Winckworth Sherwood

People, Culture and Law Conference 2025

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Key Takeaways

Panel discussion: The changing landscape - challenges for recruitment

Chair: Malini Skandachanmugarasan, Partner, Winckworth Sherwood

- **Elijah Amoako, Policy Advisor, His Majesty's Treasury & Director of Public Affairs, 100 Club**
- **Katy Fridman, Founder-CEO, Flexible Working People**
- **Jayne Morris, CEO, TPP Recruitment Ltd**

Poll Question 1: Recruitment v Redundancies: which area is currently taking up most of your time?
The highest answers were recruitment of new talent (37%) and training and development of staff (26%).

- It was noted that attrition rates have dropped by 24%, with a growing trend of 'job hugging', whereby employees hold onto their jobs for fear of movement or change.

- It was observed that, amid widespread redundancies and significant challenges faced by individuals re-entering the job market, current conditions represent one of the most difficult employment landscapes in recent years.

- The panel acknowledged that the current market won't stay like this forever and a shift may occur when individuals who are currently holding on to their roles begin to explore new opportunities. To prepare for this potential change, the following should be taken into account:
    - Focus on retaining the talent you have and attracting the talent you want.
    - Create an environment that supports flexibility- especially as many companies are mandating a return to the office, which can impact employees who rely on adaptable working arrangements.
    - Be mindful of individual circumstances- recognise nuanced needs of candidates.

- Whilst employers are reporting a shortage of talent, job seekers are saying there aren't enough jobs. With an overwhelming volume of applicants, the panel explored ways to alleviate the pressure on recruitment managers. Key recommendations included:
    - Cultural shift – job seekers should reconsider cold calling or directly contacting hiring managers via Linked In and emails, as this can create inefficiencies and unrealistic expectations.
    - Education- educators must play a more active role in helping young people bridge the gap between education and employment, equipping them with skills and insight needed to navigate the job market.
    - Striking a balance between automation and human connection- although automation can streamline recruitment, it must not eliminate the human element. It is important that hiring processes accurately represent an organisation's brand and values.

Poll Question 2: Are you using AI in your recruitment process or looking to implement it into your processes over next 12 months
No (57%)
Yes (28%)
Unsure (15%)

The panel discussed growing disillusionment among candidates with current recruitment processes, particularly due to the growing use of automation in hiring processes.

The following key issues surrounding the use of AI in recruitment were explored:

- Keyword manipulation- candidates are increasingly aware of AI screening tools and some are embedding key words from job descriptions into their CV using white text. This tactic aims to boost their ranking in automated systems, raising questions about fairness and transparency.

- Excessive recruitment stages- Hiring processes are becoming overly complex, with multiple stages and requests for detailed strategy documents at interview level. Candidates often receive no feedback, contributing to frustration and disengagement. The panel emphasised the need to streamline recruitment by removing unnecessary barriers and shortening timelines.

- Homogenous CVs- applicants are using AI to write their CVs, making it harder for genuine individuality and experience to stand out.

Poll Question 3: What are the top offerings candidates and employees look for? Competitive salary and work life balance scored the highest.

- The panel discussed how candidate and employee priorities vary depending on seniority and sector. Senior-level candidates, for example, tend to place greater emphasis on organisational values and authenticity, rather than salary alone.

- In considering how to recruit and retain engaged, satisfied employees, the panel emphasised the importance of returning to the fundamentals of good workplace culture and environment, including being able to accommodate to the needs of employees on a personal level. This includes fostering meaningful relationships among colleagues and creating an environment where employees feel trusted, heard, and valued and having flexible working arrangements.

The Employment Rights Act - key priorities

Louise Lawrence, Partner and Florence Smart, Associate, Winckworth Sherwood

Poll results revealed that nearly a half of attendees' businesses have not yet started to take steps to prepare for the Employment Rights Bill coming into force.

