SLAUGHTER AND MAY/

NEWSLETTER

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# EMPLOYMENT BULLETIN

## QUICK LINKS


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## COMMITTEE PANEL MEMBER WAS A WORKER

**Summary:** The Employment Appeal Tribunal confirmed that a panel member chair of a Council's Fitness to Practice Committee was a worker for the purposes of the Employment Rights Act 1996 and the Working Time Regulations 1998 (*Nursing and Midwifery Council v Somerville*).

**Key practice point:** This decision and other recent cases make it increasingly likely that contractors and other casual staff taken on by employers will be workers. The EAT in this case confirmed that worker status does not require an "irreducible minimum of obligation" (the obligation on employer and employee to offer and perform work) – that is more a feature of employee status. The "mutuality of obligation" required for worker status is merely an exchange of promises which creates a contractual relationship.

**Facts:** The claimant (S), a panel member chair of the Nursing and Midwifery Council's Fitness to Practice Committee, claimed statutory holiday pay from the Council, arguing that he was entitled to it either as an employee or as a worker. The Employment Tribunal concluded that S was not an employee, because there was no "irreducible minimum of obligation" - he was not obliged to offer a minimum amount of sitting dates and was free to withdraw from dates he had accepted. However, the Tribunal found that he was a worker. The three requirements for worker status under the Employment Rights Act 1996 were satisfied:

1. A contract under which S undertook to perform work or services for the Council - there was a series of individual contracts between the parties each time S agreed to sit at a hearing, for which the Council agreed to pay him a fee. There was also an overarching contract between them in relation to the provision of his services as a panel member chair, evidenced by an agreement between the parties in relation to each of two four-year terms of appointment.
2. S undertook to perform the services personally.
3. The Council was not a client or customer of S's profession or business. Although the agreement classed S as an independent contractor and there was no restriction on the work he could undertake for other regulators, he was closely integrated into the Council. Without him the Council would not have been able to carry out one of the most important of its principal functions - the maintenance of the standards of conduct and performance for nurses and midwives. The Council also provided mandatory training for S. The EAT noted that independent contractors would be expected to maintain the necessary skills themselves and would be unlikely to submit to this level of subordination.

The Council appealed the finding that S was a worker, arguing that the irreducible minimum of obligation requirement applied to worker as well as employee status.

**Decision:** The appeal was dismissed. The authorities indicated that an irreducible minimum of obligation was not a prerequisite for satisfying the definition of worker status

in circumstances where an overarching contract existed between the parties under which S agreed to (and did) perform services personally in respect of a series of separate contracts.

The EAT commented that the absence of an irreducible minimum of obligation could be relevant to the question of whether the client/customer exception (in 3 above) applied. In *Windle*, a case on the definition of employee for the purposes of the Equality Act 2010, the Court of Appeal accepted that, in circumstances where the individual works on a case by case basis, the absence of an irreducible minimum of obligation outside the contractual assignments could indicate that the individual had such a degree of independence that he or she was not in a subordinate relationship when working.

**Analysis/commentary:** The recent run of worker status cases has put pressure on the Government to address the issue. At the end of last month, in a debate in Parliament on the gig economy, the Government confirmed that the Employment Bill, which had been expected to feature in the Queen's Speech, will be introduced "when Parliamentary time allows". The Employment Bill was originally included in the December 2019 Queen's Speech, when the Government said that the Bill would include a right for all workers to request a more predictable contract. It is possible that the new version of the Bill may contain more far reaching provisions on employment status.

## FORMAL EMPLOYER AND SECONDEE COMPANY VICARIOUSLY LIABLE FOR EMPLOYEES' MISCONDUCT

**Summary:** In a claim about liability for dishonestly assisting a VAT trading fraud, the Court of Appeal confirmed that both the formal employer and the company to whom two employees had been seconded were vicariously liable for their fraudulent actions. The extent to which the employees were part of the work, business and organisation of both employers meant that it was fair to apply dual liability (*NatWest Markets Plc v Bilta (UK) Ltd*).

