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Insights

DARLINGTON V LONDON BOROUGH OF ISLINGTON - CAN YOU SETTLE TOMORROW'S WHISTLEBLOWING CLAIMS TODAY?

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This case concerned the scope of a COT3 agreement and whether it prevented an employee from bringing a future whistleblowing detriment claim.

Mrs Darlington was employed by the London Borough of Islington (LB Islington) at Hargrave Park School. During her employment she raised safeguarding concerns which she said were protected disclosures. After leaving in May 2021, she was offered a role at Westbourne Early Years Centre (Westbourne), subject to a satisfactory reference. Both Hargrave Park and Westbourne were run by LB Islington.

Hargrave Park then issued an unsatisfactory reference and the job offer was withdrawn. Mrs Darlington alleged this was a detriment caused by her protected disclosures, but the complaint was settled via a COT3 in September 2021. The COT3 required a new reference to be provided.

The wording of the COT3 was expressed to cover all claims which Mrs Darlington *"has or may have in the future against the School (Hargrave Park), the Employer (LB Islington) or any of its governors, officers or employees whether arising from the employment with the Employer, its termination or from events occurring after this agreement has been entered [into] including, but not limited to, claims under…the Employment Rights Act 1996".*

Following the agreement, Mrs Darlington re-applied to Westbourne. This time a satisfactory reference was given, but she was again unsuccessful. Mrs Darlington claimed that Westbourne's refusal to hire her was a further detriment arising from the same protected disclosures and as a result brought a new whistleblowing detriment claim against Westbourne and LB Islington.

At both the tribunal and the EAT, two issues arose:

- Did the tribunal/EAT have jurisdiction to hear a detriment claim relating to disclosures already settled via a COT3?

- Did the COT3's express inclusion of "future claims" bar the new detriment claim?

The EAT considered the general principle that the outcome of a challenge to any agreement will invariably turn on the precise words in the agreement. Applying that principle, the EAT found that the use of the words *"whether arising from her employment with the Employer, its termination or from events occurring after this agreement*" was expressly and clearly intended to exclude claims for future alleged detriments, including detriments alleged to be causally connected to protected disclosures made prior to the COT3.

The decision is consistent with established authority (for example Bathgate v Technip Singapore PTE Ltd (2024), which confirmed that clear express wording can validly waive future claims). However, it also highlights the interaction between COT3s, whistleblowing protections and regulatory constraints.

The SRA certainly has rules about protected disclosures, and this is made clear in its warning notice of November 2020 (and subsequent warning notices/thematic review). However, this relates only to prohibitions contained in NDAs/secrecy clauses as opposed to a general bar. From a purely legal perspective, the scope is wider. Section 43J of the Employment Rights Act 1996 renders void any provision in an agreement which purports to preclude a worker from making a protected disclosure.

Importantly, neither s43J nor SRA guidance prevents an employer from settling or excluding future detriment claims arising from past protected disclosures, provided the wording is clear. The COT3 in this case did not, and could not, stop Mrs Darlington making future protected disclosures. But it did prevent her bringing further detriment claims based on the disclosures already settled, even if the detriment occurred after the agreement.

In practice, employers can protect themselves from future whistleblowing detriment claims tied to historic disclosures by using precise and unambiguous drafting. However, any provision purporting to bar the employee from making a protected disclosures post-agreement would be void under s43J and may fall foul of SRA guidance.

This makes sense as a protected disclosure made after a termination agreement, whether a COT3 or settlement agreement, could not lead to any employer liability because there could be no dismissal or detriment by the ex-employer relating to it.

NEWS ROUNDUP

EMPLOYMENT RIGHTS ACT 2025 - UPDATE

As the Employment Rights Act 2025 (ERA) finally comes close to implementation, the government has introduced five new consultations on some of the major provisions.

At the same time, the government has published a new implementation timetable for the ERA. The new timetable is similar to its original roadmap, but with a few small changes, particularly on the introduction of the new rules on fire and rehire.

CONSULTATIONS

There are consultations on the provisions on umbrella/agency companies, E-balloting, and going into a little more detail:

FIRE AND REHIRE

The ERA will impose new restrictions on the practice of fire and rehire where it is used to change/vary terms and conditions of employment. A dismissal might be automatically unfair if the reason or principal reason for the dismissal is to make a "restricted variation". These include reductions in pay, changes to pension, changes to working hours, changes to time off and the introduction of a "contractual variation" clause. As well as examining the above, the consultation will look at whether changes to matters such as expenses, benefits or payments in kind should qualify as "restricted variations". The consultation closes on 1 April 2026.

FLEXIBLE WORKING

Under the ERA, employers will have to take further steps to comply with the requirement to consult with an employee about a flexible working request which has been refused. The consultation outlines proposals for specific steps for employers, including:

- A meeting with the employee within six weeks of the request;
- Any decision to be clearly communicated to the employee, including any issues with the request, why it might not be feasible, or reasonable on statutory grounds. This communication must include consideration of possible solutions to accommodate the request;
- If the request cannot be accommodated, suitable alternatives to be considered;
- If the potential impacts are unclear, the parties choosing to trial the arrangement for a fixed period; and
- A written record of the meeting, including the outcome, being provided.

The consultation closes on 30 April 2026.

TIPPING

The ERA requires employers to consult before preparing a draft tipping policy and when reviewing such policies. Any tips policy must also be reviewed every three years.

The consultation seeks views on approaches to consulting with staff, including feedback on the statutory Code of Practice on fair and transparent distribution of tips.

The consultation closes on 1 April 2026.

NEW IMPLEMENTATION TIMETABLE

The government's original ERA "roadmap" was published in July 2025 and, bearing in mind the delays in receiving Royal Assent, the changes to implementation dates are minor. The new timetable can be found here - Plan to Make Work Pay and Employment Rights Act: timeline update - GOV.UK.

The main change is pushing back the implementation date of the new fire and rehire provisions from October 2026 to January 2027. This is a three month delay and might be caused by anticipated consultation issues or other complications.

This list of provisions now coming into force in April 2026 is still quite formidable, with the following provisions amongst those coming into force in less than two months:

- the increase to the collective redundancy protective award from 90 to 180 days;
- sexual harassment to become a protected disclosure (whistleblow);
- Statutory Sick Pay (SSP) changes; and
- voluntary gender equality action plans and menopause guidance to be published.

If you have any queries relating to the case mentioned in this update, or upcoming changes in employment law, please contact a member of our UK Employment team.

RELATED CAPABILITIES

- Employment & Labor

MEET THE TEAM

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