This session dealt with the key (not all) planned changes under the Employment Rights Bill (ERB) for 2026 and steps to prepare.

Statutory sick pay (SSP) (April 2026)

- What is changing: SSP will become payable from the first day of sickness absence; the lower earnings limit will be removed and the rate of SSP will be changed to the lower of 80% of weekly earnings or the prescribed rate.
- Action Points: review and update policies; consider additional costs and effectively manage sickness absence.

Fair work agency (FWA) (April 2026)

- What's changing: introduction of The Fair Work Agency which will bring together existing enforcement functions and cover statutory holiday and SSP. It will have significant enforcement powers, including bringing ET claims on behalf of workers and recovery of its enforcement costs, but these are not expected to come into force until a later date.
- Action points: audit your contracts, policies and practices to ensure compliance with National Minimum Wage, SSP and holiday pay, and keep records.

Whistleblowing protection (April 2026)

- What's changing: ERB will add the reporting of sexual harassment as a new whistleblowing category. The disclosure will still need to be in the public interest.
- Action points: ensure whistleblowing policies and sexual harassment policies are up to date and consider how you will investigate sexual harassment complaints which fall within your whistleblowing policy.

NDAs (expected implementation date currently not confirmed)

- What's changing: NDAs in agreements between employers and employees/workers will be void if they prevent disclosure of harassment or discrimination, or disclosures in respect of the employer's response to harassment or discrimination. This will not apply to "excepted agreements". The definition of "excepted agreements" is subject to consultation, but it may include where the employee has suggested the NDA.
- Action points: stay updated with developments and investigate and take appropriate action in relation to harassment and discrimination complaints.

Parental leave and paternity leave (April 2026)

- What's changing: parental leave and paternity leave will become a day one right.

Collective redundancy consultation (April 2026)

- What's changing: the threshold test for whether collective consultation will apply will remain (where an employer proposes 20 or more redundancies at one establishment within a period of 90 days) and a further threshold test will be added, which is likely to be based on the number of redundancies across the employing entity as a whole.
- The maximum protective award available for failure to collectively consult will double to 180 days' pay for each affected employee.
- Action points: keep abreast of developments around the regulations; consider implementing a system to keep track of proposed redundancies across all sites; and if redundancies are currently being contemplated, it may be wise to take action sooner rather than later.

Fire and rehire (October 2026)

- What's changing: the practice of 'fire and rehire' will be automatically unfair if the principal reason for the dismissal is that the employee will not agree to a "restricted variation" to their contractual terms. This includes: reduction in pay, changes to pensions or performance-based pay measures, changes to working time or the introduction of a variation clause. Existing variation clauses are unlikely to be impacted. There will be no automatic unfair dismissal if the change is not a restricted variation. There is a very narrow exception where the business is in very serious financial distress and even then, the dismissal would need to be fair in all the circumstances.

- Action points: audit existing contracts to ensure they contain suitable flexibility provisions (and not just wide variation clauses); consider making changes to employees' existing terms before the change comes into force (tread carefully even under current rules, however).

Employment tribunal time limits (October 2026)
- What's changing: time limits for most claims will be increased from 3 months to 6 months (subject to ACAS early conciliation).
- Action points: ensure data retention policies are updated accordingly and review how you manage leavers given the longer 'risk' period.

Preventing sexual harassment (October 2026)
- What's changing: employers will have a duty to take all reasonable steps to prevent sexual harassment. Regulations setting out what the 'steps' will entail are due to come into force in 2027.
- Action points: conduct a risk assessment and consider what steps can be taken to reduce the risks of harassment; review current policies; train managers; raise awareness and investigate complaints properly.

Third party harassment (October 2026)
- What's changing: an employer will be liable if they have failed to take all reasonable steps to prevent harassment of their staff by third parties in relation to all protected characteristics.
- Action points: conduct a risk assessment; consider appropriate signage and implementing an "ask for Angela" type scheme. Also consider the action points for preventing sexual harassment above.

