



UK Employment Law Update – August 2023

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

In this issue:

- [Case law updates](#)
- [Legislative developments](#)
- [Other news](#)
- [New Guidance](#)
- [Consultations](#)



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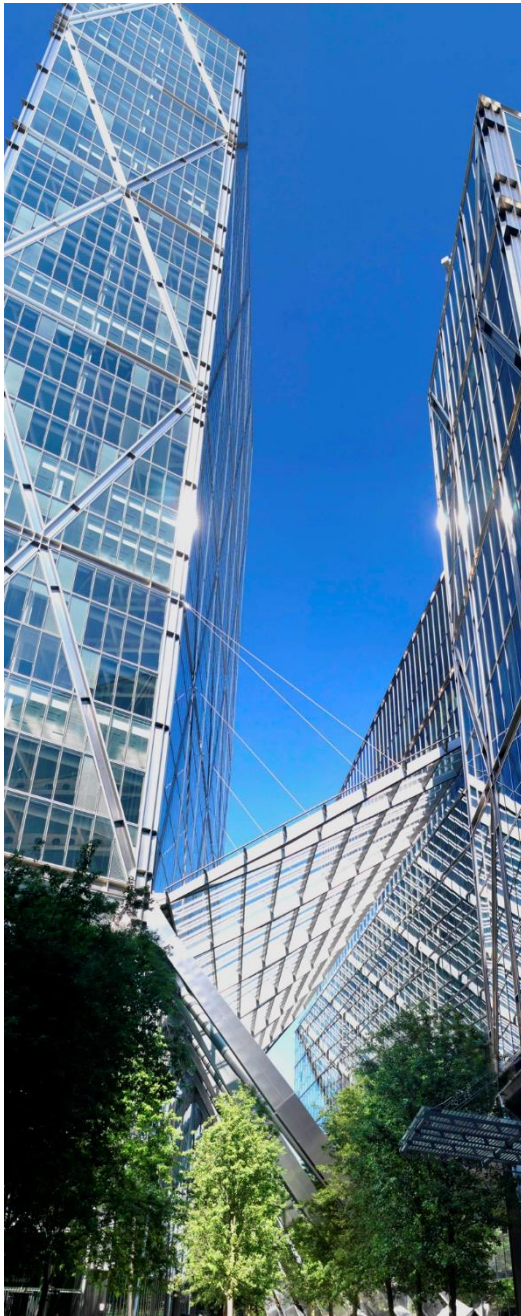


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[Bank of Greece](#))

Case law updates

Changing terms and conditions: There is a risk of an employee being deemed to have been unfairly dismissed where an employer unilaterally places the employee into a new role on different terms and conditions (even where the employee remains employed in that new role and does not resign). In determining if there has been a dismissal, the key question is whether the changes are such that, in effect, they amount to the initial contract being terminated by the employer and replaced by a new one. In this recent case, which had a complex factual background, the Employment Appeal Tribunal (EAT) overturned the decision of the employment tribunal (ET), which had found that there was no dismissal where an employee was unilaterally moved to a lower grade role. The EAT was critical of the ET's rationale – the ET had failed to carry out a proper 'before and after' exercise to compare the terms and had wrongly given relevance to the employer having no intention to dismiss the claimant. The case has been remitted to the ET. ([Jackson v. University Hospitals of North Midlands NHS Trust](#))

Philosophical belief discrimination – remedies: Maya Forstater, the claimant whose claim led the way for gender-critical beliefs being recognised as a protected philosophical belief under the Equality Act 2010, has been awarded over £100,000 in compensation following a previous finding that she had been directly discriminated against when, because of her views, her visiting fellowship was not renewed and she was not offered employment. The compensation payment included £25,000 for injury to feelings and £2,000 for aggravated damages arising from public statements made on behalf of the respondent. ([Forstater v. CGD Europe](#))

Unfair dismissal – incapacity: An employee whose termination date was extended seven times after a decision had been made to end his employment on health grounds was not unfair. Although the employer's absence policy did not include a right to extend, the postponements were intended to be to the employee's advantage, and the procedure and decisions were within the realm of reasonable responses. This case demonstrates the challenges with many ill-health scenarios – particularly where there may be an opportunity for an employee to return to work – with employers having to balance internal procedures with principles of fairness and reasonableness. ([Garcha-Singh v. British Airways PLC](#))

Unfair dismissal – misconduct: The EAT has upheld a decision that it was fair to dismiss an employee for gross misconduct where the dismissing manager made his decision following a paper exercise only. Although it will usually be unfair not to have held a disciplinary hearing with the employee, on the facts of this case, the disciplinary procedure as a whole was deemed reasonable (and, in any event, any defects were corrected on appeal). ([Charalambous v. National](#))

Legislative developments

Flexible working: The Employment Relations (Flexible Working) Bill has now received royal assent, although its provisions are not yet in force (this is not expected until about a year from now). The new Act, once in force, will amend current flexible working legislation to allow workers to make two requests in any 12-month period (up from one) and to require a response within two months (down from three). The new legislation also means that employees will no longer need to explain in their application the effect of their request and places a requirement on employers to consult before rejecting a request, although there is no clarity or guidance on what is required in this regard. It's important to note that, contrary to some headlines, the Act does not create a day-one right to request flexible working (however, this may be introduced in due course), nor does the Act provide for a right of appeal as part of the process. Read more about flexible work legislation on our [Employment Law Watch blog](#).

