussion about fabricating a false position or acting in an underhand or iniquitous way. The EAT held that, regarding the emails:
  - it was clear the solicitors had offered advice that an immediate dismissal of the claimant could be found to be unfair and had advised on the steps that could be taken to mitigate that risk;
  - the solicitors had identified and warned of a particular risk that the claimant might argue that her dismissal was an act of victimisation, but the solicitors did not suggest that a victimisation case would be well founded;
  - there was no mention in any of the emails that the claimant's grievances formed part of the decision to dismiss;
  - the only express reference by anyone to a reason for dismissal was in one of the solicitor's emails (the one containing a draft dismissal letter);
  - read as a whole, a fair interpretation of the legal advice was that it recommended a review of the position that had been reached by 25 April 2023 by a member of the respondent's senior management with the expectation that such a manager would need to be able to justify "his decision" to dismiss before a tribunal; and
  - in one of the emails, a particular decision maker had been identified without any suggestion that his involvement was merely a sham.

The EAT held that, even if all parties to the correspondence considered there was an "overwhelming likelihood", even certainty, that the claimant was going to be dismissed, there was no error of law in holding that the respondent had not crossed the threshold necessary to establish the iniquity exception. The advice given by the solicitor was the sort of advice employment lawyers regularly give to clients and was within the normal scope of professional engagement.

WHY THIS MATTERS

The sensitivity and nature of matters discussed between clients and legal advisers in employment cases may lead to allegations of iniquitous conduct, but cases such as this show that the bar to prove iniquity is high.

Shawcross v SMG Europe Holdings Ltd and others

WHISTLEBLOWING – DELAYED TRIBUNAL JUDGMENTS, OVER-RELIANCE ON LIST OF ISSUES, AND THIRD-PARTY INVESTIGATIONS

The claimant was employed as a procurement director. She raised multiple concerns/disclosures between 2015 and 2020 involving alleged non-compliance with procurement laws and improper commission payments to suppliers. After raising these concerns, the claimant claimed she was met with inadequate responses and was then subjected to a campaign of bullying and harassment, which led to her taking sickness absence due to anxiety. Following this, she resigned.

The claimant brought a claim alleging discrimination, whistleblowing detriments and unfair dismissal. The claimant was unsuccessful. The tribunal's written judgment was provided to the parties in November 2023, over 13 months after the substantive hearing.

The claimant appealed to the EAT. Her main arguments were as follows:

- the tribunal erred in law in failing to carry out its basic task of resolving the issues before it. The tribunal's unreasonable delay in producing a written judgment and its consequential failure to make necessary findings of fact constituted a breach of the rules;
- the tribunal erred in law by over-reliance on a list of issues and failed to consider sufficiently the original pleadings; and
- the tribunal failed to consider a disclosure made to a third party investigating auditor, appointed by the first respondent, to be a qualifying protected disclosure under section 43C (2) of the Employment Rights Act 1996 (ERA). Under this section, a disclosure made to a third party authorised by the employer is treated as a disclosure to the employer.

On these points and taking them in the same order, the EAT found as follows:

- the tribunal's delay in publishing its judgment constituted an error of law. Although ill-health caused some of the delay, 13 months was an "unacceptable" period for parties to have to wait, and well beyond the expected period of three and a half months for publication of judgments. Further, the judgment contained typographical and spelling errors, with the EAT commenting that parts were "unreadable nonsense" - this pointed towards it having been prepared in a rush following the delay. The EAT concluded that the excessive delay resulted in the tribunal forgetting evidence, relevant issues, and failing to make findings in respect of key

allegations. The tribunal had addressed only 37 out of 93 pleaded detriments, with a generic conclusion that it "did not accept the claimant's account or interpretation on most of the occasions." The EAT also held that the judgment was not “Meek” compliant and failed to meet the standard required by the case of *Meek*, which (very broadly) requires tribunals to set out sufficient reasons in terms of fact and law to enable parties to understand why they have not succeeded on a particular issue;

- the tribunal had erred by failing to consider the claimant’s pleaded case regarding a failure to make reasonable adjustments. The tribunal had wrongly said that these allegations were raised "for the first time" in the list of issues when in fact they were fully pleaded in the ET1. The tribunal had "slavishly" stuck to the list of issues and the EAT concluded that the tribunal should have considered whether it was in the interests of justice to address the pleadings regarding reasonable adjustments, regardless of the list of issues; and

- the tribunal had misdirected itself when considering the legal question of whether a disclosure made to an external auditor was a qualified protected disclosure. It was found that the tribunal wrongly focused on whether the auditor had “responsibility within” the employer and failed to appreciate that it needed to consider the nature of the external auditor's appointment and his role, including the fact that he was appointed specifically to investigate existing protected disclosures and to report back to the respondent. Where a disclosure is made in the context of a process which has been established by the employer for workers to raise concerns (such as a telephone helpline) or to have complaints examined or investigated, it is generally reasonable to expect disclosures to that third party to enjoy the same protection as ones made directly to the employer. In this case, the disclosure made to the external auditor fell within the relevant section of the ERA and was as good as a disclosure to the employer. The EAT also noted the overall purpose of the whistleblowing scheme, to protect workers, and to ignore a protected disclosure on a point of reporting technicality might be contrary to that overall purpose.

