St John's Buildings

EMPLOYMENT TEAM NEWSLETTER

Welcome to the St John's Buildings Employment Team Newsletter.

In this edition we have five articles from experienced members of the St John's Buildings team, tackling subjects including Vicarious Liability in Employment Law, Legal Privilege and Without Prejudice Communications, Issues of International Jurisdiction in the Employment Tribunal, Interim Relief: A Guide for Respondent Employers, and Medicinal Cannabis and Disability Discrimination.

For those of you who are less familiar with the SJB Employment team, we are a group of 22 expert barristers, including recognised senior practitioners and part-time chairs of employment tribunals, offering both breadth and depth of expertise to clients. We offer advisory and advocacy services in the Employment Tribunal, Employment Appeal Tribunal, county and high courts as well as disciplinary hearings before professional regulatory bodies. SJB has five Chambers from which our team primarily operates, covering cases all over the country and beyond. We are clerked by an exceptional team of clerks, led by Senior Clerk Chris Shaw.

I hope that you enjoy the content of this Newsletter and invite you to submit any ideas you have for topics you would particularly like us to address in our next edition. Contact details are available on the back page.

Best regards,

Jason Searle
Head of Employment

“IN THE COURSE OF EMPLOYMENT”

BY JASON SEARLE

YEAR OF CALL: 1993

Looking at the Issue of Vicarious Liability in Employment Law

S109 Equality Act 2010

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—
(a) from doing that thing, or
(b) from doing anything of that description.
(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

1. The leading authority remains Stubbs.
2. In *AB v Grafters Group [2025] EAT 126*, C was a hospitality agency worker who believed she was booked to work at Hereford Racecourse. She missed arranged transport and accepted a lift from a male colleague, who sexually harassed her while in the car. The ET accepted that harassment occurred, but found that the colleague had not acted in the course of his employment, so the employer was not liable under s109 EQA. The main reasons were that there was no requirement or expectation that he drive C and the employer did not know and so had not approved the lift.
3. The EAT found the ET erred by failing to properly consider whether the incident was an ‘extension of employment’ as established in *Chief Constable of Lincolnshire Police v Stubbs [1999].*

"IN THE COURSE OF EMPLOYMENT" (CONTINUED)

The authority sets out in good order the principles to be gleaned from Stubbs[1], Jones[2], Waters[3], Forbes[4] and Sidhu.[5]

4. Paragraphs 13 and 14 of HHJ Taylor's judgment give a clear explanation of the legal principles. They are worth reading in full, so here they are:

> 13. There are a number of key points relevant to this appeal that arise from consideration of section 109 **EQA** and the relevant authorities:
>
> 13.1. an employer is liable for "anything done" by an employee A in the course of A's employment: s109(1) **EQA**.
>
> 13.2. It is the alleged harasser, A, who must be acting in the course of employment: s109(1) **EQA**.
>
> 13.3. the term "course of employment" is not to be interpreted in accordance with the well-established meaning in law derived from the law of tort: **Jones**.
>
> 13.4. the words "in the course of employment" are used in the sense in which every layman would understand them: **Jones**.
>
> 13.5. anti-discrimination legislation should be given a broad interpretation: **Jones**.
>
> 13.6. the application of the phrase will be a question of fact for each Employment Tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort: **Jones**.
>
> 13.7. because the determination of what is in the course of employment is essentially a question of fact for the Employment Tribunal, different decisions may be made in circumstances that appear similar:
>
> 13.7.1. a sexual assault, committed by a male police officer against a female colleague at a police section house where she had a room when both were off-duty was found not to have been done in the course of employment: **Waters**.

---

[1] *Chief Constable of Lincolnshire Police v Stubbs* [1999] ICR 547
[2] *Jones v Tower Boot Co Ltd* [1997] ICR 254
[3] *Waters v Comr of Police of the Metropolis* [1997] ICR 1073
[4] *Forbes v LHR Airport Ltd* [2019] ICR 1558
[5] *Sidhu v Aerospace Composite Technology Ltd* [2001] ICR 167

13.7.2. a male police officer who sexually harassed a female colleague at a pub where officers had gathered socially after the conclusion of their duties was acting in the course of employment: **Stubbs**.

13.7.3. racial abuse by a white colleague at a family day out at a theme park was not done in the course of employment: **Sidhu**.

13.8. the above examples emphasise that the question of whether a "thing" was or was not done in the course of employment is very much one of fact to be determined by the Employment Tribunal having regard to all the relevant circumstances: **Forbes**.

13.9. while it is not possible or even desirable to lay down any hard and fast guidance, some factors will generally be relevant such as whether the impugned act was done at work or outside of work: **Forbes**.

13.10. if the "thing" was done outside of work, the Employment Tribunal should consider whether there is nevertheless a sufficient "nexus or connection with work" such as to render it in the course of employment: **Forbes**. The Employment Tribunal may need to consider whether the circumstances are such as to make the situation an "extension of work and the workplace": **Stubbs**.

