



# UK Employment Law Update – December 2023

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

**Changing terms and conditions:** There is a risk of an employee being deemed to have been unfairly dismissed where an employer unilaterally places the employee into a new role on different terms and conditions (even where the employee remains employed in that new role and does not resign). In determining if there has been a dismissal, the key question is whether the changes are such that, in effect, they amount to the initial contract being terminated by the employer and replaced by a new one. In this recent case, which had a complex factual background, the Employment Appeal Tribunal (EAT) overturned the decision of the employment tribunal (ET), which had found that there was no dismissal where an employee was unilaterally moved to a lower grade role. The EAT was critical of the ET's rationale – the ET had failed to carry out a proper 'before and after' exercise to compare the terms and had wrongly given relevance to the employer having no intention to dismiss the claimant. The case has been remitted to the ET. ([Jackson v. University Hospitals of North Midlands NHS Trust](#))

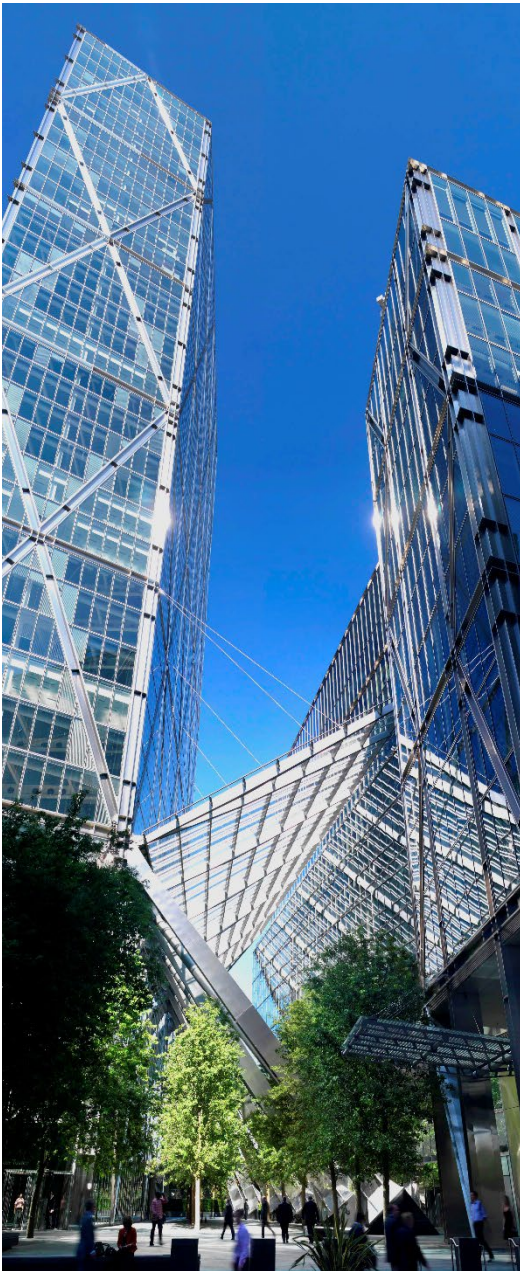
**Constructive unfair dismissal:** Constructive dismissal claims arise from an employee resigning in response to their employer's fundamental breach of contract, although claims will fail where the employee has 'affirmed' or accepted the contract after the alleged breach. A recent case has explored whether invoking a grievance procedure or appeal process is sufficient to unequivocally affirm the contract. In this case the claimant raised a grievance about the alleged breach, reserving her rights, and resigned before the grievance process was complete. The ET dismissed her claim on the basis that her continued employment and delayed resignation meant she had affirmed the contract, but the EAT concluded the fact of her grievance was insufficient in itself, and more consideration to the overall circumstances was necessary to determine whether she had in fact affirmed the contract. ([Brooks v. Leisure Employment Services](#))





**Insolvency – redundancy:** In a case which will be welcomed by administrators, the Supreme Court has determined that an administrator appointed under Part II of the Insolvency Act 1986 is not an “officer” of the company within the meaning of the phrase “director, manager, secretary or other similar officer of the body corporate” so as to fall within section 194(3) of the Trade Union and Labour Relations (Consolidation) Act 1992, meaning they are not liable to prosecution for failing to file an HR1 form. ([R \(on the application of Palmer\) v. Northern Derbyshire Magistrates Court and another](#)). Read more on our [Employment Law Watch blog](#).

