



## UK Employment Law Update – March 2023

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



**Carl De Cicco**  
Partner, London  
cdecicco@reedsmith.com



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



# Case law updates



**Employment status:** When analysing whether an individual is an employee, it is a well-established principle that the written contractual terms are not determinative and that the issue should be considered holistically whilst also considering the reality of the relationship between the parties. A recent Employment Appeal Tribunal (EAT) decision considered this issue further in circumstances where the claimant (purportedly engaged as an independent contractor) argued that the written terms should not be the starting point for analysis. The EAT provided clarity that the starting point should always be the words of the statute (section 230(1) of the Employment Rights Act 1996) and that in circumstances where there is no dispute that the written contractual terms reflect the intention and reality of the relationship, no further enquiry will be needed. However, where it is alleged that the written terms do not accurately reflect the intention or reality, wider considerations should be looked at. It would be wrong to disregard the written terms completely, but also not wrong for them to have been considered at the outset in the context of a wider analysis of the relationship. (*Ter-Berg v. Simply Smile Manor House Ltd*)

**Flexible working:** A recent EAT decision is a helpful reminder that disadvantage or detriment arising from a discriminatory decision cannot necessarily be cured on appeal (although it may impact compensation), acting as a cautionary tale for employers considering and negotiating flexible working requests. In this case, the claimant made a flexible working request while she was on maternity leave. Having previously worked five days on a flexible basis across all seven days of the week, she asked for three fixed days to accommodate childcare. This was rejected, and on appeal, she was initially offered four days a week on a flexible basis. However, following legal intervention, and while she was still off work, her original request was agreed. She subsequently brought an indirect discrimination claim which was rejected by the employment tribunal (ET) on the basis that the provision, criterion or practice (or PCP) (to work flexibly) was never applied. The EAT disagreed with the ET's analysis, saying that disadvantage or detriment should be considered at the time of the initial rejection, regardless of whether the required working pattern was ever worked. The EAT remitted the claim for reconsideration. (*Glover v. Lacoste UK Ltd*)

**Redundancy:** A claimant who brought an age discrimination claim when his redundancy dismissal was rushed through to ensure he was dismissed before he reached age 55 (when he became eligible for an enhanced payment) is having his case reconsidered by a second newly constituted ET after a successful appeal. The EAT held that the original ET had failed to properly consider comparators, and in making a finding that the detriment was a proportionate means of achieving a legitimate aim, the ET had failed to identify that aim or explain its rationale for proportionality. (*Cook v. Gentoo Group*)

**Termination date:** In a hearing ultimately looking at whether an ET claim was brought in time, attention was focused on whether a letter sent from the employer marked 'without prejudice' and referring to mutual termination on a particular date, with a payment in lieu of notice, was a dismissal letter, with the effective date of termination on the date cited. The EAT, agreeing with the ET, determined that it was, notwithstanding the 'without prejudice' label or that the reference to mutual agreement was incorrect. The EAT was satisfied that there was no ambiguity that the claimant's employment was being summarily terminated and that the 'without prejudice' reference was limited to the payment of an additional ex gratia payment if he signed a settlement agreement. The case highlights the importance of clear drafting and the limits of the 'without prejudice' rule. (*Meaker v. Cyxtera Technology UK*)

**Tribunal procedure – appeal time limits:** The EAT has granted an extension of time in circumstances where there was a delay in receipt of appeal documents because of issues with the email server. The claimant (who was a litigant in person) submitted his appeal half an hour before the deadline, although the documents were not, in fact, received for ten more days. Although the EAT said that there was no good excuse for leaving it so late in the day, the technical issues were not the fault of the claimant and it was not unreasonable for him to assume that in the absence of a 'bounce back' or 'delay' notification, that his email was sent instantaneously. Further, even if he had submitted the papers well within the deadline, he would still not have known that they had not arrived. Notwithstanding this decision, appellants (or indeed anyone working to any tribunal deadline) should endeavour to

leave sufficient time before a deadline to allow for contingencies; leaving things to the eleventh hour is always risky. (*Hawkes v. Oxford Economics*)

