SLAUGHTER AND MAY/

NEWSLETTER

SEPTEMBER 2025

EMPLOYMENT BULLETIN

QUICK LINKS

LEGISLATION UPDATE

The **Employment Rights Bill** is in its final Parliamentary stages, passing back and forth between the House of Commons and the Lords in order to consider the amendments made by the Lords in July. For a summary of those amendments, which include some easing of the dismissal and re-engagement provisions and new restrictions on non-disclosure agreements, please see our *Employment Bulletin July 2025*.

The new corporate **criminal offence of failure to prevent fraud**, under the Economic Crime and Corporate Transparency Act 2023, took effect from the beginning of this month. Large organisations may be criminally liable where a fraud offence has been committed, unless they can demonstrate that they had taken reasonable measures to prevent fraud. For more information about the anti-fraud procedures employers should now have in place, including requiring, and monitoring, compliance by employees, please see our *Employment Bulletin November 2024*.

Section 17 of the Victims and Prisoners Act 2024 will shortly come into force, making **non-disclosure agreements** (NDAs) signed on or after 1 October 2025 unenforceable to the extent that they seek to prevent certain disclosures by victims of crime. NDAs, in a settlement agreement for example, should make clear what the parties are able to disclose in particular circumstances. For details, please see our *Employment Bulletin June 2025*.

If you would like further information or advice on any of these developments, please speak to your usual Slaughter and May contact.

EMPLOYEE OF TEMPORARY WORK AGENCY WAS PART OF ORGANISED GROUPING FOR TUPE SERVICE PROVISION CHANGE

Summary: The Employment Appeal Tribunal (EAT) confirmed that the employment of a temporary work agency employee transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) when her employer took over a service provider contract from another agency. Although it was unclear how employees were chosen to carry out the services, there was a settled group, sufficient to constitute "*an organised grouping of employees whose principal purpose was the activities on behalf of the client*" for a TUPE service provision change (*Mach Recruitment Ltd v Oliveira*).

Key practice point: This decision confirms previous case law that, for there to be a TUPE service provision change, immediately before the transfer there must be a grouping organised by reference to the particular requirements of the client. However, the EAT added a nuance: the decision to organise needs to be "conscious" rather than the result of deliberate planning. If there was a random allocation to clients (as there might be with couriers, for example) this would be unlikely to amount to an organised grouping. The EAT noted that, with more evidence, a different tribunal might have concluded that there was no organised grouping - an indication of the fact sensitive nature of the application of TUPE and the need for potential transferors and transferees to make a careful assessment of the arrangements for service provision.

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Facts: The claimant was employed by a temporary work agency and supplied to their client to work as an aluminium tray operative. In July 2018, she became employed by Mach Recruitment, another temporary work agency, who later in 2018 took over providing services to the client. The Employment Tribunal found that there was an organised grouping of employees whose principal purpose was providing services for the client and that the transfer of activities to Mach Recruitment (the transferee) amounted to a service provision change within TUPE. The transferee appealed.

Decision: The EAT rejected the transferee's argument that the grouping had to be "deliberately organised" – in other words, there had to be a conscious decision to segregate a particular group. It was enough that the claimant consistently operated with the same group of employees throughout, except when someone left and was replaced. The flexible and ad hoc nature of the group was because it was agency work. The principal purpose - the servicing of the client by operatives - was clear and there must have been a conscious decision to organise the employees by reference to the client's requirements.

The EAT noted that the lack of evidence from the transferee (about who was provided to the client, how they were chosen etc) was key to the Tribunal's decision and that another Tribunal might have reached a different decision.

FORMER EMPLOYEE COULD RELY ON ESTOPPEL TO ENFORCE EXERCISE OF SHARE OPTIONS AFTER TERMINATION

Summary: The High Court decided that a former employee could exercise share options after the end of his employment, despite the lack of formal approval under the share plan rules, because he had been given an assurance that he could do so at the time he entered into a settlement agreement on termination of his employment.

Key practice point: It will usually be appropriate to confirm the treatment of share options in a settlement agreement. However, this must reflect accurately the operation of the share plan rules, which may be controlled by a company other than the employer.

Facts: Following the acquisition of his employer by the defendant company in 2011, the claimant was issued with share options in the company's unapproved share option plan. In 2014, he was informed that his employment was to be terminated. The plan rules provided for employees' options to cease to be exercisable as soon as they were given notice of termination of employment, but the company had discretion to extend the period when they could be exercised. The rules also contained a "*Micklefield*" exclusion clause (named after the case in which the use of the clause had been found to be effective), under which employees waived any claims to compensation for the loss of share awards on termination of employment.

Having initially been asked to leave at the end of September 2014, the claimant was requested to stay in post until the end of December 2014, and to agree various restrictive covenants, extending to four months post termination. He was told he could keep, and would be able to exercise, his options after leaving. (This was consistent with the treatment of other former employees.) In October 2014, the claimant and his employer (but not the company) entered into a settlement agreement which included provisions consistent with what had been agreed, including a clause saying that the claimant retained his entitlement to the options following termination. The claimant sought to exercise his options in 2020 and 2022. The company maintained that they had lapsed when he left employment.

Decision: The High Court found that there had been no exercise of the power to extend the option period, but that the claimant could enforce the assurance he had been given that the options would continue. The assurance was clear, and the claimant had reasonably relied on it, and suffered detriment as a result, by entering into the settlement agreement, which required him to work until the end of 2014 and then to be bound by restrictive covenants. The company was prevented by estoppel from going back on that assurance. The *Micklefield* clause did not provide protection in this particular case; it only covered losses flowing from termination of employment and could not apply to the denial of promised rights.

