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# UK Employment Law Update – August 2024

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

Our August update considers the employment law impact of the Labour government's landslide victory on 4 July in the UK general election, as well as updates on the new statutory code on fire and rehire practices, and the draft guidance on the upcoming duty on employers to prevent sexual harassment in the workplace.

## In this issue



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# Case law updates

**Religion and belief discrimination:** An employee with gender-critical beliefs was neither unfairly dismissed nor discriminated against after his employment was terminated when he refusing to remove 'deliberately provocative' preferred pronouns from his email signature. His employer introduced an optional policy inviting staff to share their preferred pronouns as part of their email signatures, although no explicit list of acceptable pronouns was provided. The claimant added "XYchromosomeGuy/AdultHumanMale" to his signature and refused to remove it despite several management instructions to do so. The Employment Tribunal (ET) concluded that his eventual dismissal was fair and not discriminatory, as it was in response to an inappropriate manifestation of beliefs – not because he held those beliefs. It was relevant that the claimant held a public-facing role, and there was a high risk of reputational damage and his employer's public sector equality duty. The ET commented that the circumstances created more risk than if the claimant had shared views on social media. While it was only at the ET level, this is another case demonstrating the delicate balance to be drawn when employees make their beliefs known publicly. (*Orwin v. East Riding of Yorkshire Council*)

**Religion and belief discrimination:** A job applicant has succeeded with a direct-belief discrimination claim after his conditional offer of employment as a support worker was withdrawn when the employer found homophobic content on his social media. The applicant was invited to a further interview and was given the opportunity to discuss his religion and his beliefs and how these might affect his work with the LGBTQI+ community (a key part of the role he was applying for). Although he failed to provide satisfactory reassurance to the employer at that time, it was the withdrawal of the job offer **before** this meeting which was the basis for a successful claim. However, as it is likely that the employer could have fairly withdrawn the offer after the second interview, compensation will be limited. (*Ngole v Touchstone Leeds*)

**Religion and belief discrimination:** In another gender-critical beliefs case, the Employment Appeal Tribunal (EAT) has been considering an appeal against a decision that an LGBTQI+ campaign charity caused or induced the claimant's barrister's chambers to discriminate against her when the charity complained to the chambers about the content of the claimant's social media posts which suggested the charity supported trans-extremism. Action then taken by her chambers in respect of the posts was found to have been discriminatory (and was not subject to this appeal), but there was no finding that the charity had caused or induced that discrimination. The EAT did not overturn this decision. (*Bailey v. Stonewall, Garden Court Chambers and others*)

**Disability discrimination:** A claimant who initially succeeded with an indirect disability discrimination claim has had it remitted for reconsideration after the EAT criticised the ET's analysis of the objective justification defence. The claimant has a visual impairment, and the case involved the font size used by her employer in published documents. The ET found in her favour, saying "there is simply no objective justification for this. There is no legitimate aim, and it cannot be proportionate when the simple thing to do would be to provide documents in larger font. It is unfortunate that the Claimant simply did not explain her difficulty with documents in small font size to the Respondent at the time of the events in question". However, contrary to the ET's statement that there was no legitimate aim, the employer had put one forward (management efficiency), and the EAT was critical of the reasoning provided by the ET in reaching its conclusion. It is worth noting that the EAT acknowledged that as a matter of common sense, there is nothing objectionable in providing documents in a standard format provided it is made clear that they can be provided in any other reasonable format on request. (*Hilton-Webb v. Minis Childcare*)

**Part-time discrimination:** The EAT has been considering an appeal against the decision of an ET to dismiss a part-time discrimination claim by a part-time private-hire taxi driver that he was treated less favourably by having to pay the same flat-rate fee as his full-time colleagues to get access to a database. The ET concluded that there was no less favourable treatment as everyone had to pay a fee, but the EAT disagreed; the claimant received proportionately less take-home pay than his full-time colleagues after the fee was deducted. However, the EAT agreed with the ET's overall finding that this was not discriminatory treatment as part-time status was not the sole cause of the unfavourable treatment. There is conflicting case law about whether part-time status needs to be the 'sole' cause of the differing treatment, or the 'effective' cause. While the EAT considered the latter to be correct, it was not an error of law by the ET to have used the sole-cause test and to conclude that this test had not been made out. (*Augustine v. Data Cars*) **Injunctions:** The High Court has granted an injunction against a former employee who, after being dismissed in his probationary period, subjected the company's owner to a series of emails and WhatsApp messages containing serious threats of harm if he was not financially compensated. The court found that these threatening communications were likely to amount to harassment and blackmail, sufficient to amount to criminal acts. (*RBT v YLA*)

**National minimum wage (NMW):** An employer who allowed workers to voluntarily pay money, deducted from their wages, into a 'holiday fund' and to withdraw that money at any time has been found to be in breach of the NMW. Overturning the ETs decision (which took into account the employer's good intention), the EAT expressed sympathy for the employer, but as contributions into the scheme took wages below the NMW, there was a breach of law. Interestingly, HMRC and the EAT judge conceded that if the contributions had been held in a separate third-party account, there would have been no such breach. (*Revenue and Customs Commissioners v. Leeds of Scotland Ltd*)