13.11. the "thing" may be done in the course of employment although it was not done at the workplace, or in working hours, if there is a sufficient "nexus or connection with work" such as when the situation is an "extension of work and the workplace"

13.12 whether the "thing" is done with the employer's or principal's knowledge or approval "does not matter": section 109(3) EQA

13.13 a decision by an Employment Tribunal as to whether an act was done in the course of employment can only be challenged if there is a material misdirection as to the law, the decision is perverse in the sense that it falls outside the very wide ambit within which different views might reasonably have been taken about what is done in the course of employment, or the Employment Tribunal has demonstrably failed to take account of an important relevant factor or taken into account an irrelevant factor.

14 The interplay between sub-sections 109(1) and (3) **EQA** merits further consideration. Section 109(1) **EQA** refers to "Anything done by a person (A) in the course of A's employment". The conduct of A is the "thing" for which the employer is responsible if it is done in the course of employment. The conduct of A is "that thing" referred to in section 109(3) **EQA** when it is stated that it "does not matter whether that thing is done with the employer's or principal's knowledge or approval". I do not consider that means that the employer's knowledge or approval in a more general sense is wholly irrelevant to whether A is in the course of employment.

“IN THE COURSE OF EMPLOYMENT” (CONTINUED)

So, for example, if an event after work is organised by the employer who knows and approves of the attendance of their employees, and an act of sexual harassment occurs at the event, the fact that the employer knew and approved of the alleged harasser A’s attendance might be relevant to the question of whether A was acting in the course of employment although it would not matter that the employer did not know or approve of the act of harassment, which would be the “thing” for the purpose of the legislation.

5. Remember that the definition of employment in the EQA is wider than under many other employment law provisions. So, for example, it covers a wider group of workers than are covered by the unfair dismissal provisions in the ERA.

6. The fact that a contract of employment is illegal or performed in an illegal manner will not exclude an Employment Tribunal having jurisdiction to hear an employment-related discrimination claim. This will be so provided that the discrimination is not inextricably linked to illegal conduct (so as to make an award of compensation appear to condone that conduct).

7. Also, consider Chapter 10 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice (although last updated in 2014).

8. The Grafters Group case gives a useful updated summary of the key legal principles when it comes to arguing whether or not an act occurred in the course of employment. The distinction is key as for employers it can defeat a claim for liability of individuals for whom the employer might otherwise be vicariously liable.

Jason Searle
Barrister
July 2026

LEGAL PRIVILEGE AND WITHOUT PREJUDICE COMMUNICATIONS

BY KEVIN MCNERNEY

YEAR OF CALL: 1992

Phrases we all grew up with and ones that the public think they understand. 'Without Prejudice' (WP) has always struck me as a phrase that needs or begs another sentence to explain it. Without prejudice to what? Costs I hear you say, but that without prejudice save as to costs (WPSAC) is only a subset or second limb to the fundamentals of without prejudice. Let me try to explain.

WP and WPSAC are actually separate, deployable in different circumstances. Both are a type of legal privilege. The overarching legal privilege (LP) is in essence a shield against the "other side" trying to use something a client has said or written in the litigation or dispute generally.

Remembering litigation is a battle between two opposing sides, LP is where one side tries to stop the other from using a document or indeed something said in litigation in a case to win. A classic example, almost a cliché, is where one side knows that the other has been advised by their lawyers they are going to lose in a letter to the client and it explains why. The other side might seek disclosure of that document in order to win the case but as night follows day, LP will attach to that document and thus the document does not have to be disclosed. So far, so dead easy. But what about communications generally, correspondence between the parties headed WP? This shorthand that we all use needs explaining, putting into plain English. It means, when used in a letter, "*I am going to say something in this letter which might actually harm my case but because my letter is a genuine attempt to settle the claim you have brought or might bring, you cannot use the contents of this letter or the bad thing I say about my case in that litigation*". It is only in such circumstances that the use of WP will protect the contents of that letter.

The policy behind the protection afforded in such circumstances to letters or other types of communication is that it is good if parties are open about their case and its strengths and weaknesses, and then the communications may assist in avoiding costly litigation and unnecessary court hearings.

But not every communication written or otherwise will get the protection, so you need to be sure that your communication qualifies. Firstly, there must be a "dispute" to which the WP relates. The dispute can be within a grievance and if that is then substantially mirrored in an ET claim, WP discussions or communications generally in relation, for example, to a grievance will get the protection.

Secondly, there must be within the WP communication a genuine attempt to settle a dispute. If that is not the case the protection will fall, so always check, is this really an attempt to settle or simply strong arm the other side into folding? If the latter your communication is not in the fundamental spirit of WP comms - here are the difficulties in my case but overall I think we will win for these reasons so let us settle. If the tenor and underlying reality of your WP communication is not this, it is at risk of losing any protection and therefore could see the light of day and be used in court hearings.

WPSAC

WPSAC is a subset of the fundamental WP above. This allows the document or other communication to be used without the need to waive privilege but only when deciding if costs should be awarded against a party. A final context for our look at WP/WPSAC is to look at what happened at the Post Office inquiry following the scandal of postmasters/mistresses being prosecuted. The inquiry under Sir Wyn Williams has looked at in some detail the use of legal privilege by lawyers, predominantly for the Post Office and WP communications.