PILOT HIRED THOUGH INTERMEDIARY WAS AGENCY WORKER NOT SELF-EMPLOYED

Summary: The Court of Appeal has confirmed that a pilot contracted through an intermediary to provide services to an airline was an agency worker within the Agency Workers Regulations 2010 (AWR), entitling him to the same basic working and employment conditions as directly employed pilots, and was not self-employed. Despite working for the airline for a five-year fixed term, he was supplied to work "temporarily" for the purposes of the AWR (*Lutz v Ryanair DAC*).

Key practice point: The decision confirms that long-term agency arrangements are not exempt from the AWR requirements; "temporarily" means finite not short term. The supply of the pilot was clearly not an indefinite arrangement; other scenarios could present more difficult cases.

Facts: The claimant applied to be a pilot for Ryanair and was passed to an intermediary, which managed a pool of "contracted pilots" who worked alongside employed pilots. The intermediary organised the setting up of a service company for the claimant to operate as self-employed and the claimant entered into a five-year fixed term contract with the service company, under which all work was exclusively for Ryanair. Following his dismissal, the claimant brought claims against Ryanair for payment of annual leave and compensation for not providing the same pay and conditions as directly employed pilots. Ryanair and the intermediary argued that he could not bring the claims as he was self-employed. However, both the Employment Tribunal and the Employment Appeal Tribunal found that he was an agency worker under the AWR and therefore entitled to the same working and employment conditions as Ryanair's employed pilots, and to holiday pay under Civil Aviation Regulations as a "worker" for the intermediary. Ryanair and the intermediary appealed.

Decision: The Court of Appeal dismissed the appeals. The claimant was supplied to work "temporarily" for Ryanair. The arrangement - a five-year fixed term - was finite. By contrast, if it had been indefinite or permanent, the claimant would have been outside the AWR.

WHISTLEBLOWING DISCLOSURE TO EXTERNAL INVESTIGATOR COULD BE PROTECTED DISCLOSURE

Summary: The Employment Appeal Tribunal (EAT) decided that a disclosure to an external auditor appointed by the employer to investigate earlier complaints was capable of being a protected whistleblowing disclosure (*Chase v Northern Housing Consortium Ltd*).

Key practice point: Under section 43C(2) of the Employment Rights Act 1996, disclosures by workers made under a procedure "authorised" by the employer are treated as made to the employer, and therefore capable of being protected disclosures. Although there has been little case law on section 43C(2), the assumption was that it was aimed at whistleblowing hotlines. This decision confirms that protection can extend to one-off arrangements such as the appointment of an external investigator.

Facts: The claimant, whose role included oversight of business development and procurement, had concerns about internal procedures and, from 2016 to 2018, made disclosures to her employer (a publicly funded not-for-profit organisation). From 2020, she made a series of disclosures about potential fraud. She was dissatisfied with the employer's response and felt that her concerns were being ignored or downplayed. An external auditor was appointed in 2020 to investigate the employer's compliance with procurement and contract rules and the claimant made a disclosure to that auditor. The Employment Tribunal found that this was not a qualifying protected disclosure within section 43C(2). The claimant appealed.

Decision: The EAT allowed the appeal and sent the case back to be decided again. An employer did not have to sanction the making of disclosures to the auditor in order for it to be "authorised". The issue was whether the procedure might be used by workers to raise protected disclosures. Given the claimant's concerns that the alleged misconduct had been ignored or downplayed and that insufficient measures had been taken to ensure that similar events could not happen again, it was highly likely that she (and potentially other witnesses) would not only repeat existing disclosures but also provide information which revealed related concerns or evidence of continuing issues.

HORIZON SCANNING

What key developments in employment should be on your radar?

2025	Certain provisions of the Employment Rights Bill relating to trade unions and industrial action to come into force at or soon after Royal Assent
1 September 2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations in force
1 October 2025	Section 17 Victims and Prisoners Act 2024: NDAs signed on or after 1 October 2025 unenforceable to the extent they prevent certain disclosures by victims of crime
April 2026	Certain Employment Rights Bill provisions to come into force, including on the collective redundancy protective award, family leave, whistleblowing protections, Statutory Sick Pay, trade union recognition 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 Bill 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 reps)
2027	Further Employment Rights Bill provisions to come into force, including on collective redundancy consultation threshold, protection from unfair dismissal as a Day One right, zero hours contracts, gender pay gap and menopause action plans, pregnancy rights, bereavement leave, flexible working
2027 or before	Employment Rights Bill: NDAs to be unenforceable to the extent they prevent worker from making allegations or disclosures about workplace harassment or discrimination
Uncertain	• Publication of Equality (Race and Disability) Bill, extending pay gap reporting to ethnicity and disability for employers with more than 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 • Three-month limit on non-compete clauses in employment and worker contracts proposed by previous government

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

Discrimination / equal pay: *Bailey v Stonewall Equality Limited* (Court of Appeal: whether third party had caused employer to discriminate); *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 of 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)

Employment status: *Groom v Maritime and Coastguard Agency* (Court of Appeal: whether volunteer could be worker in relation to remunerated activities)

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: *Rice v Wicked Vision Ltd* (Court of Appeal: whether an employer could be vicariously liable for the acts of a co-worker where the alleged detriment was a dismissal); *Barton Turns Development Ltd v Treadwell* (Court of Appeal: whether employer could be vicariously liable for whistleblowing detriment of dismissal).

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