SLAUGHTER AND MAY/

NEWSLETTER

JANUARY 2026

EMPLOYMENT BULLETIN

QUICK LINKS

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

EMPLOYMENT RIGHTS ACT: FIRST SET OF CHANGES

The Employment Rights Act 2025 received Royal Assent on 18 December 2025. Key provisions coming into force on 18 February 2026 are:

- Industrial action ballots: removal of ballot thresholds and support requirements under the Trade Union Act 2016.
- The notice period for industrial action will be reduced from 14 to 10 days.
- The validity of strike ballots is extended from six to 12 months.
- There are enhanced protections against dismissal for employees taking part in strike action.

Further changes will follow in April and October, as well as a myriad of consultations on proposals which may stretch into 2027.

Our Employment Rights Act hub is designed to help you stay ahead. Here you will find expert insights, practical guidance, and answers to key questions raised by the Act, serving as a central resource for navigating the Act. Please also listen to our podcast for a breakdown of the government's implementation timeline as well as discussion of the key considerations for businesses.

TRADER ENTITLED TO DISCRETIONARY BONUS FOR PERIOD PRIOR TO DISMISSAL

Summary: A trader was successful in a breach of contract claim in relation to his employer's decision not to pay him a discretionary bonus for a period prior to his dismissal. The employer had failed to exercise its discretion for the purpose set out in the employment contract (*Gagliardi v Evolution Capital Management*).

Key practice point: The principles established by the Supreme Court in *Braganza v BP Shipping Ltd* (where there is a genuine discretion under a contract, it must be exercised in good faith) continue to be the touchstone for the exercise of employer discretion in relation to bonuses where entitlement is subject to a contractual discretion. The case highlights the importance of a clause in an employment contract setting out the circumstances in which a departing employee will not be entitled to a bonus, and the methods for calculating bonus entitlements on termination. It may also be preferable from the employer's perspective not to be too prescriptive about the factors to be considered in assessing the amount of the bonus, as the wording is likely to be interpreted strictly. Here, the reference in the bonus clause to "individual performance" meant that other matters, such as conduct, could not be taken into account.

Facts: The claimant, an experienced portfolio manager, ran a block trading fund for his employer, ECM, a US-based company. His employment contract provided for a discretionary bonus (emphasis added):

"*For each calendar year, provided you are an employee in good standing on each fiscal-year-end bonus payday, you may receive a discretionary bonus based on your individual*

performance and [ECM]'s overall performance ("Discretionary Bonus"). The target range of the Discretionary Bonus will be 10%-15% of profit of your revenue contributions but will be purely discretionary."

In 2022, following a market-wide investigation by US authorities into block trading malpractices, the claimant was dismissed on one week's notice, expiring on 7 March. The bonus payday was 15 March. ECM decided to pay zero bonus to the claimant. The Court found that this was because it did not want to pay a bonus before knowing the outcome of the investigation. The US authorities made a preliminary determination to recommend enforcement action but, after enquiry, decided against this and the claimant was never charged with any offence. The claimant brought a claim against ECM for breach of contract.

Decision: The High Court upheld the claim. The employment contract included an implied term of trust and confidence and therefore, under the *Braganza* principles, the contractual discretion had to be exercised in good faith in accordance with its contractual purpose and not "irrationally, arbitrarily or capriciously". In addition, in reaching its decision, ECM had to consider only those matters that were relevant. The contract said that the bonus would be based on "individual performance". This was a reference to the claimant's individual revenue contribution to the fund's profits, so ECM could not take into account behavioural and reputational matters.

The Court also rejected the argument that a bonus was not payable because the claimant was not "in good standing" on the bonus payday. Under a clause in the contract covering the payment of bonuses post-termination, pro-rated bonuses had to be paid within a month following termination; ECM could not "wait and see" the result of the investigation. Also, there was no reference in the contract to "good standing"; the pro-rated bonus was payable unless there was a termination "for cause". ECM did not terminate for cause; it simply gave notice under the contract.

The Court found that the only factor considered by ECM at the time of the bonus exercise was the investigation. This was not a valid reason for non-payment of the bonus. The claimant had generated 97% of the fund's profits, so on the proper exercise of its discretion, ECM should have awarded the top end of the 10-15% target. The Court awarded damages representing a 15% bonus of $5,385,000 (plus interest).

