



UK Employment Law Update – December 2022

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: A recent Employment Appeal Tribunal (EAT) case reminds employers that taking action against a disabled employee for conduct which has been influenced by their disability will not necessarily be unfair or discriminatory. In this case, the claimant, who had autism, was dismissed for her conduct in overstepping professional boundaries (which the claimant was aware of). The EAT confirmed that her employer was able to objectively justify the disciplinary sanction even if it arose as a consequence of her autism. (*Morgan v. Buckinghamshire Council*)

Disability discrimination – reasonable adjustments: A disabled claimant was not discriminated against when his employer failed to adjust an interview process for him as part of a restructuring and redundancy process. It was accepted that the claimant, who was on long term sick leave with work related stress and whose impairment affected his memory, concentration and social interactions, was at a substantial disadvantage compared to non-disabled employees by the requirement to be interviewed for a role in the new structure. However, the EAT was satisfied that it was not reasonable for his employer to delay his interview as a short delay would not have alleviated the disadvantage and time was of the essence as other candidates had been interviewed. The EAT also concluded that simply 'slotting in' the claimant to the new role without interview was not a reasonable adjustment as this provided him with an advantage over other candidates which went over and above alleviation of his disadvantage. It was also relevant in this case that the claimant had made it clear that his unwillingness to attend the interview was unconnected with his disability. This case is a helpful illustration for employers about the scope of their duty to make reasonable adjustments. (*Hilaire v. Luton Borough Council*)

Equal pay: A job evaluation study (JES) is a common feature of equal pay claims, often with technical preliminary arguments about whether something amounts to a JES. In an appeal on this issue, the EAT has confirmed that whether a study amounts to a JES should be considered in light of the definition in the Equality Act 2010 – this is narrower than the position established through case law, and as set out in the Equality and Human Rights Commission Statutory Code of Practice on Equal Pay, and although the EAT did not think the analysis would be affected in practice, the decision leaves scope for some uncertainty in this area. The case also considered the burden of proof for establishing whether a study is a JES, concluding that the burden rests with the person seeking to rely on it. (*Element v. Tesco*)

Unfair dismissal: An EAT decision reminds us that a successful appeal against a dismissal will overturn the dismissal and the employee is treated as reinstated with appropriate back pay, and that this is the case regardless of whether the employee wants to return. If the employee does not wish to be reinstated, they should either not appeal the decision, or clearly and unambiguously withdraw their appeal. (*Marangakis v. Iceland Foods*)

Settlement agreements: The first tier tax tribunal has held that a substantial payment made to an employee in consideration for entering into confidentiality and non-disclosure obligations under a settlement agreement was taxable as employment income. Employers should remember to take care when structuring settlement payments to take account of the different tax rules, and draft the settlement terms accordingly. (*Mrs A v. HMRC*)

Unfair dismissal – mitigation of loss: A recent EAT decision is a helpful reminder that claimants must provide evidence of why they have not sought to mitigate their loss. In this case the claimant said she had not searched for another job due to concerns that she was stigmatised as a whistleblower. Although the employment tribunal held that this was not an unreasonable failure to mitigate her losses prior to the liability decision, the EAT disagreed – the claimant should have presented evidence which factually supported her assertion. (*Hilco Capital v. Harrington*)

Legislative developments

Whistleblowing: The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2022, which comes into effect on 15 December 2022, amends the statutory list of prescribed persons to whom disclosures can be made to gain protection under whistleblowing legislation. The amendments include widening the scope of matters with respect to which the Financial Conduct Authority (FCA) is a prescribed person.

Low income workers – exclusivity clauses: New regulations, which came into force on **5 December 2022**, render exclusivity clauses in contracts for low income workers unenforceable, and provide protection to any such workers who suffer detriment for breaching an exclusivity clause. Low income workers are those who earn less than the 'lower earnings limit', which is £123 per week in 2022/23. These regulations extend the rules already in place (since 2015) regarding exclusivity clauses in zero hours contracts. (Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022).

Fire and rehire: The promised statutory code of practice on fire and rehire is expected "in the near future".

Human rights: It is being reported that the Bill of Rights Bill (which will repeal the Human Rights Act 1998 and reframe the UK's relationship with the European Convention on Human Rights) has been reinstated by the government and has resumed its passage through the legislative process. The Bill had previously been dropped under former prime minister Liz Truss.



Other news

Budget: The government's [autumn statement](#) was made on 17 November 2022. Key employment related announcements are:

- **National Living Wage (NLW) and National Minimum Wage (NMW):** From 1 April 2023, the NLW rate for those aged 23 and over will increase to £10.42 (from £9.50). The NMW rates (for those aged 22 and under) are as follows:
 - Age 21-22: £10.18 (from £9.18)
 - Age 18-20: £7.49 (from £6.83)
 - Age 16-17: £5.28 (from £4.81)
 - Apprentice rate: £5.28 (from £4.81)
 - Accommodation offset: £9.10 (from £8.70)

The government also reiterated its commitment to increasing the NLW to two thirds of median earnings by 2024, and extending the NLW rate to over 21s.

