



Sarah Clarke

Year of Call: 2005

Email Address: sarah.clarke@3pb.co.uk

Telephone: 0117 928 1520

Employment and discrimination

Sarah is an employment law specialist. She appears for both claimants and respondents in the Employment Tribunal and the Employment Appeal Tribunal. She has experience of the following types of claims:

- Unfair and wrongful dismissal
- Sex discrimination
- Race discrimination
- Disability discrimination including failure to make reasonable adjustments claims, discrimination arising from disability and direct discrimination
- Sexual orientation discrimination
- Maternity discrimination
- 'Whistleblowing' claims
- Unlawful deduction from wages/ holiday pay claims
- Claims under the National Minimum Wage Regulations 2015
- Illegal contracts of employment
- TUPE
- Equal pay

Recent cases:

- Chowdhury v Marsh Farm Future UKEAT/0205/DA.
https://assets.publishing.service.gov.uk/media/5e9d7c8086650c031715996a/Mr_N_A_Chowdhury_v_Marsh_Farm_Futures_UKEAT_0205_19_DA.pdf
- Tykocki v Royal Bournemouth and Christchurch Hospitals NHS Trust UKEAT/0081/16/JOJ. Sarah successfully appealed a decision that a dismissal was fair. It was argued that the decision was perverse as the judge failed to take into account relevant factors
- Anderson and ots v First Wessex UKEAT /0132/17/RN. Sarah acts for the Respondent in this matter. She succeeded at first instance, and the matter is currently listed for a preliminary hearing in the EAT. Over 100 claims were brought for detriment on the grounds of trade union membership
- Elliott v Plymouth Hospitals NHS Trust UKEATPA/0826/14/LA. Sarah appeared for the Appellant in relation to a claim for discrimination arising from disability
- Lynch v Stockley Academy UKEATPA/0097/17/BA. Sarah successfully represented the Respondent at first instance in a 10-day trial in a claim for unfair dismissal and whistleblowing. The matter is currently listed for a preliminary hearing in the

EAT

- *Fathers v Pets at Home Ltd* UKEAT/0424/13/DM. An appeal under the Equality Act 2010, Sarah successfully argued that the tribunal had erred because they had not addressed the 'deduced effects' and 'likelihood of recurrence' provisions in determining whether or not the Claimant was disabled
- Acting for the Claimant in a claim against a well-known airline in respect of a claim that the overtime policy constitutes indirect sex discrimination and less favourable treatment on the ground of part-time worker status
- Sarah secured an extremely favourable settlement for the claimant (on day 1 of a 4-day trial) in a claim for unfair dismissal and disability discrimination against a premier league football club
- Sarah acted for the 2nd Respondent in the Remploy litigation. Claims were brought by over 1,000 employees arising out of the closure of several Remploy factories across the country as a result of a decision by the DWP to reduce funding
- Sarah successfully acted for the claimant in a 9-day trial against a major finance house in a claim for disability discrimination
- Successfully acted for the Respondent, an employment advice centre, in a 5-day unfair dismissal and discrimination on the grounds of sexual orientation claim (involving applications to the EAT)
- Acted for the Claimant, a midwife, in a 4-day trial in a claim for unfair dismissal arising out of allegations of gross negligence in respect of two births
- Acted for the Respondent in a 4-day trial in a claim for disability discrimination and unfair dismissal. The Claimant, a registered nurse in a care home for the elderly, was dismissed on the basis of gross negligence and putting residents at risk
- Acted for the Claimant in an application for a restricted reporting order in a claim against an Academy and the Principal regarding allegations of sexual harassment. Unusually it was the Respondent who sought the order, and this was successfully opposed by the Claimant. The matter was widely reported in the press.

Sarah also has substantial experience in relation to interim injunction applications in the High Court to enforce restrictive covenants. For more information on this area please see her Business and Commercial Profile.

Sarah has been appointed to the barrister panel of ELAAS (the Employment Lawyers Appeals Advice Scheme). ELAAS is a service offering pro bono employment law advice to appellant and respondents where there is a preliminary hearing in the EAT with no previous legal representation on record. She therefore has vast experience of rule 3(10) permission hearings.

