



UK Employment Law Update – April 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



Disability discrimination: A claimant who alleged that his disabilities (dyslexia, symptoms of Asperger's syndrome, neurodiversity, and some hearing loss) affected his interactions at work, with stress, anxiety, and conflict causing him to display mannerisms which could be seen as aggression, has unsuccessfully appealed the court's rejection of his 'something arising in consequence of disability' discrimination claim after he was disciplined following a number of incidents with colleagues. The Employment Tribunal (ET) had dismissed his claim, finding that his conduct did not arise from his disabilities but rather from habit or because he had a short temper and did not like being told what to do. He appealed, arguing that his disability did not need to be the main reason for the 'something' (i.e., his conduct), as long as it had more than a trivial influence. However, although critical of the structure of the ET's judgment, the Employment Appeal Tribunal (EAT) concluded that its rationale was not fundamentally flawed – the ET was aware of the medical evidence, and the court had found no error in law or principle in concluding that the conflicts he was disciplined for had not arisen in consequence of his disabilities and, having reached that conclusion, did not have to consider whether any unfavourable treatment had been "because of" something arising in consequence of his disabilities. The EAT provided some helpful guidance on how to approach issues of this nature, stating that the questions to ask are: (1) what are the disabilities; (2) what are their effects; (3) what unfavourable treatment is alleged in time and proved; and (4) was that unfavourable treatment 'because of' an effect or effects of the disabilities? Alternatively, the questions could be reversed: (1) what unfavourable treatment is alleged in time and proved; (2) what was the reason for that unfavourable treatment; (3) what were the effects of the disabilities; and (4) was the reason for the unfavourable treatment an effect or effects of the disabilities? (*McQueen v. General Optical Council*)

Discrimination – conflict of protected characteristics: The ET has again been considering the issues where there is a conflict between different protected characteristics. The claimant, a Christian chaplain at a private school, alleged religion and belief discrimination following the school's treatment of him after he delivered sermons which furthered his Christian views, his beliefs opposing same sex marriage and sex outside marriage, and his 'gender critical' views. The ET was satisfied that the school had not harassed or discriminated against the claimant – their treatment of him was not because of his beliefs, but his manifestation of them, and it was not unreasonable for the school to object to that manifestation in circumstances where the school had received numerous complaints, had vulnerable LGBT+ students coming to terms with their sexual identity, had safeguarding obligations, and where they promoted difficult topics being discussed in a classroom context. The decision is only ET level and does not alter the law in this area, but is interesting as part of the ongoing debate and case law development in this area. (*Randall v. Trent College*)

Tribunal litigation – mitigation of loss: Claimants are expected to take reasonable steps to reduce financial losses arising out of alleged wrongdoing by their employer, and compensation can be reduced where a tribunal finds that there was an unreasonable failure to carry out such mitigation. In considering an appeal against a tribunal's decision to award a 50 per cent reduction in compensation for a failure to mitigate, the EAT reminds us that the burden of proof is on the respondent employer to show that there was an unreasonable attempt to mitigate, and that the issue for the tribunal to determine when considering any reduction in compensation is when the claimant would have, if acting reasonably, found new employment and at what level of income. (*Edward v. Tavistock and Portman NHS Trust*)

Tribunal procedure – 'unless' orders: Last month we reported a case (*Mohammed v. Guy's and St Thomas' NHS Foundation Trust*) where the EAT held that it was wrong for the ET to have made 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 month, in a different case (*Rojha v. Zinc Media Group*), the EAT has reached a different conclusion, saying that it was necessary and proportionate to make an order that her entire claim would be struck out if she failed to provide further particulars in respect of just some of her claims. It was perhaps relevant that her claims were assessed as having no reasonable prospects of success and the claimant had failed to attend some of the hearings, highlighting that the individual circumstances of each claim can be relevant to the fairness of case management decisions, rather than there being any blanket rule. In light of these recent decisions, it is timely that in a different case again (*Minnoch v. Interserve FM Ltd*), the EAT has provided some guidance and key points (see paragraph 33 of the judgment) when considering unless orders, setting out key considerations when making one, the importance of giving notice of non-compliance, and a careful assessment of the consequences of non-compliance. Each case will of course depend on its own facts, but this judicial guidance will be a helpful reference for parties and for the tribunals.