- **Income tax:** From 6 April 2023, the threshold for paying the additional rate of income tax (45 per cent) will be reduced from £150,000 to £125,140. All other thresholds will be maintained until April 2028.
- **National Insurance contributions (NICs):** Current NIC thresholds will remain in place until April 2028. Class 2 and Class 3 NIC rates will be increased in line with inflation for 2023/24 and set until 2028, and the threshold at which employers start to pay Class 1 Secondary NICs will be fixed at £9,100 from April 2023 to April 2028.
- **Lower earnings limit (LEL):** The LEL will remain at the 2022/23 rate of £123 per week for 2023/24.
- **State pension age:** The outcome of a review into the appropriateness of the currently proposed increase to the state pension age over the next 25 years will be published in early 2023.
- **Employment:** There will be a phased rollout, from September 2024, of 'In-Work Progression', a programme to tackle barriers to progression of low earners.
- **Unemployment:** Current forecasts are that unemployment will rise to 4.9 per cent in 2024.

- **Real wages:** Adjusted for inflation, real wages fell by 3.7 per cent in Q3 of 2022. It is forecasted that nominal earnings will rise by 4.2 per cent in 2023, but will fail to keep pace with rising prices.

2023 bank holidays: There will be an additional bank holiday, on Monday **8 May 2023**, to celebrate the coronation of King Charles III.

Accent bias: A recent [study](#) by the Sutton Trust highlights the prevalence of accent bias in the workplace, with workers reporting being conscious of their accent, being mocked for it, and having concerns that their accent will impact their ability to succeed. The report notes how accent can be a primary signal of socio-economic status, and a potential indicator of protected characteristics such as gender, race, age, and/or sexual orientation, even though socio-economic status is not in itself protected under the Equality Act 2010. Regardless though, employers should embrace the diversity of accents among their staff, and include accents in their DEI agenda to actively consider and reduce accent bias in the workplace.

Fertility: A [study](#) published by Fertility Network UK during fertility awareness week reported that over half of employees who were either going through fertility treatment, or having fertility issues, did not have adequate support from their employers. It also reports how more than half of the participating employees who had undergone or were undergoing treatment felt that work affected their treatment (e.g., because of difficulty making appointments), that their treatment affected their work (e.g., because of an inability to concentrate), and that their careers would be affected. Although there is currently no legal requirement to provide time off (a private members' bill on this issue is currently being considered), employers are encouraged to consider what more they can do to provide support and raise awareness around this issue.

Ethnic pay gaps: A [report](#) by the Institute of Fiscal Studies suggests that although educational progression and employment opportunities have improved for ethnic minorities, a significant pay gap remains, with marked differences between different ethnic groups. There is currently no mandatory requirement for UK businesses to report on their ethnic pay gaps, although we are expecting guidance to encourage voluntary reporting.

Women on boards: A [report](#) by the Cranfield School of Management has reported that while a target of 40 per cent female representation on boards of FTSE companies has been reached in the FTSE 100 and almost met in the FTSE 250, genuine gender equality in senior roles is still lacking, with the majority of progress coming from women in non-executive rather than executive positions. The report highlights the ongoing need for leaders to set about change, prioritising gender diversity and focusing on gender-proofing executive succession planning. Meanwhile, in the EU, a proposed directive is being considered which will require listed companies in member states to meet particular targets in respect of women holding executive and non-executive positions.

Four-day working week: Following a trial, 100 UK companies are reported to have signed up for a permanent four-day working week with no loss of pay for employees. Read more about the four-day working week initiative on our [Employment Law Watch blog](#).

Financial services: The FCA has published a [speech](#) by its COO about how the culture in financial services can change to everyone's benefit. It encourages firms to analyse their culture and how this impacts conduct, while creating an environment where people feel safe to challenge and speak out.

New guidance

Menopause: New [NHS guidance](#) has been published to help employers improve their culture around menopausal support. While directed at NHS staff, the guidance is intended to be transferrable for use within other workplaces.

Consultations

Workplace monitoring: The Information Commissioner's Office (ICO) has issued [draft guidance](#) for employers on monitoring in the workplace. It is inviting views on the content by **11 January 2023**.

Workers' health: The ICO has also produced [draft guidance](#) on information pertaining to workers' health, and is inviting views on the content by **26 January 2023**. Read more about this topic on [ReedSmith.com](#).

Publications and on-demand recordings

- [Get the party started: Preventing HR issues at work events](#)
- [Avoiding an own goal: Managing employment issues during the World Cup](#)
- [Flexible working reforms: what do UK employers need to know?](#)
- [Louise Worrall: Resilience, discipline, and adaptability](#)
- [Paving the way: Creating diverse, inclusive, and equitable professional industries](#)

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