**Redundancy:** A recent EAT decision is a helpful reminder of the procedural requirements of a fair redundancy dismissal, reiterating that a reasonable employer should take steps to mitigate against the impact of redundancies by limiting the number of people affected, the impact on individuals or avoiding dismissals, via meaningful consultation. In this case, there was no opportunity for the claimant to discuss the redundancy proposals or try to affect the decision, and he was not provided with his scores from the selection matrix, failures which could not be rectified on appeal. As such his dismissal was unfair. ([De Bank Haycocks v. ADP RPO Ltd](#))



**Resignation:** Although employers can usually rely on words of resignation in line with their ordinary meaning, a recent EAT decision is a useful reminder that this is less straightforward when resignations are given ‘in the heat of the moment’. In this case the claimant tendered his verbal resignation during an argument with his line manager, but a couple of days later (and without having put his resignation in writing) sought to retract it. Although the ET found the resignation to stand on the basis of words used, the EAT decision reiterates that in these types of cases, the words used are not sufficient alone – it is also relevant to consider whether, objectively, the employee ‘really’ intended to resign. ([Omar v. Epping Forest District Citizens Advice](#))

**Trade unions:** The Supreme Court has concluded that Deliveroo drivers do not have rights under article 11 of the European Convention on Human Rights to form and join a trade union because they do not have an employment relationship with the company. This does not affect Deliveroo’s ability to voluntarily agree to recognise a trade union. ([Independent Workers Union of Great Britain v. Central Arbitration Committee](#))

**Whistleblowing:** The EAT has prohibited a claimant from bringing fresh proceedings relying on the same set of protected disclosures used as part of a previously settled claim, but from which she alleged subsequent new (post-settlement) detriments. The COT3 agreement used to settle her original claim contained sufficient wording to prevent future claims associated with the disclosures, highlighting the importance of clear wording in settlement agreements. ([Ajaz v. Homerton University Hospitals NHS Foundation Trust](#))

**Woman – definition:** The Scottish Court of Session (Inner House) has held that a ‘woman’ for the purposes of the Equality Act 2010 includes trans-women with a gender recognition certificate. While not binding in England and Wales, this decision may be referred to if the definition of ‘woman’ is in dispute. ([For Women Scotland Ltd v. The Scottish Ministers](#))

## Legislative developments

**Employment tribunals:** Draft regulations have been placed before parliament which place responsibility for determining the composition of the ET and EAT with the Senior President of Tribunals (SPT). Most cases are expected to be heard by a judge sitting alone (including preliminary hearings), but the SPT will decide whether it is appropriate for the case to be heard by a panel (which would include one or two lay members). It is currently unclear when these changes will come into effect.

**Equality:** Regulations laid before parliament will ensure that, from 1 January 2024, the law will continue to provide a number of protections which were developed under EU derived laws in respect of pregnancy, maternity and breastfeeding, indirect discrimination, access to employment and occupation, equal pay and the definition of disability, and which would otherwise be lost at the end of the year under the Retained EU Law (Revocation and Reform) Act 2023.

**Strike action – minimum service levels:** The Strikes (Minimum Service Levels) Act 2023 was passed back in July, giving powers to make regulations to set minimum service levels in certain industries during strike action. The government has now made regulations under these powers, to set minimum service levels for ambulance, rail and border security staff, which are expected to be in force by the end of the year. A draft [code of practice](#) (which deals with the reasonable steps that a trade

union must take to comply with the legislation) has also been laid before parliament and is expected to be in force by mid-December.

**TUPE:** Following a consultation earlier this year, the government has announced its intention to change the consultation obligations so that there can be direct consultation with affected staff for businesses with fewer than 50 employees or businesses of any size with fewer than 10 transferring employees (in both cases, assuming no existing employee representatives are already in place). Regulations addressing these changes have been laid before parliament and are expected to come into force on 1 January 2024. [Read more on our \*Employment Law Watch\* blog.](#)

**Working time:** The government has also announced its intention to introduce rolled-up holiday pay and a 12.07% accrual method for calculating the holiday pay of those working irregular hours or part of a year. It is also clarifying record keeping requirements and restating the current laws that allow for carry over of holiday where this has not been taken due to family leave or sickness absence, and for payments such as commission and overtime to be 'normal remuneration' for holiday pay calculation purposes. Regulations addressing these changes have been laid before parliament, with the record keeping, carry over and normal remuneration elements expected to come into force on 1 January 2024, and rolled-up holiday pay and accrual calculations expected from 1 April 2024. The COVID-related holiday carry over will stop on 31 March 2024. Read more on our [Employment Law Watch](#) blog.

**Carers' Leave:** The Carers' Leave Act 2023 (Commencement) Regulations 2023 have been published, bringing the Carers' Leave Act 2023 (which was passed in May) into force from **4 December 2023**, creating a power to make regulations on the detail of a new statutory right to unpaid leave per year for the purposes of providing or arranging care for a dependent with a long-term care need. It is currently anticipated that these further regulations will be in place for the new right to apply from April 2024.

## Other news

**Autumn budget:** The 2023 [autumn statement](#) was presented on **22 November 2023**. Key employment related announcements are:

**National insurance contributions (NICs):**

- Class 1 employee NICs will be cut from 12% to 10% from **6 January 2024**.
- The NICs holiday for veterans in their first year of civilian employment will be extended to **5 April 2025**.
- For the self-employed, Class 2 NICs will be abolished, and the main rate of Class 4 self-employed NICs reduced from 9% to 8%, from **6 April 2024**.

