

Jonathan Davies

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Introduction

Jonathan is a specialist employment and discrimination lawyer with a record of success in very high profile and high value cases. Specialisms include shared parental leave, doctors' regulatory work, police pay claims and discrimination work, common law employment claims such as restrictive covenants and economic torts, negligent reference claims, bonus and pay claims and injunctions to prevent dismissal.

He recently successfully represented the Chief Constable in the well-publicised appeal case dealing with shared parental leave *Hextall v the Chief Constable of Leicestershire Police* [2019] IRLR 695, CA.

Recommendations

"He gives clear advice, is good with clients and good on his feet." "A strong advocate in tribunal cases and a pleasure to work with." Chambers & Partners

"He will fight cases with real force and his cross-examination produces excellent results." The Legal 500

Employment

Employment Tribunal Litigation

Atypical Workers

Jonathan has represented various clients in claims involving in the Agency Workers/Part Time Workers/Fixed Term Employees Regulations.

In 2015 acted for a part time fixed term lecturer seeking pay parity with her full-time permanent colleagues.

Compromise and Settlement Agreements

Jonathan advises employees and employers on the settlement of disputes/exit agreements as well as advising and acting in the event of non-compliance/breach. In 2017 Jonathan advised a police force on the departure of a senior employee in well publicised case. He also advised a highly regarded boutique law firm on exit arrangements.

Jonathan has often been instructed in claims seeking to enforce in the civil courts compromise agreements or seeking damages for their breach. In 2016, he acted in a claim against a high street retail bank for failure to provide a pension to a former employee was negotiated as part of her exit. In 2017, acted in a similar claim which came to trial against a large local authority.

In 2015 he advised in a settlement worth £9m involving an investment banker; he is a trained mediator.

Conflict of Laws/Territorial Jurisdiction

Jonathan has advised and lectured on, and has a particular interest in, jurisdictional issues arising in the context of employment and discrimination disputes, both in wrongful dismissal and business protection High Court proceedings, and in proceedings before the ET. He has also advised on state immunity.

Consultation Rights

He has extensive experience of claims for failure to carry out redundancy and TUPE consultations under TULRCA 1992/TUPE 2006.

In 2012, he acted for a major union and their sacked members in a group action alleging failure to consult arising out of a nationwide dispute in the education sector relating to a forced change of terms and conditions. In 2014, he acted in a very similar dispute in the rail manufacturing sector.

Contracts of Employment

Jonathan is often instructed to draft contract of employment, service agreements, restrictive covenants and other contractual documentation.

Data Protection/GDPR

Jonathan has successfully acted for a major insurance and pension provider in a claim for unfair dismissal where it was alleged that its alleged breach of the Data Protection Article 8 privacy rights rendered the dismissal unreasonable.

Jonathan has advised trade unions on the use of data for membership purposes as well as acted in cases involving data protection issues relating to the giving of references and confidential information.

Discrimination at Work

Jonathan has around 18 years' experience of every conceivable form of discrimination claim in the employment context. He was co-author of a chapter on the core principles of discrimination law for OUP.

Jonathan successfully defended an appeal against an employment tribunal decision in which the employment

tribunal found that the Claimant (whom he had successfully represented below) had been the subject of direct discrimination because his employer refused to send him to work on an assignment abroad partly on the basis that he might suffer race discrimination due to the fact he is Asian. In *HMRC v Saldanha*, The principal issue on appeal was whether the rule in *Reynolds v CLFIS* [2015] ICR 1010, CA that an innocent decision maker cannot be fixed with the discrimination of a person who might have influenced the decision in the context of criterion (as opposed to mental processes) cases. The EAT held that the fact that in a criterion case the act is discriminatory on its face prevents the rule being applied.

Jonathan regularly acts in claims of disability discrimination. Recently, he successfully acted for a claimant in her claim for disability discrimination and failure to make reasonable adjustments against Highways England.

Between 2016 and 2019, Jonathan successfully represented Chief Constable throughout the litigation in *Hextall v the Chief Constable of Leicestershire Police* [2019] IRLR 695, CA. Mr Hextall sought to argue that failure to pay him the same rate of pay during his shared parental leave as a female officer would be paid during her maternity leave amounted to direct and indirect sex discrimination, as well as a failure to pay equal pay. All his claims were rejected. Jonathan successfully defended the ET's rejection of Mr Hextall's claim in the Court of Appeal.

