



## UK Employment Law Update – October 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



**Investigation reports – legal advice privilege:** Employers should take heed of an Employment Appeal Tribunal (EAT) decision which found that an investigation report will not retrospectively attract legal advice privilege by virtue of having legal advice on its content. In this case, a grievance investigation report was prepared by an independent member of the staff but was subsequently subject to a number of amendments by external legal advisors and by the original author. In later Employment Tribunal (ET) proceedings, only the final version was disclosed, although it was clear from annotations that it had been revised following legal advice. The claimant therefore sought, and succeeded with, an application for disclosure of the original and unamended report. The EAT rejected the argument that the original document was subject to legal advice privilege – the report was not privileged when it was first made (no legal advice had been received on it, and the report was not prepared in contemplation of litigation), and subsequent legal advice did not retrospectively mean that privilege could be attached. It was unclear which amendments were made as a result of legal advice and which were made by the author and were unrelated to that advice. Also, it was relevant that a comparison between the original and final versions could allow inferences to be drawn. This case highlights the importance of working alongside legal advisors on an investigation plan, establishing in advance what legal advice is needed – exercising careful consideration and keeping that plan in mind when preparing documentation, since draft reports may become disclosable. (*University of Dundee v. Chakraborty*)

**Disability discrimination – long COVID:** An employee who was dismissed a couple weeks after contracting COVID, and who was subsequently diagnosed with long COVID, was not disabled for purposes of the Equality Act 2010 (EqA). Although her symptoms had a substantial effect on her ability to carry out day-to-day activities, they could not, at the time of her dismissal, be said to be or likely to be long-term as long COVID was not a consequence of COVID for the majority of people. Cases of this nature turn on their facts, and had the claimant already been diagnosed with long COVID at the time of her dismissal, the outcome may have been different. However, it is a useful reminder that for protection, an employee must be disabled at the date of the alleged discrimination. (*Quinn v. Sense Scotland*)

**Discrimination – philosophical belief:** Whether a particular belief amounts to a protected philosophical belief under the EqA is often the subject of litigation. In this case, the claimant argued that his support for the Rangers football club was a way of life and akin to a religion. However, while his support and genuine devotion to the club was not disputed, the ET did not consider it to amount to a ‘belief’ or otherwise meet the criteria necessary to be covered by the EqA. (*McGlung v. Doosan Babcock and others*)

**Unfair dismissal – misconduct:** The EAT has upheld the ET’s decision that it was fair to dismiss an employee for misconduct for persistent lateness over numerous years. The claimant had received several warnings after being up to half an hour late for work on numerous occasions. At the time of her dismissal, she was on a final written warning with no signs of her timekeeping improving. Despite only being a few minutes late on a few occasions, and despite the company’s disciplinary policy not being disclosed, the extent of her lateness was sufficient to justify dismissal – especially because there was no evidence of her having been treated differently to others. The EAT commented that employees must be both present and ready for work and that timekeeping was generally considered a conduct issue. (*Gafari Tijani v. House of Commons Commission*)

**TUPE:** The EAT has determined that a claimant’s rights under a collateral contract to participate in a share incentive plan (SIP), but which rights were not expressly referenced in the employee’s employment contract, were nevertheless “in connection with” his employment and therefore were transferred under the Transfer of Undertakings (Protection of Employment) (TUPE), entitling him access to a substantively equivalent SIP with his new employer. The case reminds parties to a TUPE of the importance of establishing which rights are transferred, and for a transferee to ensure that appropriate arrangements are in place to provide equivalent benefits which they are unable to replicate, as well as to ensure that the changes are covered in the required pre-transfer information and consultation and exercise. (*Ponticelli v. Gallagher*)

**Employment tribunal procedure – extending time:** The EAT has held that it was not inappropriate for an employment tribunal to consider the merits of a claim when weighing up whether it was just and equitable to extend the time limit for bringing discrimination claims. An assessment of the merits could be reasonably made from information presented at the preliminary hearing, and although the tribunal could not say that the claims were so weak so as to have no reasonable prospect of success, they were entitled to take the merits into account. This case is a helpful reminder for employers arguing jurisdictional points that it may be helpful to introduce at a preliminary stage any evidence that strongly supports the merits of the substantial claim. (*Kumari v. Greater Manchester Mental Health NHS Trust*)