**Unfair dismissal:** Care workers who were dismissed during the COVID pandemic for refusing to be vaccinated under their employer's policy – before vaccination was mandated by the government – were fairly dismissed. The EAT, agreeing with the ET's decision, concluded that the dismissals had been handled fairly under employment law, and that there was no breach to the workers' human rights. While the specific facts of this case are now unlikely to arise, the case is helpful for looking at how the ET should balance human rights arguments with unfair dismissal principles. (*Masiero v. Barchester Healthcare*)

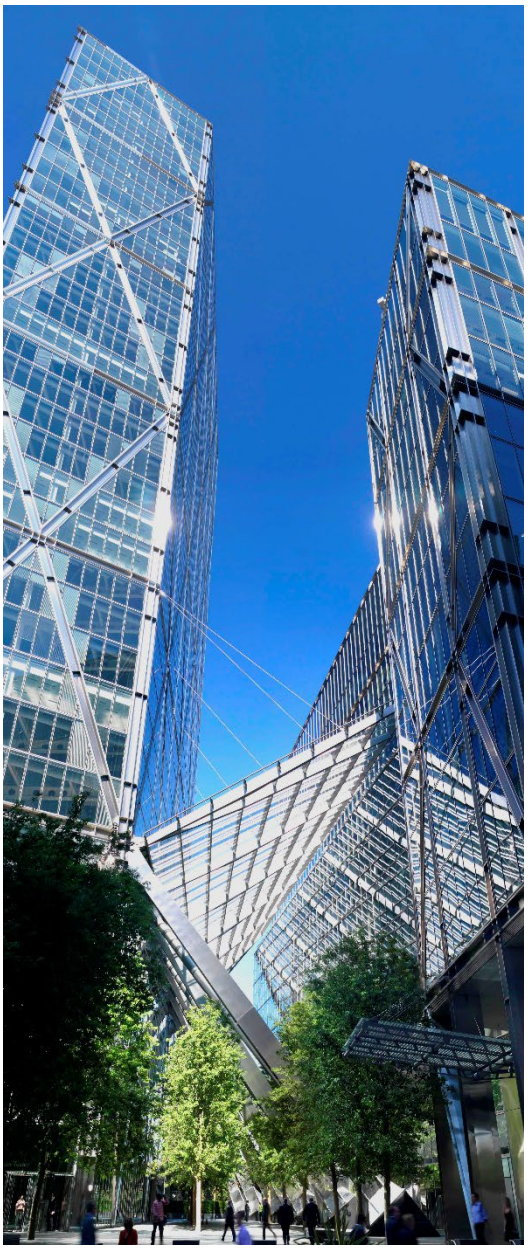
**ET procedure – deposit orders:** In determining whether a respondent's defence had any reasonable prospect of success for purposes of making a deposit order, the EAT has concluded that an ET is entitled to consider the outcome of previous litigation against the same respondent relating to the same arguments and identical facts. This case involved the employment status of drivers; previous litigation had concluded that a different set of drivers working for the respondent were 'workers', the present claim being further litigation by another set of claimants on the same issue. The respondent sought to defend the claim, and in the circumstances, it was not disproportionate to make a deposit order. (*Addison Lee Ltd v. Afshar and others*)

**ET procedure – postponement:** The EAT has concluded that an ET was wrong to deny a claimant a postponement on day two of a 10-day hearing in circumstances where her representative was not able to continue representing her due to a deteriorating medical condition. The claimant had made an application for a postponement the previous day for other reasons which was rejected, but the ET had been too hasty in rejecting the application a second time – there had been a material change in circumstances, and consideration should have been given to whether the claimant, who had several disabilities, was able to represent herself. (*Bennett v. London Borough of Islington*)

# Legislative developments

**Employment law reform:** Following the election of a new government, the Kings Speech on 17 July provided an opportunity for the new Labour government to set out its legislative priorities. As anticipated, employment law reform is high on its agenda, and two employment-related bills are expected.

**Employment Rights Bill:** Cited as a commitment to the new government's 'Plan to Make Work Pay', a bill covering the following is expected within 100 days: banning zero hours contracts so that individuals have the right to a contract which reflects the hours they regularly work and reasonable notice of canceled or curtailed shifts; reforming the law on firing and rehiring to provide effective remedies and to replace the current statutory code; day one rights for unfair dismissal (subject to probationary periods), parental leave and statutory sick pay (SSP); removing the lower earnings limit and waiting period for SSP and making it available to all workers; making flexible working the default from day one of employment; making it unlawful to dismiss a woman who has had a baby for six months after her return to work (subject to exceptions); creating a single enforcement body for enforcement of workplace rights; introducing fair pay agreements for the social care sector (extended to other areas on review); reintroducing the school support staff negotiating body to establish national terms and conditions, fair pay rates and career progression routes; updating trade union by removing restrictions on trade union activity (including minimum service levels); and simplifying statutory trade union recognition, including a regulated route to access a union. Labour has also said it will deliver a genuine living wage and remove discriminatory age bands.