**Key practice point**: Recent cases have indicated that organisations can be liable for the actions not only of employees, but also of independent contractors and those with more distant connections to the organisation if, on the facts, there is a "relationship akin to employment". This decision illustrates another aspect of the broad scope of vicarious liability – it is likely to continue to apply even if a third party is using the employees' services on a day-to-day basis. Employers may want to review their insurance coverage and, where necessary, seek to broaden cover in respect of vicarious liability.

**Facts:** Claims in relation to a large VAT fraud involving trading in carbon credits were brought by companies which had been used as vehicles for fraud. Two traders who had allegedly facilitated the fraud were employed by the second defendant (RS) but seconded to the first defendant. The High Court found that both the formal employer and the secondee company were vicariously liable for their misconduct in the course of their employment. The defendants appealed, RS arguing that the secondment meant that only the secondee company should be held responsible for the traders' acts.

**Decision:** The Court of Appeal ordered a re-trial, following a 19-month delay in the production of the first instance judgment, but confirmed the High Court's decision on dual vicarious liability. The imposition of vicarious liability is a highly fact sensitive exercise and the High Court had been entitled to decide that the extent to which the traders were a part of the work, business and organisation of both defendants meant that it was fair to impose dual liability. The High Court had found that the traders were still recognisable as the employees of RS and part of its organisation and had not transferred exclusively to the secondee company. Although the traders acted in the secondee company's name, RS remained primarily liable to pay their salaries and other benefits (albeit these were reimbursed by the secondee company) and retained an overarching responsibility for the provision of the traders and for their supervision. Earlier cases had established that although contractual provisions between an employer and a third party using the employee's services under a contract or other arrangement with the employer might govern their liability as between them, the question of vicarious liability turns on the circumstances of the case.

The Court pointed out that vicarious liability involves no fault on the part of the employer – it depends on the business model agreed to by the parties and the way in which it was operated. The Court said that it would be "very rare" for there to be a complete shift of vicarious liability from the actual employer to the organisation to which the employee is loaned.

## EAT CONFIRMS THAT EMPLOYER CANNOT CURE FUNDAMENTAL BREACH

**Summary:** The EAT found that there had been a fundamental breach of contract arising out of the implied duty to provide a safe working environment. The situation could not be remedied by the employer's conduct after the breach of contract had become so serious that it amounted to a constructive unfair dismissal entitling the employee to resign (*Flatman v Essex County Council*).

**Key practice point:** Once there has been a repudiatory breach of contract, an employer's subsequent actions to make amends cannot "cure" it. An employee is entitled to accept the breach by resigning. However, if the employer acts promptly, it may be possible for a threatened claim of constructive dismissal to be thwarted by the employer's acceptance of (and action to remedy) behaviour which falls short of a fundamental breach.

**Facts:** The claimant's duties involved daily lifting of a pupil at the employer's school. She repeatedly requested, but was not provided with, manual handling training. She developed back pain and was subsequently on sickness absence. On her return to work, her employer did take action - she was advised that she would not be required to carry out manual handling and would be assigned to another class. Training was promised. Despite this, she resigned and claimed constructive unfair dismissal. The Employment Tribunal dismissed her claim, finding her employer was not in fundamental breach of its duty to take reasonable care of her health and safety. Communications at the point of her return demonstrated genuine concern for her health and safety and, in the light of that concern, the earlier failure to provide training was not a fundamental breach of contract. The claimant appealed.

**Decision:** The EAT allowed the appeal and substituted a finding of constructive unfair dismissal. The EAT confirmed the principle, established in *Buckland v Bournemouth University,* that it is not possible for the employer to "cure" a repudiatory breach of contract. Unless the employee has waived the breach or affirmed the contract by waiting too long to resign, the employee has a right to choose whether to treat the breach as terminal.