In 2015, Jonathan succeeded in obtaining £250,000 in a claim of associative discrimination and costs in damages on behalf of his client in employment tribunal proceedings against the world's largest advertising agency who were represented by a silk.

In 2015, Jonathan advised in a settlement worth £9m involving an investment banker.

In 2015, Jonathan successfully overturned a finding of indirect discrimination in the case of *Bethnal Green & Shoreditch Educational Trust v Dippenaar* UKEAT/0064/15 (21 October 2015, unreported). The case established that the provision, criterion or practice ('PCP') must be shown to exist before any question arises of applying the statutory burden of proof under the burden of proof provisions in the Equality Act 2010. Reversal cannot be used to establish the PCP in the first place: (applying *Project Management Institute v Latif* [2007] IRLR 519, EAT per Elias P).

In 2011, he was appointed to the Equality and Human Rights Commission's panel of barristers.

Equal Pay

Jonathan has wide experience of equal pay claims. For example, in December 2015, he was instructed in a seven day equal pay case arising out of the failure of an employer to implement its Job Evaluation Study relying on market forces defence.

Jonathan successfully represented the Chief Constable in the in the Court of Appeal decision of *Hextall v the Chief Constable of Leicestershire Police* [2019] IRLR 695, CA. Mr Hextall sought to argue that failure to pay him the same rate of pay during his shared parental leave as a female officer would be paid during her maternity leave amounted to a failure to pay equal pay. The Court of Appeal accepted the Chief Constable's argument that the claim was in truth one of equal pay and hence barred under the provisions which permit more favourable treatment in favour of mothers who have given birth.

Holiday Pay

Jonathan has acted in several group litigation claims on behalf of employees seeking to recover underpaid

holiday pay.

Maternity, Paternity and Shared Parental Leave Rights

Jonathan successfully represented the Chief Constable in the in the Court of Appeal decision of *Hextall v the Chief Constable of Leicestershire Police* [2019] IRLR 695, CA. Mr Hextall sought to argue that failure to pay him the same rate of pay during his shared parental leave as a female officer would be paid during her maternity amounted to direct and indirect sex discrimination, as well as a failure to pay equal pay. All claims were rejected. The Court of Appeal accepted the Chief Constable's argument that the claim was in truth one of equal pay and hence barred under the provisions which permit more favourable treatment in favour of mothers who have given birth.

Jonathan is often instructed in maternity rights claims. In 2015, Jonathan succeeded in obtaining £250,000 in a claim of associative discrimination and costs in damages on behalf of his client, in employment tribunal proceedings against the world's largest advertising agency, who were represented by a silk.

Jonathan acted in a major harassment on the grounds of maternity claim by a senior human resources professional against a housing association.

In 2012, Jonathan acted for an employee in a maternity discrimination claim in which the employer moved the employee's place of work, requiring her to travel by public transport at a time when she was suffering from acute morning sickness which prevented her from travelling. The case turned on whether an employer is under a duty to adjust the working conditions of those suffering pregnancy-related illness, as the UK Equality Act 2010 potentially fails to implement European Law.

National Minimum Wage/ Working Time

Jonathan has substantial experience of NMW and Working Time claims, especially in relation to the question of whether workers who are required to live and/or sleep on employer's premises should be deemed working when resting.

Pensions

Jonathan acts in pension disputes as they arise in the employment context including advising in disputes before the Pensions' Ombudsman.

He has advised a major police force on the effect advice it gave about the changes to pension scheme members of A-day.

Jonathan recently acted for a former employee of a major retail bank in her claim for failure to provide her with, or advise properly in relation to, an early retirement pension promised as part of an exit agreement.

In 2017, he acted for the Claimant in his claim for failure to offer an employee the option of an early ill health pension prior to making the employee redundant.

Police Pay

Jonathan was instructed in *Thomas and others v the Commissioner of Police for the Metropolis* – (a High Court group litigation action on behalf of the Royal Protection Squad for recovery of non-payment of overtime and other

allowances under the Police Regulations 2003. The claim resulted in a multi-million pound settlement in favour of the officers.

Jonathan is currently instructed in a follow up claim for recovery of non-payment of overtime and other allowances under the Police Regulations 2003 on behalf of the Royal and Specialist Protection Squad.

Practice and Procedure

Jonathan, acting pro-bono, successfully represented the Claimant in his appeal in *Greenwood v NWF Retail* [2011] ICR 896, EAT. The case dealt with the extent of the obligation on an Employment Tribunal to give reasons in its judgment under the 2004 Employment Tribunal Rules and is now the leading case in this area. The case is listed in the EAT's Practice Direction of 20 June 2012 of cases so frequently cited that parties do not need to bring it to a hearing.