**Equality (Race and Disability) Bill:** This bill is intended to provide a right to equal pay for ethnic minorities and disabled people and to introduce mandatory ethnicity and disability pay-reporting for larger employers (those with 250+ employees).

There are various commitments in the 'Plan to Make Work Pay' document and the Labour Party manifesto which do not feature explicitly in the documents circulated as part of the King's Speech, including the right to switch off, extending the time limits for bringing tribunal claims, and strengthening laws around redundancy, transfer of undertakings (protection of employment) (TUPE) and whistleblowing. It is currently unclear if these are dropped or if they will appear in the Employment Rights Bill once it is published. Plans to reform employment status were also not explicitly mentioned, but Labour has already indicated that this will take more time to work through, and so we can expect to hear more about this separately.

**Fire and rehire:** The statutory code of practice on dismissal and re-engagement came into force on **18 July 2024**. The principles of the Code should be followed by employers when changing terms and conditions of employment, with the possibility of a 25 per cent uplift on compensation if an employer unreasonably fails to follow it (although this does not extend to protective awards as the legislation required to do this was not passed before parliament was dissolved ahead of the election). The Code emphasises the need for information sharing and consultation, and also emphasises that fire and rehire should be a last resort and that dismissal should be a threat if it is not envisaged. The new Labour government has said it will repeal and replace this new Code, describing it as 'inadequate', but the timeline for them doing so is currently unclear. Read more about the content of the Code in our Employment Law Watch blog.

**Tips:** Legislation and a statutory code of practice which deal with the fair allocation of tips, including obligations to ensure there is a fair and transparent distribution and that workers receive tips in full comes into force on **1 October 2024.**

**Artificial Intelligence (AI):** The EU Artificial Intelligence Act has been published and will come into force on **1 August 2024**. While some of the rules take effect in 2025, the majority will not apply until **2 August 2026**.

**Seafarers:** Eight amendments to the Maritime Labour Convention (MLC) aimed at improving living and working conditions at sea will come into force on **23 December 2024**. The amendments cover issues such as recruitment and placement, repatriation, accommodation, access to recreational and welfare facilities, food and catering, medical care, health and safety and financial security.

**Higher Education – NDAs:** Legislation which was due to come into effect on 1 August 2024 banning the use of NDAs by higher education providers in cases involving sexual misconduct, bullying and harassment has been put on hold by the new government.

# Other news

**National living wage (NLW):** The government has expanded the Low Wage Commission's (LPC) remit to take into account the cost of living, as well as the impact on business, competitiveness, the labour market and the general economy when recommending increases to the NLW. The government has committed to ensuring a genuine living wage for workers and intends to remove the age bands between the different rates. Having one single rate for adults seems unlikely to happen as soon as April 2025 (when the next NLW and national minimum wage (NMW) rates are due to change), but the government has asked the LPC to narrow the gap between the NLW rate and the NMW rate for 18- to 20-year-olds in its next review.

**Four-day working week:** A new four-day working week trial is being launched as of November 2024, with campaigners hoping to use positive results to lobby the government for change.

**Equality and human rights:** The EHRC has published its draft strategic plan for 2025–2028, identifying the following issues as priority areas for supporting change and improvement in the workplace context: addressing sexual harassment in the workplace; improving pay gaps for women, ethnic minority groups and disabled people; addressing barriers to work for disabled people; discrimination arising from home/hybrid working and new technologies (such as AI); and legal clarity where there is a conflict between two or more protected rights.

# New guidance

**Recruitment:** The EHRC has published updated guidance on ensuring advertisements comply with discrimination laws, including content on 'occupational requirements' for employing someone with a particular protected characteristic.

# Consultations

**Sexual harassment:** Ahead of the new mandatory duty on employers to prevent sexual harassment in the workplace, which will apply from October 2024, the EHRC has launched a consultation on the associated technical guidance. The new "preventative duty" requires employers to take reasonable steps to prevent the sexual harassment of workers in the course of employment, with the guidance explicitly stating that this extends to preventing sexual harassment by third parties. The test of reasonableness is objective, but employers are expected to consider the risks present and the steps needed to reduce those risks, to assess which of those steps are reasonable and to implement those steps. A failure to follow the new duty can result in the EHRC taking enforcement action and/or, where the breach is linked to a successful ET claim, an uplift in compensation of up to 25 per cent. The consultation closed on **6 August 2024**.

**Directors:** The Institute of Directors has launched a consultation on a Code of Conduct for Directors, intended as a voluntary commitment to a behavioural framework. Comments are invited from the business community and the public, to be provided by **16 August 2024.**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