

TLD LegalLive! Employment Law



TLD LegalLive!

Employment Law

EMPLOYMENT RIGHTS BILL

- Implementation timeline
- 2025 amendments

KEY 2025 CASES

- Redundancy processes
- “Last straw” resignations
- AWR and status
- Disability: definition / misconduct dismissals / reasonable adjustments
- Disciplinary processes and decisions
- Protected disclosure dismissals

TIMELINE FOR IMPLEMENTATION

Implementation in 2025

- Repeal of the need for minimum service levels during strikes
- Repeal of most of the Trade Union Act 2016, which would roll back almost all of the restrictions on calling strike action introduced by Conservative-led governments since 2010
- Stronger protections against being dismissed for taking industrial action
- Simplification of industrial action notices

April 2026

- Changes to trade union recognition rules
- Doubled protective award for breach of collective redundancy consultation requirements (from 90 to 180 days' pay)
- A day one right to paternity leave and unpaid parental leave (scrapping existing service requirements)
- Making statutory sick pay available to low earners and scrapping the waiting period so that it is payable from the first day of sickness absence.
- Fair Work Agency body established (although it is not clear when it will be fully up and running)

October 2026

- Ban on “fire and rehire” (except in limited circumstances)
- Rights for trade unions to access workplaces to communicate with workers, including digital access
- Upping the requirement on employers to prevent sexual harassment to “all” reasonable steps (not just reasonable steps)
- Employers to be held liable if employees are harassed by third parties

2027

- A 'day one' right for employees not to be unfairly dismissed
- Change to the trigger for collective redundancy consultation requirements
- Regulation of umbrella companies
- New guaranteed hours offer for zero- and low-hours employees and agency workers
- Stronger rights to request flexible working
- Gender pay gap and menopause action plans (voluntary from April 2026)
- Rules restricting dismissal of pregnant workers
- New statutory right to bereavement leave
- Further regulations about harassment

2025 Amendments

Recent Amendments

Some 64 pages of amendments were published on 7 July.

Worth noting...

- Fire and rehire
- Guaranteed hours
- Bereavement leave for pregnancy loss
- Non-disclosure agreement ban

Fire and Rehire

The ban originally covered changes to any contractual term without employee agreement, no matter how sensible the change or how unreasonable the employee's unwillingness to agree to it (unless the business was in extreme financial difficulty). The position has now relaxed slightly. The ban will now only preclude dismissals to make changes to an employee's contractual:

- pay
- required number of working hours
- pension
- shift times and length
- time off rights, and
- other changes to be defined in regulations (might include benefits)

What Does This Change Mean?

- If an employee is dismissed and re-engaged to impose a contractual change which is not caught by the amended ban, the dismissal will no longer be automatically unfair and the usual fairness tests will apply.
- Much still depends on the new regulations, but this softening is welcome as it will be less restrictive of growth. But this will still present a block to changing outdated or unprofitable pay, pensions and hours structures. Employers will be allowed to hire new recruits on different terms and make pay rises conditional on employees agreeing to change but will not lawfully be able to terminate the contracts of existing employees to impose change unless the business is facing financial collapse.
- NB the new limitation on imposing flexibility clauses through dismissal and re-engagement. Employers will still be able to include flexibility clauses in contracts of new hires and rely on existing flexibility clauses in contracts of existing employees, but they will be precluded from imposing new flexibility clauses on existing employees except in very limited circumstances. Employers should therefore review the flexibility clauses in their contracts ahead of the new law coming into effect in October 2026.

Fire And Replace

- The ban has now been extended to cover the replacement of employees with self-employed independent contractors, agency workers etc, if the replacement is going to do substantially the same work (P&O Ferries).
- This “fire & replace” situation is currently treated by law as a redundancy (because it is a reduction in the need for employees) and is potentially fair.
- The new wording would mean that the replacement of a workforce with non-employees (e.g. agency workers) would be regarded as automatically unfair unless the employer was facing financial collapse.

Guaranteed Hours

Earlier this year, the zero hours reforms, including the right to be offered guaranteed hours, were extended to agency workers.