Serious concerns have been raised about lawyers using legal privilege generally and WP in particular. Several lawyers are currently having their collars felt by relevant professional authorities for apparent misuse of legal privilege and WP. Basically, the allegation is that they were using both for routine business matters and possibly oppressing victims.

A few other points to remember about WP is that if you are desperate, the communication does not have to actually be labelled WP in order to attract the protection. So long as it complies with the fundamentals - an objective attempt to settle matters and there is an extant dispute at the time of the WP, you could still claim without prejudice protection. It also applies to litigants in person who are increasingly the main focus of employment tribunals. They will also be protected even though they do not use the phrase in any negotiations so long as the communications satisfy the two fundamental criteria above.

That more generous attitude towards the substantial WP communications does not apply to WPSAC. The case of *Chocoladefabriken Lindt and Spraglag v Nestlé* (1978 RPC 287) made the point that WPSAC communications do need specific labelling if they are to be used in any issue as to costs. That contrasts with the more favourable attitude to WP not needing the label. So if you are looking to at some point have a fight about costs, make sure such letters are labelled WPSAC. Overall, it is important to remember that WP is not something to be bandied about. Indeed, bandying it about and using it inappropriately could lead to professional misconduct problems. Who'd be a lawyer?

Kevin McNerney
Barrister
July 2026

ISSUES OF INTERNATIONAL JURISDICTION IN THE EMPLOYMENT TRIBUNAL

BY DIARMUID BUNTING

YEAR OF CALL: 2006

Executive Summary

I will start with a warning. The subject matter here is a bit dry, and I am trying to be informative, rather than entertaining. I hope I have structured this article in a logical and accessible way, so that the reader can return to it if/when the need arises.

The most important thing to remember is this: Pursuant to *Simpson v Interlinks Limited* [2012] ICR 1343, when considering issues of international / territorial jurisdiction, a distinction should be made between:

1. International jurisdiction – which state's courts have jurisdiction?
2. Applicable law – which state's national laws apply to the dispute?
3. Domestic jurisdiction – this relates to, for example, Northern Ireland / Scotland vs England, ET vs County Court, so it is usually obvious and / or unimportant;
4. Territorial scope – of the relevant legislation which gives rise to the cause(s) of action.

International jurisdiction and territorial scope are the two that crop up most, so this article will focus on them.

Issue 1: International Jurisdiction

The issue of international jurisdiction has to be determined before and in addition to other issues like the territorial scope of the relevant legislation in a given case.

If international jurisdiction is not established, then the various cases like *Lawson v Serco* and *Ravat v Halliburton* - which may spring to mind in cases with an international element - will get you nowhere. This is because, if the court does not have international jurisdiction, it never gets to determine whether the applicable right applied to the employee (let alone whether the right was breached).

For claims issues since 2021, the applicable legislation is section 15C of the Civil Jurisdiction and Judgments Act 1982 ('CJJA').

If your case does not fall into one or more of the three categories under s15C of CJJA, you cannot pursue it in the UK courts. These categories are summarised below.

S15C(2)(a)/(7): Employer Domiciled or Deemed Domiciled in the UK

A corporation is *domiciled* in the UK under s15C(2)(a) if any of the following are in the UK:

- Its registered office;
- Its place of incorporation;
- The law under which it was formed;
- Its central administration; or
- Its principal place of business.

A corporation is *deemed to be domiciled* in the UK under s15C(7) if the employer is not domiciled in the UK but (1) it has a branch, agency or other establishment in the UK and (2) the dispute arose from the operation of that branch, agency or establishment.

If the employer is domiciled or deemed domiciled in the UK, the UK courts have international jurisdiction.

S15C(2)(b): Employee Habitually Worked in the UK

If the work was at one location, this issue is straightforward. Where an employee worked in various locations, relevant guidance comes from *Nogueira v Crewlink Ireland Ltd* [2018] ICR 344, [63]:

> *"Those courts must, in particular, determine in which member state is situated*
>
> *(i) the place from which the employee carries out his transport-related tasks,*
>
> *(ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and*
>
> *(iii) the place where his work tools are to be found."*

If the employee habitually carried out her work in the UK, the UK courts have international jurisdiction.

S15C(2)(a): Location of the Business which Engaged the Employee

Even if the employer was not domiciled in the UK and the employee did not habitually work in the UK, the employer may be sued by the employee in the part of the UK *where the business which engaged the employee* was situated.

Significantly, the location of 'the business which engaged' the employee refers exclusively to the place of business which engaged the employee at the time she was engaged, when the contract was agreed – not to the place she was most connected to during her employment (*Stena Drilling PTE Ltd v Smith [2024] EAT 57*).

Issue 4: Territorial Scope

Territorial Scope of the Employment Rights Act 1996 and the Equality Act 2010

Only now do we get to familiar caselaw on territorial scope, the cases of *Lawson* and *Ravat*.

Lawson v Serco [2006] UKHL 3 involved determination of the territorial scope of the Employment Rights Act 1996 to three cases.