Articles

Sarah Clarke considers the case of *Vaultex v Bialas* EA-2022- 001258-AT, in which HHJ Auerbach set aside a finding of unfair dismissal on the basis that the tribunal judge had substituted his own view and erred in law in respect of the range of reasonable responses test.

Sarah acted for the successful Appellant.

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Sarah Clarke considers the case of *Jones v The Secretary of State for Health and Social Care* EA-2022-000744-JOJ, which provides a useful reminder of the very wide discretion given to employment tribunals when determining whether or not a claim had been brought within such time as was just and equitable, and appellate courts should be slow to interfere with the exercise of this discretion.

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Sarah Clarke reviews the case of *Rajput v Commerzbank and Société Générale* [2023] EAT, which appears to be the first appellate authority examining when a transfer takes place within a 'series of transactions' cases under TUPE regulation 3(6). The EAT also looked at the relevance of location of the business in a TUPE transfer.

Sarah Clarke acted for the successful appellant Jagruti Rajput.

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Sarah Clarke on the case of *Pilkington v Jones* [2023] EAT 90, which serves as a warning to employers to very carefully consider the dismissal of an employee in cases of potential malingering as they could unwittingly find themselves facing a successful section 15 claim.

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Sarah Clarke reviews *Bathgate v Technip UK Ltd et al* [2022] EAT 155: EAT, in which the EAT makes clear that future claims cannot be compromised in settlement agreements under s147 EQA.

Sarah further explores what employers and practitioners could do contractually, to ensure that future claims do not arise, in light of this EAT judgment.

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With the festive season fast approaching [Sarah Clarke](#) reviews how employers can mitigate against possible vicarious liability for the acts of their employees during out of work events (while everybody still having a good time!).

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[Sarah Clarke](#) analyses *Kumari v Greater Manchester Mental Health NHS Trust* [2022] EAT 132 in which the EAT held that it was permissible to rely on the weak merits of a claim when considering whether to extend time.

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[Sarah Clarke](#) analyses ***Allen v Primark Stores Ltd [2022] EAT 57***, a case in which the EAT reminds us of the need to carefully consider the relevant provision, criterion or practice (PCP) when constructing the pool for comparison, making sure that the potential pool for comparison suitably tests the discrimination that is being alleged.

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Allette v Scarsdale Grange Nursing Home Ltd 1803699/2021

[Sarah Clarke](#) reviews *Allette v Scarsdale Grange Nursing Home Ltd* 1803699/2021, in which the ET held that the dismissal of a care worker following a refusal to get the Covid-19 vaccine was fair. However, the case highlights that employers should ensure, before disciplining any employee for refusing to get vaccinated, that they have carried out a full investigation as to the reason why they consider that the vaccination is necessary within their particular workplace and the reasons why an employee has refused the vaccine.

The tribunal were careful to make it clear that they were not setting a precedent that dismissal for a refusal to have the vaccine would always be fair, as all the circumstances surrounding the case had to be taken into account, including the public health situation of the day and the respondent's business insurance requirements.

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Secretary of State for Justice v Johnson [2022] EAT 1

[Sarah Clarke](#) analyses *Secretary of State for Justice v Johnson* [2022] EAT 1, in which the EAT makes it clear that when considering whether or not it would be 'just and equitable' to extend time limits, it is not only the period of delay prior to the issuing of the claim that is relevant.

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Sarah Clarke analyses *Burn v Alder Hey Children's NHS Foundation Trust* [2021] EWCA Civ 1971, in which the Court of Appeal's obiter comments could make the concept of fairness in disciplinary procedures an implied term, reducing employees' burden to show breaches of trust and confidence.

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Sarah Clarke reviews *Aleem v E-Act Academy Trust Ltd* UKEAT/0100/20/RN, a case which reminds us that the purpose of the duty to make reasonable adjustments is to assist an employee remaining in employment or returning to work after a period of absence. If an employer does decide to maintain a salary whilst investigating the way forward, it is imperative that it is made clear to the individual that this is only a temporary measure.