This gives agency workers the right to:

- Guaranteed hours reflecting the hours worked during the reference period.
- Reasonable notice of shifts and payments for shifts cancelled or curtailed at short notice.
- And now, the right to be offered those guaranteed hours on terms no less favourable than those the worker had previously worked under. In particular, pay offered must be no less favourable than either the agency terms they'd been working on or those of comparable workers (who do similar work).

Guaranteed Hours

- Given agency workers can often be engaged on different terms, depending on the assignment, this will require an audit of terms by the end-hirer to ensure they pay the workers the same for the guaranteed hours as they had previously received.
- New clarification that when an agency worker accepts a guaranteed hours offer from an end-hirer, they will become a worker (rather than an employee).
- There is an open-ended power to set out in future regulations further circumstances when an offer of guaranteed hours does not need to be made e.g. where employers are dealing with “exceptional circumstances”.
- There are also a number of proposed amendments from opposition parties which would significantly water down the guaranteed hours provisions, e.g. making it a right to request guaranteed hours by an employee (rather than a requirement for an employer to offer).

Bereavement Leave

The proposed amendment extends the new right to bereavement leave to include pregnancy loss that occurs before 24 weeks of pregnancy.

This will entitle mothers and their partners to at least one week of unpaid leave.

Non-disclosure Agreements

A whole new section on non-disclosure agreements (NDAs) bans NDAs relating to harassment or discrimination.

A Government press release says, *“If passed, these rules will mean that any confidentiality clauses in settlement agreements or other agreements that seek to prevent a worker speaking about an allegation of harassment or discrimination will be null and void”*.

This is not limited to sexual harassment or specific types of discrimination. The voiding of NDAs also extends to disclosures about the response of the employer to the harassment or discrimination, or the response of the employer to the making of the allegation or disclosure.

NDA Ban

- There is also power to make regulations on “excepted agreements” where the ban does not apply – watch this space.

The new provision:

- only covers harassment or discrimination by the employer or fellow worker. The victim of the conduct must also be the worker themselves or a fellow worker, so the NDA ban does not cover the new right to make a claim about harassment by third parties.
- does not cover a failure to make reasonable adjustments for a disability. It also does not cover victimisation.

NDA Ban

The change:

- will have major implications for confidentiality wording in contracts and policies, as well as settlement agreements.
- is welcome if it stops the “hushing up” of serious allegations which allows harassment and discrimination to be repeated, but..
- may have the unintended consequence that employers become less willing to settle harassment and discrimination claims – particularly commercial settlements where the employer feels confident of defending the allegations in tribunal.

It is not currently clear when this ban will come into effect.

Umbrella Companies

Umbrella companies act as an employer for contractors who work on temporary contracts, handling payroll, deducting taxes before paying salaries, invoicing and collecting payments.

- In April 2026, new legislation will shift PAYE and National Insurance compliance responsibilities from umbrella companies to recruitment agencies or end clients, by making recruitment agencies and (where there is no agency), end users, jointly and severally liable for unpaid tax.
- The Government's changes are designed to address the risks of the use of these in tax avoidance schemes, by shifting accountability to businesses higher up the labour supply chain.

Umbrella Companies

Until any revisions to the Conduct Regulations, the true impact of the changes to the framework for employment businesses is unknown. The policy intent on the tax changes is clearer, although technical guidance on some practical aspects is awaited.

To prepare, employers should:

- Try to understand their labour supply chain to understand their reliance on umbrella companies and other labour supply arrangements, undertaking due diligence processes to identify areas of risk.
- Obtain clear documentation from supply chains to demonstrate tax compliance, and to ensure all new umbrella providers are thoroughly vetted before engagement.
- Keep in touch with labour suppliers to see how they are responding to the proposed changes.

KEY CASE LAW IN 2025

Hendy Group V Kennedy - Redundancy

Kennedy had worked for the Group since 2013. The pandemic resulted in a genuine redundancy situation. He accepted that both the redundancy situation and his selection were fair. The issue was with the process....

- Lack of support: rather than actively helping Kennedy find alternative roles within the company, HR told him he could apply for positions advertised on the company website, treating him no differently to external candidates.
- Kennedy was required to return his laptop a week after being given notice and lost access to internal emails and the company intranet.
- During Kennedy's seven-week notice period, multiple sales positions were available within the group. Despite Kennedy's 30 years' experience in motor trade sales and his proven track record the company made no effort to actively consider him for these roles.
- Active blocking of applications: an email from HR stated that because Kennedy hadn't been successful in one interview he would not be considered for any other sales roles within the group.

