



UK Employment Law Update - May 2023

At a Glance...

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

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Capability: Labor, Employment & Benefits

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Case law updates

Restrictive covenants: In 2019, in *Tillman v. Egon Zehnder*, the Supreme Court clarified that unreasonably wide words in a covenant can be severed from post-termination restrictions, provided that what remains does not lead to a major change to the overall effect of the covenant. The extent of this severance has now been considered by the Court of Appeal (CoA). The claimant was a senior employee in a niche pharmaceutical business, and when he resigned to join a competitor, his employer sought an injunction to enforce his 12-month non-compete. The High Court granted the injunction but severed the covenant in doing so. The employee appealed, arguing that the severed wording significantly changed the nature of the restriction and, in any event, left the restriction too wide to be enforceable. The CoA disagreed – the High Court had been entitled to sever the covenant at an interim stage as it was not plainly or obviously incapable of severance. The CoA accepted the clause was widely drafted but held it could be justified in the context of a highly specialised business; the restriction was clearly aimed at preventing competition of specialist activities and not wider pharmaceutical business, and its scope was in the contemplation of the parties when entered in to. Whilst cases of this nature are highly fact-specific, the case provides helpful clarity on the scope of the Tillman severance principles. ([Boydell v. NZP Ltd](#)).

Employment tribunals – bias: Two cases this month highlight that apparent bias can hinder the progress of a hearing. In [Higgs v. Farmor's School](#), a case which is often cited as part of the developing case law on gender critical views, the Employment Appeal Tribunal (EAT) has held that a lay member of the EAT panel hearing the substantial issues should be recused because, at the material times, he held a senior role in an organisation which was taking a strong public position on the issues which were core to the case. Although the lay member had not shared any of his own views publically, the circumstances were sufficient to give an appearance of bias, which rendered it inappropriate for him to sit on the panel. Similarly, in [Rolec Electrical and Mechanical Services v. Georgiou](#), an employment judge's interventions during a hearing, including some interruptions and quips at the respondent, were considered sufficient to conclude that there was a real possibility of bias, leading to his decision being set aside and the issues being reconsidered by a new tribunal.

Employment tribunals – heads of claim: An EAT decision demonstrates that the categorisation of claims by an employment tribunal (ET) following a preliminary hearing is not necessarily correct. In this case, an unrepresented claimant referred to 'discrimination based on nationality' on his claim form, which was categorised as a direct discrimination claim after the preliminary hearing. However, the EAT held that on a proper analysis, his claim was one of indirect discrimination. It was relevant in this case because although his direct discrimination claim had been struck out for late payment of a deposit order, the claim could be reinstated under a different head of claim. A cautionary tale for employers! ([Lasdas v. Vanquis Bank Plc](#))

Employment tribunal procedure – civil proceedings order (CPO): A CPO can be put in place to prevent a claimant, usually a vexatious litigant, from issuing further proceedings without the permission of the Court. In this case, the claimant issued ET proceedings despite being subject to a CPO, raising the question of whether that claim was void or whether it should be stayed pending retrospective approval. The CoA held the former – the ET claim was null and void as the permission had not been obtained when it was issued. ([Williamson v. Bishop of London](#))

Employment tribunal procedure – multiple claims: The CoA has been considering the procedural requirements where a claim is brought by multiple claimants, and particularly what information should appear on the claim form. It concluded that the claim form must contain the name and address of each claimant and each respondent but that it was not necessary to include the early conciliation (EC) numbers of each claimant. It is sufficient for just one of the named claimant's EC certificate numbers to be included. ([Sainsbury's Supermarket v. Clark](#))

Vicarious liability: Although in the context of a personal injury claim, a recent Supreme Court decision provides a helpful reminder of the principles of vicarious liability that may also be relevant in an employment context. The case involved the rape committed by an elder against a member of his congregation, and while lower courts had found the Jehovah's Witness organisation to be vicariously liable, the Supreme Court overturned this finding. The judgment helpfully reminds us that there are two elements to consider: firstly, the relationship between the parties and secondly, the connection between that relationship and the wrongdoing. In this case, there was no employment relationship between the elder and the organisation, and so the case explored whether the relationship was 'akin to employment', as well as the factors that might be considered when looking at whether the conduct was so closely connected that the 'employer' be held liable. ([Trustees of the Barry Congregation of Jehovah's Witnesses v. BXB](#))

Other News

Equality Act 2010 – sex and gender: The European Human Rights Commission (EHRC) has made a recommendation to the government to clarify the definition of 'sex' in the Equality Act 2010. Recognising that it is a tricky issue, the EHRC has also commented that there is a need for clarity in a currently ambiguous area. Their recommendation is for the definition of 'sex' to mean 'biological sex' and not to include 'legal sex' (i.e., essentially, overriding any gender reassignment certificate). It is a controversial topic that is likely to be heavily debated, and it remains to be seen whether the government will intervene and amend the current legislation.