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IX v WABE and MH Muller v MJ

Sarah Clarke reviews *IX v WABE* and *MH Muller v MJ*, in which the CJEU ruled that a blanket ban on all forms of outward manifestations of religion did not constitute direct discrimination as all religions were being treated in exactly the same manner – but reached a more controversial conclusion in relation to the issue of indirect discrimination.

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The Court of Appeal clarifies the correct test to apply when a tribunal is considering whether or not to make an order for re-engagement when the employer argues that the trust and confidence has broken down.

Specialist employment law barrister Sarah Clarke analyses *Kelly v PGA European Tour* [2021] EWCA Civ 559.

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Smith v Pimlico Plumbers Ltd UKEAT/0211/19/DA

Specialist employment barrister Sarah Clarke analyses the EAT's decision in *Smith v Pimlico Plumbers Ltd* UKEAT/0211/19/DA, in which Mr Justice Choudhury considers whether a worker is entitled to a payment in lieu of annual leave upon termination, whether such leave was taken or not, in circumstances where the respondent did not provide any paid annual leave during the relationship.

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Is there a different burden of proof in relation to misconduct cases in which there is a possibility that an employee who works with children may pose a danger?

Sarah Clarke analyses *K v L* UKEAT/0014/18/JW.

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Is an employee who works shifts at two franchises who trade under the same name employed by both?

Sarah Clarke analyses *Aftala Norfolk Ltd T/A Papa John's Pizza et al v Read*, in which we are reminded that when it comes to the question as to who the correct employer is, the employment relationship needs to be critically analysed.

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Employment law barrister, Sarah Clarke analyses the case of *Khorochilova v Euro Rep Ltd* UKEAT/0266/19/DA.

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The ECJ gives a preliminary ruling on the issue of worker status in the case of *B v Yodel Delivery Network Ltd*- case C-692/19

ECJ Referral

The tribunal referred the following questions for a preliminary ruling:

Does Directive [2003/88] [which was transposed into UK national law by the WTR] preclude provisions of national law which require an individual to undertake to do or perform all of the work or services required of him, "personally" in order to fall within the scope of the Directive?

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Can a tribunal depart from an agreed List of Issues at a final hearing? Yes, in certain circumstances, says the Court of Appeal

in *Mervyn v BW Controls Ltd* [2020] EWCA Civ 393.

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Which employees can I furlough and how does the furloughing process work? An analysis by Sarah Clarke for Business West

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Can a one-off decision amount to a PCP? Generally not, unless it can be shown that the decision, act or omission relied upon would be the same in a similar situation, says the Court of Appeal in *Ishola v Transport for London* [2020] EWCA Civ 112

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Sarah Clarke analyses *Chowdhury v Marsh Farm Futures*, following her successful appearance in the EAT.

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When are Article 8 rights engaged in the context of an unfair dismissal claim and how should the engagement of such rights be approached by the tribunal? Sarah Clarke analyses *Q v Secretary of State for Justice* UKEAT/0120/19/JOJ.

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3PB barristers Craig Ludlow and Sarah Clarke analyse the latest employment law cases, covering March, April and May 2019:

- Time limits and the correct approach to the reasonable practicability of lodging ET claims when the previous fees regime was in place - *Mr G Wray v Jewish Care* (UKEAT/0193/18/JOJ)
- s.26 Harassment: The correct approach - *Mr F Ahmed v The Cardinal Hume Academies* (UKEAT/0196/18/RN)
- Criminal & Employer Investigations, Interim Injunctions & Mutual Trust and Confidence - *North West Anglia NHS Foundation Trust v Andrew Gregg* [2019] EWCA Civ 387
- S.15 Disability Discrimination based on mistaken belief - *IForce Ltd v E Wood* (UKEAT/0167/18/DA)
- Discrimination arising from disability/knowledge of dismissing officer and appeal officer - *Baldeh v Churches Housing Association of Dudley & District Limited* UKEAT/0290/18/JOJ
- Employee Suspension: Necessity or Reasonable and Proper cause? - *The Mayor & Burgesses of the London Borough of Lambeth v Agoreyo* [2019] EWCA Civ 322
- Compensatory rest break need not be an uninterrupted 20-minute period, even if such a break was in fact possible to provide - *Network Rail Infrastructure Ltd v Crawford* [2019] EWCA Civ 269
- TUPE transfer/sole or principal reason for dismissal/proximity of transfer - *Hare Wines Ltd v Kaur* [2019] EWCA Civ 216