Tax – IR35: IR35 is a tax rule designed to stop the avoidance of tax and NICs by using an intermediary and requires that if, but for that intermediary, the contractor would be an employee of their client for tax purposes, tax and NICs must be made. In what is thought to be the first appeal decision looking at whether the contract for services was direct or through an intermediary, the first-tier tribunal (tax chamber) concluded that notwithstanding a partnership being an ‘intermediary’, there was a direct contract between the contractor and his client by virtue of the contracts being signed by him in his capacity as a partner. As such, IR35 did not apply. It is anticipated that HMRC will appeal this decision. Employers engaging contractors and considering IR35 should note that there is some new guidance (see below). (*Linekar v. HMRC*)

Legislative developments

April’s rates and limits changes:

- The national living and minimum age rates increased on **1 April 2023**. The national living wage rate, for those ages 23 and over, increased to £10.42 per hour (up from £9.50).
- Statutory sick pay increased to £109.40 (up from £99.35), and statutory maternity, paternity, adoption, shared parental, and parental bereavement pay increased to £172.48 (from £156.66).
- On **6 April 2023**, a ‘week’s pay’ (for the purposes of calculating statutory redundancy payments and certain tribunal awards) increased to £643 (up from £571) and the cap on unfair dismissal compensatory awards increased to £105,707 (up from £93,878).
- For discrimination claims presented on or after **6 April 2023**, the new ‘Vento’ bands for compensation for injury to feelings are: lowest band for less serious cases – £1,100-£11,200; middle band of £11,200-£33,700; and top band for the most serious cases of £33,700-£56,200. Only exceptional cases would attract an award above £56,200.

See our ‘at a glance’ overview of the key rates and limits and the implications of these for employers on our [Employment Law Watch](#) blog.

Harassment: The government continues to support the Worker Protection (Amendment of Equality Act 2010) Bill, which imposes a proactive duty on employers to take all reasonable steps to prevent the harassment of its employees, including by third parties, with a compensation uplift where they fail to do so. The bill is making its way through the legislative process, and following the latest debate on its content, intends to clarify the extent to which expressions of opinion will amount to harassment (whether that be third party or between employees). Read more about what this might mean for employers on our [Employment Law Watch](#) blog.

Pensions: A private member’s bill is being backed to extend the scope of automatic enrolment obligations. If passed, the new legislation will provide powers to reduce the age for being automatically enrolled (currently age 22) and abolish the lower earnings limit for contributions.

Seafarer pay: The national minimum wage (see above for latest rates) now applies to all seafarers on vessels using UK ports at least 120 times a year, regardless of whether those vessels are UK registered or if the seafarers are not ordinarily resident in the UK. The new legislation ([Seafarers’ Wages Act 2023](#)) also gives harbour authorities the power to request a declaration from ship operators that they are paying the NMW, and to charge operators and/or refuse access to the harbour for non-compliance.



Other news

Spring budget: The chancellor delivered his [spring budget](#) on **15 March 2023**, with an emphasis on reducing inflation and government debt and growing the economy. From an employment perspective, there is a focus on getting more people into or staying in work, particularly the long-term sick and disabled, welfare recipients, workers over age 50, and parents. Initiatives include: a universal support system to match disabled and long-term sick individuals with suitable roles; increasing work coach support for welfare claimants; increasing tax relief on pensions; expanding the scope of free childcare for eligible working parents; introducing policies encouraging employers to support people back to or stop them falling out of work; and consulting on requiring all employers to offer occupational health services. The government also intends to carry out a review of the 'shortage occupation list' for accessing talent from abroad (see below) and takes the opportunity to remind employers of planned upcoming legislation around flexible working, carer's leave, and neonatal leave and pay.