Financial services – climate: The Financial Stability Board has published a report looking at climate-related financial risks in compensation structures. Recognising that the impact of climate change is a strategic priority for businesses and part of their environmental, social and governance activity, the report explores some of the challenges of climate-related metrics in compensation frameworks.

Racial disparity: The government has published an update on its progress against action points to tackle racial disparity. As well as guidance on ethnicity pay gap reporting and positive action (see below), it also looks at the use of language by employers and the potentially discriminatory impact of artificial intelligence (AI).

Shared parental leave: Although the number of parents taking shared parental leave has increased since the right was introduced, recent government figures suggest that take-up remains low. A 2019 consultation on reforming

parental pay and leave remains outstanding, although the government has said it intends to respond to that consultation 'in due course'.

Workers' rights: The Business, Energy and Industrial Strategy Committee has published a report making a number of recommendations to the government regarding worker rights and protections. It calls for:

- A right to be consulted and notified where technology results in surveillance, and consultation on a code of practice on these issues.
 - A rethink of flexible working to reflect modern working practices, a default position to have a secure contract after 26 weeks, four weeks' notice of work schedules and compensation for cancelled shifts.
 - Research into the prevalence of pregnancy discrimination, with legislation to address issues and strengthen rights if required.
 - A review of shared parental leave, and a report on plans to improve take-up.
 - A single enforcement body.
 - Statutory protection from umbrella companies that seek to deprive workers of their rights.
 - An investigation into the health and safety implications of night working.
 - Justification as to why tribunal time limits have not been extended to six months for certain claims.
 - Scrutiny of provisions that may be affected by the Retained EU Law (Revocation and Reform) Bill 2022-23.
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New Guidance

Ethnicity pay gap reporting: Long-awaited [guidance for employers](#) on how to measure, report on and address any ethnicity pay differences within their workforce has now been published.

Mental health – reasonable adjustments: Acas has published [guidance](#) to support employers and employees over the issue of reasonable adjustments at work for mental health, providing practical steps, recommendations and advice.

Positive action: [Guidance for employers](#) has been published on how to lawfully use positive action to help widen opportunities and overcome barriers for those who share protected characteristics.

Consultations

Financial services: There are currently several consultations affecting financial services:

- **Proportionality of remuneration requirements:** The Prudential Regulation Authority has published a [consultation](#) paper in respect of its proposed changes to the rules and expectations around enhancing the proportionality of remuneration requirements that apply to small firms. Comments can be made until **30 May 2023**.
- **Senior Managers and Certification Regime (SM&CR):** In December 2022, the Chancellor [announced](#) plans to launch a consultation on the legislative framework around the SM&CR, with the 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 PRA and FCA have now published a [joint discussion paper](#) on the operational aspects of the regime, with the Treasury [calling for evidence](#) on the legislation by **1 June 2023**.

- **Diversity:** The European Banking Authority is [consulting](#) on the content of draft guidelines on the benchmarking of diversity practices, including diversity policies and gender pay gaps. This will be of relevance to financial services institutions operating in EU member states. Comments can be submitted online by **24 July 2023**.

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

Artificial intelligence: Alongside its white paper, '[A pro-innovation approach to AI](#)', the Department for Science, Innovation and Technology has launched a [consultation](#) seeking feedback on its policy proposals. It closes on **21 June 2023**.

Publications

- [Global Perspectives – International trends in commercial disputes – April 2023](#)
 - [Employment Law Watch – Reform of non-compete clauses](#)
 - [Employment Law Watch – Changes to post-Brexit UK employment law: What next for working time and TUPE](#)
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If you have questions or would like additional information on the material covered in this newsletter, please contact one of the authors – listed below – or the Reed Smith lawyer with whom you regularly work.



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