Employees using AI – Top 10 things to think about

Chris Garrett, Partner, Winckworth Sherwood

1. Data Protection & Confidentiality

Most employees have access to confidential information, and employees also have access to personal information. If you are inputting this type of information into generative AI tools, you have a risk of losing control of it. This should be at the front and centre of organisational training – public generative AI platforms should not be used for confidential information or personal data.

There is also the possibility of a breach of contractual provisions. Organisations should be thinking of any provisions in their agreements that relate to a prohibition on information being disclosed to third parties.

Organsations should be mindful of their privacy notices. These have to be provided from the start as they set out the uses of personal data, namely where data is stored and how it is used.

A key reminder on automated decision-making: there are special rules on this in data protection. Organisations don't necessarily have to tell people that they are using AI to process individuals' data, but they do have to tell people if they are using AI in making any automated decisions (such as when hiring employees).

2. IP Ownership

The key question organisations should be asking themselves is who owns the output from AI-generated materials. This is not straightforward to address and can vary across jurisdictions.

If employees are going to be using AI to produce materials that are commercially valuable to their employer, it is important for organisations to look into this and check if the business owns these.

As usual, employers should ensure that they include confirmation in their employment contracts that everything created by employees in the course of their employment is owned by the company.

3. Accuracy, bias and reliability

There have recently been a few publicised cases in the legal sector – AI making up cases which were presented in court. Organisations must remember that factual errors are a key risk when using AI.

Furthermore, a lot has been written about bias and discrimination risk when utilising generative AI – this arises from the fact that the tool is only as good as the data it is trained on. The output will reflect or perhaps amplify any bias or discrimination present in the data on which is trained.

4. Security Risks

For products that organisations are purchasing, they must ensure due diligence is undertaken in respect of the security standards the provider is committing to.

The general rule when it comes to employees is that they should be restricted to only using AI tools approved by the employer so that IT security risks are managed.

5. Compliance with Laws
The UK does not currently have any specific AI laws, but other jurisdictions do. As such, it is recommended to appoint a person who would deal with AI regulation in your organisation.

6. Transparency
If organisations are using personal data in their use of AI, it's likely that they have to update their privacy notices to address that, especially if they have not yet done so.

There are also additional EU requirements on transparency. The most onerous transparency requirements are unlikely to be applicable to organisations if they simply utilise AI tools rather than creating them.

Regulators may require transparency. The FCA has made it clear that their approach to regulation is technology neutral. The rules are the same whether or not you're using AI.

7. Reputation Management
Organisations should be mindful that AI usage could damage their brand if AI produces something that is factually incorrect which is then used for external audiences. If organisations hide the way they use generative AI from the public, this may lead customers or clients to feel mislead and they may be unwilling to work or engage with the business in the future.

8. Training
Training is absolutely vital and should form part of the induction process and any refreshers – this, accordingly, goes hand in hand with policies on the use of AI that the organisation has put in place.

9. What If It Goes Wrong?
Employees would be held responsible internally if they make a mistake but in most cases employers are also responsible for the actions of their employees in the course of their duties. It can cause reputational damage, financial loss, as well as litigation.

10. Change Management
What if employees refuse to use AI for the fear of being replaced by automation?

The benefits have to be considered and explained to staff – AI might change expectations and requirements, so it is important to be alert to that.

If roles are going to be replaced by automatic functions, organisations should not forget their obligations when it comes to redundancy consultations.

The Employment Rights Act - looking forward

Andrew Yule, Head of Employment and Beth Hamilton, Associate, Winckworth Sherwood

Overview
This session looked at changes coming into force in 2027 under the Employment Rights Bill. As noted in the session, much of the detail will be set out in regulations and guidance that are yet to be published and will be subject to consultation. A number of consultations have been launched in recent weeks, providing opportunities to comment on the changes being proposed. Further consultations will also follow. The summary below offers an overview and highlights key steps employers can take to prepare for these changes now.

