



UK Employment Law Update – December 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



Disability discrimination: In an interesting case where the claimant suffered periodic episodes of paranoid delusions, the Court of Appeal has been considering the 'substantial and adverse long term effects' element of the definition of 'disability' in the Equality Act and has upheld the tribunal's judgment that the claimant was not disabled. Although the claimant's episodes were in existence over many years, the substantial and adverse effect was limited to two major episodes, lasting four to five months in 2013 and another lasting three to four months in 2017, and there was no medical evidence suggesting that, after either, the substantial effect was likely to reoccur. This case is a reminder that periodic illnesses will not necessarily fulfil the definition of disability, and the fact that a condition has reoccurred does not necessarily mean that it was likely to, or that it is likely to again. Employers should ensure they have a complete understanding of the medical position, including any prognosis, when managing staff with potentially recurring conditions. ([*Sullivan v Bury Street Capital Ltd*](#))

Disability discrimination: In a case looking at elements of the definition of disability, the Employment Appeal Tribunal (EAT) has determined that the test of whether an impairment adversely affects day-to-day activities is an objective one. In this case a claimant (who had epilepsy and vitiligo) refrained from coffee, alcohol, sunlight, cosmetics, cleaning products and prescribed medication believing they contributed to her conditions, despite there being no medical evidence to support her contentions. As she pleaded her case on physical rather than mental impairments, the EAT concluded that it was appropriate to exclude her coping mechanisms when assessing whether her impairments in fact adversely affected her day-to-day activities. The question of 'disability' has been referred to a new tribunal. ([*Primaz v Carl Room Restaurants t/a McDonalds*](#))

Unfair dismissal: Upholding the tribunal's decision, the EAT held that a misconduct dismissal was outside the band of reasonable responses, and therefore unfair, in circumstances where the claimant was not given an opportunity to respond to the specific allegations being relied upon. This is a reminder that a reasonable investigation and disciplinary process must involve getting the claimant's version of events. This case was also of interest as an example of the claimant being reinstated, a remedy that employers can often overlook as a possibility. ([*London Borough of Hammersmith v Keable*](#))

Working time: The Working Time Regulations 1998 (WTR) specifically exclude training time (where it is conducted by a training provider or educational institution) from the definition of 'working time'. However, a recent decision of the European Court of Justice (ECJ) suggests that the Working Time Directive (on which the WTR are based) goes wider than this, and that time spent undertaking mandatory vocational training at the premises of an external training provider outside normal working hours is 'working time'. As a post-Brexit decision, the ECJ's judgement is not binding in the UK but the courts and tribunals may have regard to it if considering similar issues. Employers who exclude training time from working time should therefore be mindful of this development. ([*BX v Unitatea Administrativ Teritoriala D*](#)).

Legislative developments and law reform

Data protection – immigration exception: The Court of Appeal has ruled that the Immigration Exception in the Data Protection Act 2018 (which exempts compliance with certain data protection rights and obligations where the personal data is processed for effective immigration control) is unlawful as it is incompatible with the General Data Protection Regulation which remains relevant in the UK despite Brexit. The declaration of unlawfulness has been suspended until **31 January 2022** to allow the government time to amend domestic legislation. The decision affects both the public and private sector.

Financial services – Investment Firms Prudential Regime (IFPR): New mandatory rules affecting how firms regulated by the FCA pay and reward their employees come into force on **1 January 2022**. Learn more about the IFPR and how affected firms can prepare for the changes on our [FinReg Focus podcast](#).

Statutory rates and limits: It has been announced that statutory sick pay is set to increase to £99.35 per week (from £96.35) and that statutory maternity, paternity, adoption and shared parental leave pay is to increase to £156.66 per week (from £151.97) from **11 April 2022**.

COVID-19 Update

Vaccinations:

- **Boosters:** The government has extended its rollout of booster vaccinations, setting a target to offer all adults a booster by the end of January 2022. Read more about how the booster rollout may impact workplace vaccination policies on our [Employment Law Watch blog](#) (noting that the booster rollout has been extended further since this was published and that details of any booster received have appeared on the NHS Covid pass since 19 November 2021).
- **Mandatory vaccination (i):** Since **11 November 2021**, it has been a legal requirement for staff in care homes to be fully vaccinated (unless an exemption applies) as a condition of deployment, and the government has now announced plans, following consultation, to extend this to health and social care workers who have direct face-to-face contact with service users (subject to limited exceptions) from **1 April 2022**.
- **Mandatory vaccination (ii):** Although the overall proportion of roles requiring mandatory vaccination is relatively low, recent analysis suggests a 189% growth in the number of UK job advertisements requiring candidates be fully vaccinated. For more on mandatory vaccination policies, read our article in [Global perspectives – International trends in commercial disputes: ‘The new workplace: how vaccines and testing impact employers in England and the United States’](#).

Self-isolation: Employees who test positive for, or who have had close contact with someone who has tested positive for, the new Omicron variant are required to self-isolate regardless of their vaccination status. A change in travel rules also sees a requirement for arrivals to the UK to self-isolate pending a negative PCR test. These changes may impact the ability of some employees attending their place of work.