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3PB barrister Sarah Clarke analyses the latest employment law cases, covering:

- What constitutes 'information' in the context of making a protected disclosure? *Kilrairie v London Borough of Wandsworth* [2018] EWCA Civ 1436
- When determining the amount of one's holiday pay, should regular voluntary overtime be included? In the context of the NHS, should non-guaranteed and voluntary overtime be included? Yes to both, says the EAT: *Flowers v East of England Ambulance Trust* UKEAT/0235/17/JOJ
- Can a dismissal for a first offence of serious (not gross) misconduct ever be fair? Yes, says the EAT: *Quintiles Commercial UK Ltd v Barongo* UKEAT/0255/17/JOJ
- Supreme Court has upheld previous decisions that an ostensibly 'self-employed' plumber was in fact a 'worker': *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29

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3PB Employment barristers Sarah Clarke and Simon Tibbitts analyse the latest employment law cases, covering:

1. Guidance of whose motivation will be taken into account in determining the "Employer's" reason for dismissal: *Royal Mail Limited v Kamaljeet Jhuti* [2017] EWCA Civ 1632
2. EAT find that relying on previous instances of misconduct, for which no sanction had been applied, does not render a dismissal unfair: *NHS 24 v Pillar* UKEATS/0005/16/JW
3. Subjecting men and women to the same detriment can be 'less favourable treatment': *HM Chief Inspector of Education*,

Children’s Services and Skills v The Interim Executive Board of Al-Hijrah school [2017] EWCA Civ 1426

4. The Advocate General has ruled that employees may qualify for protection from pregnancy discrimination before informing employer about their pregnancy: Guisado v Bankia SA (Case C-102/16)

Please click below to read the case law update.

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3PB Employment barrister Sarah Clarke provides a case law update covering the past month. Sarah's update includes: Dismissal connected to absence because of cancer treatment was not discrimination arising from disability: Charlesworth v Dransfields Engineering Services Ltd; If an employee working night shifts is required to 'sleep in' at the premises, are they entitled to NMW for this time? It depends, says the EAT in 3 conjoined appeals: Focus Care Agency Ltd v Roberts UKEAT/0143/16/DM; Frudd v The Partington Group Ltd UKEAT/0244/16/DM; and Royal Mencap Society v Tomlinson-Blake UKEAT/0290/16/DM; Where an employee works in more than one EU state, the employment contracts fall within the jurisdiction of the country where, or from which, the employee principally carries out their obligations: Nogueira and others v Crewlink Ltd C-168/16; Moreno Osacar v Ryanair, formerly Ryanair Ltd C-169/16.

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Recommendations

Sarah Clarke is experienced in a range of employment matters including discrimination claims, whistle-blowing, unfair dismissal and TUPE work. She also has experience acting in cases involving restrictive covenants and bonus payments, and acts for both claimants and respondents.

Strengths: "She is thorough and well prepared in her advice and advocacy. Sarah often goes the extra mile." "Not only does she provide strategic general advice when called on to do so but she also has an incredible mastery of the details in a matter."

Chambers UK 2024/Employment/Western

Strengths: "Sarah is a very effective and formidable advocate."
"She is top notch on legal analysis."

Chambers UK 2023/Employment/Western

Strengths: "She seems to be getting cases beyond her call. She is never one to be intimidated and will happily go toe to toe with barristers much more senior than her. Clients really like her no-nonsense approach."
Recent work: Successfully represented the respondent in a four-day trial involving allegations of detriment on the ground that the claimant had made protected disclosures in respect of alleged unsafe dust levels at a Crossrail site.