Zero-hour contracts
- Current law: Zero hour contracts are lawful but cannot include exclusivity clauses. In addition, there is currently no specific right to a more predictable working pattern or to receive notice of shifts, creating real uncertainty for workers.
- What's changing: It is proposed that zero/low hour workers (including agency workers on zero/low hours) will have the right to be offered a contract that guarantees hours reflecting those actually worked over a reference period (likely 12 weeks although yet to be confirmed). It is expected that, in most cases, this will be permanent, though fixed term contracts may be permitted (full details will follow). Workers will also be entitled to reasonable notice of the time, day and hours of shifts (with what is "reasonable" yet to be defined) and to compensation where shifts are cancelled or changed at short notice. Agency workers moving to guaranteed hours will also likely have some pay protection. Limited opt outs/exceptions are anticipated, for example where a fixed term offer is reasonable for seasonal patterns of work.
- Action: Identify existing zero/low-hour workers; start monitoring hours worked over a likely 12-week reference period; review systems to track hours, plan shifts and manage short-notice changes; establish a process to offer guaranteed-hour contracts at the end of each reference period; anticipate and monitor potential exceptions; support managers with clear guidance; and watch for future consultation and detailed government regulations.

Umbrella companies

- Current law: Employment businesses and agencies are regulated; umbrella companies often sit outside the regime.
- What's changing: The definition of employment agencies will be widened to capture umbrella companies, introducing greater oversight and worker protections.
- Action: Audit and understand your supply chain; prepare to assess whether suppliers meet current and upcoming regulatory requirements; review and update agreements, potentially to include clear compliance terms and indemnities; introduce ongoing monitoring; technical guidance is expected for affected businesses.

Single status of worker

- Current law: Three categories exist: employee, worker and self-employed.
- What's changing: A two-tier model is being considered which may merge employees and workers so that they form one category, with the genuinely self-employed being a separate category. This is not currently in the Bill but is under discussion.
- Action: Monitor developments and periodically audit how you determine, justify and manage employment status.

Pregnancy/maternity leave protections

- Current law: Since April 2024, pregnant employees have had the right to be offered suitable alternative employment (where available) from notification of pregnancy through to 18 months post-birth, with equivalent protections for shared parental, adoption and neonatal leave returners. This right only applies in redundancy situations.
- What's changing: Dismissing a pregnant employee or a new mother within six months of return from maternity leave will generally be unlawful except in limited circumstances (e.g. gross misconduct). Extension to other family leave returners has been proposed, subject to consultation. The protection is expected to apply to any dismissal decision made in that period, not just redundancy.
- Action: Review risk assessments and policies; train managers; and log protected periods and key dates in HR systems.

Expansion of bereavement leave

- Current law: Statutory leave is only available for the loss of a child under the age of 18 or stillbirth after 24 weeks. Employees are generally entitled to two weeks' leave and pay if certain eligibility criteria are met.
- What's changing: Mothers and their partners will be entitled to one week of unpaid leave for early pregnancy loss (expected to include miscarriage, ectopic pregnancy and unsuccessful embryo transfer during IVF treatment). The Bill is also seeking to create a new general right to bereavement leave for all employees from day one of employment. It is proposed that this would be available following the death of a dependant, with "dependant" set to be defined in future regulations.
- Action: Update compassionate/bereavement policies; implement a clear, confidential request process for leave; and equip managers to respond consistently and sensitively to bereavement situations.

Enhanced flexible working rights

- Current law: Since April 2024 employees have had the right to make up to two statutory flexible working requests in any 12-month period from day one of employment. Employers must consult with employees and may only refuse a request for specified business reasons.
- What's changing: Employers will only be able to refuse a request if it is reasonable to do so. Employers will need to consult with employees before refusing a request and explain in writing why their refusal is reasonable. Tribunals will be able to assess the reasonableness of refusals. The government plans to consult on the steps employers will need to take to comply with the obligation to consult before a request is refused.
- Action: Review policies; train managers; consider trial periods where feasible; introduce template decision letters and a tracking system for requests, consultations and outcomes.