In *Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389, SC, the Supreme Court held that, where an employee works partly in GB and partly abroad, the vital question is whether the employment relationship had a *stronger* connection with Great Britain than with the foreign country where the employee worked.

Lord Hope in *Ravat* also indicated that an employee who lives in GB but travels abroad for working assignments would face a less onerous burden in showing the necessary connection with Great Britain than an employee who both lives and works abroad. Thus, where an employee works and lives wholly abroad, it will be more appropriate to ask whether his or her employment relationship has *much stronger* (rather than just stronger) connections both with GB *and* with British employment law than with any other system of law (*Duncombe v Secretary of State for Children, Schools and Families (No.2)* 2011 ICR 1312, SC). Therefore, country of residence and location of work are important factors, because they can affect the threshold for the 'strong connection' test.

Below is a non-exhaustive list of other facts which will frequently be relevant to the issue of whether the connection with GB was sufficiently strong:

1. Where the employee was recruited;
2. What the contract says about identity of the employer, i.e., its location;
3. The extent of the employer's connection to GB;
4. What the contract says about which laws apply;
5. Whether the contract refers to GB laws (e.g., even if the contract says that other laws apply, does it, or a handbook or similar document, nonetheless refer to the right to rest breaks and/or to parental leave under GB legislation?);
6. Where the employee was managed/directed from;
7. Where the employee received administrative/HR support from;
8. Whether the employee was managed, in reality, under GB industrial laws and/or norms;

9. The currency in which payment was made;
10. The country in which tax was paid;
11. The nationality and/or citizenship of the employee;
12. The amount of time spent living and/or working in GB versus abroad.

In *Bleuse v MBT Transport Ltd and anor* [2008] ICR 488, EAT, the EAT held that there was no reason why a different test should apply to a claim of unauthorised deduction from wages as to a claim for unfair dismissal. This was not determinative of the issue (and *Lawson* actually suggested that different ERA rights might have different territorial reaches). However, it is generally assumed - and usually accepted - that the default position is that the same territorial scope applies to different parts of ERA.

The above cases were about ERA rights. But what about the Equality Act 2010?

The good news is that the same test for territorial jurisdiction of ERA usually also applies to EqA claims (*R (Hottack and another) v Secretary of State for Foreign and Commonwealth Affairs and another* [2016] ICR 975).

In addition, bear in mind that *seafarers* in particular can qualify for protection via routes other than *Lawson* and *Ravat*. There is specific provision for seafarers in ERA and EqA:

> *The Equality Act 2010 (Work on Ships and Hovercraft) Regulations, 2011 extends the territorial jurisdiction of the EqA to certain seafarers working wholly or partly in Great Britain (including UK waters adjacent to Great Britain) provided that certain other conditions are met.*
>
> *Section 199(7) of the ERA contains similar provisions in relation to claims of unfair dismissal brought by seafarers.*

So, for seafarers, you have an additional bite at the 'territorial scope' cherry, but only if you can get past the initial 'international jurisdiction' hurdle, above. (There are similar provisions for offshore workers).

Territorial Scope of Other Rights

The National Minimum Wage Act 1998 applies to persons working in or who ordinarily work in the UK (section 1). The concept of ordinarily working is decided by reference to the terms of the employee's contract of employment, having regard to the whole period contemplated by the contract at the date it was made (*Carver v Saudi Arabian Airlines* [1999] ICR 991, CA).

Alternatively, where the contract of employment was inconclusive as to where an employee would ordinarily work, the issue should be determined according to where the employee's base was, going by 'the conduct of the parties and the way they have been operating the contract' (*Todd v British Midland Airways Ltd* [1978] ICR 959, CA).

Also, from 1 December 2024, seafarers working on ships that use UK ports at least 120 times a year must be paid a rate at least equivalent to the UK NMW for their work in UK waters.

Various rights under the Trade Union and Labour Relations (Consolidation) Act 1992 are geographically restricted, in that they expressly do not apply to employment where, under the contract, the employee works outside GB. This applies to rights in relation to trade union membership and activities – including the associated detriment complaints – under sections 137, 138, 145A, 145B, 146, and 168-170.

In relation to other trade union rights, a test similar to that for ERA rights will *probably* apply.

However, in a claim for a failure to inform and consult under s188 of TULRA, the 'sufficient connection' test should focus on the connection between the establishment at which the workers work and Great Britain, rather than the connection between the individual worker and Great Britain (*Seahorse Maritime Ltd v Nautilus International* [2019] IRLR 286, CA).

The TUPE Regulations 2006 and the Working Time Regulations 1998 contain no territorial parameters. Realistically, considerations similar to those under ERA are likely to apply.

Regarding claims for breach of contract, the ET's jurisdiction is governed by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Under article 3, for an ET to hear a claim, it must be one that a court in England/Wales would have jurisdiction to hear. Thus, as long as the GB courts have international jurisdiction, the only additional hurdle in cases with a foreign element is the potential issue of which country's laws are applicable. (There is no question of territorial scope).