Menopause: In our past editions we have reported the Women and Equalities Committee's campaign to improve support and legal protection around menopause and the government's response to their recommendations which have stopped short of legal reform. In updates this month, the government has appointed a Menopause Employment Champion, Helen Tomlinson, who is calling for employers to develop policies. Labour has also announced that if in government, it intends to introduce a requirement on employers with over 250 employees to have a 'menopause action plan' detailing how they are supporting menopausal employees. Read more on our [Employment Law Watch](#) blog.

Surrogacy: A new report has been published, '[Building families through surrogacy: a new law](#)', by the Law Commission of England and Wales, and the Scottish Law Commission'. The report outlines a number of recommendations to reform laws around surrogacy, including reforms to employment law to ensure the surrogate and intended parents have adequate rights.

Whistleblowing: The government is launching a [review](#) into the effectiveness of the UK's whistleblowing framework to help shape policy and improvements in this area. It is expected that the review will conclude by autumn 2023.

Electronic signatures: The Industry Working Group on Electronic Execution of documents has issued its [final report](#) on the electronic execution of documents, concentrating on the use of e-signatures in cross-border transactions. It details the challenges arising from e-signatures in this context and explores way to maximise the benefits and to mitigate against the risks of fraud. A number of recommendations have been made for the UK government to consider further.

Immigration – Electronic Travel Authorisation (ETA): A new scheme will launch in October 2023 to provide digital permission for visitors to travel to the UK who do not have a UK visa, nor permission to live, work, or study in the UK. An ETA lasts for two years and can be used for multiple visits, although it does not guarantee entry. Initially the ETA scheme will only apply to Qatari nationals from 15 November 2023, and will be extended to other Middle Eastern countries in February 2024. It is expected that more countries, including those in Europe, will be added throughout 2024.

Immigration – minimum salary requirements: Minimum salary thresholds for certain visas increased on **12 April 2023** to reflect wage inflation. The new rates can be found in the government's [statement of changes](#).

Workplace monitoring: The Institute for Public Policy Research has issued a report looking at [worker surveillance in the UK after the pandemic](#). Noting the growth in technology and algorithmic bias, it makes a number of recommendations to the government to help redress any imbalance between worker and employer which may have developed.



New guidance

Gender pay gap reporting: The Government Equalities Office has published [new statutory guidance](#) for employers with 250 or more employees on their gender pay gap reporting obligations. The update is limited to changes in format and accessibility; there have been no changes to the factual content.

IR35: The government has published new [guidance](#) for clients using the services of a contractor through an intermediary company. It clarifies who the IR35 rules apply to, the obligations that apply, and provides guidance around carrying out status determinations.

Returning to work: Following the government's emphasis in the spring budget on helping individuals return to work, it has published [guidance](#) for employers in helping with this process, including setting up a returner programme, adapting recruitment processes, and engaging on-boarding returners.

Right to work checks: The Home Office has updated its [guidance](#) on carrying out right to work (RTW) checks. The new guidance clarifies that an employer may still be liable even where it has engaged an identity service provider to carry out RTW checks, provides options for individuals who have completed a work visa application but have not filed sufficient documentation, adds guidance on online checking for individuals with short-dated biometric residence permits, and confirms that poor quality photographic evidence will not be valid.

Pensions: The pensions regulator has published diversity, equality, and inclusion [guidance for employers](#) and for those empowered to appoint trustees.

Consultations

Financial Services – 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 FCA tasked at looking at the regulatory framework. The intention is to review and explore the effectiveness, scope, and proportionality of the SM&CR regime, and to 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**.

Financial Services – sustainability: The FCA is seeking [comments](#) on sustainability-related governance, incentives, and competence, looking to evolve good practice and to 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 requirement that apply to small firms. Comments can be made until **30 May 2023**.

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 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 dismissal not being used as a threat or negotiating tactic. Further, the tribunal will have the power to uplift or reduce compensation by 25 per cent where the Code is not followed, unreasonably. Read more on our [Employment Law Watch](#) blog.

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 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**.

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

- [Diversity, Equity and Inclusion Annual Report 2022](#)
- [Should we be doing a four-day working week? Article and podcast](#)

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