COMPLAINT ABOUT TWEETS DID NOT INDUCE DISCRIMINATION

Summary: The Court of Appeal confirmed that Stonewall did not cause or induce discrimination when it complained to the barristers' chambers where she worked about tweets she had made (*Bailey v Stonewall Equality Ltd*).

Key practice point: The decision clarifies the test for causing or inducing discrimination, emphasising that, in order for liability to be established, there must be a direct unbroken link between the actions of the third party and the discrimination.

Background and facts: Section 111 of the Equality Act 2010 imposes liability for discrimination for instructing, causing or inducing discrimination, or attempting to do so. After the chambers where she worked joined Stonewall's Diversity Champion programme, the claimant published her objections. She was also involved in setting up an association based on gender critical principles and her tweets about this led to a number of complaints being made to the chambers, including by Stonewall. Following an investigation, the claimant was asked to delete the messages.

An Employment Tribunal and the Employment Appeal Tribunal found that the chambers had discriminated against the claimant because of her protected belief but rejected the claim that Stonewall had breached section 111. The claimant appealed.

Decision: The Court of Appeal dismissed the appeal. Stonewall had not caused the discrimination; the effective cause was the investigation by the chambers. Stonewall's complaint was merely a protest - it had not been looking for any specific action by the chambers – and the investigation broke the chain of causation between the complaint and the discrimination.

REDUCTION IN COMPENSATION FOR PROCEDURALLY UNFAIR DISMISSAL

Summary: The Employment Appeal Tribunal (EAT) set out the correct approach for calculating a reduction in compensation for a procedurally unfair dismissal to reflect the likelihood that the employee would have been dismissed in any event if a fair process had been followed (*Zen Internet Limited v Stobart*).

Key practice point: *Polkey* assessments of unfair dismissal compensation, involving consideration of how long the employee would have remained in employment had there been a fair dismissal, are likely to increase in significance following the removal (next year) of the unfair dismissal compensation cap, under the Employment Rights Act 2025. Although the date of a decision which might have been reached following a fair procedure will often be after the actual decision to dismiss, this will not always be the case. The decision is also a reminder that, however senior the employee, they are entitled to a fair capability (or disciplinary) process.

Facts: Mr S was dismissed as Chief Executive on 31 March 2023. On 24 February, he had been informed that the company had lost confidence in him and that he could no longer remain in the CEO role. The decision to dismiss was taken at a board meeting on 17 March.

The Employment Tribunal found the reason for the dismissal was capability and that it was procedurally unfair because the company had failed to follow its procedures, applicable to staff at all levels, which (mirroring the ACAS Code on disciplinary and grievance procedures) would have involved taking steps to establish the facts, informing Mr S of the problem, arranging meetings for him to put his case, deciding on the outcome, and offering an appeal. For the purposes of compensation, the Tribunal, applying *Polkey*, looked at what would have happened had a fair procedure been followed. It found that he would have been dismissed no later than 31 May 2023. The company appealed against both the finding of unfairness and the *Polkey* assessment.

Decision: The EAT confirmed that the dismissal was unfair. The EAT acknowledged that the need for warnings and an opportunity for improvement might be less apparent for senior management, because generally they are aware of what is required of them and capable of judging whether they are meeting those requirements. However, although there might be exceptional cases (for example, if it would serve no useful purpose), normally a capability dismissal will be procedurally unfair in the absence of a warning and an opportunity to improve. The Tribunal had considered the argument that, in light of Mr S's senior position, the comments in his performance reviews amounted to an implied warning, but it concluded that, in all the circumstances, a fair process had not been followed.

The company's appeal against the *Polkey* finding was allowed. The Tribunal had wrongly confined its consideration to what had happened after the decision to dismiss on 17 March and had ignored the period from 24 February when performance concerns had first been raised. This earlier starting point could have affected the length of time a fair process would reasonably have taken. The EAT sent this issue back to the Tribunal for reconsideration.

VOLUNTEER WAS A WORKER IN RELATION TO REMUNERATED ACTIVITIES

Summary: The Court of Appeal has confirmed that a volunteer who attended activities for which he was entitled to remuneration was a worker (*Maritime and Coastguard Agency v Groom*).