Conclusion

When considering issues of international / territorial jurisdiction, a distinction has to be made between:

- International jurisdiction – which state's courts have jurisdiction to consider the dispute?
- Applicable law – which state's laws apply to the dispute?
- Domestic jurisdiction – which UK courts have domestic jurisdiction?
- Territorial scope [of the relevant legislation] – does the legislation under which the claim is brought extend to the place where the claimant was employed?

In particular, don't jump headlong into issue 4 without having considered issue 1 and the three routes into it under s15C of CJJA.

Diarmuid Bunting
Barrister
July 2026

MEDICINAL CANNABIS AND DISABILITY DISCRIMINATION

BY TARLUN AHARI

YEAR OF CALL: 2014

As private prescriptions for medical cannabis continue to rise, employers are faced with new considerations in the workplace. This article considers the law and impact in the context of the Equality Act 2010.

Introduction

Cannabis medicines have been legally prescribed in the UK since 1 November 2018. Persons who are legally prescribed medical cannabis can possess and carry their medication under section 5(1) of the Misuse of Drugs Act 1971 because of an exemption in regulations made under section 7 of that Act.

Due to NHS prescriptions being strictly limited to circumstances such as chemotherapy or multiple sclerosis side effects, the number of such prescriptions is minimal. On a private basis, however, there are a broad number of conditions that would qualify someone for a prescription, such as anxiety, chronic pain, back problems and migraines. This is why the numbers continue to rise. Data suggests that there were more than 50,000 private cannabis prescriptions in July 2024, and figures will undoubtedly have grown since then.

Employers have a legal duty under the Health and Safety at Work etc Act 1974 to ensure, so far as is reasonably practicable, the health, safety, and welfare at work of both their employees and anyone affected by the employer's undertaking.

All the above has understandably led to concerns by employers surrounding the impairment of employees who take medicinal cannabis, and any health and safety consequences. This is particularly the case for employees who drive vehicles, operate heavy machinery or have "safety critical" roles.

The Equality Act 2010 ("EqA")

The taking of medicinal cannabis is most likely to trigger sections 15 and 20 of the EqA.

MEDICINAL CANNABIS AND DISABILITY DISCRIMINATION

Section 15

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Employers should be mindful that where an employee takes medicinal cannabis for their disability, that is likely to amount to "something arising in consequence" as per section 15. The employer therefore cannot treat the employee unfavourably unless they can show that such treatment is a proportionate means of achieving a legitimate aim.

Section 20

For the purpose of this Article, only the following parts are relevant:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

...

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

The obvious scenario where this will apply is where the employer has a no smoking and/or no drugs policy. Reasonable adjustments may include adjusting work hours, providing a private area for medication, or modifying the employee's duties. Employers are required to take such steps as are reasonable to have to take in the relevant circumstances.

Case Law

As of now, there are not many reported cases on medicinal cannabis use. However, the following case is worth noting:

Mx C Kimber v Cardiff and Vale University Local Health Board

The Claimant brought multiple claims but this article focuses on the claim of discrimination arising from disability. Not all of the claims succeeded but it is useful to look at some to gain insight into the rationale for the decision.

MEDICINAL CANNABIS AND DISABILITY DISCRIMINATION

Background

The Claimant was employed by the Respondent as a Healthcare Support Worker. The Claimant had ADHD and autism and was therefore disabled for the purposes of section 6 EqA. The Claimant's health had a regular impact on their ability to undertake the work required of them. This triggered the Respondent's Managing Attendance at Work Policy.

On 6th May 2022, the Claimant informed his employer that he looked to be eligible for medicinal cannabis. The Respondent sought advice from Occupational Health ("OH"). OH confirmed as long as the medication did not impact on the Claimant's performance and safety at work, it should be acceptable as it was being monitored by a medical professional.

An OH assessment took place on 2nd November 2022 with a report being produced the next day. The physician recommended the Claimant be allowed to take medicinal cannabis as per any prescribed medication.

At a long-term sickness meeting on 23rd November 2022, the Claimant reported that a treatment plan from their private clinic doctor had been due to be passed to their GP.

The Respondent emailed OH seeking further clarification on C's use of medicinal cannabis. The physician recommended that the Claimant provide a copy of their prescription and if they were not willing or able to do this, this would present as a "red flag".

The Respondent wrote to the Claimant erroneously stating that OH advice was that the Claimant ought to provide a copy of their prescription **and** treatment plan before medicating at work.

The Claimant commenced a trial redeployment on 13th February 2023. There was a return to work meeting where the Claimant showed their line manager the treatment plan on their phone. The line manager left the Respondent's employment shortly after that.

On 20th March 2023 i.e. after the claimant had been working for five weeks in their redeployed role, the Claimant contacted OH to check if they could vape medicinal cannabis at work. They spoke to a nurse who was not familiar with their case. The nurse told the Claimant they should not be working and then telephoned a Mr Keogh to say the same. Mr Keogh acted on that advice and sent the Claimant home.

Mr Keogh also asked for the Claimant's treatment plan. The Claimant said they did not feel comfortable providing it, but suggested sharing it with OH but not the new line manager.

A further referral to OH was made. Mr Keogh contacted the Claimant's new line manager who stated that the Claimant was doing very well in the role.