Coronavirus Job Retention Scheme: The scheme has now closed, and [statistics](#) have been published with an analysis of the scheme by various factors, including sector, geography, age, gender, estimated annual pay and flexible furlough.

Kickstart Scheme: The [Kickstart Scheme](#), which provides funding for employers to create jobs for 16-24 year olds, is closing. The deadline for applications for funding is midday on **17 December 2021**, although jobs can start at any time up until 31 March 2022. Funding is for a six month period.

Working from home: Employees in Scotland have been advised to work from home if possible. As things currently stand, there is no equivalent advice or mandate in England or Wales, but this may change.

Other news

“Fire and rehire”: Last month, we reported that although legislation to curb the practice of dismissal and re-engagement as a way to facilitate changes to terms and conditions of employment would not be forthcoming, the government had asked Acas to develop more detailed guidance on the use of the practice. [Acas guidance](#) on changing terms and conditions, which follows an independent fact-finding exercise on the use of ‘fire and rehire’, has now been published with an emphasis on thorough and constructive consultation with staff to explore all alternative options, describing fire and rehire as ‘a last resort’. The guidance (which is not binding) does not change the law in this area, and employers who are contemplating making changes to employee terms will need to continue to be mindful of their legal obligations and the legal risks associated with their proposals.



Pension age: The [Treasury](#) has confirmed the previously announced plans to increase the normal minimum pension age from 55 to 57 from **6 April 2028**.

Sexual harassment at work: Following the government's announcement earlier in the year that it would be introducing a new duty on employers to proactively prevent sexual harassment in the workplace (for more details see our [Employment Law Watch Blog](#)), the government has now proposed its intention for the UK to ratify the [Violence and Harassment Convention](#) of the International Labour Organisation which, among other things, recognises that everyone has a right to work in an environment free from violence and harassment.

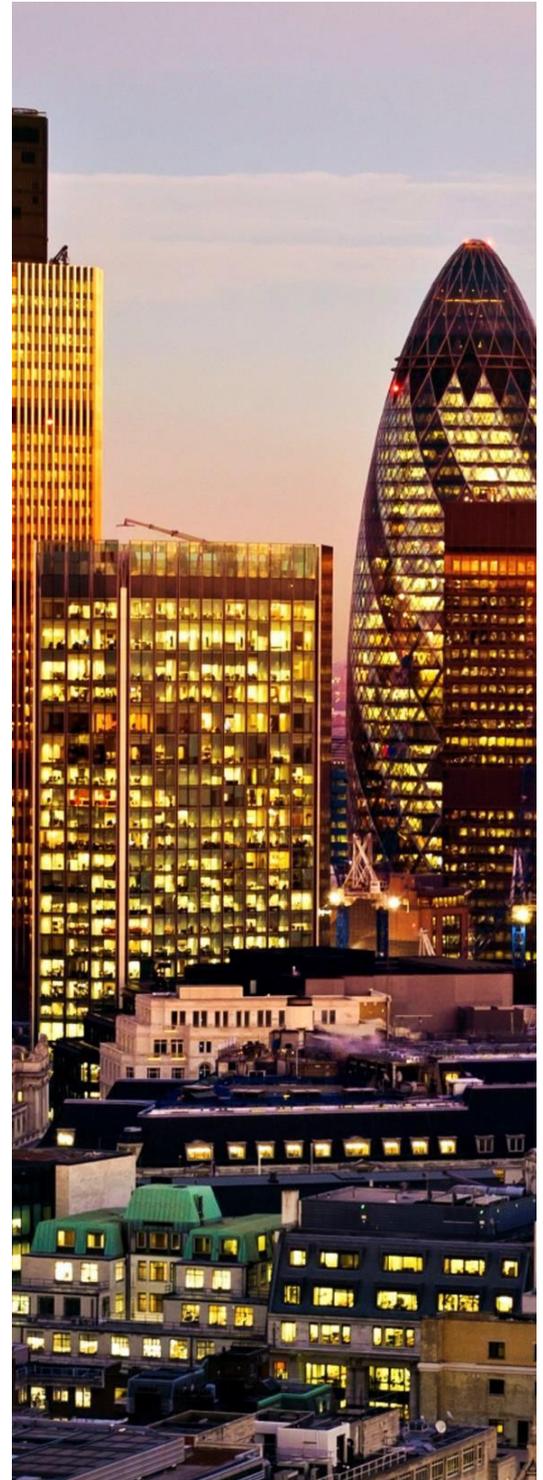
Publications

Employment: [Pioneering employment changes in the UAE with a new labour law](#)

Anti-bribery

- [Do the FCPA, UK Bribery Act, French or German criminal codes make our company liable for the acts of my subsidiaries and employees?](#)
- [How do you define a public official and how does that definition vary between the FCPA, UK Bribery Act and French, German and Greek criminal codes?](#)
- [What do the FCPA, UK Bribery Act, French or German criminal codes mean for dealings with third parties?](#)

Disability inclusion: [Watch the recordings from our Disability Inclusion Summit](#)



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