Hendy Group V Kennedy

The case reinforces several key legal principles around redundancy:

- Consider alternative employment: employers have a well-established obligation to look for alternative employment and satisfy themselves that none is available before dismissing for redundancy. This isn't just about allowing employees to apply for jobs – it requires active consideration and support.
- Reasonableness assessment: the test remains whether the employer acted reasonably in all the circumstances. Here, despite being a large organisation with significant resources, Hendy Group took virtually no positive steps to help Kennedy find alternative work.
- The range of reasonable responses: while employers aren't required to create jobs or guarantee alternative employment, they must act reasonably. The Tribunal found that no reasonable employer would have adopted Hendy Group's hands-off approach.

Hendy Group V Kennedy

- Kennedy was awarded £19,566.73 in compensation with no reduction applied.
- Crucially, the Tribunal refused to make a “Polkey reduction” – a reduction to reflect the chance that dismissal might have occurred anyway even with a fair process.
- The Judge concluded that had Hendy Group properly considered alternative employment rather than actively blocking Kennedy’s applications, he would more likely than not have secured another role within the company.

Hendy Group V Kennedy

Steps to take (as a minimum):

- Actively identify suitable alternative positions
- Discuss options with at-risk employees
- Provide practical support with applications
- Ensure managers across the business know about at-risk colleagues so they can consider them for any opportunities

Other ideas: embed a structured redeployment process, maintain accessible vacancy registers, assign a manager to support, discuss suitable roles and training needs

Document your efforts! Record every role offered and reasons for rejection.

Alternative employment doesn't have to be identical to the redundant role. Consider different locations (even if involving travel), roles requiring retraining, positions at different levels or pay grades, temporary arrangements while searching for permanent alternatives.

MARSHALL V MCPHERSON – “LAST STRAW”

The Claimant was a driver whose job was to remove spent grain from distilleries.

He found it difficult to take breaks and complete his duties due to work pressure, breakdowns, and stoppages, even resorting to manipulating his tachograph to appear as though he had taken scheduled breaks. He informed his line manager of his difficulties but was told to "do what he could and 'crack on'," and the issue was not recorded.

The company asked another driver to check his tipping, without warning. The claimant was annoyed and decided to leave his position.

He raised a grievance about his current difficulties and raised two past incidents from 2017. There was some delay in dealing with the grievance and he eventually resigned, claiming constructive dismissal.

Marshall V Mcpherson

The ET concluded that if a 'last straw' act was "not repudiatory in nature, it will not revive earlier acts".

This was deemed wrong by the EAT.

The 'last straw' itself does not need to be a breach of contract; it merely needs to contribute, however slightly, to a cumulative breach of the implied term of trust and confidence. Even the 2017 incidents could contribute.

The case offers a reminder of the legal principles underpinning constructive unfair dismissal—particularly the “last straw” doctrine. It explores whether an employee can claim constructive dismissal when the final incident prompting resignation is relatively minor and not repudiatory in isolation, but forms part of a broader pattern of conduct that undermines mutual trust and confidence.

Marshall V Mcpherson

The key question is whether the overall pattern of conduct amounts to a repudiatory breach.

What are the takeaways?

- Take employee concerns seriously: Respond promptly, transparently, and document all complaints and how they have been addressed — especially when the employee has raised issues previously.
- Cumulative conduct counts: A single event need not be serious to justify resignation. Minor incidents can contribute to a broader pattern that breaches trust and confidence.
- Past conduct may be revived: Previous issues, even if tolerated at the time, can be relevant when assessing cumulative breaches. Tolerance does not equal waiver.

Garner V Thorpe Hall Leisure Ltd

Disability discrimination – misconduct



#!@F*!

Garner V Thorpe Hall Leisure Ltd

A chef in a four-star hotel, had anxiety, depression, and polycystic ovary syndrome. She took sick leave in June and July 2023, and her return-to-work forms stated that she was taking medication to support her ongoing mental health problems.