**Tribunal procedure – strike out:** The EAT has upheld an ET's decision to strike out a claimant's claim on the basis of his conduct being scandalous, unreasonable or vexatious, rendering a fair trial impossible because of his repeated and prolonged failure to cooperate with either the respondent or the tribunal. The claimant, a litigant in person, sought to keep adding further allegations and making amendments rather than clarifying claims and issues despite five preliminary hearings, and his conduct at the final (hybrid) hearing was discourteous, uncooperative and wholly unreasonable. The judgment is clear that great care should be taken before striking out an entire claim, and the decision should not be taken as 'a green light' for striking out claims that are difficult to manage. However, this claim, described as having 'exceptional circumstances', shows that where claims reach a point where conduct renders a fair trial impossible, strike out is appropriate and fair. The judgment provides some helpful commentary on the importance of good and effective case management, particularly in cases involving litigants in person who provide lengthy, illogical and or unparticularised pleadings. (*Smith v. Tesco Stores*)

**Tribunal procedure – 'unless' orders:** Applying for an 'unless order' can be a helpful tactic to prompt a party to tribunal proceedings to comply and cooperate with the process – essentially, that 'unless' they do something, some or all of their claim or defence will be struck out. However, the EAT has held that it was wrong for the ET to make an unless order that had the consequence of a claimant's entire claim being struck out if she failed to provide information about certain parts of her claim. This was disproportionate, and a clear distinction needed to be drawn between those parts of her claim to which there was material non-compliance and those where there had been compliance. The EAT emphasised the importance of considering the consequences of non-compliance before making an order and not being overly draconian. (*Mohammed v. Guy's and St Thomas' NHS Foundation Trust*)

## Legislative developments

**Predictable contracts:** The government has confirmed it is backing the Workers (Predictable Terms and Conditions) Bill, a private member's bill aimed at addressing one-sided flexibility. If passed, the legislation will give workers and agency workers the right to request, up to two times in a 12-month period, a predictable work pattern. It is expected that the right will only apply to workers with 26 week's service and that the process will be similar to making a flexible working request, but this is subject to potential change as the Bill continues its passage through the legislative process.

**Harassment:** The Worker Protection (Amendment of Equality Act 2010) Bill continues its passage through the process to introduce a new duty on employers to take all reasonable steps to prevent sexual harassment in the workplace and to create employer liability for certain third-party harassment. It is expected that the legislation will not come into force until a year after it has passed, so it will not be new for 2023.

**Pregnancy and maternity:** The Protection from Redundancy (Pregnancy and Family Leave) Bill also continues its passage through the legislative process. This will see amendments to the Employment Rights Act 1996 to extend the protections in a redundancy scenario during and after maternity leave, although the detail (including the precise length and scope of protection) would be made in subsequent regulations.



## Other news

**Statutory rates:** From **April 2023**, statutory sick pay will increase to £109.40 (up from £99.35) and statutory maternity, paternity, adoption, shared parental and parental bereavement pay will increase to £172.48 (up from £156.66).

**Spring Budget:** The Chancellor will deliver his spring budget on **15 March 2023**.

**Ethnicity pay gap reporting:** Guidance on voluntary ethnicity pay gap reporting has been expected since summer 2022 but has not yet materialised. However, the government has restated its commitment to publishing the guidance, which will follow 'in due course'.

**Menopause:** The Women and Equalities Committee (WEC) has responded to the government's response to its report on reforming the law around menopause, which was published in January. The WEC continues to campaign for improved support and legal protection, which the government, to date, is resisting. The government has however now appointed a Menopause Employment Champion, Helen Tomlinson, and is calling for employers to develop policies. Read more on our [Employment Law Watch](#) blog.

