



## UK Employment Law update – March 2021

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

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**Robin Jeffcott**  
Partner, London  
rjeffcott@reedsmith.com



**Graham Green**  
Partner, London  
ggreen@reedsmith.com



**David Ashmore**  
Partner, London  
dashmore@reedsmith.com



**Alison Heaton**  
Knowledge Management Lawyer,  
Global Solutions - Leeds  
alison.heaton@reedsmith.com



# Case law updates



**Competition claims – disclosure:** The Court of Appeal has upheld a disclosure order that required a defendant to ask its current and former employees to voluntarily disclose their personal mobile phones and emails so that IT consultants could search for work-related communications. Dismissing arguments that the order was disproportionate and inappropriate, in breach of the GDPR, and an infringement of privacy rights, the Court of Appeal considered it relevant that in the circumstances of the case, where the use of personal devices for business purposes was likely to be a deliberate attempt to conceal dealings, the court should have the ability to ensure that relevant documents are disclosed. This case acts as a reminder that, in appropriate cases, parties may be required to disclose documents of third parties or otherwise outside their control. [[Phones4U v. Deutsche Telekom AG & others](#)]

**Covert recordings:** An employee and director of a company who was dismissed for gross misconduct for installing a web enabled camera in his private office was unfairly dismissed. The claimant was suspended from duty and installed the camera because of concerns that someone was accessing his computer while he was away from work. In ruling his dismissal unfair, the EAT found that the employer had failed to carry out any balancing exercise between the rights of privacy and the claimant's wish to protect confidential information, and since there was negligible risk that anyone other than someone entering his room would be caught on the camera, it was outside the band of reasonable responses to dismiss in the circumstances. Cases like this will always turn on their facts, but this is a useful reminder that covert recordings by employees are not necessarily acts of gross misconduct. [[Northbay Pelagic Limited v. Anderson](#)]

**Employment status:** The Supreme Court has held that Uber drivers are “workers” rather than self-employed contractors, entitling them to the associated rights such as the national minimum wage and paid holiday. This case is of particular significance for the gig economy, and as a general reminder that the Courts have determined that employment status is not a contractual matter. [[Uber BV v. Aslam & others](#)]

**Harassment:** An employer has failed to defend a claim of racial harassment by arguing that it had taken all “reasonable steps” to prevent employees acting in a discriminatory way, the EAT finding that the equality and diversity training relied on by the employer to assert the reasonable steps defence was “stale” and no longer effective to prevent harassment given that it had been delivered around two years previously. Employers should therefore be carrying out regular refresher training and/or taking any other action which is both reasonable and likely to be effective in promoting an inclusive, non-discriminatory workplace. [[Allay \(UK\) v. Gehlen](#)]

**TUPE:** A claimant who was unfairly dismissed by the transferor for a TUPE related reason could not rely on the 'successor employer' principle under the Employment Rights Act 1996 to seek reinstatement with the transferee (who was not named as a respondent to this claim). Following an earlier decision, the EAT held that there are limited circumstances where there would be a successor employer in a TUPE situation, and it did not cover a change in employer on a service provision change; any claim or remedy should be brought against the transferee as the new employer. [[Greater Glasgow Health Board v. Neilson](#)]

**Unfair dismissal – face coverings:** An employment tribunal has found that an employee was fairly dismissed for refusing to wear a face covering when attending a client's site. The claimant was a delivery driver and had refused (despite it being the client's policy and him being repeatedly asked) to wear a covering while he was in the cab of his vehicle, saying that was his own space. He was banned from site and summarily dismissed by his employer. Although the ET accepted that another employer might have chosen to issue a warning, it was satisfied that dismissal fell within the range of reasonable responses in the circumstances, particularly given the importance of maintaining relations with the client, his breach of health and safety policies, the practical difficulties of him being banned from the client's site, and concerns arising from his continued insistence that he had done nothing wrong. [[Kubilius v. Kent Foods](#)]

**Whistleblowing – public interest test:** An EAT decision has reiterated the importance of established case law principles (the Chesterton guidelines) for applying the public interest test to determine whether a disclosure is protected under whistleblowing legislation. In particular, the public interest test will be satisfied provided the individual holds a reasonable belief that their disclosure is in the public interest; the test will not fail if they also have personal motivations or other reasons for making a disclosure. [[Dobbie v. Felton Solicitors](#)]

## COVID-19 update

**Clinically extremely vulnerable people:** The government has updated its [guidance on the definition](#) of clinically extremely vulnerable people and now includes an additional 1.7 million people who are advised to shield. The shielding period has been extended until the end of March 2021, and anyone in this category is included on a higher priority for the vaccination. Employers with employees now caught by the extended definition will need to be mindful that under the current shielding guidance, these employees will not be able to attend work (unless they are able to work from home).