Shared Parental Leave

Jonathan successfully defended the Chief Constable in the ET claim *Hextall v the Chief Constable of Leicestershire Police*. Mr Hextall sought to argue that failure to pay him the same rate of pay during his shared parental leave as a female officer would be paid during her maternity amounted to direct and indirect sex discrimination as well as a failure to pay equal pay. All claims were rejected. Jonathan successfully represented the Chief Constable in the in the Court of Appeal decision of *Hextall v the Chief Constable of Leicestershire Police* [2019] IRLR 695, CA.

Taxation (of awards, settlements and termination packages)

Jonathan trained in a corporate tax department of big-4 accountancy firm and is a member of the Chartered Institute of Taxation (ATII). He can therefore advise on all taxation aspects of the employment relationship – his unique blend of experience puts him in a particularly good position to advise on taxation issues as they arise in employment disputes, including the taxation of settlements, tribunal awards and termination packages.

TUPE

Jonathan has been involved in a number of TUPE claims, including failure to consult as well as claims of automatically unfair dismissal especially in the context of pre-pack administrations and service provision changes. His accountancy experience is especially useful in this context.

Unfair Dismissal

Jonathan has acted for employees and businesses from every conceivable sector of the economy (both private and public sector) in unfair dismissal claims and has a thorough grasp of this area of the law. *Secretary of State for Justice v Lown* [2016] IRLR 22 – Jonathan appeared in this appeal which reconsidered the circumstances in which an employment judge is to be taken to have substituted his own view for that of the employer in unfair dismissal proceedings.

Whistleblowing

Jonathan has lectured widely on whistle-blowing claims and many represented both whistleblowers, from doctors to policemen. He has also dealt with the interplay between the employee's rights as a whistle-blower and his duties of confidence (see under 'Breach of Confidence').

High Court & Other Civil Litigation

Breach of Confidence /Privacy/Data Protection

In February 2017 Jonathan successfully defended an application for interim injunction in the High Court before William Davis J, (*S3 Sciences Ltd v Griffiths*) brought against his client by a former employer who was alleging breach of confidentiality in relation to what he claimed was a confidential list of contacts. The application was refused and client was awarded her costs on an indemnity basis.

In 2015, Jonathan was instructed in a High Court claim which revolved around comments made from previous employer outside the terms of an agreed reference contained in a compromise agreement. In the past Jonathan has acted for an NHS Consultant in a similar claim and defended such a claim on behalf of a further education college: *McKie v. Swindon College* [2011] IRLR 575, QBD.

Jonathan has been instructed by a very senior employee of a major football club in relation to threatened proceedings for injunctive relief for delivery of confidential and private information in his possession about its players which arose in the context of an employment dispute. The case dealt with the interplay between the employee's rights as a whistle-blower and his duties of confidence towards his employer and the players.

Business Protection/Restrictive Covenants

Jonathan acts for both parties in business protection disputes. In February 2017 Jonathan successfully defended an application for interim injunction in the High Court before William Davis J, (*S3 Sciences Ltd v Griffiths*) brought against his client by a former employer who was alleging breach of confidentiality in relation to what he claimed was a confidential list of contacts. The application was refused and client was awarded her costs on an indemnity basis. The case also involved a counter claim for defamation and negligent misstatement in relation to derogatory remarks made in a reference He has also advised in other restrictive covenant cases during the year.

Jonathan successfully represented the claimant in a claim for breach of restrictive covenants and conspiracy which went to full trial in November 2013: *Croesus v the Bradshaws* [2013] EWHC 3685 QB.

Jonathan successfully represented an employer in two different sets of proceedings for injunctive relief to protect confidential information after several employees left, taking customer lists and other sensitive information.

He has also represented employees accused of taking confidential and private information.

Commercial Agents

Jonathan has extensive experience of advising and litigating for both agents and principals under the Commercial Agents Regulations in relation to claims upon termination of the agency.

Compromise and Settlement Agreements

Jonathan advises employees and employers on the settlement of disputes/exit agreements as well as advising and acting in the event of non-compliance/breach. In 2017 Jonathan advised a police force on the departure of a senior employee in well-publicised case. He also advised a highly regarded boutique law firm on exit arrangements.

