Farore Law

- Mini Guide -

CRIMINAL LAW FOR EMPLOYMENT LAWYERS

A short guide for Rights of Women's Sexual Harassment at Work Advice Line legal advisors

Farore Law is proud to be affiliated with **Rights of Women**, a charity that assists women through effective application of the law.

The firm helped produce this Guide to assist operators of the charity's advice line for those who have experienced (or are experiencing) sexual harassment at work.

Visit rightsofwomen.org.uk to learn more about their vital work.

This content is intended only as a general guide and does not constitute, nor should be used as a substitute for, legal advice.

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Anonymity: general

Section 1 of the Sexual Offences (Amendment) Act 1992 entitles complainants of the vast majority of sexual offences to lifelong press anonymity from the moment that an allegation of such an offence is made.[1] The Act specifically refers to "any publication" in this context, meaning that it is not just newspapers that are covered, but also outlets such as social media.

The extent of the definition of "allegation" (i.e. to whom the allegation must be made) is not specified, but in practice this usually means an allegation made to the police.

Nothing about the complainant may be published if it is likely to lead members of the public to identify her. This means that a civil court or Tribunal should not publish the name of the complainant in a judgment (or on the court notice boards) if the facts of the case refer to the sexual offence she has suffered. It is a criminal offence to breach a person's right to anonymity under the Act (Section 5, Sexual Offences (Amendment) Act 1992).

Complainants' entitlement to anonymity is automatic in the vast majority of cases. However, anonymity may be waived in the following circumstances:

- If the complainant decides to waive it herself;
- If the court decides that a waiver is needed to encourage potential trial witnesses to come forward and that the defence is likely to be substantially prejudiced otherwise;[2]
- If a judge is satisfied that *not* allowing the complainant anonymity at trial would impose a substantial and unreasonable restriction upon the reporting of proceedings, and that it is in the public interest to relax the right;[3] and/or
- If a convicted defendant has lodged an appeal against the conviction, applies for a waiver of the complainant's right to anonymity, and shows that it would be needed to obtain supporting evidence (without which the defendant would suffer substantial injustice).[4]

[1] The relevant offences are all offences under Part 1 of the Sexual Offences Act 2003, except **Sections 64** (*Sex with an adult relative: penetration*), **65** (*Sex with an adult relative: consenting to penetration*), **69** (*Intercourse with an animal*) or **71** (*Sexual activity in a public lavatory*). The Act does not include 'revenge porn'; more can be read here.

[2] Section 3(1) of the Sexual Offences (Amendment) Act 1992

[3] Section 3(2) of the Sexual Offences (Amendment) Act 1992

[4] Section 3(4) of the Sexual Offences (Amendment) Act 1992

Note that the media is free to report a victim's identity in the event of criminal proceedings other than the actual trial or appeal in relation to the sexual offence. This exception covers the situation then a complainant in a sexual offences case is subsequently prosecuted for perjury or wasting police time in separate proceedings.[5]

Anonymity: Employment Tribunal

Section 11(1)(a) of the Employment Tribunals Act 1996 provides that if Employment Tribunal proceedings involve allegations of **sexual offences**, Tribunal procedure may include provisions for securing the registration or availability of documents or decisions, so as to prevent the identification of any person affected by or making the allegation.

Section 11(1)(b) of the Employment Tribunals Act 1996 provides that if Employment Tribunal proceedings involve allegations of **sexual misconduct**,[6] an Employment Tribunal may make a reporting restriction order ("**RRO**") either on its own initiative, or on the application of any party to the proceedings. RROs are addressed below.

Reporting restriction orders and "Rule 50" protection

An RRO has the effect of preventing the identification of any person affected by the allegation until the Employment Tribunal reaches a decision on the relevant case.

An RRO lasts only until the Tribunal's decision of the Tribunal is promulgated (that is, sent to the parties). If this period of time is insufficient, or for whatever other reason Section 11 is not sufficiently wide, then an order known as **Rule 50** may instead be made.[7]

A Rule 50 Order will be made with a view towards preventing or restricting the public disclosure of any aspect of proceedings so far as the Tribunal considers necessary in the interests of justice, or in order to protect a person's Convention rights. Practically speaking, Rule 50 allows the Employment Tribunal to impose a "lifetime" restricted reporting order, or another one of various measures regarding privacy and restrictions on disclosure. When considering whether to make a Rule 50 Order, the Tribunal will give full weight to the principle of open justice and to the Convention right to freedom of expression (Article 10). Lifelong anonymity will be

[5] This point is noted by formal judicial guidance on reporting from 2015, which suggests that it is derived from Section 1(4) of the Sexual Offences (Amendment) Act 1992.