WHY THIS MATTERS

Amongst other things, the judgment covered a situation where an employer appoints a third party (for example counsel) to consider protected disclosures already made, normally to prepare a whistleblowing report. This investigation would almost certainly qualify as a procedure which had been “authorised by the employer” under section 43C (2) of the ERA. A disclosure made to the third party would therefore be the same as a disclosure made to the employer.

The EAT did not accept the respondent’s argument that, because the third party’s instructions from the respondent did not expressly include or permit the third party to accept/receive protected disclosures, any disclosures made to the third party fell outside section 43(2) C and therefore were not treated as disclosures to the employer. The EAT did not give any guidance on whether express written instructions to third parties **not** to accept/receive new disclosures would be effective to

exclude such disclosures as being made to the employer under section 43C (2). The point was not covered.

Chase -v- Northern Housing Consortium

CONFIRMATION THAT ACTS OF DISCRIMINATION WILL NORMALLY BE REPUDIATORY BREACHES OF CONTRACT

The EAT considered whether acts of disability discrimination were repudiatory breaches of contract contributing to/causing an employee's resignation. Normally, an act of discrimination will be sufficient to establish a repudiatory breach entitling the employee to resign and claim constructive dismissal. Was this case an exception?

The claimant was employed as Head of Installations. In August 2018 she took time off for chemotherapy having been diagnosed with cancer. During her absence, one of the respondent's employees gave notice of resignation. In an effort to retain her, the respondent offered the employee a permanent role as Head of Installations (the claimant's job). The claimant was not consulted about this - the respondent's reasoning was there was enough work to be split across two Heads of Installations once the claimant returned. The claimant only discovered this through a post on "LinkedIn". She raised concerns but was told her role would be unaffected.

In July 2019 the claimant returned to work and was provided with a new job description along with an organisation chart. This made it clear that there were now two Heads of Installations, with her as the second Head. The claimant was unhappy - she believed she had been demoted.

She raised a grievance about her treatment but there were significant delays in dealing with it. The claimant eventually resigned in late September 2019, claiming she had been constructively dismissed, referring to her treatment during her absence undergoing chemotherapy. She alleged she had been demoted, misled/lied to regarding the false assurance that her role would be unaffected, and she was critical of the respondent's slow handling of her grievance, which she referred to as the "final straw" in terms of the respondent's misconduct.

Although the main claim was disability discrimination, the constructive unfair dismissal claim raised the issues of

- whether an act of discrimination was always tantamount to a repudiatory breach of contract; and
- whether there could be multiple repudiatory breaches where there are different acts of discrimination.

Under the ERA an employee is constructively dismissed where they resign in response, at least in part, to an employer's repudiatory breach of contract, although the repudiatory breach need not be

the sole or effective cause of the resignation.

The claimant's argument was clear. The respondent had repudiated her contract by (without any consultation or notice) employing another individual in her role and effectively demoting her through a new/inferior job description/org chart, all while she was off work. The respondent had also given her false assurances and unreasonably delayed addressing her grievance, which was the final straw. These were all acts of disability discrimination because of the reason she was absent from work.

The tribunal dismissed the constructive unfair dismissal claim on the basis that there had been no demotion, and that this had been the sole reason for her resignation. The other elements of the respondent's alleged misconduct were not taken into account. The tribunal also dismissed the claimant's claims of direct disability discrimination, victimisation and wrongful dismissal. It did uphold one claim of discrimination "because of" something arising in consequence of disability.

The claimant appealed, arguing that the tribunal had failed to consider whether the multiple acts of disability discrimination complained of were repudiatory breaches which formed part of her decision to resign.

The EAT upheld her appeal. It agreed there were multiple acts of disability discrimination, not just one, and the tribunal failed to explain why the other discriminatory acts did not amount to repudiatory breaches of contract. The EAT did not accept the tribunal's explanation that a flawed perception of being demoted was the only reason for the claimant's resignation. The claimant had clearly referred to other examples of poor treatment and repudiatory breaches of contract which had contributed to her decision to resign.

The tribunal had also erred in its interpretation of the law relating to constructive dismissal. It failed to carry out an analysis of whether the discriminatory acts amounted to repudiatory breaches of contract, namely the implied term of mutual trust and confidence, and whether the claimant's resignation was influenced, even if only in part, by the breaches. The case was remitted to a different tribunal.

The EAT judgment itself was delayed by over two years and, during this time, the case was (re)heard by a differently constituted tribunal. This time the claims for constructive unfair dismissal and discriminatory dismissal were upheld, and the claimant was awarded total compensation of **£1,224,862**, including a high injury to feelings award.