Jonathan has often been instructed in claims seeking to enforce in the civil courts compromise agreements or seeking damages for their breach. In 2016, he acted in a claim against a high street retail bank for failure to provide a pension to a former employee was negotiated as part of her exit. In 2017, acted in a similar claim which came to trial against a large local authority.

in 2015 he advised in a settlement worth £9m involving an investment banker; he is a trained mediator.

Conflict of Laws/Territorial Jurisdiction

Jonathan has advised and lectured on, and has a particular interest in, jurisdictional issues arising in the context of employment and discrimination disputes, both in wrongful dismissal and business protection High Court proceedings, and in proceedings before the ET. He has also advised on state immunity.

Conspiracy and the Economic Torts

Jonathan successfully represented in the High Court a former employer in its claim for unlawful means conspiracy in the context of a business protection dispute and has lectured widely on how the economic torts can be used in business protection cases: *Croesus v the Bradshaws* [2013] EWHC 3685 QB.

Disciplinary Procedures

Jonathan is regularly instructed by doctors seeking to enforce the application of Maintaining High Professional Standards in the Modern NHS and has been involved as junior Counsel in some of the most important disciplinary cases including:

Kulkarni v Milton Keynes NHS Foundation Trust [2009] IRLR 829, CA which established that doctors and dentists employed by the National Health Service are entitled to legal representation at internal disciplinary hearings to determine serious disciplinary charges made against them.

Mezey v SW London & St George's Mental Health NHS Trust (No.2) [2010] IRLR 512 CA in which the Court of Appeal held that, under the national disciplinary and capability procedure that applies to all medical practitioners in the NHS, a capability issue only arose if it could be shown that the employee medical practitioner lacked knowledge, or ability, or had rendered consistently poor performance.

Discrimination in the provision of goods and services

In 2011, as well as being appointed to EHRC panel, Jonathan acted for a national airline of a Gulf state in a claim brought by the Royal Family of that state in relation to a dispute arising from the refusal to permit members of the royal family to board a flight where it was alleged the reason was their nationality.

He has recently given training to a major online trader on the Equality Act 2010 and the ramifications of it for companies offering services online.

Discrimination in the exercise of public functions (including judicial review)

Jonathan has advised on legal challenges to local authorities' and central government's plans to cut public services having a detrimental impact on the environment on the basis they are in breach of the public sector equality duty, Part 3 of the Equality Act 2010 and in breach of public law duties to consult. He has also advised on legal challenges to decisions to grant planning permission on the basis they are in breach of the public sector

equality duty, Part 3 of the Equality Act 2010 and in breach of public law duties to consult.

Human Rights

Jonathan has an interest in human rights issues as they arise in the employment context. He has successfully acted for a major insurance and pensions provider in a claim for unfair dismissal concerning an alleged breach of the Data Protection Article 8 privacy rights which rendered the dismissal unreasonable and given lectures on the effect of the Human Rights Act in the employment context.

Kulkarni v Milton Keynes NHS Foundation Trust [2009] IRLR 829, CA. This case strongly suggested (albeit obiter) in relation to all employees of public bodies that internal disciplinary proceedings which may result in dismissal in circumstances where, as a direct consequence of that dismissal the dismissed employee is effectively prevented from ever practising his profession again, must comply with Article 6 of the European Convention of Human Rights.

Negligent Misstatement/Reference Claims

Jonathan acts for both employees and employers in claims arising out of inaccurate and misleading references.

In 2015, Jonathan was instructed in a High Court claim which revolved around comments made from previous employer outside the terms of an agreed reference and in breach of a mutual non-disparagement clause contained in a compromise agreement. In the past Jonathan has acted for an NHS Consultant in a similar claim.

Jonathan is currently instructed by a former employee of a major retail bank in her claim for negligent misstatement. The claimant was induced to enter into a compromise agreement in which she agreed to take redundancy on the basis of inaccurate advice given to her about her pension rights.

McKie v Swindon College [2011] IRLR 575, QBD. Jonathan acted for the employer in defending this high-profile claim for negligent misstatement. This was a ground-breaking common law claim in which the duty not to make negligent misstatements about a former employee by a former employer was extended to cover communications other than references.

Misrepresentation

In 2016, Jonathan was instructed by a former employee of a major retail bank in her claim for misrepresentation. The Claimant was induced to enter into a compromise agreement in which she agreed to take redundancy on the basis of inaccurate representations made to her about her pension rights.

Jonathan has advised on a claim for misrepresentation in relation to an employee who found herself out of work after accepting an offer of employment in which the financial position of the employer was misrepresented to her.