[6] Under the ETA 1996, "sexual misconduct" has an extremely wide definition that covers all manner of "adverse conduct ... related to sex". See Section 11(6) of the Employment Tribunals Act .

[7] A Rule 50 Order is made under Schedule 1 paragraph 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which incorporates Section 11 of the Employment Tribunals Act 1996.

automatic if Section 1 of the Sexual Offences (Amendment) Act 1992 applies. However, it is always advisable for the claimant or their lawyer to point this out clearly to the court or Tribunal in correspondence or in bold at the top of the pleading. This applies particularly because of the ambiguity over whether the allegation has to be made to the police in the context of the Sexual Offences (Amendment) Act 1992.

A Rule 50 Order may be made on the Tribunal's own initiative or on application. Anybody wishing to apply for a Rule 50 Order should do so as soon as possible during Tribunal proceedings.

Anonymity: civil Courts

Where the complainant does not have the automatic right under the 1992 Act then the CPR will need to be considered. The rules governing anonymity in civil proceedings are contained in rule 39.2(4) of the Civil Procedure Rules, which states that a court may order that the identity of any party or witness must not be disclosed if necessary, to protect the interests of that party or witness.

When the court is asked to make an order for anonymity or restraint of publication, it should only do so after closely scrutinising the application and considering whether doing so necessary. If so, the court must then consider whether there is a less restrictive or more acceptable alternative.[8] The court will also consider whether there is a significant public interest to take into account, such as freedom of expression, and weigh this against the reasons the claimant gives for requiring anonymity.

Even if both parties in a case agree to anonymity, the court will still need to balance the interests at stake, as such a situation will demand particular vigilance.[9]

[8] *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645, para. 21; confirmed in *V v T* [2014] EWHC 3432 (Ch)

[9] As confirmed in *C v Secretary of State for Justice* [2016] UKSC 2, para.19

2. Police access to the complainant's counsellor's or psychiatrist's notes (or other medical records)

Ongoing consultation

The CPS is conducting a public consultation on the draft guidance on pre-trial therapy (which replaces and combines earlier guidance the "Provision of Therapy for Child Witnesses Prior to a Criminal Trial" and the "Provision of Therapy for Vulnerable or Intimidated Adult Witnesses prior to a Criminal Trial", 2002).

According to the CPS website, the revised guidance is intended to be a practical document to assist in ensuring that victims receive the therapy they require while supporting therapists, investigators and prosecutors successfully to navigate the legal and procedural issues that can arise where a victim has received/is receiving therapy or is deciding whether to receive therapy.

The consultation closes on 30 October 2020. Full details are available here.

Farore Law has observed that is not uncommon for the police to request copies of notes taken by a complainant's counsellor or psychiatrist when sexual offences are reported. In the firm's experience, it would be unusual for the police to not do so. (In certain instances, the police's request will also extend to other medical notes or records.)

Current CPS guidance[10] states that the police will need to secure the complainant's informed consent before requesting access to such notes. When obtaining consent, the police should inform the complainant why the request is being made, and what might happen to the records. The complainant has the right to withhold consent, but if she wishes to do so, the police must inform her of the possible consequences for the case outcome.

Rights of Women have worked with individuals who have confirmed that the police do not always provide the above information, and that they sometimes make relatively generic requests for notes rather than aiming for specific/targeted notes.

The CPS guidance identifies 3 scenarios regarding police access to a complainant's counselling/psychiatry notes:

[10] CPS legal guidance: Rape and Sexual Offences - Chapter 15: Disclosure and Third Party Material

Scenario 1 → **The complainant provides informed consent.** This allows the police access to and service of the counselling/psychiatry notes as appropriate.

Scenario 2 → **The complainant provides qualified consent.** This allows the police access to the counselling/psychiatry notes as appropriate, but not the defence.