Gender pay gap report and menopause support

- Current law: Employers with 250+ employees must publish annual gender pay gap reports although they are not required to publish action plans.
- What's changing: Employers with 250+ employees will be required to publish gender pay gap action plans outlining how they propose to address the gender pay gap and how they will support workers going through the menopause. Employers will be encouraged to adopt this policy on a voluntary basis from April 2026, and it will become mandatory in 2027. Ethnicity and disability pay gap reporting is expected to follow (although this is not currently included in the Bill).
- Action: Use the voluntary window to pilot action plans; strengthen data collection and analysis; seek input from employees; and train managers to recognise and support menopause-related issues.

Day one unfair dismissal rights

- Current law: Two-year qualifying period applies for ordinary unfair dismissal rights, subject to certain exceptions.
- What's changing: Protection from unfair dismissal will apply from day one of employment (although not before employment commences). An initial period of employment ('IPE'), currently proposed as nine months, would permit potentially fair termination within that period, if the reason for termination is capability, conduct, illegality or SOSR (some other substantial reason, but only if it relates to the employee) and if the employer completes a lighter-touch process. The details of what that 'lighter touch' process will require, and of the compensation regime, are still to be determined. Redundancy is expected to sit outside this lighter touch regime.
- Action: Tighten recruitment and pre-employment checks; review probation clauses and scheduled performance reviews; set clear standards/KPIs aligned to the IPE; consider shorter first-year notice periods and the use of PILON clauses; train managers on feedback, documentation and performance improvement plans; and monitor forthcoming regulations and litigation risk.

Investigations: pitfalls, considerations and risk management

Chair: Andrea London, Partner, Partner, Winckworth Sherwood

- **Chris Garrett, Partner, Winckworth Sherwood**
- **Kate Miller, Partner, DRD Partnership**

1. **Determine who is going to deal with an investigation - the pros and cons of internal process vs external process; when is it OK to manage internally? Other matters to consider in this situation.**

Internal Investigations:

- enable organisations to keep matters under their control;
- need a larger organisation to effect this properly
- are typically able to be carried out quicker; and
- involve less concerns about potential leaks – the fewer parties that are involved, the lower chance of the issue being brought into the public domain.

External Investigations:

- have a higher chance of ensuring that organisations are seen as taking the complaint seriously and dealing with it appropriately, independently and impartially;
- allow for any conflict of interest or a clash with the duties of acting in best interest owed to clients by solicitors to be avoided by ensuring a non-implicated party is conducting the process; and
- ensure appropriate expertise is involved when considering sensitive topics.
- can be the better option when it comes to dealing with privilege and disclosing information about the investigation in the Employment Tribunal;

2. **Get lawyers in the loop quickly to agree the scope of the investigation and ascertain legal risk**

- It is highly recommended to get the company lawyers involved as early as possible when it comes to investigations. However, depending on the complaint's circumstances and whether the organisation has Senior HR or General Counsel with experience in the area, initial fact-finding may be conducted internally. If dealing with a particularly serious concern, it is best to seek external advice to avoid any doubt as to the fairness of the process.
- Organisations' normal legal advisors are always a good first port of call, as useful guidance can be provided by them in relation to conducting an internal investigation, what the scope of the process should be and the legal implications of the allegations. In the event that the key aim is to ensure the process is fair and independent, as well as being taken as seriously as possible, external assistance should be utilised
- It is crucial for organisations to understand that a line can be drawn between asking your normal legal advisors for advice and instructing them to conduct an investigation. However, this can easily become blurred if you have initially taken advice as to the investigation and how to conduct it, and then instruct your legal advisors to undertake the investigation itself. Better to use a separate firm or barrister for the investigation and retain your usual lawyers for ongoing legal advice.