Pay, Bonus and Commission Disputes

In 2017, Jonathan successfully represented the Claimant in a county court contractual pay dispute arising out of breaches of a high level consultancy agreement.

In 2016, Jonathan was instructed in *Thomas and others v the Commissioner of Police for the Metropolis* – (a High Court group litigation action on behalf of the Royal Protection Squad for recovery non-payment of overtime and other allowances. The claim was settled in favour of the claimants in May 2016.

Jonathan has experience of acting in 'bonus' type breach of contract claims in the High Court and in the Court of Appeal. This includes appearing as sole counsel in *GX Networks Ltd v Greenland* [2010] IRLR 991, CA.

He has also lectured widely on city bonus claims and commission claims in the telecoms industry and he recently acted for a banker in a multi-million pound dispute.

Jonathan is an expert on the jurisdictional issues which arise out of the limited jurisdiction of the Employment Tribunal in breach of contract and unlawful deduction of wages claims and the *res judicata* issues which arose from the choice of more than one forum in such claims.

Protection from Harassment

Jonathan advises and acts in protection from harassment claims arising in employment. He has extensive experience of county court procedure and the recovery of personal injury damages. In 2017, Jonathan was instructed by a local authority to defend a protection from harassment claim.

Recovery of Overpayment of Wages recovery of Overpayment of Wages/Over claimed expenses

Jonathan has extensive experience of county claims seeking to recover overpayments of wages from both existing and former employees. He has been appointed to work for a major NHS health trust in assisting it in all of its claims. He has given training on unjust enrichment/the action for money had and received on the basis of his extensive experience.

In 2014, Jonathan defended the former General Secretary of a major trade union in a claim for alleged unlawfully claimed expenses by his former union.

Workplace torts

Rice and Thompson v. Secretary of State for Trade and Industry [2007] ICR 1469, CA. Jonathan appeared as junior counsel in the Court of Appeal on behalf of two former dockworkers suffering from asbestos-related diseases. Established the existence of a novel duty of care in negligence akin to that owed by an employer to an employee but where there was no employment relationship in the strict sense.

McKie v Swindon College [2011] IRLR 575, QBD which similarly dealt with novel duties of care in which the duty not to make negligent misstatements about a former employee by a former employer was extended to cover communications other than references.

Wrongful Dismissal

Jonathan regularly advises and acts for employees with significant notice periods and/or bonus entitlement claims as to their common law rights on termination.

In 2011, he acted for a qualified medical practitioner employed as a sports doctor who was constructively wrongfully dismissed because he refused to effect treatment he considered to be contrary to GMC guidelines.

Reported & Interesting Cases:

- *Thomas and others v the Commissioner of Police for the Metropolis* – large group action against the Metropolitan Police by the royal 'bodyguards' for recovery of unpaid allowances

- *RASP v the Commissioner of Police for the Metropolis* – large group action against the Metropolitan Police by politicians ‘bodyguards’ for recovery of unpaid allowances
- *Dippenaar v Bethnal Green Academy*, EAT, Langstaff J UKEAT/0064/15/JOJ Harvey on Employment Law Bulletin 448 November 2015 - Correct application of the statutory burden of proof provisions in the context of indirect discrimination claims under the Equality Act 2010.
- *Secretary of State for Justice v Lown* [2016] IRLR 22 - Circumstances in which Employment Judge substitutes his own view.
- *Croesus v the Bradshaws* [2013] EWHC 3685 QB Injunctive relief in business protection case.
- *Greenwood v NWF Retail* [2011] ICR 896, EAT Employment Tribunal’s duty to give reasons.
- *Hextall v the Chief Constable of Leicestershire Police* [2019] IRLR 695, CA *Kulkarni v Milton Keynes NHS Foundation Trust* [2009] IRLR 829, CA Right to legal representation in internal disciplinary proceedings.
- *Mezey v SW London & St George’s Mental Health NHS Trust (No.2)* [2010] IRLR 512 CA Enforcement of contractual disciplinary procedures by way of injunctive relief.
- *Rice and Thompson v. Secretary of State for Trade and Industry* [2007] ICR 1469, CA Workplace duties of care in negligence.
- *McKie v Swindon College* [2011] IRLR 575, QBD Negligent references.
- *GX Networks Ltd v. Greenland* [2010] IRLR 991, CA Contractual commission dispute.

Qualifications and Appointments

- MA Modern Languages (Oxford), Magdalen College, Oxford
- Post Graduate Diploma in Law (City University) (2001)
- Bar Vocational Course – Outstanding (2002)