The prosecutor will need to decide whether or not the notes should form part of the prosecution case. If the notes support the prosecution case, the prosecutor should inform the complainant of their decision and seek the complainant's consent to use the record as part of the evidence.

If the prosecutor decides that the notes should be disclosed as unused material (i.e. material that is relevant to the investigation but does not form part of the prosecution case), the complainant's consent should again be sought.[11]

Scenario 3 → **The complainant does not consent to the release of their notes**. If there are reasonable grounds to believe that disclosable material is contained within the notes, the prosecutor will need to consider whether it is appropriate to use the witness summons procedure to access them.

In short: the police are likely to request counsellors' and/or psychiatrists' notes and are able to secure an order to obtain them if the complainant refuses consent. An experienced psychiatrist or counsellor will know this and may avoid taking notes if their client has submitted a complaint to the police.

Farore Law has observed instances of individuals who felt unable to access support therapies for fear that the police would use their counsellors' or psychiatrists' notes against them. It may therefore be worthwhile to advise the client to ask their counsellor or psychiatrist not to take notes as a form of mitigation to ensure that the client can at least still access help during what is likely to be a stressful time.

Rights of Women has observed that in practice, the police are more likely to drop the case rather than go to the effort of obtaining an order to secure the relevant notes should a complainant refuse consent.

[11] If the complainant refuses consent, the prosecutor should decide between making an application for non-disclosure on the grounds of Public Interest Immunity (PII) or not proceeding with a prosecution. If a PII application is made, the complainant will be entitled to have her views put before the court. The court will then make a decision.

Note that medical professionals are within their legal rights to break patient/client confidentiality if it is necessary to prevent or detect a serious crime (such as rape) or if it is otherwise in the public interest to do so.

3. Police access to the complainant's mobile phone

In July 2020, the CPS and police were forced to stop use of digital data extraction consent forms. This followed an 18-month investigation by the ICO,[12] which found that police forces were not giving enough consideration to "*necessity, proportionality and collateral intrusion*".[13]

Despite the largely irrelevant amount of material on mobile phones, a series of news articles over the past two years suggests that it was not uncommon for complainants of rape and other sexual offences to be warned that their cases might not proceed unless they consented to the police accessing their phone content. This issue was also observed by Farore Law.

Example: Ann met Ben at a bar on Friday. Ben sexually assaulted Ann that day. Ann had not met Ben prior to that day, and she made this fact clear to the police when she reported the incident. The police have since requested access to Ann's mobile phone and stated that her case may be prejudiced unless she complies. This is despite the fact that Ann had not met Ben prior to the assault, meaning that the contents of her phone are highly likely to be immaterial to the case.

One Farore Law client reported a rape to the police. The police requested access to their phone on the basis that the CPS would want proof that our client was not "making the story up". When our client expressed reluctance to hand over their phone, the police accused them of not being transparent.

Following this U-turn, complainants should no longer expect to complete these digital data extraction forms.

At present (and indeed, whilst the digital data extraction forms were in use), the CPS confirmed that victims' mobile telephones or other digital devices should *not* be examined as a matter of course in sexual offence cases.[14] They should only be examined in investigations where data on the device could form a reasonable line of enquiry. Seeking consent to access mobile phones and/or other digital devices will most likely be used in investigations where the complainant and suspect are known to each other and past communication is a reasonable line of enquiry.[15] The CPS also confirmed that coercive police powers are not appropriate for use against complainants and access to their devices should be on the basis of specific, free and informed consent. Police should only seek access to personal data when necessary and proportionate.[16] **The removal of digital data extraction forms therefore appears to be further**

[12] ICO, '**Mobile phone data extraction by police forces in England and Wales: Investigation Report' (2020)** <https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf>

[13] The Guardian, '**Police and CPS scrap digital data extraction forms for rape cases'** <https://www.theguardian.com/society/2020/jul/16/police-and-cps-scrap-digital-data-extraction-forms-for-cases>

[14] CPS News Centre: Handing over mobile phone data in rape prosecutions (April 2019) and CPS Guidance: Disclosure - A guide to "reasonable lines of enquiry" and communications evidence (July 2018)

[15] CPS News Centre: Handing over mobile phone data in rape prosecutions (April 2019)

[16] CPS News Centre: Handing over mobile phone data in rape prosecutions (April 2019)

in line with this guidance (which may or may not be subject to change in light of the ICO's findings).