**New Department for Business and Trade:** Following the Prime Minister's announcement on 7 February 2023, the Department for Business, Energy and Industrial Strategy (BEIS) will be split up, and a new Department for Business and Trade (DBT) will be created. The DBT is expected to be responsible for employment policy and regulation, alongside supporting British business. Kemi Badenoch MP has been appointed as the new Secretary of State for Business and Trade.

**Four-day week:** The [results](#) of a four-day working week pilot, which took place in the UK from June to December 2022, have been published, reporting the pilot as a resounding success. Sixty-one companies and 2,900 employees took part, and 92 per cent intend to continue with the shorter working week with no reduction in pay. The organisers of the pilot intend to use the results of the pilot to lobby for a shorter working week in Britain. For more information, visit our [Employment Law Watch](#) blog.

**Gender pay gap:** A report by the Trades Union Congress equates the gender pay gap of 14.9 per cent as equivalent to women working an average of 54 days for 'free', although this is two days less than reported in 2022. The pay gap varies by region and industry, but also by age.

## Consultations

**Fire and rehire:** the government has now published its [draft Code of Practice](#) on fire and rehire, and has launched a [consultation](#) on its content. The consultation closes on **18 April 2023**. The Code of Practice sets out guidance and accepted standards on how employers should approach changing terms and conditions, with an emphasis on meaningful consultation, transparency and openness, fire and rehire being a last resort and the fact that dismissal should not be used as a threat or negotiating tactic. Further, the ET will have the power to uplift or reduce compensation by 25 per cent where the Code of Practice is not followed, unreasonably. Read more on our [Employment Law Watch](#) blog.

**Financial services – Senior Managers and Certification Regime (SM&CR):** The Chancellor has [announced](#) plans to launch a consultation on the legislative framework around the SM&CR, with the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) tasked with looking at the regulatory framework. The intention is to review and explore the effectiveness, scope and proportionality of the SM&CR regime and look into ways in which it could be improved or reformed. The call for evidence is expected in **Q1 of 2023**.

**Financial services – bankers' bonuses:** Following the announcement in the Autumn Budget that the cap on bankers' bonuses would be removed, the PRA and FCA have published a [joint consultation](#) on how this will be done. The consultation closes on **31 March 2023**.

**Financial services – sustainability:** The FCA is seeking comments on sustainability-related governance, incentives and competence, looking to evolve good practice and consider whether further regulation is needed. Views are invited by **10 May 2023**.



**Financial services – proportionality of remuneration requirements:** The PRA has published a [consultation](#) paper in respect of its proposed changes to the rules and expectations around enhancing proportionality of remuneration requirements that apply to small firms. Comments can be made until **30 May 2023**.

**Holiday pay:** Following the Supreme Court’s decision in *Harpur Trust v. Brazel*, the government has launched a consultation on calculating holiday pay for part-year workers, seeking to understand the implications of the judgment and what steps could be taken to ensure fair and proportionate holiday pay. The [consultation](#) closed on **9 March 2023**.

**Human rights:** The Joint Committee on Human Rights has [called for evidence](#) on human rights in the workplace, looking at the extent to which they are protected and respected and whether the current legal framework is sufficient. Responses are requested by **24 March 2023**.

**Employment tribunals:** A consultation has been launched to look into the composition of ETs and the EAT, particularly the circumstances in which lay panel members are required to sit in addition to a judge. The [consultation](#) closes on **27 March 2023**.

**Strikes – minimum service levels (rail):** The government is proposing legislation that will require minimum service levels to be maintained across health, transport, education, fire and rescue, border control, nuclear decommissioning and radioactive waste management services at times of strike, and it has recently launched a consultation to assist with setting such minimum service levels for passenger rail services. The consultation closes on **15 May 2023**.

**Immigration:** The Migration Advisory Committee has [called for evidence](#) on the shortage occupations list. Responses are requested by **26 May 2023**.



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