A letter from the Claimant's Consultant Psychiatrist was provided to the Respondent, which confirmed that the Claimant was a registered patient and that medicinal cannabis was legal to manage their symptoms, as long as they adhered to guidance on safe legal use.

The OH appointment took place on 3rd April 2023 but did not resolve matters.

A further OH report was completed on 30th May 2023 which stated that the letter of support from the Claimant's Consultant Practitioner would hopefully give the Respondent reassurance that the prescription was medically based and overseen by an appropriately qualified practitioner.

Mr Keogh then emailed the Claimant to meet and complete a risk assessment. The risk assessment took place on 21st July 2023. Mr Keogh ultimately scored the Claimant as being low risk of having an incident at work.

The claims under section 15

The Claimant claimed that he had suffered a number of acts of unfavourable treatment because of his medicinal cannabis which was "something arising in consequence of his disability".

The Respondent relied on the legitimate aim of maintaining employee and patient safety.

The claims of unfavourable treatments were:

1. Removing the Claimant from their redeployed role as a Theatre Assistant.
   This claim succeeded. It was held that this was not a proportionate means of achieving a legitimate aim.
2. Requiring the Claimant to provide their treatment plan.

   This claim succeeded. The panel's view differed in relation to this and they therefore reached a conclusion on a majority basis.

   The majority view was that, whilst it was not unreasonable to ask the Claimant to provide a copy of their prescription, it was unreasonable, and therefore unfavourable treatment, to ask them for their treatment plan. That could have contained broader personal and further medical information and therapy goals which had no bearing on the Claimant's ability to undertake their duties. Given the Respondent had sight of the Claimant's prescription, the tribunal concluded this obviated the need for the

Respondent to see the Claimant's treatment plan. To request it was therefore unreasonable and a disproportionate step.

3. Requiring the Claimant to submit to Occupational Health

This claim was rejected. The Claimant had already been referred to Occupational Health but the Tribunal did not view this as unfavourable treatment. In fact, the Tribunal found it might have led to additional input into the Claimant's condition and its management, which would have been positive.

4. Subjecting the Claimant to unnecessary, extensive, intrusive enquiries about their use of medicinal cannabis

This claim was successful.

The Tribunal noted that when the OH nurse contacted Mr Keogh in March 2023, he did not take any meaningful steps to clarify the position before sending the Claimant home. Mr Keogh was aware of the OH report from November 2022, albeit said it was not in his mind at the time. He took no steps to check with the Claimant's line manager as to whether she had any concerns that the Claimant's performance had been impaired. Soon after the concern was raised by the nurse, the Respondent received a letter from the Claimant's private doctor which should have given Mr Keogh reassurance.

Ultimately, the tribunal found that the concerns raised by the OH nurse could have been addressed by the information available at the time or very shortly afterwards. The enquiries made of the Claimant in relation to their use of medicinal cannabis were therefore unnecessary and amounted to unfavourable treatment.

The Tribunal recognised that whilst it was not inappropriate for the Respondent to react to the contact from the OH nurse by seeking further information, they had much of that information already. Further, the Tribunal concluded that the Respondent's concerns would have been allayed if they had simply sought input from the Claimant's line manager. It was therefore not a proportionate means of fulfilling the legitimate aim.

5. Requiring the Claimant to undertake a risk assessment

The Tribunal found that the Respondent had been waiting for concerns regarding the Claimant's ability to work in the Trauma Theatre to be addressed by way of OH advice. By the end of May 2023, it was clear that that would not be forthcoming. Moving to undertake a risk assessment was therefore very much to the Claimant's advantage, as it paved the way for him to return to work. It did not, therefore, amount to unfavourable treatment.

Conclusion

Employers should consider establishing a clear policy on the use of prescription medicines in the workplace or amending their Misuse of Drugs and Alcohol Policy to reflect that employees may legitimately be prescribed cannabis.

Employers are legally required to assess the risks associated with the use of prescription medicine in the workplace (in accordance with their requirements under the Health and Safety at Work Act). A risk assessment is a reasonable way to do this.

Employers may also want to consider what they require employees to disclose. Although not usual to do so, it would be legitimate to include a positive requirement to disclose any prescription medication which can cause impairment. Such a requirement will also allow employers to rely on section 15(2) if the employee fails to disclose their medicinal cannabis use.

This is a developing area but employers should be reassured that each case will turn on its facts and that they can still lawfully take steps to ensure that medicinal cannabis is taken safely by their employees.