Consequently, if a complainant is informed by the police that she 'must' hand over the contents of her mobile phone or risk her case being delayed or dropped, the complainant should be advised that she is well within her rights to withhold consent, and to demand a detailed explanation as to why her case cannot proceed or is otherwise prejudiced without access to her mobile phone.

Complainants should still be advised to exercise caution, as it was not unknown for the police to place considerable pressure on complainants to hand over their phones and it is unclear whether or not this will still be the case despite the elimination of digital data extraction forms. It may be that a complaint against the police force in question becomes necessary.

In the event that a caller is not averse to handing over certain parts of their mobile phone data, she should be advised that extraction software used by the police is capable of obtaining existing or deleted data without discrimination.[17]

It is also worth noting that certain mobile phone providers may continue to provide customer call records to police forces on request through automated systems.[18] This will enable the police to see, for instance, how many times a complainant has called the perpetrator. It may also be possible to use a witness summons to access a complainant's mobile phone information from the mobile phone or social media provider. CPS guidance on witness summonses[19] suggests that mobile phone and social media companies are potential "third parties".

Prior to the removal of digital data extraction forms, some of our client were told by the police that it may be 3 months before their phone is returned. This remains a point to bear in mind.

One Farore Law client was asked to hand in their phone to the police so that text messages could be obtained. The client asked that they be allowed to keep the SIM card, as all messages were saved to the phone's internal memory. The police agreed, obtained possession of the phone, and subsequently returned it. No further update or report on the specific data obtained was provided to our client afterwards.

[17] For further information on mobile phone forensics, see Privacy International: A technical look at Phone Extraction.

[18] As revealed by a Guardian investigation in 2014; see here.

[19] Protocol between the Police Service and the Crown Prosecution Service on dealing with third party material (2018)

4. Making a DSAR application to the police or CPS

A data Subject Access Request ("***DSAR***") is a request that can be made by an individual to the police or CPS for a copy of any personal data held about them. Individuals have a legal right to obtain such copies of their personal data and the police or CPS are legally obliged to provide it to them.

In addition to a copy of their personal data, individuals are entitled to receive confirmation that the police or CPS is processing their personal data, in addition to other supplementary information including, and not limited to, the retention period for storing personal data; information about the data source; and data transfer safeguards.[20]

It is important to understand that this right extends only to an individual's own personal data, not to data relating to others (unless that information is also about them).

Deadline for compliance

The police or CPS must comply with a DSAR within 1 month of receiving the DSAR, or if later, within 1 month of receipt of (i) confirmation of the individual's identity if required; or (ii) a fee.

There is generally no fee involved in making a DSAR. However, the police or CPS may charge a fee for the administrative costs involved, but only if it is (a) excessive or manifestly unfounded; or (b) an individual requests further copies of their data following a DSAR.

A request for proof of identity should only be made by an organisation if it is necessary. Similarly, any fees for fulfilling the DSAR should not be excessive. Given the potential delays involved, Farore Law recommends that individuals ensure that the police or CPS is aware of their identity, and/or that any fees are paid on (or as close as possible to), the submission date of the DSAR.

The police or CPS may extend the deadline by a further 2 months if the DSAR is complex or if a number of DSARs are received from the same individual. If the police or CPS opts to extend, it must let the individual know within 1 month of receiving their DSAR, along with an explanation as to why it is necessary.

If a DSAR is considered excessive or manifestly unfounded, the police or CPS may refuse to act (Section 53 of the Data Protection Act 2018).

[20] A comprehensive overview of the supplementary information that individuals are entitled to, in addition to a broad overview of the DSAR process, is available at the ICO website here (alternatively, see Section 45 of the Data Protection Act 2018).