**Employment tribunal procedure – extending time:** In another case involving the extension of time, the respondent was permitted to lodge their appeal against a default judgment out of time because the delay had been affected by the CEO's mental impairments – specifically, ADHD and depression. It is perhaps relevant that the respondent's business was small; larger businesses would likely be expected to have more personnel dealing with claims management. It is also noteworthy that although the original default judgment arose from the claim having been sent to the company's accountants (as the registered office) during COVID (when some offices were closed), these were not reasons in themselves for justifying an extension, employers being expected to make reasonable efforts to ensure that important paperwork reaches them and it not being unusual to expect post to be sent to a registered address even if this is not the same as the company's office address. (*MTN1 Ltd v. O'Daly*)

**Employment tribunal procedure – multiple claims:** Where a claim is issued on behalf of multiple claimants, the EAT has held that it is sufficient for the claim form to only include the Acas early conciliation (EC) number from a certificate belonging to one of the named prospective claimants, rather than having to quote the EC numbers of every claimant. However, the EAT went on to say that it is good practice to include the EC numbers of all claimants on a multiple claim form to assist the ET and to avoid arguments about whether the claim should be accepted for failing to comply with EC requirements. Employers facing multiple claims should be mindful that this case may impact any potential technical arguments for a claimant being rejected. (*Clark and others v. Sainsburys Supermarkets Ltd*)

**Employment tribunal procedure – Civil Procedure Order (CPO):** A claimant who was subject to a CPO, requiring consent from the High Court to commence civil proceedings, was prevented from pursuing his ET claim despite getting retrospective consent to issue proceedings. He did not have consent at the time of commencing his claim, and both the ET and EAT agreed that retrospective consent was insufficient. (*Williamson v. the Bishop of London and others*)

## Legislative developments

**Retained EU Law (Revocation and Reform) Bill 2022-2023:** A bill has been introduced which will automatically repeal all retained EU law on 31 December 2023 (subject to a power to extend this date to 23 June 2026) unless specific legislation is introduced to retain it. Read what this might mean for EU-derived employment laws on our [Employment Law Watch blog](#).

**UK Bill of Rights:** Following the appointment of Liz Truss as the new Prime Minister, plans to reform the Human Rights Act 1998 and introduce a new UK Bill of Rights have been dropped.



## Other news

**Growth Plan 2022:** The newly formed government revealed its [Growth Plan](#) (or mini-budget) on 23 September, setting out its economic agenda. The following announcements are relevant in an employment context:

- **National Insurance Contributions (NICs):** The 1.25 percentage point rise in NICs which took effect from 6 April 2022 will be reversed from 6 November 2022. The Health and Social Care levy (which was going to replace the NIC increases from April 2023) has been cancelled.
- **Income tax:** From April 2023, the basic rate of income tax is reduced to 19 per cent.
- **Banker bonuses:** The cap on bankers' bonuses is being removed.
- **Industrial action:** Legislation is set to be introduced to ensure minimum service levels are in place for transport so that industrial action does not make it impossible for people to travel to work. Legislation is also anticipated to ensure that any pay offers are put to a members' vote, with strike action only permitted if rejected.
- **IR35:** The IR35 reforms will be repealed in the public and private sectors, from 6 April 2023.
- **Immigration:** A plan is expected in the coming weeks with details of how the government proposes to ensure the immigration system supports economic growth.
- **Employment rates:** More support will be provided to get people back into work, including improved accessibility to affordable and flexible childcare.

**Right to work checks:** The COVID-adjusted right-to-work checking measures ended on 30 September 2022. Since **1 October 2022**, employers need to either (i) revert to their pre-COVID checking processes, carrying out in-person manual checks; (ii) carry out online right-to-work checks online, provided the individual is a foreign national with a biometric work or residence permit or e-visa, and has provided their date of birth and share code; or (iii) use a certified identity service provider for complete digital right-to-work checks. For more information, see our [Employment Law Watch blog](#).