Key practice point: It is now clear that a volunteer can be a worker and therefore entitled to certain employment rights, including, with effect from 2027, the right (for certain qualifying workers) to receive a "guaranteed hours offer", based on the average hours worked over a reference period. Each relationship will be determined on its own facts; clearly it was significant in this case that there were activities for which remuneration (other than reimbursement of expenses) was payable.

Facts: The claimant was a volunteer coastal rescue officer (CRO) for the Maritime and Coastguard Agency. He made a claim for refusal to permit accompaniment by a trade union representative at a disciplinary hearing. He would only have the right to accompaniment if he was a worker as defined in section 230 of the Employment Rights Act 1996. The Employment Appeal Tribunal decided that the claimant was a worker when he attended activities in respect of which he was entitled to remuneration. The Agency appealed.

Decision: The Court of Appeal dismissed the appeal. The CROs were described as volunteers. However, the set of documents issued to them accurately depicted what was happening in practice. They showed that while CROs were not obliged to attend for work on any occasion and could specify the time for which they were willing to do so, if they did attend, they were bound to obey reasonable instructions; and were entitled, although not compelled, to claim remuneration for much of that work. A contract for the provision of services came into existence when a CRO attended for an activity for which there was a right to claim remuneration. The necessary "mutuality of obligation" was evident in that the CRO had to comply with reasonable instructions and the Agency had to pay the CRO on receipt of a claim for

attendance for relevant activities.

HORIZON SCANNING

What key developments in employment should be on your radar?

18 February 2026	Certain Employment Rights Act provisions in force, including: • Enhanced protection against dismissal for taking part in industrial action • Industrial action ballots: removal of ballot thresholds and support requirements under Trade Union Act 2016 • Notice periods for industrial action reduced from 14 to 10 days • Validity of strike ballots extended from six to 12 months • Changes to facility time, union subscriptions and political fund reporting
April 2026	Certain Employment Rights Act provisions expected to come into force, including removal of qualifying periods for paternity leave and unpaid parental leave, increase in collective redundancy maximum protective award, sexual harassment whistleblowing protections, Statutory Sick Pay, trade union recognition process and workplace balloting
By June 2026	Data (Use and Access) Act 2025 in force: organisations required to have data protection complaints procedure
October 2026	Further Employment Rights Act provisions to come into force, including on dismissal and re-engagement, protection from harassment, tribunal time limits, protections against industrial action detriment, trade unions (rights of access, employer duty to inform workers of right to join, protections for representatives)
2027	Further Employment Rights Act provisions to come into force, including on collective redundancy consultation threshold, unfair dismissal qualifying period, zero hours contracts, gender pay gap and menopause action plans, pregnancy rights, bereavement leave, flexible working
2027 or before	Employment Rights Act: NDAs to be unenforceable to the extent they prevent worker from making allegations or disclosures about workplace harassment or discrimination
Uncertain	Publication of the Equality (Race and Disability) Bill, extending pay gap reporting to ethnicity and disability for employers with 250+ staff, extending equal pay rights to race and disability, and preventing outsourcing from being used to avoid equal pay Extension of employer right to work checks to working arrangements other than under a contract of employment

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

Discrimination and equal pay: *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 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); *Augustine v Data Cars Ltd* (Supreme Court: whether part-time status must be the sole reason for less favourable treatment)

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)

Whistleblowing: *Argence-Lafon v Ark Syndicate Management Ltd* (Court of Appeal: whether employee was dismissed for making protected disclosures).

CONTACT

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- PHILIPPA O'MALLEY
- PARTNER
- T: +44 (0)20 7090 3796
- E:Philippa.O'Malley@SlaughterandMay.com

- DAVID RINTOUL
- SENIOR COUNSEL
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

- SIMON CLARK
- SENIOR COUNSEL
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com

- CLARE FLETCHER
- KNOWLEDGE COUNSEL
- T: +44 (0)20 7090 5135
- E: Clare.Fletcher@Slaughterandmay.com

- HELENA DAVIES
- KNOWLEDGE LAWYER
- T: +44 (0)20 7090 5140
- E:Helena.Davies@SlaughterandMay.com