Chambers UK 2022/Employment/Western

Strengths: "She is very brave and fierce in terms of her cross-examination. She is good at picking apart situations and getting results."
Recent work: Successfully advocated for the claimant in Kirby v Key Office Solutions, a claim for direct discrimination, failure to make reasonable adjustments and discrimination arising from disability.

Chambers UK 2021/Employment/Western

Her crossover into commercial and personal injury matters lends itself well to her work in employment mandates.
"A brilliant cross-examiner who is able to present her case in an exceptionally convincing manner." "It's one thing to prepare and turn up with a script, but what really impresses me is her ability to handle situations when things go wrong and the witness bowls a googly: she makes it look like it was planned all along while subtly adjusting her approach."

Chambers UK 2020/Employment/Western

Sarah Clarke is a 'really strong and tenacious advocate' with a broad practice that includes regular claimant and respondent

instructions. She has recently acted for the claimant in *Rajput v Commerzbank and Société Générale*, a high-value sex and maternity discrimination case against two investment banks.

'Sarah has a vibrant personality and clients really warm to her. She explains things thoroughly and clearly, breaking down complex elements so clients can understand them. She is also a skillful advocate and her cross-examination is concise but thorough.'

Legal 500 2024/Employment/Leading Juniors/Western Circuit - Tier 1

'Sarah is a force of nature. She is fantastic at cross-examination, has incredible mastery over the details and is very personable; clients love her.'

Legal 500 2023/Employment/Leading Juniors/Western Circuit - Tier 1

'A highly skilled advocate with a sharp mind. She is brilliant with clients.'

Legal 500 2022/Employment/Leading Juniors/Western Circuit

'Fearless and great at cutting through the irrelevant and focusing her cross-examination on the core issues.'

Legal 500 2021/Employment/Leading juniors

Strengths: "She is a very effective advocate who can put her case strongly and convincingly."

Recent work: Instructed by the respondent in the five-day hearing of a claim for unfair dismissal relating to a protected disclosure.

Chambers UK 2020/Employment/Western

'A fierce opponent who fights her clients' corner to the bitter end.'

Legal 500 2020/Employment/Leading juniors

"I have recently instructed Sarah Clarke in a restraint of trade matter for a client who had issues with a departing partner soliciting clients of the partnership, I was very impressed with Sarah's extensive knowledge in this complex area and her ability to explain these matters and offer solutions for our client to protect their business. Sarah is personable and is able to build a good rapport and trust with clients quickly and I cannot recommend her highly enough."

Instructing solicitor, July 2017

"Thank you for all your hard work and effort. You were brilliant and I can never thank you enough for all your support"

Lay Client

"Thank you so much for fighting so hard and well on my behalf. You honestly came out of the gate fighting and gave them no inch to move (as my mother put it "a lioness") when we were at the tribunal and for that I can't thank you enough."

Lay Client

"Thank you so much for all your help and advice on the case. You achieved a fantastic result for the client. We couldn't have done it without you"

Instructing solicitor

"Just a quick thank you for all your work in pushing a settlement through today- it means a lot to us, and we appreciate that you will have done this with a stack of other work needing to be done too. We are extremely grateful both for your work today and all you have done before"

Lay Client

"Sarah delivers an excellent service and knows her stuff. She is approachable, experienced and convincing."

Instructing solicitor

"We have instructed Sarah for many years and we have always found her to be excellent. Sarah is knowledgeable and provides thorough and well-reasoned advice. Sarah is very approachable and is very good with clients. Sarah is an excellent advocate who presents her cases with determination and authority and she always gives 100%."

Instructing solicitor

Academic qualifications

- BA (Oxon) 2:1 Jurisprudence
- BVC Nottingham Law School
- Inner Temple Exhibition 2004
- Sally Ball Award 2004

Professional bodies

- Employment Law Bar Association (ELBA)