



# UK Employment Law Update – November 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

**Holiday pay:** The Supreme Court has held that when looking at holiday pay claims involving a series of deductions, the 'series' is not always broken by a gap of three months or more, nor necessarily broken by a correct payment being made. Instead, whether there is a series of deductions must be considered on the facts and in all the circumstances, including the similarities and differences, frequency, size and impact, and how the payments came to be made. Although a decision based on the Northern Irish equivalent of the Working Time Regulations, the decision will nonetheless be relevant in Great Britain, although regulations here currently limit back payments to two years. (*Chief Constable of Police Service of Northern Ireland v. Agnew*)

**Philosophical beliefs:** The employment tribunal has found a claimant's beliefs around race and racial equality, particularly his opposition to critical race theory, to be protected under the Equality Act 2010 but that his beliefs around sex and feminism were not. Although not a binding decision, it is a helpful reminder of the five-stage test for determining protection, namely that the belief (i) is genuinely held; (ii) is not merely an opinion or viewpoint; (iii) concerns a weighty and substantial aspect of human life and behaviour; (iv) is sufficiently cogent, serious and cohesive; and (v) is worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others. (*Corby v. Acas*)



**Restraint of trade:** The High Court has rejected an argument that a clawback clause requiring repayment of a bonus in certain circumstances was a restraint of trade or a penalty clause. Whilst the clawback clause, which required repayment if the employee left employment or was under notice within three months of it being paid, was a disincentive to resign, it did not prevent the employee working elsewhere. (*Steel v. Spencer*)

**Vicarious liability:** The Court of Appeal (CA) has been considering the liability of a school in circumstances where a work experience student groomed and sexually assaulted one of the students. Upholding the decision that the school was not liable, the CA was satisfied that there was a relationship 'akin to employment' but that there was not a sufficiently close relationship between that relationship and the wrongdoing. The close connection test will usually turn on the specific facts, but is often tricky to establish where the act of wrongdoing is not associated or extrinsically linked with something the individual is authorised to do. (*MXX v. A Secondary School*)

## Legislative developments

**Harassment:** The Worker Protection (Amendment of Equality Act 2010) Act 2023, which places a duty on employers to take reasonable steps to avoid discrimination in the workplace, has now received Royal Assent and will come into force in October 2024. Read more on our [Employment Law Watch blog](#).



**Organisational crime:** The Economic Crime and Corporate Transparency Act 2023 has received Royal Assent, although there is currently no timescale for it to come into effect. The Act introduces a new offence for larger organisations that fail to prevent fraud (albeit with a defence if they have adequate procedures in place to prevent fraud), and expands corporate criminal liability to organisations that have senior managers who, when acting within the actual or apparent scope of their authority, commit a relevant offence.

**Rehabilitation of offenders:** The Rehabilitation of Offenders Act 1974 and Exceptions Order 1975 has been amended with effect from 28 October 2023 to reduce the length of time after which certain convictions become 'spent', affecting when they must be declared to employers (assuming offenders do not reoffend, the periods are now one year for custodial sentences of a year or less, and four years for custodial sentences of one to four years), and introduce a rehabilitation period of seven years for custodial sentences of over four years. These periods are halved for under 18s. The new rehabilitation periods only apply to less serious offences and not to serious sexual, violent or terrorist offences, and more stringent rules continue to apply where individuals would work with vulnerable people. The accompanying [press release](#) includes details of the previous rehabilitation timeframes, and [guidance](#) has been published.

## Other news

**Autumn Budget:** The 2023 Autumn Statement will be presented on **22 November 2023**.

**Disability:** Responding to the government's consultation on its disability action plan for 2023/24, the Equality and Human Rights Commission has called for a series of reforms to improve the lives of disabled people, including mandatory disability pay gap reporting.

**Financial services – bonus caps:** The FCA and PRA have issued a policy statement in response to the consultation on the removal of the bonus cap and have confirmed that this proposal will go ahead, although guidance is provided on setting an appropriate ratio between fixed and variable pay and firms must nevertheless comply with rules around prudent risk-taking. However, the changes provide more flexibility in determining and managing remuneration structures. The changes are effective from 31 October 2023 and will apply to performance years ongoing at that date and future performance years. The regulators won't ask for remuneration policy statements to be resubmitted for the current year if they were submitted by 24 October 2023.

**Immigration:** The Migration Advisory Committee has published a review of the shortage occupation list and is calling for its abolition or heavy reform.

**Labour market strategy:** An independent report on the labour market enforcement strategy for 2023/24 has been published, with a number of recommendations for improving information and effectiveness, engagement and support between businesses and workers, and facilitating a more joined-up approach.

**Menopause:** The government's Menopause Employment Champion has published a policy paper detailing her plans to support menopausal women in the workplace, emphasising the priority of developing a repository for guidance and resources. Separately, an all-party parliamentary group has published a Manifesto for Menopause, calling on all parties to commit to certain policies ahead of the general election, including requirements that all employers with over 250 employees publish a menopause action plan, that guidance is in place for small and medium-sized businesses and that tax incentives are in place for incorporating menopause care with occupational health services.

**National Living Wage (NLW):** The government has announced its intention to accept the Low Wage Commission's recommendations for increasing the NLW, meaning it is expected to exceed £11 per hour from April 2024. The NLW, which applies to workers aged 23 and over, is currently £10.42.

**Real Living Wage (RLW):** The RLW rate for 2023/24 has been announced as £12 per hour outside London and £13.15 per hour in London. RLW employers should implement these increases by **1 May 2024**.

## New guidance

**Fit notes:** The government has updated its guidance on fit notes, aimed at employers and managers. It includes a new checklist for employers, as well as case studies and explanations about the forms.

**Mental health:** Acas has updated its guidance on supporting mental health in the workplace.

**Rehabilitation of offenders:** Updated guidance has been provided following the changes to when certain convictions become spent (see above).

**Tax – agency and temporary workers:** HMRC has updated its guidance on agency and temporary workers in its Employment Status Manual.

**Workplace monitoring:** following a consultation earlier this year, the ICO has published guidance on the lawful monitoring of workers. Read more in our Technology Law Dispatch.



# Consultations

**Financial services – DEI:** The [PRA](#) and [FCA](#) have issued separate but linked consultation papers on proposed regulations, 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](#) that invites views on a variety of proposed reforms to the employment tribunal 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 is inviting views from regulated businesses before **7 January 2024**. Financial services are explicitly excluded.

**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**.



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