In August 2023, she was heard arguing with colleague, with whom she had been in a relationship at the time. She was heard swearing by numerous staff and guests, some of whom complained.

The company's disciplinary policy includes examples of gross misconduct, including "the use of aggressive behaviour or excessive bad language", and actions that bring the company into disrepute.

At a disciplinary hearing, Garner refused to recognise the impact of her behaviour, downplaying the incident as having little impact.

She was dismissed for gross misconduct and failed to turn up for her appeal.

Garner V Thorpe Hall Leisure Ltd

Ms Garner issued claims for disability discrimination.

She admitted to her outburst and appreciated that it was unacceptable behaviour in the workplace, but argued that her disabilities affected her ability to control anger.

The ET found her inability to control her anger and attitude in the meeting were a consequence of her disability but concluded that her employer was justified in dismissing her in pursuit of legitimate aims of preserving its reputation and not tolerating unprofessional conduct.

However, the ET was critical of her employer's failure to make reasonable adjustments to allow for her health issues and not obtaining medical evidence after her prior mental health-related sick leave – which could have led to a different outcome – amounted to discrimination based on disability.

She was awarded about £13,500 (with £11,000 of this to reflect ITF).

Garner V Thorpe Hall Leisure Ltd

Key Takeaways:

- Spot the link early
- Pause and obtain medical evidence where disability is a possibility e.g., how the condition contributed to the incident, whether medication or work stress are factors and what reasonable adjustments could help the employee regulate conduct. Skipping this step cost Thorpe Hall, despite the 80% probability that Mrs G would have been dismissed anyway.
- Make reasonable adjustments to the process – consider what can be done to ensure the disciplinary process itself is fair e.g. allowing a companion with knowledge of their condition or adjusting the format to reduce anxiety, providing written questions in advance, choosing a less intimidating setting.
- Balance legitimate aims with proportionality – protecting the guest experience was legitimate but consider other sanctions e.g. final written warning, role change etc.
- Review policies to cross reference misconduct and absence procedures and to flag the need for medical input / train managers to spot behaviours.

Rooke V NHS Blood And Transplant Service



Rooke V NHS Blood And Transplant Service

- Rooke claimed constructive unfair dismissal, disability discrimination, failure to make reasonable adjustments, and whistleblowing detriment.
- She had made disclosures, including concerns about donor safety checks and training shortcuts
- After this, she was characterised as “Darth Vader” in a personality-type questionnaire which was filled out on her behalf.
- She resigned but then tried to retract her resignation, which was refused.

The Tribunal ruled that Mrs R was a whistleblower – she reasonably believed her concern showed a health and safety risk and reasonably believed that the issue was in the public interest – and that while NHSBT had not breached the implied term of trust and confidence or discriminated on the grounds of disability, it had treated Mrs Rooke detrimentally because of her protected disclosures.

This included refusing her request to withdraw her resignation and taking actions that undermined her professional reputation (“Darth Vader is a legendary villain and being aligned with him is insulting”).

She was awarded £28,989.61, covering losses and compensation for injury to feelings.

Rooke V NHS Blood And Transplant Service

Key takeaways:

- This case highlights the importance of being aware of the protection given to whistleblowers and of handling whistleblowing disclosures appropriately.
- Even if other employment claims (such as discrimination or unfair dismissal) do not succeed, employers may still face liability for whistleblowing detriment.
- Clear internal procedures and fair decision-making processes – such as properly considering resignation retractions – are essential.
- Ensure that all employees know it is not permitted to subject a colleague to detrimental treatment of any kind because of their whistleblowing. Assess team building and other exercises to ensure they are appropriate and standards are upheld.

Unfair Dismissal – Band Of Reasonable Responses

ERA 1996: having established one of the fair reasons for dismissal (misconduct here), the decision as to whether a dismissal is fair or unfair depends on whether the employer carried out a fair procedure and acted reasonably or unreasonably in treating it as a sufficient reason for dismissal.

This means that a dismissal must be within a band of reasonable responses.

