



UK Employment Law Update – September 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

Disabled and vulnerable witnesses: A dyslexic claimant will have her claim reheard by a fresh employment tribunal (ET) after the Employment Appeal Tribunal (EAT) deemed her original hearing unfair because the panel failed to give any consideration to the Equal Treatment Bench Book (ETBB) or Presidential Guidance on vulnerable witnesses when she was experiencing difficulties during the final hearing. The ET concluded that the claimant's inconsistency during the hearing was down to performance and exaggeration which undermined her credibility as a witness, rather than referring to the ETBB and guidance and recommendations on understanding and managing dyslexic witnesses. Although intended for use by the tribunal, the ETBB is also a useful reference document for employers, particularly if handling issues involving disabled or vulnerable individuals. The document also covers other protected characteristics. ([Habib v. Dave Wheelan Sports Ltd](#))



Gender reassignment discrimination and the “all reasonable steps” defence: Although the claimant, a transwoman, lost her claim, the ET has ruled that the use of a gendered swearword may be sufficient to amount to gender reassignment discrimination. In this case, the claimant alleged discrimination when she was called a “w*nker” by a colleague. The ET concluded that the alleged incident had not in fact occurred, but found that, if it had, the term was not gender neutral and tended to be used towards men.

The ET also considered the extent to which the employer had taken “all reasonable steps” to prevent discrimination. While finding it had taken some steps, the ET also found that a number of additional steps would be expected, such as regularly reviewing and updating policies (including compliance with the EHRC employment statutory code of practice), ensuring it was clear which policies related to whom (the claimant was an agency worker), focusing on equality **and inclusion**, ensuring policies were both readily accessible and understood, having employee representative groups, and raising awareness of equal opportunities both generally and in respect of transgender issues. Although only an ET decision (and so not binding), this is a helpful judgment for employers navigating transgender issues in the workplace. It also acts as a useful reminder that employers should not be complacent about their role in preventing discrimination in the workplace in respect of all protected characteristics, with ETs expecting proactivity around policies, training and awareness. ([Fischer v. London United Busways Ltd](#)). [Read more on our Employment Law Watch blog.](#)

Pension loss: Calculating pension loss for compensation purposes is not straightforward, particularly when career-long losses are being claimed, especially as there is limited guidance or judicial steer on the issue. However, following a remedy hearing dealing specifically with career-long losses for a defined contribution scheme, we now have some clarification that it is appropriate to use the Ogden tables (numbers 3-18). These actuarial tables are used in personal injury claims and take into account mortality rates and the benefit of accelerated receipt from a lump sum. ([Jhuti v. Royal Mail Group](#))



Tribunal procedure – extensions of time: Tribunals have power to extend time where it is just and equitable to do so, and a recent case has considered the extent to which an explanation for the delay in submitting a claim within normal time limits is relevant. In the absence of any reason being provided by the claimant, the ET refused an extension of time. However, the EAT was critical of this approach, indicating that while the lack of evidence to explain a delay is relevant, it is not a decisive factor, referring the case back to the ET to reconsider whether, in all the circumstances, it would be just and equitable to extend time. ([Owen v. Network Rail Infrastructure Ltd](#))

TUPE – what transfers: The Inner House of the Court of Session has upheld the EAT’s decision that although a claimant’s rights under a collateral contract to participate in a share incentive plan (SIP) were not expressly referenced in his contract of employment, they were nevertheless “in connection with” his employment and therefore transferred under TUPE, entitling him access to a substantively equivalent SIP with his new employer. The case reminds parties to a TUPE transfer of the importance of establishing which rights transfer, and for a transferee to ensure that appropriate arrangements are in place to provide equivalent benefits which they are unable to replicate (which may be financially and practically burdensome), as well as to ensure the changes are covered in the required pre-transfer information and consultation exercise. ([Ponticelli Ltd v. Gallagher](#))

Other news

Artificial intelligence (AI): The House of Commons Library has published a research briefing paper on [AI and employment law](#), looking at where employers are starting to use AI in the workplace and where employment law fits in. It also includes a policy update.

Employment tribunals: HMCTS has issued new [ET1](#) and [ET3](#) forms. These were published on 3 August 2023 and should be used by parties to employment litigation.

Returns: The government's previously announced plan to introduce "returnships" to promote accelerated apprenticeships or other initiatives to encourage a return to work for the over 50s has been scrapped.

Consultations

Flexible working: In anticipation of the new legislation changing how flexible working requests will operate, Acas has launched a [consultation](#) on an accompanying [Statutory Code of Practice](#) on handling requests. The consultation closed on 6 September 2023, although separately there is a call for evidence on organisations' approaches to flexible working outside of the statutory regime. This is open for comment until **7 November 2023**. [Read more on our *Employment Law Watch* blog.](#)

Financial services – UK Corporate Governance Code: The Financial Reporting Council has launched a consultation on the content of the UK Corporate Governance Code, an amended version of which is expected to apply from January 2025. The consultation explores a number of issues including board leadership and division of responsibilities; succession planning and performance reviews; remuneration principles; risk and audit; and reporting, including on ESG metrics. The deadline for responding is **13 September 2023**.

Entertainment and media: The Culture, Media and Sport Committee has launched an [inquiry](#) into the challenges faced by this sector, and how to best maintain and enhance it. From an employment perspective, it looks at skills and retention, and how the industry can adapt alongside artificial intelligence. Comments can be provided until **19 September 2023**.

Disability: The government has launched a [consultation](#) on its Disability Action Plan, a facet of its disability strategy aimed to improve the lives of disabled people. Anyone can comment on all or parts of the consultation until **6 October 2023**, with the views and experiences of disabled people and other interested parties particularly sought.

Occupational health (OH): The Department for Work and Pensions has launched a [consultation](#) exploring the ways in which OH coverage and quality can be improved. The consultation is open until **12 October 2023**.



David Ashmore
Partner, London
dashmore@reedsmith.com



Carl De Cicco
Partner, London
cdiccico@reedsmith.com



Robin Jeffcott
Partner, London
rjeffcott@reedsmith.com



Joanna Powis
Counsel, London
jpowis@reedsmith.com



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



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