How to make a DSAR

If an caller plans to submit a DSAR to the police, it is worthwhile mentioning that the police are split into independently-operated police forces[21] and that it is important that a DSAR is submitted to the correct force to minimise delay (as each force will have its own means of processing DSARs). Police forces may have their own tailored form for submitting a DSAR to them. The CPS also has its own template available to download from its website.[22] **It is not mandatory to use a tailored form for a DSAR to be valid, but it is recommended that complainants use them to minimise delays going forward.**

It is good practice (and strongly recommended) that a DSAR is made in writing, with a note to the effect that it is indeed a 'Data Subject Access Request'. However, a DSAR can be made verbally or in writing, in as formal or informal a fashion as one likes, provided that it is clear that an individual is asking for a copy of their personal data.

The parameters of the requested data should be defined as precisely as possible. This is because it is useful to have clear records of any action taken by the individual. It also ensures that the receiving organisation is aware that they are in receipt of a DSAR and that they take appropriate action to fulfil the request with minimal reason for delay.

Farore Law has observed instances in which organisations postpone responding to DSARs on the basis that the parameters of requested data searches were too broad, and that further clarification was required before the organisation could proceed with a response. The firm has seen this employed as a delaying tactic. It is therefore important that a DSAR is made as clearly as possible.

Take the following example of two search parameters, where the individual wants to obtain a copy of all emails about her that are held by the police or CPS.

Example:

"*I request a copy of all emails involving me, Jane Doe, at Organisation X*." →	This may be considered too vague (or potentially too excessive to fulfil) on the basis that it would involve combing through an unspecified number of emails that may or may not include the individual's email address. There may also be more than one Jane Doe within the Organisation.

[21] e.g. Metropolitan Police Service; North Yorkshire Police; West Midlands Police, etc. A full list is available here.

[22] See here.

"*I request a copy of all emails between 1 January 2018 and 1 March 2018 inclusive, in which reference to me, Jane Doe, is made. This should include any emails containing the phrase "Jane" or "Jane Doe", with or without capitalisation. I also request a copy of all emails in which my email address, [Jane.Doe@OrganisationX.com] is the sender and/or recipient (whether directly, CCd, or BCCd).*"	→	This is a precise parameter that is more likely to succeed. The inclusion of the individual's name (and or any nicknames), email address and a timeframe provide a level of specificity to the DSAR that significantly reduces the risk of error or delay.

Farore Law has observed an instance in which an individual sent multiple identical DSARs to separate departments within the same institution. In cross-referencing the responses to each DSAR, it was shown that one department had redacted information unfavourable to the institution but which the individual was legally entitled to view.

As such, sending multiple DSARs to independent departments within the organisation may be a useful tactic if the individual has strong reason to believe that a department may not fully comply with a DSAR.

However, it is essential to exercise caution in advising a caller to do so, as multiple DSARs may be considered excessive and thus refused. This course of action is therefore only suggested if the DSARs are sent to departments that operate independently of each other.

Exceptions

The police (or any other competent authority for law enforcement purposes) may restrict or prevent a DSAR to avoid obstructing an official or legal inquiry, investigation or procedure, if it is necessary and proportionate to do so.[23] In practice, this almost always means that the police will (and are entitled to) refuse to disclose information in response to a DSAR is there are ongoing criminal proceedings, police investigations, and/or a complaint against the police. As such there is no point making a DSAR until the investigation has been completed.

[23] This is not the only circumstance in which the police may refuse to response to a DSAR. See Section 45(4) of the Data Protection Act 2018.

5. What employers ought to do when there is an allegation of sexual harassment with a complaint to the police

It is essential that employers address complaints of sexual harassment appropriately and comprehensively. Aside from the legal and moral responsibilities involved, a failure to properly handle such a complaint may leave the employer open to a claim of victimisation.

Recent Equality and Human Rights Commission ("*EHRC*") guidance[24] provides the basis for the following overview as to what employers ought to do when they are presented with an allegation of criminal behaviour within the workplace; the relevant sections of it are paraphrased below.

If an individual complains of behaviour that may amount to a criminal offence, the employer should raise the possibility of reporting the matter to the police with the complainant and provide them with the necessary support if they choose to do so.

There is a difference between sexual harassment as defined in employment law, and that which might be criminal. For instance, sexist comments may constitute harassment under the Equality Act 2010 but are unlikely to amount to criminal behaviour.

The employer should attach significant weight to the complainant's wishes: if she does not wish to report the matter to the police, then in most cases the employer should respect that wish. However, certain incidents ought to be reported by the employer. The employer should balance the risk of reporting the matter to the police contrary to the complainant's wishes against any risk to her own safety, and/or that of her colleagues and third parties if the incident is not reported to the police.