WHY THIS MATTERS

As discriminatory acts will normally constitute repudiatory breaches of contract, it is possibly not surprising with a claimant absent because of chemotherapy that the original decision was overturned.

It is a reminder of the established view that, with some exceptions, discriminatory acts will be considered as repudiatory breaches of contract and where there are multiple discriminatory acts, they will all be taken into account and one may be the "last straw".

The level of compensation is perhaps a reflection of the circumstances of the claimant's absence, and the seriousness and number of the acts of discrimination.

Wainwright v Cennox plc

NEWS

UPDATE ON EHRC CODE OF PRACTICE AND CHALLENGES TO "FOR WOMEN SCOTLAND"

The consequences of the decision in *For Women Scotland v Scottish Ministers* continue.

The EHRC's interim update of April 2025 was itself updated in June 2025 but the final version is now expected around November 2025, which leaves employers in a difficult position. The interim guidance as updated is a slight improvement, but employers are still left in the position of reconciling the "biological sex only" approach of the case, with the practical day-to-day realities of use of toilets and changing rooms, whilst at the same time avoiding legal liability in a complex area.

The most prominent and radical challenge comes from transgender retired judge Dr Victoria McCloud. Dr McCloud originally applied to be an intervenor in the *For Women Scotland* case, but the application was refused. Dr McCloud's argues that, as a result, there was no genuine transgender representation at the Supreme Court hearing.

Dr McCloud's application was originally brought under Article 6, which is the right to a fair trial based on her being excluded as an intervenor. The application is now, according to an interview with Dr McCloud, possibly broader in scope, involving Articles 8 and 14 as well as Article 6:

- **Article 8** is the right to respect for private and family life and to live life privately without government interference. The concept of "private life" is interpreted very broadly. It covers sexual orientation, lifestyle, and the way an individual looks and dresses. It also includes to right to control who sees and touches an individual's body. It also covers the right to develop a personal identity and to participate in essential economic, social, cultural and leisure activities. In some circumstances, public authorities may need to help an individual enjoy their right to a private life, including an ability to participate in society; and
- **Article 14** is the "protection from discrimination" right and requires that all the rights and freedoms set out in the Human Rights Act 1998 be protected and applied without discrimination.

Dr McCloud, who is supported by Trans Legal Clinic and W-Legal, said the rights she was seeking to protect for transgender people were, "*essentially the rights to respect for who I am, my family, my human existence, my right to a fair trial in matters determining my own freedoms and obligations without discrimination*.

Dr McCloud went on to say "*No representation or evidence had been included from us in the 8,500 group [the estimated UK population of people with GRCs who are diagnosed as transsexual]. I was refused. The court gave no reasoning. The court reversed my and 8,500 other people's sex for the whole of equality law … We are now two sexes at once. We are told we must use dangerous spaces such as male changing rooms and loos when we have female anatomy. If we are raped we must go to male rape crisis. We are searched by male police, to "protect" female police from, I assume, our female anatomy.*"

Dr McCloud is seeking a **full rehearing** of the *For Women Scotland* case, arguing that the Supreme Court undermined, at the very least, her Article 6 rights to a fair trial when it refused to hear representation from her, and did not hear evidence from any other transgender individuals or groups.

CURRENT AND FUTURE CONSULTATIONS ON THE EMPLOYMENT RIGHTS BILL (ERB)

As the ERB makes slow progress through the House of Lords, there are two major ongoing consultations as follows:

- unpaid internships and internships paid below the National Minimum Wage (NMW) are the subject of consultation, as are other roles which may be unpaid or paid below NMW. As part of the Government's "Plan for Change" it has committed to prohibiting unpaid internships unless they are part of an educational or training course. Views from a variety of sources, including individuals with internship experience, employers, educational institutions, legal and HR professions and non-profits and charities, have been requested, with a deadline of 9 October 2025. The findings are expected to be published in early 2026; and
- employment status – the government's original stated aim was to merge the two categories of "worker", namely (as currently defined) "workers" and "employees", into one single category of "worker". As it is more likely that employee rights will be extended to workers (the reverse would mean reducing employee rights which would be impracticable) this would mean that some self-employed individuals would have the right to maternity leave and to bring a claim for unfair dismissal. The consultation will also look at additional measures to strengthen self-employed protection. The findings are expected by the end of 2025;

There are also miscellaneous proposals, including increasing the ACAS early conciliation period to three months to reflect the increase of the tribunal limitation period from three months to six months, issuing guidance on how the Fair Work Agency will exercise its power to bring

employment tribunal proceedings, possibly on behalf of employees and also of its own accord, and a substantial recruitment drive to appoint more employment tribunal judges.

RELATED CAPABILITIES

- Employment & Labor
- Employment Class & Collective Actions

MEET THE TEAM

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