The employer had breached the implied duty to provide a safe working environment by failing, over a period of months and despite repeated requests, to provide training. The breach had become fundamental, due to increased and continuing risk and harm caused, and the contract had not been affirmed. The breach became fundamental at the latest by the time the claimant went on sickness absence. The employer's subsequent statements of intention when she returned to work were insufficient to retrieve the situation.

**Analysis/commentary:** The employer attempted unsuccessfully to rely on a previous case, *Assamoi v Spirit Pub Company*, in which the EAT held that a constructive dismissal claim failed where the basis for the claim had been accepted and remedied by the employer. In that case, shortly after disciplinary proceedings had been instigated the employer accepted that there was no basis for the proceedings and confirmed that no further action would be taken. It also offered the employee the option of a transfer to a different workplace. The EAT found that the employer's subsequent actions prevented the situation escalating into a fundamental breach of contract.

## DISMISSAL WAS NOT MATERIALLY INFLUENCED BY WHISTLEBLOWING

**Summary:** The EAT confirmed that the dismissal of the claimant following whistleblowing disclosures was not automatically unfair. The decision to dismiss was not materially influenced by the protected disclosures; it was based entirely on the claimant's behaviour following the disclosures. The Employment Tribunal was entitled to find that this behaviour was separate and distinct from the protected disclosures themselves (*Watson v Hilary Meredith Solicitors Limited*).

**Facts:** W was CEO at a law firm. He resigned with notice a few months after joining, having made protected disclosures about financial irregularities. He was placed on garden leave and the firm attempted to persuade him to return to work to help resolve their problems. After those attempts and settlement negotiations failed, he was dismissed because of his post-disclosure conduct. His claim of automatic unfair dismissal for making protected disclosures failed. W appealed.

**Decision:** The EAT agreed with the Tribunal's decision that the dismissal was not "materially influenced" by the disclosures (the test established by case law). W's actions following the making of the protected disclosures could be severed from the protected disclosures themselves. In particular, the decision-maker (the Chair of the law firm) did not at any stage criticise W for making his disclosures; she did not try to cover up the disclosures and, for a period after they

were made, she maintained an amicable relationship with W. This only began to change when she started to reflect on events and decided she was not happy about W's decision to resign rather than to stay on to help resolve the problems that had been identified. The EAT accepted that, whether or not the criticism of W's behaviour following the disclosures was valid, there was material that could lead a person in the Chair's position to the view that it was open to criticism. By the time that W was dismissed, the Chair's focus was upon ways of arranging for the termination, given the inability to reach a settlement and the recognition that both sides wanted the relationship to end. The EAT found that the dismissal "served a perceived business need".

## HORIZON SCANNING

What key developments in employment should be on your radar?

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| **1 July 2021** | Employers to contribute to the Coronavirus Job Retention Scheme |
| **30 September 2021** | Scheduled end of the Coronavirus Job Retention Scheme |
| **5 October 2021** | Deadline for reporting 2020 gender pay gap data |

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

- **Employment status:** *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes); *Stojsavljevic v DPD Group* (EAT: whether individuals working under franchise agreements were workers); *Stuart Delivery Limited v Augustine* (Court of Appeal: whether delivery courier with right of substitution is a worker); *Professional Game Match Officials Ltd v HMRC* (Court of Appeal: whether referees were employees for tax purposes)

- **Discrimination / equal pay:** *Efobi v Royal Mail Group* (Supreme Court: test for shift of burden of proof); *Forstater v CGD Europe* (Employment Appeal Tribunal: whether views on transgender women were protected as a philosophical belief); *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services)

- **Redundancy:** *Gwynedd Council v Barratt* (Court of Appeal: whether selection procedure on restructuring was fair)

- **Vicarious liability:** *Chell v Tarmac Cement and Lime* (Court of Appeal: whether employer vicariously liable for consequences of employee's practical joke in the workplace)

- **Whistleblowing/detriment:** *UCL v Brown* (Court of Appeal: whether disciplining a trade union rep employee for failure to comply with an instruction was a detriment)

- **Working time:** *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime).

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