Tarlun Ahari
Barrister
July 2026

INTERIM RELIEF - A GUIDE FOR RESPONDENT EMPLOYERS

BY JASON SEARLE

YEAR OF CALL: 1993

1. Interim relief (IR) applications have rocketed from 20 per year to 20 a week per region. This is because of the use of AI and is being misused by LiP. Why wait until 2029 for a hearing if there is a 'fast track'?
2. It is because of the drastic increase that the Presidents of the Employment Tribunals have issued Presidential Guidance with effect from 22 June 2026. It reads as a straight-talking word of warning to be read, hopefully, by those considering IR.
3. Be aware that the origin for IR has its genesis in the protection of trade unions. It was changed to include whistleblowers in the UK in 1999, when the Public Interest Disclosure Act (PIDA) 1998 came into force. PIDA amended the Employment Rights Act 1996 to add whistleblowing dismissals as a qualifying claim for early IR.
4. IR is emergency relief for an employee who has been dismissed for union activities or making a protected disclosure. The test is whether it is likely that C will be able to win at trial on proving all of the elements for a successful PD claim. It usually comes down to causation - what was the reason or principal reason for the dismissal? Is there a 'smoking gun?' ie. an email saying what a nuisance C is following C complaining about poor tyre treads?
5. The current practice of listing IR hearings for a full day is to stop. These hearings are to have an ELH of three hours. If C cannot establish their case in that time then it is not an IR appropriate case. Parties must be alive to the fact that the judge will need to read any papers and deliberate and deliver a decision in that three hour window.
6. The primary order for a tribunal is an order to reinstate. If that is not practicable then an order for re-engagement may be made. If that is not practicable then an order for continuation of contract will be made which means that the employee is reinstated but suspended on full pay until trial. However you look at it, all of those options are very costly for the employer.

7. If the employer refuses both options, or states that neither is practicable, the tribunal cannot force the physical return of the employee. Instead, it falls back on the default statutory remedy: a Continuation of Contract Order. Even if the employer later successfully defeats the claim at trial, the interim wages paid out cannot be recovered from the employee.
8. The employee has no incentive to engage in any settlement negotiations. Why would they? With trials not being for a number of years post issue of proceedings the employee might believe they are better suited to staying at home on full pay. The trial is supposed to be expedited but that does not regularly happen.

What you need to know:

9. Consider the gateway requirements. Section 128(1) ERA requires that C has brought a claim for unfair dismissal asserting that the reason (or principal reason) for the dismissal falls under one of the specified categories.
10. If the reason for the dismissal was redundancy, IR is not available (McConnell and anor v Bombardier Aerospace/Short Brothers plc (No.2) 2009 IRLR 201, NICA). That is because the reason for dismissal is key and not the reason for selection. See the interplay between s128 and s104F ERA 1996 which refers to selection in relation to blacklists only.
11. Claims under the Equality Act are excluded (Steer v Stormsure Ltd 2021 ICR 807, EAT). The statutory key for IR is not discretionary. If an employee is claiming to have been dismissed because of actual or proposed union membership or participation in union activities, they must also produce a certificate from an authorised union official (s161(3) TULR(C)A).
12. Where employment status is in dispute, that does not mean C is precluded from the right to bring an application (Simply Smile Manor House Ltd and ors v Ter-Berg 2020 ICR 570, EAT). Rather, this aspect will fall under the 'likely to succeed' test, but see what the PG says on this. It is an added layer of complexity.
13. The time limit for IR applications is seven days from the effective date of termination.
14. Early Conciliation is dispensed with if bringing a claim for IR (Reg 3(1)(d) Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254). An EC exercise is still needed for other claims such as detriments. This is often overlooked and so we have satellite litigation (*Reynolds v Abel Estate Agents Ltd* [2025] EWCA Civ 1357).
15. A claimant can subsequently obtain an EC certificate for any detriment claims and

apply to the Tribunal to amend the claim to include them. The Court of Appeal has confirmed this is the proper procedure, and Tribunals will generally allow the amendment if the dismissal and detriments are closely connected. The Selkent principles apply - the nature of the amendment, the timing and manner of the application, the prejudice to the employer and the balance of injustice and hardship.

16. The Tribunal is to determine the issue as soon as is practicable (s128(3) ERA/s162(1) TULR(C)A) and it must give the employer at least seven days' notice of the hearing, along with a copy of the application and any accompanying certificate (s128(4)/s162(2)).

17. A tribunal cannot postpone a hearing on IR unless there are 'special circumstances' (s128(5)/s162(4)).

18. The test is whether it is likely that C will succeed at a full hearing of the unfair dismissal complaint (s129(1) ERA/S.163(1) TULR(C)A). What that phrase means has been the subject of various cases, some of which give slightly different interpretations. Some phrases can be used to assist, such as 'pretty good chance of success' (*Taplin v C Shippam Ltd* 1978 ICR 1068, EAT), 'something nearer to certainty than mere probability' (*Ministry of Justice v Sarfraz* 2011 IRLR 562, EAT). What it does not mean is: 'real possibility' (*Taplin*), 'reasonable prospect' (*Taplin*), or 'more likely than not' (*Sarfraz*). A percentage chance is also not considered an appropriate test (*Sarfraz*).

19. It is also important to remember that the test applies to each and all elements of the claim. Was the PD made to the employer? Was it about one of the categories? Did C have a reasonable belief? Was that belief reasonably held? Was there a PD of information? Is it likely that C will be able to show causation?

20. If C has qualifying service (now two years) then it will be for R to show the reason or principal reason for dismissal. If they have insufficient service then the onus is on C. Guidance on the burden of proof in PIDA claims was given in *Jenny Feccitt v Manchester NHS*.

21. Note the useful warnings given in the PG. Claims that are complicated by a number of PDs need a clear and persuasive causative link. It must be 'blindingly obvious.'