A long career undone.....*Okoro v Bidvest Noonan (UK) Ltd*:

- a lone security guard fell asleep while on duty, for 15 minutes, on his sixth consecutive night shift
- he had an unblemished 16-year employment record
- there were no adverse consequences arising as a result of the incident
- he claimed that he had been meditating, and that he had dry eye and had to shut his eyes
- the company engaged OH about his eye issues but Okoro refused to share the findings
- the company was worried about reputational risk
- the policy did not specify falling asleep as a gross misconduct offence

Unfair Dismissal – Band Of Reasonable Responses

The key question for the tribunal wasn't whether it would have made the same decision, but whether the employer's action fell within the range of reasonable responses.

The tribunal found that the process had been fair but that he had been unfairly dismissed. While it accepted that deliberately sneaking off to take a nap could amount to gross misconduct, that wasn't the case here. The Claimant had unintentionally and momentarily nodded off, with few, if any, consequences to answer for.

As such, although the matter was serious, the tribunal held that dismissal wasn't a reasonable response.

Okoro was awarded over £20,000 in compensation, but this was reduced by £4,030 for contributory loss.

Unfair Dismissal – Band Of Reasonable Responses

Pitchell v JATA Construction Ltd:

- a laborer employee used his work credit card for a personal purchase (some pottery).
- he contacted work the following day to inform his employer and make arrangements to repay the £100 he had taken using the work credit card.
- there had been a history of the claimant and the company's managing director loaning money to each other.
- Under the Theft Act, borrowing can amount to theft.

The tribunal held that this only applied if the borrowing took place in circumstances and for a period that made it “equivalent to outright disposal” and that “no reasonable employer could have come to that conclusion. The respondent knew that the claimant had contacted the office the next day asking to repay the money. It was not reasonable of them to conclude that the claimant had the intention to permanently deprive the company of the money. Therefore, on the facts known to the respondent at the material times, it was not reasonable to conclude that the claimant had committed theft.”

Award: over £26,000

Part Time Worker Discrimination

Two recent cases: *Augustine v Data Cars* and *Mireku v London Underground Ltd*

Both deal with the debate as to whether a claim for less favourable treatment under the Regulations requires part-time status to be the **sole** cause of the treatment or just had to be the “effective cause”.

Regulation 5 of the PTWRs gives part-time workers the right not to be treated less favourably than comparable full-time workers.

In *Augustine v Data Cars*, Mr A Augustine was a part-time driver, but had to pay the same flat £148 weekly circuit fee as full-timers for access to the company’s booking system. He argued that he should pay a pro-rata fee.

A previous case (*McMenemy*) had established that even if there were less favourable treatment, if it was not solely due to his part time status, the claim must fail.

Mr A’s case was dismissed on the basis that the £148 fee was not charged solely because he was a part-time worker. It was because it was standard practice in the industry, not because he worked fewer hours.

Part Time Worker Discrimination

Mr Mireku worked in a job-share (two weeks on/off). His application to work overtime at a different station during an “off” week was denied

The Tribunal dismissed the claim of detriment on the basis that those hours were declined for a number of reasons:

- A general desire to limit overtime post-COVID
- The desire to make sure there was a fair opportunity to access overtime

The EAT dismissed Mr Mireku’s appeal and followed the decision in *Augustine v Data Cars Ltd*, confirming that the current test is that for it to be unlawful, the individual’s status as a part-timer must be the *sole cause* of the treatment. So, it is currently difficult for part-time workers to establish that any less favourable treatment is solely caused by their part-time status.

However, Mr Mireku is likely to appeal to the Supreme Court to establish the correct test. There is likely to be a departure from the current approach, lowering the bar for causation when looking at claims for discrimination by part time workers i.e., that their part time worker status is an “effective cause” of the less favourable treatment and not the “sole” reason”.

HINDMARSH V NORTH EAST AMBULANCE SERVICES

- The Equality Act 2010 imposes a duty on employers to make reasonable adjustments to help disabled job applicants and employees where they are put at a substantial disadvantage, in comparison with persons who are not disabled.
- A reasonable adjustment is a modification or accommodation – for example, providing information in accessible formats, altering the disabled worker's hours of work or training, or providing special equipment.
- However, what if the employer perceives that the requested adjustment has no real prospect of helping to avoid or reduce the disadvantage?

Mr Hindmarsh, a non-emergency ambulance driver, transported patients. He suffered from poor mental health and had an underlying asthmatic condition. He had extreme anxiety about COVID-19. He refused to return to work during the pandemic unless he was given an FFP3 mask. He had been issued with an FFP2 (in line with guidance). The Trust refused, on the basis that it would not provide him with complete protection and assuage his concerns.

