



## UK Employment Law Update – October 2021

Welcome to our monthly newsletter, with a summary of the latest news and developments in UK employment law.

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# Case law updates



**COVID-19 – pregnancy discrimination:** The employment tribunal has dismissed a pregnant worker’s claim of discrimination and victimisation after being sent home from work by her employer at the start of the pandemic over concerns for her and her unborn baby’s health. A risk assessment, informed by government and public health guidance at the time, had been completed appropriately and it was reasonable for the worker’s employer to act as they had in response to the risks identified. The worker was also not left out of pocket financially. Although an unbinding decision, the case is a useful reminder of an employer’s duty to carry out risk assessments on pregnant staff and that in certain circumstances it will be appropriate to medically suspend them from duties without this being discriminatory. ([Prosser v. Community Gateway Association](#))

**Discrimination – sexual orientation:** In an interesting case highlighting the challenges where two protected characteristics conflict, and overturning an earlier decision, the Court of Appeal has held that an independent fostering agency who restricted carers to Evangelical Christians were unlawfully directly discriminating on grounds of sexual orientation by including rules that carers also refrain from homosexual behaviour. While the evidence was that homosexuality is generally incompatible with the Evangelical Christian faith, the court was clear that this did not mean that religious discrimination and sexual orientation discrimination could be equated – as sexual orientation was an independent protected characteristic, the discrimination issues should be looked at separately. The Court also considered that the rules restricting homosexual behaviour could not, on the facts, be objectively justified. ([R \(Cornerstone Fostering\) v. Ofsted](#))

**Employment tribunals – anonymity orders:** An EAT decision confirms that anonymity orders should be considered on application by anyone named in a judgment even if they are neither a party nor a witness in the proceedings. In this case, the individual was named in relation to allegations of misconduct, and the EAT concluded that the individual’s right to a private life and protection of her reputation under article 8 of the European Convention of Human Rights was engaged to the same extent as if she had been a party or witness. Although anonymity orders can be difficult to obtain, this case is helpful to confirm that applications of this nature should be considered on their merits irrespective of the role the applicant plays in the proceedings. ([TYU v. ILA Spa](#))

**Employment tribunals – costs:** When making an application for costs with arguments that a claim (or defence) has no reasonable prospects of success, the EAT has determined that each head of claim should be considered independently rather than as a collective; a helpful decision where costs are sought despite some elements of a claim or defence having succeeded. ([Opalkova v. Acquire Care](#))

**Flexible working:** In a case attracting a lot of media attention, a female employee has won her claim of sex discrimination when her flexible working request to change hours of work for childcare purposes was rejected. While not changing the law in this area, with flexible working requests anticipated to rise as businesses start encouraging a return to the workplace, the case acts as a timely reminder that employers must consider flexible working requests reasonably, be able to properly justify any rationale for turning a request down, and that a rejection may amount to unlawful indirect discrimination where the business’ stance has a disproportionate impact on those with a particular protected characteristic. The claimant in this case is reported as being awarded around £185,000 in compensation, so the case also acts as a reminder that compensation for discrimination is uncapped, and that reputational damage from widespread media attention can also arise. [The law around flexible working is currently subject to a consultation.](#)

**Redundancy:** The Court of Appeal has held that the absence of an appeal does not necessarily render a redundancy dismissal unfair, but rather that it is one of a number of factors and circumstances that must be considered when looking at the overall reasonableness of a redundancy dismissal. Employers should not, however, see this as a decision to regularly depart from offering the right of appeal in a redundancy situation, as despite not necessarily being vital to ensure a fair dismissal, it is nevertheless an important element of a fair redundancy process. ([Gwynedd Council v. Barratt](#))

**Retirement:** The University of Oxford's compulsory retirement age was challenged by two professors in two different employment tribunals, one finding that mandatory retirement was not objectively justified, the other finding that it was. Both claims were subject to appeal, and the EAT has upheld the original decisions in both cases. The nature of the assessment of objective justification, that is, whether the mandatory retirement age was a proportionate means of achieving a legitimate aim, meant that it was not perverse for different tribunals to reach different conclusions on the same policy. This is a stark reminder of the risks associated with litigation. ([Pitcher/Ewart v. Chancellor Masters And Scholars Of The University Of Oxford](#))

**Statutory rights:** Employees are protected from dismissal in circumstances where they have asserted a statutory right, and a recent EAT decision clarifies that a breach of the statutory right does not necessarily need to have occurred. In this case, the claimant was dismissed after complaining and refusing to work additional shifts contrary to the Working Time Regulations 1998 (WTR) on weekly rest breaks. The fact that no breach of the WTR actually occurred was irrelevant; the instruction to work additional shifts was sufficient to have infringed the claimant's rights, and rendered her dismissal automatically unfair. Employers should therefore tread carefully where assertions of this or a similar nature occur. ([Simoes v. De Sede](#))

**Unfair dismissal:** Last year, the Supreme Court determined that the actions and motivations of a person more senior in the corporate hierarchy (but who was not the decision-maker in a particular process) could nevertheless be attributed to the employer and give rise to an unfair dismissal, even if the decision-maker had acted reasonably and in good faith based on the information they had from their superiors ([Jhuti v. Royal Mail](#)). The EAT has said that this approach will only arise in rare circumstances. Whereas in *Jhuti* a senior person had invented a reason to dismiss which was adopted by the decision-maker (who was unaware of the manipulation and invented facts), in this case, a comparable level of deceit had not occurred. Here, although the complaint about the employee's behaviour, which led to their dismissal, was made on an incorrect basis, the more senior complainant had subjectively believed the criticism was warranted and there was no active or demonstrable manipulation to engineer the dismissal. This case will provide helpful clarity and reassurance for employers. ([Kong v. Gulf International Bank](#))



# COVID-19 update

**Coronavirus Job Scheme (CJRS):** The CJRS closed on 30 September 2021. Final claims must be submitted by 14 October 2021.