### Coronavirus Job Retention Scheme (CJRS):

- The CJRS is being extended to 30 September 2021, with a gradual tapering of the government grant from July. Employers will be required to contribute 10% towards the hours their staff do not work in June, increasing to 20% in August and September.
- HMRC has released its second publication detailing the companies who have claimed a CJRS grant for the December 2020 claim period. This month the publication also includes an indicative value of the claim. It can be found at [www.gov.uk](http://www.gov.uk).



**Easing lockdown:** The government has announced a 'roadmap' for easing restrictions in England over four steps (with similar steps being taken in Scotland, Wales and Northern Ireland). There will be a gradual reopening of businesses which have been closed, although the roadmap is vague about when the 'work from home where you can' mandate may be relaxed. This is subject to an ongoing review.

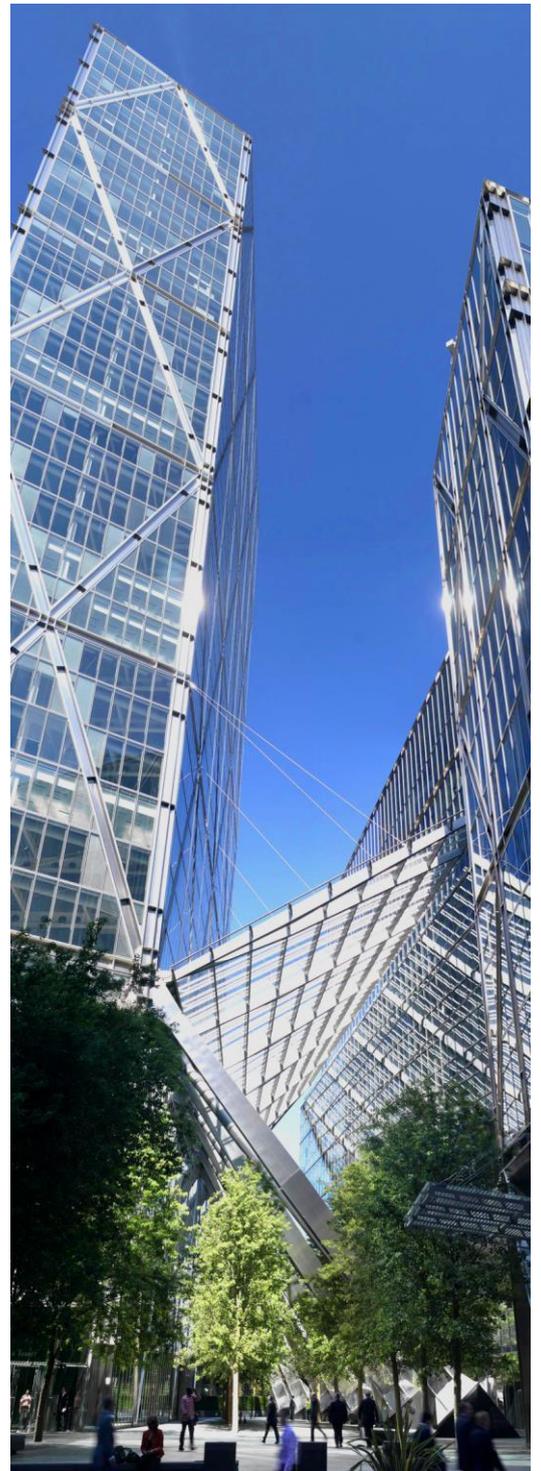
**Occupational risks:** The Environmental Modelling Group has published a paper detailing the [risks of COVID-19 transmission by occupation and workplace](#). This may assist employers with workplace risk assessments and with implementing measures, policies and procedures in the workplace.

**Statutory payments for furloughed staff:** The regulations which require employers to base the calculation of statutory payments (e.g., notice pay and statutory redundancy payments) on employees' usual/normal pay rather than their reduced furloughed pay have been extended to 30 April 2021.

**Travel to the UK:** In addition to existing rules (e.g., no entry for those without residency rights, proof of a negative test in the three days before departure, completion of a passenger locator form, and 10 day quarantine), since 15 February 2021 anyone travelling to the UK from a country on the UK's travel ban list (the 'red list'), or all arrivals into Scotland, are subject to a mandatory 10 day quarantine in a government-approved facility and required to take tests on days 2 and 8. There are financial penalties for non-compliance, and potential prosecution and up to 10 years' imprisonment for anyone attempting to conceal that they have been to a red list country. There are some jobs that qualify for exemptions to the testing and self-isolation requirements – see [www.gov.uk](http://www.gov.uk) – although the exemptions do not apply where travel is from a red list country. There are reports that the policy is being challenged by judicial review proceedings.