3. **Ascertain who will be involved in the investigation – from a process POV and also witnesses**

- In terms of the parties involved; if this is an internal process, it is of the utmost importance for a senior figure at the organisation to conduct the investigation. The first and foremost requirement for that individual would be for them to not have been implicated or involved in the process previously, and for them to not have any connections or conflict of interest with the parties named as complainant and alleged perpetrator.
- If the investigation is conducted by an external party, it is highly unlikely for them to have any connection to the investigation or have been able to determine its scope (save with discussion with the lawyers).
- When approaching witnesses, individuals should be advised that discussions are strictly confidential and confidentiality must be observed at all times, also that any discussions with other people could compromise the findings of the investigation.
- Another thing to be kept in mind is that when witnesses give evidence anonymously, its value is severely diminished. Individuals should be advised of this and encouraged to come forward with any concerns or allegations they may have. Nevertheless, investigators have the ability to redact witness names, despite this significantly decreasing their weight as evidence. Further, anonymity is rarely able to be guaranteed.
- Finally, it is important to understand that – in terms of fairness - the accused has to be able to respond to the allegations against them, and if this is anonymous, this is harder to do.

4. **Considerations from a communications perspective including management of internal gossip/leaks and what should be said around the process being undertaken**

- This is always a complex point to navigate, particularly when the complaint involves individuals who are very senior in the organisational structure and are, as such, potentially more visible in the public eye and possibly considered "newsworthy".
- There are various issues to be mindful of for organisations, including:
    - Confidentiality versus anonymity
    - Ensuring a fair and neutral process

- Organisations need to be mindful of current employment law, but also of any other legislation and regulations that they could be subject to (regulatory requirements, such as those of the FCA, PRA etc). In some sectors, organisations could be subject to a high level of scrutiny in respect of non-compliance – an example being charities from its regulator, the Charity Commission.
- It is also important to be mindful of the fact that some organisations could suffer reputational risk if they proceed with an internal investigation (only), as opposed to hiring an external party to conduct the process.

5. Suspension– is it a neutral act? is it appropriate in the circumstances?

- Conducting an investigation does not always result in nor require suspension. In law, it is not a sanction but the optics are different. Whilst they are not supposed to be an indication of the outcome of a potential disciplinary process in the future, often this is considered to be the case. Employers should consider the reputational harm to the alleged perpetrator by several weeks (at least) absence from the business against the possibility of the accused seeking to or influencing the evidence given by witnesses.
- It has been noted that, recently, individuals are more likely to be asked to take leave or work from home instead of being subject to a formal suspension. As such, organisations have a variety of avenues to consider and should not always immediately just suspend the accused whilst the investigation is ongoing. This is, as ever, subject to each complaint's specific facts.
- In relation to the duration of suspension and what time frame would be appropriate, be mindful of whether or not the investigation is likely to be conducted in a timely manner. It must be considered whether adequate resources can supplement and expedite the process
- There are sometimes cases where investigations continue for extensive periods – such as up to 6-months: this could result in the impossibility of an accused viably returning to work. Furthermore, investigations are often not straight forward and sometimes a specific timeframe cannot be accurately given. Scope needs to be factored in here – does it need to be narrowed or widened? Suspension and return from suspension (if applicable) must be continually assessed.
- Finally, any criminal aspects must be considered if applicable: it may be the case that an organisation needs to involve the police. It is not unheard of for investigations to then take over a year to complete, and not through the fault of the organisation if the police have asked that any internal investigation is halted pending the police investigation. Careful thought should be given as to how to navigate similar circumstances.