Industrial action (1): The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022, which allowed employers to replace striking workers with temporary agency workers (revoking long-standing rules to the contrary), have been deemed unlawful – the government should have consulted on the proposed changes and not unilaterally introduced amending legislation. As a result, these regulations will be quashed with effect from **10 August 2023**, after which the previous prohibition on the use of agency workers, set out in regulation 7 of the Conduct of Employment Agencies and Employment

Businesses Regulations 2003, will apply. It remains to be seen if, after an appropriate consultation, the government will seek to try again to introduce legislation along these lines.

Industrial action (2): The Strikes (Minimum Service Levels) Bill has now received royal assent. However, secondary legislation will be needed to set specific minimum service levels in the affected industries.

Redundancy: The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 came into force on 24 July 2023, although nothing will change for the time being as the Act simply provides powers to make regulations which will enhance the protection of pregnant employees, and those on maternity, adoption or shared parental leave, in a redundancy situation. While there has been talk of protection running from the date the employee notifies their employer of pregnancy until six months after the end of the relevant leave, we will need to await draft regulations before the precise nature of protection becomes known. There is no current timescale for introduction of the regulations.

Sexual harassment: As the Worker Protection (Amendment of Equality Act 2010) Bill works its way through the process of becoming law, the House of Lords has removed the explicit third-party harassment provisions and has changed the obligation on employers to prevent sexual harassment at work to taking “reasonable steps” (rather than **all** reasonable steps), suggesting that there may be different tests under this legislation and the existing provisions in the Equality Act 2010. The Bill continues its passage through Parliament, and other amendments cannot be ruled out before the provisions become law.

Other News

Employee retention: The British Standards Institution has published a [report](#) exploring the reasons why women leave the workforce early and how employers can support women to stay at work for longer. The report examines the challenges faced by working women, including women’s health issues and caring responsibilities, and encourages ongoing discussions with a view to creating more open, flexible, and supportive workplaces so as to avoid the premature attrition of the female workforce.

Immigration: The UK government has published a [statement of changes](#) to immigration rules, including an update to the shortage occupation list, an extension of the pre-settled status under the EU settlement scheme, and some restrictions on student visas. These changes took effect on **17 July 2023**. The government has also announced an intention to increase immigration visa fees by 15 to 20 per cent with the aim of raising funds to pay for public sector pay rises.

Seafarers: The UK government has announced a new [Seafarers’ Charter](#), a voluntary agreement between the government and maritime operators setting out key standards for employers. These include provisions around pay, benefits, working time, training and development, and health and safety. Read more on

New Guidance

EU law reforms to TUPE and working time: As noted above, the government announced its intention to change some parts of TUPE and the WTR and has launched a [consultation](#) to seek views on their proposals.

- **TUPE:** The government is only looking at the information and consultation requirements under TUPE and, particularly, the expansion of where employers are permitted to consult with employees directly. It is seeking views on allowing direct consultation on any transfers for businesses with fewer than 50 employees and for employers of any size where the transfer involved fewer than 10 employees.
- **WTR:** The consultation centres on record-keeping requirements, simplifying annual leave entitlements and allowing rolled-up holiday pay. It proposes retaining a minimum entitlement of 5.6 weeks per year but applying the same rules for all holiday and using the consultation to explore how holiday pay be calculated.



The consultation closes on **7 July 2023**. Responses can be provided [online](#).

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

- **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**.
- **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**.

Open justice: HMCTS has published a consultation exploring principles of open justice, including access to court documents and information, the publication of case lists and judgments, remote observations, broadcasting and data use. It covers the whole court and tribunal system, not just employment tribunals. The consultation closes on **7 September 2023**.

Consultations

Umbrella companies: HM Treasury has launched a [consultation](#) looking at ways to tackle non-compliance with employment rights and tax laws by umbrella companies. It seeks views on the definition of an umbrella company and on minimum legislative requirements with which they should comply. The consultation closes on **29 August 2023**.

Financial services: The House of Commons Treasury Committee has launched an [inquiry](#) into sexism in the city, with a particular focus on financial services. The call for evidence runs until **1 September 2023**, examining barriers that women face and what can be done by firms and by the government to help combat sexual harassment and misogyny.

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](#) about handling requests for flexible working. The consultation is open until **6 September 2023**. 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](#).

Open justice: HM Courts and Tribunals Service has published a consultation exploring the principles of open justice, including access to court documents and information; publication of case lists and judgments; and remote observations, broadcasting, and data use. It covers the whole court and tribunal system – not just employment tribunals. The consultation closes on **7 September 2023**.

Financial services – UK Corporate Governance Code: The Financial Reporting Council (FRC) 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 FRC board leadership and division of responsibilities; succession planning and performance reviews; remuneration principles; risk and audit; and reporting, for example, on ESG metrics. The deadline for responding is **13 September 2023**.

Entertainment and media: The Culture, Media and Sport Committee has launched a new [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 at improving 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**.

Publications

- [UK audit and corporate governance reform – UK Corporate Governance Code consultation](#)

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