



# Employment update

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Following this judgement, for employees (without a fixed place of work) and who have limited influence or control over the scheduling of their customers or client visits, time spent travelling between their home and the premises of their first and last customers of the day is "working time" under the Working Time Directive. [more>](#)

## Can an employee who has not carried out a "protected act" succeed in a claim for victimisation?

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In this case the EAT explored the possibility of a claim for associative victimisation and the nature of the connection between the claimant and the individual who had performed the "protected act." [more>](#)

## Discrimination arising from disability: what is the appropriate test of causation?

*Hall v Chief Constable of West Yorkshire Police*

Following this case, an employee who can show that he or she has been treated unfavourably because of a cause or outcome of his or her disability can pursue a disability discrimination claim. The motivation for the treatment is irrelevant. [more](#)

Any comments or queries?

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## Should permanently unfit for work employee transfer following a service provision change under TUPE?

*BT Managed Services Ltd v (1) Mr G Edwards (2) Ericsson Ltd*

The EAT found that an employee on long-term sickness absence with no identifiable prospect of return may stop being “assigned” to the service and, therefore, not transfer. [more](#)

## HR assistance in disciplinary procedures: how much is too much?

### *Ramphal v Department for Transport*

Following this case, if a disciplinary officer's decision to dismiss is improperly influenced by members of an HR team, it will be unfair.

#### Facts

The employee, Mr Ramphal, was reimbursed for business expenses. However, following an audit of his expense claims, irregularities were identified and an investigation was carried out by Mr Goodchild from the Department of Transport. The matter was referred to a formal disciplinary process.

Mr Goodchild, who also acted as the disciplinary officer, was inexperienced in disciplinary procedures. He sought, therefore, detailed guidance from the Department for Transport's HR department. This advice was not limited to matters of law, procedure and level of sanctions. It, also, addressed issues of Mr Ramphal's credibility and level of culpability.

Mr Goodchild's first draft report contained several favourable findings. He had found that Mr Ramphal's misuse of expenses was not deliberate, his explanations given were plausible and the arguments made were very persuasive. He concluded that Mr Ramphal was guilty of misconduct only and should be given a final written warning.

However, following further communication with HR, the report was amended and the decision was changed to an outcome of gross misconduct and summary dismissal. No new evidence came to light between the two versions of the report.

Mr Ramphal was summarily dismissed and brought a claim against his ex employer for unfair dismissal.

#### Outcome

The original employment tribunal found that the decision to dismiss was fair: it was based on a reasonable investigation and the dismissal was within the band of reasonable responses. The judge held that the decision was ultimately made by Mr Goodchild and that he did not appear to be much influenced by HR.

Mr Ramphal appealed.

The Employment Appeal Tribunal (EAT) considered the previous case of Chhabra. This case established an implied term that the report of an investigating officer for a disciplinary enquiry must be the product of their own investigations. The EAT found that the changes to the report were so striking that they gave rise to an inference of improper influence. Therefore, the employment judge should have given clear and cogent reasons for accepting that there was no such influence. If there had been such improper influence the dismissal would be unfair. The case was returned to the employment tribunal to consider this point.

### Points to note

Due to the nature of their role, HR team members are always going to be closely involved in the disciplinary process. They need to be on hand to assist managers with the process to ensure that a fair procedure is carried out. However, there is clearly a limit on how far they can be involved in the decision making process. In its decision, the EAT confirmed that an investigating or disciplinary officer is entitled to call for advice from HR but HR must limit advice to questions of law, procedure and/or process; HR should avoid straying into areas of culpability. It is particularly important that HR do not advise on the appropriate sanction (other than exceptional circumstances – for example when their input is needed to ensure consistency of sanctions). While HR involvement is often used to avoid claims for unfair dismissal, somewhat ironically, heavy involvement can, in itself, lead to such a claim.

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## Could travelling to and from work be considered “working time”?

### *Federacion de Servicios Privado del sindicato Comisiones Obreras v Tyco Integrated Security SL and another*

Following this judgement, for employees (without a fixed place of work) and who have limited influence or control over the scheduling of their customers or client visits, time spent travelling between their home and the premises of their first and last customers of the day is “working time” under the Working Time Directive.

#### **Facts**

Tyco employs technicians who install and maintain security equipment in private, industrial and commercial premises within a specific geographical assigned to them.

Tyco determined, through an itinerary sent to each worker the night before, which customers the worker would visit and when. Each worker then travelled from their home directly to their customer and, at the end of the day, from the last customer, home. The distances travelled vary but were sometimes over 100km a day.

Tyco did not count time spent travelling between home and the first site and the last site and home as working time. Instead, it calculated a working day as starting with the worker’s arrival at the first site and ending with their departure from the last site.