HINDMARSH V NORTH EAST AMBULANCE SERVICES

- This case provides clarity on the limits of an employer's duty to make reasonable adjustments under the Equality Act 2010 concerning the provision of auxiliary aids.
- The key question was: were Mr Hindmarsh to be provided with an FFP3 mask, what were the chances of him returning and maintaining attendance at work to such an extent that he would not be subjected to the Trust's absence management policy and would not have been dismissed?
- The tribunal held that if an adjustment like an auxiliary aid like an FFP3 mask, has no real prospect of alleviating the substantial disadvantage or enabling them to return to work, it is not reasonable to require the employer to implement it.
- The case underscores that while an adjustment does not need to guarantee success or completely eradicate the disadvantage to be considered reasonable, there must be a demonstrable likelihood or "real prospect" of a positive difference.
- Despite the Claimant's belief that the mask would ease his anxiety, the ET was entitled to conclude that his fear was so profound that the mask's provision would not, in reality, have led to his return to work. The objective assessment of effectiveness is paramount.

Wicken V Akita Systems Ltd – Constructive dismissal

- Mr Wicken was Technical Director. His relationship with the Founder deteriorated.
- When asked to attend a face-to-face mediation meeting, he requested it to be held on Teams. His request became a flash-point. The director explained he was “very disappointed” with this request, insisting on in-person attendance. Mr Wicken complied and attended the meeting in person, but described the experience as hostile and confrontational.
- He was asked to draft an ‘improvement plan’, and was told that the directors had “lost trust and confidence in you and you can’t change that, can you?”.
- His formal grievance was handled by a long-standing friend of the MD with no investigation experience, who refused to step aside.
- Disciplinary proceedings were issued while he was on sick leave.
- He resigned, alleging a fundamental breach of contract.

Wicken V Akita Systems Ltd

The tribunal held that Akita's cumulative conduct, especially the biased grievance process, destroyed the implied term of trust and confidence and amounted to constructive unfair dismissal.

- The employer failed to follow a fair process, particularly in relation to performance concerns and the handling of the improvement plan.
- The decision to dismiss appeared to have been made **before** the grievance process had concluded, undermining the fairness of the procedure.
- The tribunal was not persuaded that the request to attend the meeting remotely was unreasonable, or “blameworthy” behaviour and his financial reward was therefore **not** reduced.

Wicken V Akita Systems

Key takeaways:

- The ruling underlines that employees may raise legitimate flexible working or remote working requests, even at short notice, and must not be penalised merely because managers dislike the reason. These requests must be assessed fairly.
- Employers should ensure that hybrid-working policies specify how ad-hoc requests will be treated, document the objective business reasons for any refusal and train managers in dealing with these.
- Document performance concerns and clearly convey expectations around improvement plans.
- Where relationships sour, any grievance or disciplinary investigation must be run by someone demonstrably independent. Appointing a close associate of the decision-maker is viewed as bias that breaches the implied duty of trust and confidence.
- A flawed grievance or mediation procedure can convert what would otherwise be a minor disagreement over remote working into a successful constructive dismissal claim.

Wicken V Akita Systems

NOTE ON COMPENSATION

- Compensation was £30,692.35, reflecting a 50 per cent Polkey reduction but a 15 per cent ACAS uplift for procedural failings.
- Was there contributory fault – the Judge agreed that asking to work from home for personal reasons had been a mistake, yet found it was not “culpable or blameworthy” behaviour and could not justify the employer’s response.

Stedman V Haven Leisure Ltd - Definition Of Disability

Mr Stedman had ASD and ADHD and brought claims of disability discrimination after his application for employment as an Animation Host was unsuccessful.

As an initial issue the tribunal considered whether he was disabled under s 6 Equality Act 2010? Did he have an impairment that was long term that had a substantial adverse effect on his ability to carry out day to day activities?

The Judge said he was not, based on the Impact Statement and oral evidence.

While accepting Mr Stedman had a mental impairment, the Tribunal found his reported difficulties with day-to-day activities were *"what one might expect from somebody who is not disabled"*. Specifically, the Tribunal noted he was a social person, performed in public, had academic successes, and only had problems with public transport when overcrowded.