Employers' responsibilities during a criminal investigation – do internal proceedings need to be halted during police involvement?

As clarified by the EHRC guidance: if the police become involved, an employer should discuss the disciplinary process with them. The employer should not assume that it cannot take any action to investigate the matter until police enquiries or any subsequent prosecution has concluded, and that it should check with the police that it can carry out its own investigation without prejudicing any criminal process. If it is safe to do so, then the employer should

[24] Equality and Human Rights Commission - Sexual harassment and harassment at work: technical guidance <https://www.equalityhumanrights.com/en/publication-download/sexual-harassment-and-harassment-work-technical-guidance>

consider whether it would be reasonable to continue with an investigation immediately rather than to await the outcome of the criminal process.

Farore Law dealt with one case involving a criminal complaint arising from workplace sexual harassment, where the police allegedly instructed the employer not to disclose to the complainant any witness statements or outcome reports following a grievance investigation on the basis that doing may have tainted the complainant's evidence. This is one example showing how the usual investigation process may be altered following police involvement.

A recent Court of Appeal case[25] held that where an employee is subject to a police investigation, **there is no legal requirement for the employer to put disciplinary proceedings on hold** unless such action results in a breach of the implied term of trust and confidence. A court should only intervene if the employee can show that continuation of disciplinary proceedings gives rise to a real danger of miscarriage of justice in the criminal proceedings.

Likewise, if the police investigation does not result in a conviction, the employer should not assume that it cannot take further action. Criminal offences have to be proved beyond reasonable doubt, meaning that there must be clear evidence supporting the allegation against the accused. An employer, on the other hand, need only have reasonable grounds to conclude that a disciplinary offence has been committed. This could involve, for example, the employer weighing up the evidence of the witnesses and deciding which witness or witnesses have provided the most cogent version of events.

It is important for claimants to be made aware that if the main subject of their legal claim to a court or Tribunal is sexual harassment that amounts to assault, and that claimant has made a complaint to the police, it is **highly likely** that the court or Tribunal will postpone the final hearing of the case until after the decision of the police or CPS. This would include postponement of the final hearing until after the criminal trial if the alleged perpetrator is charged.

As to dealing with the challenge of a refusal by the CPS or police to charge, consider Rights of Women's guidance on the victim's right to review.

Further points for the complainant to know: ABE interviews

An Achieving Best Evidence ("***ABE***") interview will be used by police with witnesses that they regard as vulnerable, such as those involved in sexual offence cases. In Farore Law's experience, the police tend not to provide complainants with copies of the interview transcript

[25] *North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387

or any associated notes. It is therefore important that complainants are advised to take their own notes during (or after) the interview to keep for consistency checks later.

In the event that the perpetrator is charged, the victim will generally not be provided with a copy of notes (save by making a Subject Access Request).

6. Does the Employment Tribunal always postpone its cases until the end of a police investigation?

In Farore Law's experience, the Employment Tribunal will usually postpone its cases until the end of a police investigation.

The power to postpone a hearing may be exercised either on the application of a party, or on the Tribunal's own initiative.[26] (Any application for one must be made as soon as possible and be accompanied by a detailed explanation of why the case cannot be heard on the date listed.) There is no automatic right to a postponement.

The general principles upon which the Tribunal's discretion to postpone or adjourn are as follows (and in line with the fact that the Tribunal will tend to postpone cases until the end of a police investigation):

- The discretion should not be used capriciously, arbitrarily, or in order to defeat the general object of the legislation;
- The Tribunal should act in the best interests of justice in each individual case; and
- The Tribunal has complete discretion to postpone or adjourn any case providing that it is exercised judicially, and there is a good ground for doing so.[27]

Similarly, a Tribunal should adjourn a hearing for a short time if material which is relevant at the time and would allow a party to continue their case in the most effective way practicable can be obtained within a short space of time.[28]

Last updated: August 2020

[26] An order to postpone a hearing is a case management order under Rule 1(3)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

[27] *Carter v Credit Change* [1979] IRLR 361

[28] *U v Butler and Wilson* (UKEAT/0354/13/DM)