6. Pastoral support for both parties

- Both the accused and the complainant(s) should be offered pastoral support, as the investigation could be a traumatic experience for any of those involved. It is advised that the process is explained, as well as the support that may be provided, and dialogue should be kept going to ensure that all parties feel that they are being appropriately taken care of.
- Should employees be absent, it is important how their absence is handled. Organisations should be thinking whether an "out of office" message is appropriate, and what this entails in terms of wording. In addition, workloads should be reviewed and adequately managed or delegated, with any diary appointments such as meetings being postponed or handled by another individual.
- Furthermore, internal and external communications relating to the implicated individuals should be agreed to ensure that gossip and leaks are avoided as much as possible.

7. Requirement for reputational risk management

- It is notable that there is a lot of interest in investigations and the news stories that follow them, irrespective of the organisation's sector. This is almost certain to be more so with the Christmas holiday period fast approaching.
- Organisations need to consider that donors, stakeholders and investors may consider pulling out if they are not content with the way an investigation is being handled or the extent of press coverage. As such, businesses must ensure they are seen as giving the appropriate thought, level of seriousness and transparency to the process. Zero tolerance to misconduct should be emphasised and if reputational risk is potentially significant, an external communications consultancy – such as DRD Partnership should be utilised.

8. Resolution options

- It is entirely possible that allegations made are not upheld, and so no disciplinary action is necessary. This is why it is vital to ensure that investigations are kept confidential.
- For organisations to seek to avoid allegations of misconduct, it is particularly important to consider and monitor how low-level concerns are dealt with, as these could have a direct impact on company culture and whether such matters are able to escalate.
- Recently, there has been an encouragement to report "microaggressions" perhaps to stop issues before they really start to arise. This manner of handling complaints is a judgment call for each organisation as it could not be quite so helpful in a business and may be misused. Focus should always, however be placed on fostering a good culture and a strong, open door or HR presence to try to avoid the need for investigations at all.

Terminating employment - recent developments

Sue Kelly, Partner and Aparna Sudhir, Solicitor, Winckworth Sherwood

Overview

- Fair dismissal requires both a valid reason (substantive fairness) and a fair process (procedural fairness). Employers must act reasonably, considering factors like their size and resources, in determining if a reason justifies dismissal.

Substantive fairness

- Easton v Secretary of State for the Home Department: Dismissal for non-disclosure of prior gross misconduct and employment gap was upheld as not unfair, affirming the dismissal fell within the band of reasonable employer responses, as the tribunal inferred a duty to disclose on a job application, especially given the employee's prior enquiries with HR.
- Hewston v Ofsted (Court of Appeal): Dismissal for an Ofsted inspector who wiped rainwater off a child was held unfair, considering:
    - Clarity of policy and foreseeability: whether the employee could reasonably know the action was a sackable offence without a clear policy; and
    - A focus on nature and seriousness of misconduct, not generic loss of trust and confidence.

Procedural fairness

- Hewston v Ofsted: The dismissal was also procedurally unfair because key documents were not disclosed, denying a reasonable opportunity to respond (contrary to the ACAS Code expectation that employees can understand and answer the case).
- Hendy Group v Kennedy: A redundancy dismissal was unfair because the employer failed to take active steps to identify and, where appropriate, offer suitable alternative employment (despite numerous roles being available in the organisation), emphasising the duty to take proactive redeployment steps.

Constructive unfair dismissal

- An employee may treat themselves as dismissed if they resign in response to a fundamental breach of contract by the employer (express or implied), which can be a single serious act or a series of acts.
- Marshall v McPherson Limited: Clarified that a 'last straw' act leading to constructive dismissal need not be fundamental in isolation but must contribute to a breach of trust and confidence when viewed with prior events.
- Wainwright v Cennox PLC: Clarified that for constructive dismissal, a breach only needs to materially contribute to an employee's resignation (not be the sole cause), and employer intention is irrelevant (even if well-intended). Employers must therefore prioritise clear communication, particularly to those employees on long-term sick leave, taking extra caution when dealing with replacements.