The Tribunal concluded his disability did not have a "substantial impact" on his normal day-to-day activities.

Stedman V Haven Leisure Ltd

Mr Stedman appealed, arguing that the Judge failed to recognise substantial adverse effects on his day-to-day activities (e.g., difficulty forming friendships, inability to use crowded public transport), and erred by focusing on what he *could* do rather than what he *could not*.

This case provides significant clarification and reinforces several crucial principles:

- The definition of "substantial" means "more than minor or trivial", and the focus should always be on what an individual cannot do or can do only with difficulty, rather than what they can do. Tribunals must not weigh a claimant's abilities against their difficulties. They should not compare the claimant to an "average" or "non-disabled" person in general.
- An impairment only needs to have a substantial adverse effect on just one day-to-day activity for a person to be considered disabled.

The case is a reminder that while academic achievements or social performance might appear to contradict claims of difficulty, they do not necessarily negate the existence of substantial adverse effects caused by conditions like ASD and ADHD, especially when assessed against the hypothetical individual without the impairment.

Lutz V Ryanair And Mcg – Self Employed Or Worker?

- Mr Lutz worked as a contracted pilot for Ryanair
- Lutz was hired as a contractor via MCG Aviation, which required him to operate through a PSC.
- His five-year tripartite contract stipulated fixed flying hours, substitution rights, and no holiday pay, while labelling him a “Company Representative”. It clearly stated he would not be deemed an employee of MCG or Ryanair.
- The agreement specified a five-year term for his services. It also required him to operate according to Ryanair's manuals and committed MCG to provide a minimum of 450 flying hours per annum after 12 months. He wore a Ryanair uniform, had a Ryanair ID card, passed Ryanair competency assessments, and worked from a base set by Ryanair. Ryanair set his rosters and he booked annual leave and swapped shifts with Ryanair. The disciplinary process leading to his termination was also conducted by Ryanair
- In practice, Mr Lutz was fully integrated into Ryanair's pilot workforce

Lutz V Ryanair And MCG

After a dispute MCG terminated his contract, leading Lutz to file two claims:

- Worker status claim against MCG for unpaid holiday pay under aviation working time regulations.
- Agency worker claim against both MCG and Ryanair under the Agency Workers Regulations on the basis that he was entitled to parity of terms when compared to Ryanair's employed pilots, as if he had been directly employed by Ryanair.

Both Ryanair and MCG Aviation argued that Mr Lutz was self-employed and that the AWR did not apply because the arrangement under which Mr Lutz would provide his services could not be described as "temporary". They relied on the contractual documents and the substitution clause.

Lutz V Ryanair And Mcg

The Court of Appeal ruled that contract labels were irrelevant—what mattered was the actual working relationship:

- Lutz was not genuinely self-employed—he was integrated into Ryanair’s operations
- The substitution clause was a “sham” due to overly restrictive terms.
- Despite the five-year contract, the arrangement was deemed “temporary” under AWR, meaning Lutz qualified for equal treatment with Ryanair’s direct employees.
- He was classified as a “worker” of MCG Aviation, entitling him to holiday pay.

Lutz V Ryanair And Mcg

Key takeaways:

- Reinforcement of Agency as Employer: the decision reinforces that an agency can be the employer even if the end-user exercises a high degree of operational control.
- Regardless of any label attributed to Mr Lutz in the written contract, what matters is the reality of how he worked. Despite him working through the PSC, he was not in business on his own account.
- The existence of a clear contractual relationship between the worker and the agency, which fully explains the provision of services to the end-user, can be sufficient to establish the employment relationship with the agency.
- The definition of "Temporary" in AWR: the case confirms that "temporary" in the AWR means of "finite duration" (e.g., a fixed-term contract), rather than strictly "short-term". This interpretation ensures broader protection for agency workers as it brings more within scope of the AWR.

LUTZ V RYANAIR AND MCG

Why does this matter?

This judgment provides clarity on the employment status of agency workers in general, especially in complex triangular relationships where an agency supplies workers to an end-user who exerts day-to-day control. The existence of a clear contractual relationship between the worker and the agency, which fully explains the provision of services to the end-user, can be sufficient to establish the employment relationship with the agency.