**Mandatory vaccination:** The legislation on mandatory vaccination in care homes comes into effect on 11 November 2021, meaning anyone working or volunteering in care homes in England will need to be fully vaccinated unless exempt. The legislation is being challenged by way of a judicial review, but in the meantime, the government has also launched a six-week [consultation](#) into making similar legislation in respect of frontline health and social care workers.

**Self-isolation:** The regulations requiring individuals to self-isolate after testing positive for COVID-19, and unvaccinated individuals to self-isolate after having had close contact with someone who has tested positive, have been extended. The rules continue to apply until 24 March 2022.

**Statutory Sick Pay (SSP):** The SSP rebate scheme, which allowed employers with fewer than 250 employees to recover sick pay from the government for COVID-19-related sickness absence, closed on 30 September 2021. Claims for eligible costs for absences up to and including 30 September 2021 can be made until 31 December 2021. Read more on the [Employment Law Watch blog](#).

**Travel exemptions:** The [list of jobs that qualify for exemptions](#) from quarantine, passenger locator forms and testing requirements has been updated to include, amongst other things, film and high-end television production activities and performing arts professionals.

**Winter plan:** The government announced its plan for [autumn and winter 2021](#), with continuation of the vaccination programme (including boosters for the over 50s and vulnerable younger adults, and vaccinations for 12-15-year-olds) as Plan A. However, it does not rule out a return to working from home, mandatory vaccination certification and mandatory face coverings as Plan B, depending on the emerging data and pressure being put on the NHS.

## Legislative developments and law reform

**Carer's leave:** the government has published its [response to its consultation](#) on carer's leave and confirmed that it will, when parliamentary time allows, introduce a day-one right to one week of unpaid carer's leave for employees who have long-term caring responsibilities. It will be possible for the time off to be taken flexibly, in half-day or longer blocks.

**Employment tribunals:** The [Employment Tribunals \(Constitution and Rules of Procedure\) \(Early Conciliation: Exemptions and Rules of Procedure\) \(Amendment\) Regulations 2021](#) amend the current rules of procedure in respect of preliminary hearings and early conciliation as follows:

- From **6 October 2021**, preliminary hearings may be directed by a tribunal on its own initiative (giving the parties reasonable notice, and at least 14 days where a preliminary issue is to be heard) or on application by a party (rule 54 of the ET rules).
- From **1 December 2021**, claimants can provide the name of more than one prospective respondent on their early conciliation form (rule 4 of the early conciliation rules of procedure).

**Ethnicity pay gap reporting:** Although no timescale has been given, the government has confirmed that it will be responding to a 2018 consultation on mandatory ethnicity pay gap reporting and that the issues have been subject to parliamentary debate.



**Flexible apprenticeships:** Following consultation, the government has announced plans to proceed with the introduction of a [flexi-job apprenticeship](#) in the creative, agricultural and construction industries, being sectors that tend to have non-traditional working patterns and for which the standard apprenticeship is not suitable. The scheme will operate through flexi-job apprenticeship agencies who then hire out apprenticeships to host organisations. Applications for becoming an agency, and access to the £7 million apprenticeship fund for registered agencies, closed on **6 October 2021**. It is envisaged that there will subsequently be an annual window for new registrations.

**Tips:** In [response to a consultation](#), the government has confirmed its intention to legislate to ensure that tips are fairly and transparently distributed amongst workers, and that other than lawful deductions for tax, workers received their tips. This reform will be included in the forthcoming Employment Bill which will be progressed when parliamentary time allows.

## Consultations

**Data protection:** The following Information Commissioners Office (ICO) consultations remain open for views:

- A consultation to help the ICO shape its [employment practices guidance](#) on compliance with data protection legislation, covering topics such as recruitment, record keeping, employee monitoring and health data. The deadline for submitting views is **21 October 2021**.
- A consultation considering how businesses can protect personal data when it is [transferred outside of the UK](#) closed on **7 October 2021**.

**Disability:** The government has said it will consult later in 2021 on reporting and voluntary and mandated workplace transparency on disability in the workforce for larger employers.

**Diversity and inclusion:** The FCA has published a [consultation](#) to seek views on improving diversity on the boards of listed companies, and whether to amend the Listing Rules to require disclosure of diversity targets. Views are sought before **20 October 2021**.

**Flexible working:** The government has launched a [consultation](#) on flexible working being the default position for all workers and making the right to request flexible working a day-one right. The consultation will also consider the reasons for refusing requests, the administrative process, whether alternatives should be actively explored, and temporary arrangements. The consultation closes on **1 December 2021**.

## Other news

**Autumn Budget:** The Budget will take place on 27 October 2021.

**Gender pay gap:** The Equality and Human Rights Commission and Chartered Management Institute have published a [toolkit](#) to help businesses address their gender pay gap. Companies employing more than 250 people are also reminded that they have until 5 October 2021 to publish their gender pay gap information (following a six-month extension due to the pandemic).

**Mental health:** The government has issued an [open letter](#) to businesses with details of resources available to promote mental health in the workplace.

**Miscarriage:** The Miscarriage Association has launched a [campaign](#) urging employers to commit to supporting staff members who experience miscarriage, including having appropriate policies and guidance in place, providing support and time off work, and ensuring managers have access to the resources they need to manage the circumstances. Employers are encouraged to sign a pledge to agree to the charity's recommended standards.

**National Insurance:** From April 2022, there will be a 1.25% increase in National Insurance contributions (NICs). Current NIC rates will resume in April 2023 when a new health and social care levy will come into effect instead.

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