**National minimum wage:** The rates to apply from **1 April 2024** have been announced, along with a change to the threshold for being eligible for the highest rate:

- Over 21s (a change from the current over 23s): £11.44
- 18-20: £8.60
- 16-17 and apprentices: £6.40

**IR35:** Legislation is expected to allow HMRC to reduce the PAYE liability of a deemed employer in the event of incorrect treatment of an individual as self-employed, allowing a set off for certain taxes already paid by the worker. This will take effect from 6 April 2024 but will be back-dated to apply to errors arising from **6 April 2017** (unless a settlement with HMRC has already been reached).

**Collective bargaining – redundancies:** The International Labour Organization (ILO) has made a number of [recommendations](#) to the UK government to strengthen collective bargaining rights in the event of mass redundancies. The ILO stops short of recommending legislative change to allow organisations to be enjoined if they fail to comply with their collective consultation obligations, or to ban fire and rehire practices.

**Financial services – gender:** HM Treasury has published a [report](#) on female representation in senior finance roles and the progress made since the launch of the Women in Finance Charter in 2016.





**King's speech:** The king delivered his [speech](#) at the state opening of parliament on 7 November, setting out the government's legislative agenda and priorities. There is nothing by way of employment law reform, although there is still an intention to simplify the UK's data protection framework.

**Occupational health:** Following a consultation earlier this year, the government has [announced](#) an intention to introduce a framework setting out minimum occupational health provision and best practice guidance for employers. This will be a voluntary framework, with no mandates placed on employers.

**Pay gaps:**

- The latest [TUC statistics](#) show that while the disability pay gap is lower than a year ago, it still remains higher than a decade ago. As a result of the figures, the TUC is calling for mandatory disability pay gap reporting.
- The Office for National Statistics (ONS) has [published](#) gender pay gap information for 2023 showing a marginal improvement on last year.
- A report published by the Social Mobility Foundation reports a significant pay gap within the same occupations between those from working class backgrounds and those from more privileged backgrounds.

**Right to work:** With effect from **22 January 2024**, the fines for employing someone who does not have the right to work in the UK will triple from £15,000 per illegal worker, to £45,000. A new statutory code of practice has been issued to help employers avoid the penalty (see below).

## New Guidance

**Apprenticeships:** The government has issued new information about [flexi-job apprenticeships through an approved agency](#) and [portable flexi-job apprenticeships](#).

**Discrimination:** Acas has published new [guidance](#) on protected characteristics in decision making, looking particularly at the concept of positive action and the objective justification by employers making decisions which could affect those with a relevant characteristic.

**New mothers:** The Fawcett Society has issued [new guidance](#) for employers in supporting new mothers at work. Amongst other things, it recommends having a clear policy framework, embedding flexibility and development, and fostering an inclusive culture.

**Right to work:** A new [code of practice](#) has been issued on preventing illegal working and outlining steps employers can take to avoid civil liability. It is in draft form, pending approval from parliament, but is expected to apply to all right to work checks from 22 January 2024 to coincide with the increase in fines for employing illegal workers (see above).

## Consultations

**Statutory sick pay (SSP):** An [inquiry](#) has been launched into the effectiveness of the SSP regime and how it might be improved to better support recovery and the return to work. Responses can be provided until **8 December 2023**.

**Seafarers' wages:** A [consultation](#) has been launched on the draft regulations and guidance on elements of the Seafarers' Wages Act 2023, legislation which is designed to protect seafarers working on regular international services to/from the UK from being paid less than an equivalent to the national minimum wage while in UK territorial waters. The legislation also grants authority to harbour authorities to seek a declaration from shipowners that they are compliant, to charge them for failing to provide a declaration, and to refuse access to the port for non-compliance. Part one of the consultation looks only at the harbour authority elements and is open for comment until **11 December 2023**. Part two, looking at the pay elements, will be launched in the new year.

**Financial services – DEI:** The [PRA](#) and [FCA](#) have issued separate but linked consultation papers on proposed regulation, rules and expectations to improve DEI in regulated firms. Both consultations are open for comment until **18 December 2023**. The consultations are broad in scope and include proposed changes to the treatment of non-financial misconduct. [Read more in our client alert](#).

**Employment tribunals:** The Law Society has published a [paper](#) which invites views on a variety of proposed reforms to the ET system, including jurisdiction, time limits and enforcement. Responses should be submitted by **5 January 2024**.

**Regulated industries (excluding financial services):** The Department for Business and Trade is [calling for evidence](#) on improving the regulatory landscape and invites views from regulated businesses before **7 January 2024**. Financial services are explicitly excluded.

**Industrial action – agency workers:** The government has launched a consultation on hiring agency workers to cover industrial action. Legislation which had been in place to allow this was quashed in July 2023 following a challenge to the sufficiency of the consultation ahead of enactment. The consultation on reinstating provisions to allow agency worker cover during strike action will be open for comment until **16 January 2024**.

**Predictable working patterns:** Acas has launched a [consultation](#) on its draft code of practice to accompany the new legislation (which is expected to come into force in autumn 2024) giving certain workers the right to request a more predictable working pattern. It is open for comment until **17 January 2024**.

**Fit notes:** As part of a series of welfare reforms, the government has [announced](#) an intention to consult on reforms to the fit note regime. There is currently no detail on what it has in mind, nor a date for launching the inquiry.



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