**Real living wage:** The real living wage, a voluntary rate, has increased to £10.90 per hour (£11.95 per hour in London), the highest percentage increase in the history of the rate. There are approximately 11,000 living wage employers who commit to paying wages at a minimum of this rate rather than the lower statutory living wage (currently £9.50).

**Scotland:** The UK government has confirmed that it does not intend to devolve employment law to Scotland.

**Industrial action:** Trade unions have commenced judicial review proceedings in response to regulations which came into force in July 2022 and which allow employment businesses to supply agency workers to replace striking staff. A response is required within 21 days.

## New guidance

**Artificial Intelligence:** The Equality and Human Rights Commission has published new [guidance](#) on AI in public services.

**Suspensions at work:** Acas has issued new [guidance](#) for employers on considering and handling workplace suspensions.



# Consultations

**Hybrid working:** The Office of Tax Simplification has called for evidence on emerging trends in hybrid and distance working in order to consider the tax implications. It has also published a survey for both employees and the self-employed. The call for evidence closes on **25 November 2022**.

**Public sector exit payments:** Following the repeal in 2021 of a cap on public sector exit payments, HM Treasury is now consulting on proposals to introduce administrative controls where public sector exit payments exceed £95,000 and to amend the process for special payments over and above contractual and statutory entitlements. The consultation closes on **17 October 2022**.

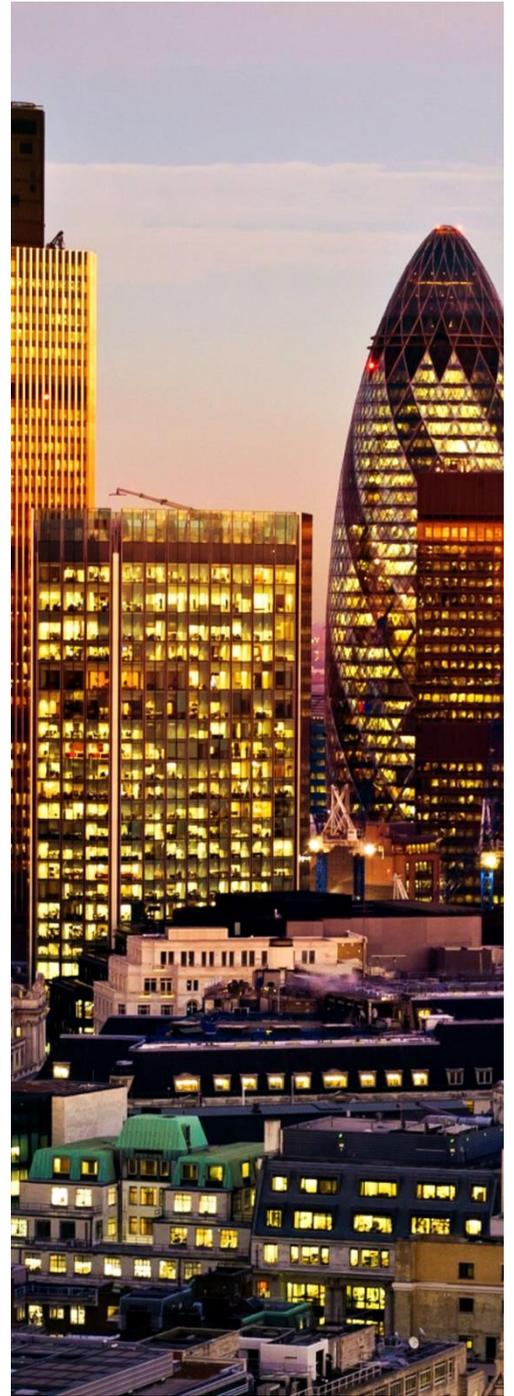
# Upcoming events

(Register using the link below)

[Let's talk gender, sex, identity and equity](#) – 8 December 2022

# Publications

[Sex and gender identity: managing conflicting views](#)



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