What you must do

22. Respondents have a number of tricky tactical decisions to make when defending IR applications. Is it better to actively defend the merits or leave it up to C to make their application? What evidence can and should be submitted if any?

23. The Tribunal is only to do an 'expeditious summary assessment' (*London City Airport Ltd v Chacko* 2013 IRLR 610, EAT) and your approach should be tailored accordingly: A Grounds of Resistance is always helpful whether complete or in draft. If it is a draft, then be clear that is the case e.g. with the appropriate watermark. If there is insufficient time, the writers would instead recommend a short position statement (akin to those used in Judicial Mediation) which details the short form response to the legal claims.
24. The bundle should be limited to a small number of core documents. Prioritise those which are easier to challenge any aspect of C's case i.e. disprove a detriment, or identify a central dispute of fact. Put simply, if there is CCTV evidence then be sure to have a still showing C taking money from the till, or whatever. Have the most compelling evidence. You are looking at torpedoing C's claim.
25. Parties should be able to direct the Judge to the specific parts of the evidence which are relevant to the application (*Raja v Secretary of State for Justice EAT* 0364/09) particularly when there is a large amount of documentation. Looking at the new PG if there is a large bundle then that is eating into the three-hour limit.
26. Full and complete witness statements would only be recommended in the most extreme cases. Remember: if there is a dispute of fact that witnesses need to resolve, it is highly unlikely that the IR application will succeed.
27. You may want to provide a short form draft statement focussing on one or two key issues e.g. a witness' lack of knowledge of any alleged protected disclosures. Be clear that any witness statements used in defence of the application are indeed for that purpose as opposed to representing the totality of the evidence to be given at a final hearing – either by way of an opening paragraph or a watermark.
28. Skeleton arguments are a must, particularly where claimants are unrepresented. It is important that any such document identifies the legal test clearly and succinctly as well as addressing each element of the legal tests. Point to the evidence with reference to the page numbers. Make it as easy as possible to throw doubt on C's assertions and make it easier for the judge to prefer your client's case.
29. If you are applying for costs, put claimants and the Tribunal on notice so that the issue has a chance of being dealt with at the same hearing. A threat of costs is unlikely to deter a LiP, but it is an option in your arsenal and may gain traction where C must have known that the application for IR was bound to fail. Persisting in the application could be held to be unreasonable or vexatious conduct.

30. Here are the four key elements to the PG:

> **Practical observations**
>
> 37. Based on the experience of dealing with applications for interim relief in cases about alleged protected disclosures, the following practical observations can be made.
>
> 38. First, to have a pretty good chance of showing that one or more disclosures are protected, the claimant must have a pretty good chance of showing that: (a) they disclosed information, not simply a bare allegation; (b) they reasonably believed that the information tended to show one of the types of wrongdoing identified in section 43B(1) ERA, and (c) they reasonably believed that the disclosure was made in the public interest because it affected other people, not just the claimant personally.
>
> 39. Second, the claimant will need to show that there is a pretty good chance the tribunal will find that the protected disclosure caused the dismissal. The employer usually disputes this. If an employer identifies an apparently good reason for dismissing the claimant that is unrelated to a protected disclosure, this is usually something the tribunal will need to decide at the final hearing on the basis of full evidence. It is difficult to see how the claimant will show that they have a pretty good chance of success, unless they have clear evidence that this was not the real reason.
>
> 40. Third, the more hurdles the claimant faces in order to succeed with the claim, the more difficult it will be to persuade the tribunal that there is a pretty good chance of success. For example, a dispute about employment status, or a dispute about whether the claimant's resignation should be construed as a dismissal, will make it even less likely that interim relief will be granted.
>
> 41. Fourth, cases which are complex because they rely on a large number of disclosures may make it more difficult for a claimant to succeed because there may be no clear link between any specific disclosures and the decision to dismiss. In contrast, those cases which are strong and which have a pretty good chance of success are generally easily identified and explained.

Jason Searle
Barrister
July 2026

THE TEAM

"SJB has a strong and respected employment set with many heavy hitters at its senior end and a good range of call throughout the set."

"Clerks are always attentive and reactive."

"A strong set with friendly and helpful clerks and a strong team of barristers."

– Legal 500 2026

"I have always experienced extremely good service and responsiveness from the clerks. They accommodate any requests and changes needed."

"St John's Buildings fields a good clerking team that is quick to reply and clear on fees."

"The clerks are excellent and go above and beyond – nothing is too much trouble."

– Chambers UK Bar 2025

CONTACT DETAILS

Chris Shaw
Phone: 0161 214 1584
Email: chris.shaw@stjohnsbuildings.co.uk

Xanthé Young
Phone: 0161 214 1544
Email: xanthe.young@stjohnsbuildings.co.uk

Sara Herceg-Millington
Phone: 0161 214 1513
Email: sara.herceg@stjohnsbuildings.co.uk

Alex Jones
Phone: 0161 214 1542
Email: alex.jones@stjohnsbuildings.co.uk

Adam Parker
Phone: 0161 214 1524
Email: adam.parker@stjohnsbuildings.co.uk