Courts will assess real working conditions, not just contractual terms.

Intermediaries and PSCs may not shield employers if the worker is controlled and integrated like an employee. Employers cannot circumvent rights through layered contracts or PSCs.

Businesses in sectors reliant on agency labour or complex contracting structures should:

- Audit arrangements and assess whether contractors are de facto employees.
- Review contracts and ensure compliance with worker rights and AWR obligations.

Grainger V Scottish Fire & Rescue Service

- Operational firefighter developed significant musculoskeletal issues and stress, leading to extended periods of absence from his operational role
- He was referred to OH several times and eventually placed on temporary alternative duties. He declined a Community Firefighter role.
- OH recommended medical evaluations from specialists, who concluded that he was permanently unfit for operational firefighter duties or for any full-time employment within the Service
- Despite initially agreeing to explore ill-health retirement, he changed his mind but was told that the process could not be reversed once it was initiated. It was determined that he was eligible for ill-health retirement.
- The Claimant's employment was terminated for incapacity due to ill-health.

Grainger V Scottish Fire & Rescue Service

- The ET rejected the Claimant's claims of unfair dismissal and disability discrimination under s.15 of EqA 2010, concluding that his dismissal was not due to capability but because he had been deemed to qualify for ill-health retirement.
- The ET decided the dismissal was fair and that it fell under the legal category of 'some other substantial reason' rather than 'capability.'
- The ET acknowledged that procedural elements of the process were lacking, such as the decision-maker not reviewing relevant OH reports and potentially pre-determining the outcome. However, those deficiencies were not significant because the dismissal wasn't framed as a capability issue.

Grainger V Scottish Fire & Rescue Service

- The EAT disagreed. It found that the ET had wrongly classified the dismissal as being for some other substantial reason rather than on the grounds of capability.
- The EAT held that ill-health retirement is not a separate reason for dismissal but a potential outcome of a capability process. Therefore, the process should have been judged as a capability-based dismissal.
- Because the ET incorrectly treated the dismissal as not being about capability, it failed to apply appropriate legal standards for procedural fairness. It ignored its own findings that the process would have been flawed had it been a capability dismissal. In addition, there was inadequate consultation with the Claimant and significant reports were not reviewed.

Grainger V Scottish Fire & Rescue Service

KEY TAKEAWAYS:

- When dismissing an employee, especially for health-related reasons, the stated reason must align with legal definitions. If you dismiss due to health, it is typically a capability dismissal and not some other substantial reason, even if ill-health retirement is involved.
- Even where there is strong medical evidence supporting a dismissal, proper procedures must be followed. This includes reviewing all relevant reports, consulting with the employee, and documenting the process clearly.
- Procedural safeguards will vary depending on context, but the threshold for fairness in capability dismissals is still high. Each case must be treated with individual care and attention.

Neeraj Handa V The Station Hotel Ltd (& Ors)

- The Claimant raised allegations of financial impropriety which he claimed were protected disclosures. Other employees of the Respondent, raised grievances against the Claimant.
- Two HR consultants were engaged, one to investigate the grievances (some of which was upheld) and another to conduct a disciplinary hearing and make recommendations.
- The Claimant was dismissed and brought claims of whistleblowing detriment against the HR consultants. The ET found that the HR consultants, who conducted grievance and disciplinary investigations, were not acting as agents of the employer in relation to the decision to dismiss.

Neeraj Handa V The Station Hotel Ltd (& Ors)

- The EAT upheld the ET decision, concluding that for an individual to be considered an “agent” under ERA, there must be clear evidence of authority conferred by an employer. Therefore, merely performing tasks or providing services to a Company would not automatically establish an agency relationship.
- This case clarifies that external consultants are not automatically deemed “agents” of an employer for the purposes of whistleblowing and discrimination claims and that, unless such consultants are directly making decisions or acting under an employer’s authority, they are unlikely to be held personally liable for decisions made by the employer.
- An important factor that may be considered is the terms of engagement between an employer and any external consultants. This case is a useful reminder to carefully review such terms at the outset of any contractual relationship to ensure that they reflect the reality of the situation.

THANK YOU!