The technicians brought a claim that Tyco was breaching the working time legislation by not including the additional time spent travelling to and from home. The Spanish court referred the issue to the European Court of Justice (ECJ), who were required to determine whether the first and last journeys of the day should be included in working time.

#### **Outcome**

The ECJ decided that, in these circumstances, travelling time did count towards working time. It noted the following in making its decision:

- the legislation is intended to protect the health & safety of workers
- travelling is an integral part of being a worker without a fixed or habitual place of work
- the court has continually held that the legislation defines the concept of “working time” as any period during which the worker is at work, at the employer’s disposal (ie legally obliged to obey the instructions of his employer) and carrying out his activity or duties for that employer.

The nature of the rostering arrangement meant that the employees had lost the ability to freely determine their travel arrangements between their homes and the place they started and finished their working day.

#### **Points to note**

The key here is whether the time spent between home and first customer and last customer and home is determined by the company, without flexibility, or structured in such a way that the employee can manage the itinerary/list themselves without major constraints. The important element is whether the arrangement has sufficient give to enable the employee to pursue their own interests. In this case, the employer adopted a highly directional and fixed approach:

the order of the customers was set, as were the meeting times. That allowed little scope for movement or self-determination. We imagine that situation could be compared and contrasted with one where an employee simply has a list of customers/clients which must be visited albeit the order and times at the discretion of the individual. If the scheduling was also then run over a longer period, say a week, the employee arguably has scope to manage their own time and by extension pursue their own interests. In this situation, you'll have a better argument that it's not working time.

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## Can an employee who has not carried out a “protected act” succeed in a claim for victimisation?

### *Thompson v London Central Bus Company Ltd*

In this case the EAT explored the possibility of a claim for associative victimisation and the nature of the connection between the claimant and the individual who had performed the “protected act.”

For the purposes of a victimisation claim, “protected acts” include bringing a claim under the Equality Act, giving evidence or information in connection with any proceedings under the Equality Act, doing something for the purpose of or in connection with the Equality Act and alleging that someone has contravened the Equality Act.

### Facts

Mr Thompson, a bus driver, was dismissed for giving a high-visibility vest issued to him to another employee (he had already received a final written warning which remained live at this time). He brought a tribunal claim for unfair dismissal, notice pay and victimisation.

Mr Thompson also lodged an internal appeal. He apologised as part of this appeal. The employer decided to impose a 21 day unpaid suspension and a final written warning instead of dismissal. Given his reinstatement by his employer, Mr Thompson did not pursue his claims for unfair dismissal and notice pay. However, his claim for victimisation continued.

Mr Thompson said he was victimised. Not because he had committed a protected act himself, but rather because he was associated with others who had carried out protected acts. Therefore, he had a claim for victimisation “on an associative basis”.

He felt the disciplinary allegations were a detriment which resulted from his association with an employee who had committed a protected act.

A preliminary hearing was held and the tribunal found that Mr Thompson could rely on the protected acts of others in order to bring a victimisation claim. However, the tribunal concluded that a further preliminary hearing was required in order to assess the causal connection, which the tribunal considered to be “loose”.

The claim for associative discrimination was struck out at this second preliminary hearing. The tribunal concluded that the link or association between Mr Thompson and the individuals who performed the protected acts was so tenuous that there should be no protection under the victimisation provisions of the legislation.

Mr Thompson appealed.

### Decision

The EAT held that the tribunal was not entitled to reach the conclusions it did. The correct test is whether the claimant was subjected to a detriment by reason of a third party’s protected act: the issue is not whether there is a relationship between the victim and the third party but whether, in the mind of the employer, the protected act of a third party was the reason for the treatment of the employee.

### Points to note

This case confirms that claims for associated victimisation can proceed under the Equality Act. This increases the scope of the protection against victimisation to employees and workers who have not carried out a protected act themselves but are associated with someone who has and suffer a detriment as a result. There is an increasing trend towards recognising associative discrimination in the tribunal.

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## Discrimination arising from disability: what is the appropriate test of causation?

### *Hall v Chief Constable of West Yorkshire Police*

Following this case, an employee who can show that he or she has been treated unfavourably because of a cause or outcome of his or her disability can pursue a disability discrimination claim. The motivation for the treatment is irrelevant.

#### **Facts**

Ms Hall was employed as a Finance Officer. She was diagnosed as suffering from stress and Supraventricular Tachycardia. She had periods of sick leave from work as a result of her conditions.

In November 2010, Ms Hall's employer, West Yorkshire Police, sent her a notice of investigation which made "vague and wholly unparticularised allegations against her". This was followed with a letter stating that she was expected to return to work within the next 10 days and to have no further absences for a period of three months.