**Vaccinations:** The government has brought forward its target date for all adults being offered their first vaccination, that date now being 31 July 2021. The minister in charge of the vaccine roll-out has said that it's "up to businesses to decide" whether to require staff to be inoculated against the virus, and there are calls for the government to provide some clearer guidance for employers, especially given the risks involved with introducing a policy around vaccines.

**Workplace testing:** The government is working with businesses in sectors that are required to be open during lockdown, and which will start reopening under the planned lockdown easing, to scale up workplace testing; those with more than 50 employees may be eligible to take up a government offer for rapid workplace testing of all staff, regardless of whether they show symptoms. In a letter to businesses, the Secretary of State for Business has provided more information about this scheme, which is currently in place until the end of June 2021, and the latest guidance on workplace testing generally can be found at [www.gov.uk](http://www.gov.uk).



# Other news

**Data protection:** Having considered the UK's law and practice on data protection, the European Commission's draft adequacy statement confirms that the UK ensures an "essentially equivalent" level of protection as is required under European legislation. This will be subject to continued review and monitoring.

**Gender balance on FTSE 350 boards:** A recent [report](#) reveals that, as at February 2021, there are no all-male boards in the FTSE 350.

**Gender pay gap reporting:** Companies employing more than 250 people now have until 5 October 2021 to publish their gender pay gap information (a six month extension), although businesses can still voluntarily report their gender pay gaps before October, and are encouraged to do so. It was previously confirmed that, for the purposes of calculation, employers should exclude employees who were furloughed and not receiving full pay on the relevant snapshot date. More information on the impact of the pandemic on the reporting requirements can be found at [www.equalityhumanrights.com](http://www.equalityhumanrights.com).

**Immigration:** To drive innovation and support UK jobs, the chancellor announced a number of measures aimed at attracting highly skilled talent. Proposals include a global business mobility visa (allowing overseas businesses to establish or transfer staff in the UK) and an elite points based visa from spring 2022, reform of the global talent visa category, and a review of the innovator visa category.

**Modern slavery:** The Home Office is encouraging all organisations to publish their modern slavery statements, and has created a central [registry service](#) which is open to all businesses, whether they are legally required to publish their statements in the UK, or choose to do so voluntarily.

**Public sector exit payments:** The regulations that came into force in November 2020 placing a £95,000 cap on public sector exit payments are being revoked with effect from 19 March 2021. Employees affected by the cap will be able to recover any additional sums due as if the cap never existed.

**SEISS:** The High Court has rejected the judicial review challenge to the SEISS, finding that the scheme did not indirectly discriminate against self-employed women who were on maternity leave in the relevant qualifying tax years. They said that the disadvantage was not caused by the SEISS but rather the absence of or a reduction in earnings in the relevant prior period, the reason for which they did not consider relevant given the context and purpose of the scheme. In any event, the court concluded that the scheme was objectively justified and needed to be based on verifiable data held by HMRC. [[The Motherhood Plan & anor v HM Treasury & HMRC](#)]

**Whistleblowing:** It has been reported that 48 per cent of whistleblowing reports made to the Health & Safety Executive since March 2020 related to concerns about employers failing to properly implement safe social distancing at work, with a further 8 per cent of complaints being connected with the failure to provide adequate PPE. Employers are reminded of their legal obligations to staff in respect of health and safety, as well as the importance of having robust policies in place which are regularly reviewed and followed.



# Legislative changes from April 2021

## Minimum wage increases from 1 April 2021:

- Age over 23: £8.91 (from 8.72 for over 25s)
- Age 21-22: £8.36 (from £8.20 for 21-24 year-olds)
- Age 18-20: £6.56 (from £6.45)
- Age 16-17: £4.62 (from £4.55)
- Apprentices: £4.30 (from £4.15)

## Statutory rate increases (proposed) from 4 April 2021:

- Statutory sick pay: £96.35 per week (up from £95.85)
- Statutory maternity, paternity, adoption, shared parental, and parental bereavement pay: £151.97 per week (up from £151.20)

## Statutory limit changes from 6 April 2021:

- Cap on a “week’s pay”: £544 (up from £538)
- Minimum basic award for certain unfair dismissals: £6,634 (up from £6,562)
- Cap on unfair dismissal basic award: £16,320 (up from £16,140)
- Cap on unfair dismissal compensatory award: £89,493 (up from £88,519)

**IR35:** The extension of the IR35 off-payroll rules into the private sector, which was postponed in April 2020 due to the COVID-19 pandemic, is set to take effect from 6 April 2021. For more information, see Reed Smith’s Employment Law Watch blog for a recent article on [IR35 changes](#).

**Post-employment notice pay (PENP):** Individuals who have their employment terminated and receive a termination payment on or after 6 April 2021 will be subject to an amended formula for calculating PENP if their pay period is defined in months, but the contractual notice period is expressed in weeks. Instead of basing the calculation on the number of days in the pay period, 30.42 (being the mean average number of days in a month) should be used.

5 March 2021



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