West Yorkshire Police subsequently tried to arrange meetings with Ms Hall but she was unable to attend due to illness. She was sent two further notices requiring her to return to work. Ms Hall emailed West Yorkshire Police in February 2011 to say that she would not attend any meetings arranged as she felt bullied.

Ms Hall was invited to a disciplinary hearing in respect of the "vague" allegations regarding her sickness absence in March 2011. She was refused extra time to prepare her submissions and the hearing went ahead in her absence. Ms Hall was dismissed for gross misconduct following the hearing.

Ms Hall brought claims for unfair dismissal and discrimination arising from disability. The tribunal upheld the unfair dismissal claim but dismissed the disability discrimination claim. It concluded that the claim was not made out due to the remoteness of the connection between Ms Hall's disability and the unfavourable treatment she suffered.

Ms Hall appealed against the decision arguing that the tribunal had adopted the wrong causation test, as the legislation does not require knowledge of the disability to motivate the unfavourable treatment.

#### **Decision**

The EAT upheld the appeal. It said that the tribunal made three errors: (1) the tribunal appeared to behave that it was necessary for Ms Hall's disability to be the cause of West Yorkshire Police's action in order for her to succeed; (2) it made a contrast between the cause of the action and a background circumstance; and (3) it was wrong to inquire into the motivation for the unfavourable treatment. It concluded that the tribunal should have found that the necessary causal link between the disability and the unfavourable treatment had been established.

### Points to note

This case shows that the burden on the claimant to establish causation in a claim for discrimination arising from disability is low. It will be sufficient to show that the unfavourable treatment has been caused by an outcome or consequence of the claimant's disability and the employer's motivation is irrelevant.

It is important to remember that, even if the claimant succeeds in establishing discrimination arising from disability, the usual defences apply and the employer has a chance to defend the claim by showing either that:

- they did not know or could not reasonably have known that the employee was disabled
- the unfavourable treatment was objectively justified.

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## Should permanently unfit for work employee transfer following a service provision change under TUPE?

### BT Managed Services Ltd v (1) Mr G Edwards (2) Ericsson Ltd

The EAT found that an employee on long-term sickness absence with no identifiable prospect of return may stop being “assigned” to the service and, therefore, not transfer.

#### Facts

Mr Edwards was originally employed by Orange. His employment subsequently transferred to BT Managed Services Limited (BTMS) under TUPE. He was a member of a team dedicated to a domestic network outsource (DNO) contract providing operational maintenance for mobile phone networks operated by Orange or EE.

Mr Edwards was on long term sick leave due to various illnesses including a cardiac condition. He was regarded as permanently incapacitated. He remained an employee of BTMS so he could continue to enjoy payments under a permanent health insurance scheme. After the liability of the insurers was extinguished, BTMS continued to make payments to Mr Edwards.

The DNO contract was transferred to Ericsson and a service provision change occurred under TUPE.

BTMS argued that Mr Edwards’ employment transferred to Ericsson on the basis that, despite his five year absence, he remained part of the DNO division, which transferred. However, Ericsson refused to accept Mr Edwards on the grounds that his long-term absence prevented him from being “assigned” to the division at the time of the service provision change.

The issue before the tribunal was whether Mr Edwards was assigned to the grouping of employees affected by the service provision change. The tribunal held that because he did not contribute to the economic activity of the grouping he was not assigned to that grouping within the meaning of TUPE.

#### Decision

BTMS appealed the decision and argued that Mr Edwards was assigned. The EAT held that:

- the question whether an employee absent from work at the time of a service provision change was assigned to the relevant grouping was a matter of fact to be determined according to the circumstances of the case
- although absence from work, even lengthy absence, at the time of the service provision change would not necessarily mean that an employee was no longer assigned to the grouping; an employee who had no connection with the economic activity of the grouping and would never do so in the future could not be regarded as assigned to that grouping
- an employee who plays no part in the economic activities subject to the service provision change and will never do so is not assigned to that grouping
- mere administrative connection to a grouping is insufficient to constitute an employee as being assigned to the grouping in the absence of some participation in the grouping’s economic activity.

### Points to note

This case demonstrates that employees on permanent sick leave may not transfer under TUPE. What is important is whether the employee contributes to or participates in the economic activity transferred and whether they are likely to in the future. Employers may consider more closely managing employees who are on long term sick leave to continually assess their chances of returning to work. Even if they don't do so, this could suggest that they remain assigned to the relevant economic activities as there is, at least, some potential for them to return in the future, even if it is to a different role.

The case opens the door to arguments about whether the particular circumstances of a person's long-term absence and likelihood of return takes them out of scope to transfer. In some circumstances (for example if the employee has the benefit of PHI cover) this outcome may advantage all. As ever, the key to resolving these issues will be clear communications between the various parties, existing employer, future employer and employee.

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