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UK Employment Law Update – December 2024

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

Our December 2024 update looks at the latest proposed employment law reforms, including plans to extend the time limits for bringing ET claims to six months, as well as details of a new criminal offence for businesses that fail to prevent fraud. We also provide a round-up of recent cases, covering issues such as accent-based harassment, swearing at work and improper behaviour during negotiations, as well as a very expensive unlawful deductions claim.

In this issue

Recent publications

- The birth of the UK Failure to Prevent Fraud Offence - 9 months to prepare

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Latest employment law reforms – Employment Rights Bill

Amendments to the Employment Rights Bill: As the Bill is making its way through the parliamentary process, a number of amendments have been made or proposed to the content. These include:

- **Employment tribunal (ET) time limit:** Extending the time limit for bringing ET claims from three months to six. This is not altogether surprising: whilst the time limit extension was not in the original Bill, the accompanying paper did suggest it would end up being included. Extending the time limit will increase risks for employers and further burden the already stretched ETs.
- **Unfair dismissal – initial period of employment (IPE):** Whilst the initial Bill was silent on the length of the IPE (nine months being the government's expressed preference in an accompanying paper), the Bill now explicitly states it should be between three and nine months. There is no suggestion that the government's preference for nine months has changed, but the amendments set out parameters should the IPE length need to be adjusted in the future.
- **Unfair dismissal – compensation for unfair dismissals during the IPE:** A new clause gives powers to set a maximum compensatory award for unfair dismissals during the IPE. This is consistent with previous suggestions of a different compensation regime for dismissals during the IPE, and we can expect this to be a topic for consultation.
- **NDAs:** A new proposed clause expressly renders void any confidentiality provisions which prevent a worker from making a disclosure about harassment, including sexual harassment.
- **Contractors:** New provisions propose a ban on substitution clauses in contracts for services.

Impact assessments: The Regulatory Policy Committee (RPC) has published a report highlighting serious concerns about the planned reforms and the inadequacy of the impact assessments, which accompany the draft legislation. Describing the impact assessments as unfit for purpose, the RPC's report requires the government to undertake more labour market and macroeconomic analysis to better understand the impact of the reforms on employment, wages, output and the costs to employers. It also requires the worst-rated impact assessments to provide further analysis and evidence to support them, including further consideration of an option to simply reduce the unfair dismissal qualifying period as an alternative to current plans, evidence as to whether employers are currently handling flexible working requests unreasonably, and more analysis of the prevalence of third-party harassment.

Case law updates

Redundancy consultation: The Court of Appeal has overturned a controversial decision from last year which suggested that employers should engage in general workplace consultation before making redundancies, regardless of whether collective consultation obligations are triggered. The Court of Appeal has confirmed that whilst workplace consultation may be useful in smaller scale redundancies, it is not mandatory, and the lower tribunals had been wrong to fill a perceived gap created by the statutory collective consultation requirements not applying to smaller redundancy exercises. (*Haycocks v. ADP RPO Ltd*)

Confidential information and harassment: A former employee was found in breach of contract and breach of confidence, as well as being responsible for harassment, after posting a series of LinkedIn updates containing her former employer's confidential information and sending a number of oppressive emails to hundreds of people. This complicated and extreme case had a lengthy history, arising from the employee's dismissal weeks into her probationary period, leading to grievances and unsuccessful ET and appeal proceedings, which included allegations of dishonesty and corruption against the judges. Ultimately she sought vengeance against her employer and individuals but in doing so, acted unlawfully. A final injunction was granted to prevent the employee from further unlawful misconduct, along with an extended civil restraint order, as well as damages and costs awarded against her. (*Titan Wealth Holdings Ltd and others v. Okunola*)

Harassment: The Employment Appeal Tribunal (EAT) has been considering the extent to which conduct relating to someone's accent may be "related to" a protected characteristic for harassment purposes. The claimant brought numerous complaints of race and religious discrimination based on her Brazilian nationality and Jewish ethnic origin, which were rejected by the ET. In criticising the ET's analysis of the accent harassment part of her claim (the ET had wrongly looked at motive and applied a 'because of' test), the EAT was clear that accent can be an important aspect of a person's national or ethnic identity, so could come within the scope of harassment depending on the circumstances. This case has been referred back to a new ET for consideration. (*Carozzi v. University of Hertfordshire*)

Non-competes: A technology education provider has successfully obtained an injunction against two consultant game developers for breaching six-month post-termination non-competes, despite a dispute over the scope of the agreement the parties had entered into and the extent to which the work they had carried out was subject to the restriction. The court was satisfied that the provider had a legitimate business interest to protect and that while more analysis was needed to establish what work had been carried out by the developers, and if it was covered by the restrictions, the gamers had had access to confidential information which placed them at an advantage. In the circumstances, there was a serious issue to be tried, damages were not an appropriate remedy, and the balance of convenience rested with granting the interim injunction pending a speedy trial. As well as providing an example of a successful interim injunction, this case acts as a reminder of the challenges arising from uncertainty in the terms of an agreement. (*CoGrammer Ltd v. Tuulik*)

Protected negotiations: Employers are able to engage 'off the record' in settlement negotiations about ending employment on agreed terms (i.e., without the content of discussions being admissible in evidence at any later ET unfair dismissal proceedings if negotiations fail) even where there is no existing dispute between the parties, provided

there is no 'improper behaviour'. In this case, the employer started termination negotiations with the claimant on his return from sick leave and having identified the need to make redundancies. When terms were not agreed and the claimant was later dismissed for redundancy, he brought an unfair dismissal claim and sought to rely on the pre-termination negotiations as part of his claim, arguing that they were admissible in evidence because his employer had behaved improperly in three ways. Dismissing the appeal, the EAT found that the following did not amount to 'improper behaviour': (i) giving the claimant 48 hours to consider and verbally accept a settlement in principle (in circumstances where more time was available to finalise and negotiate written terms); (ii) using a return to work meeting as a pretext to have a 'protected conversation'; and (iii) pointing out that the redundancy process would continue and that dismissal was a possible outcome. This case will be helpful to employers as guidance on the EAT's views on what is, and is not, improper behaviour, although employers should always still take care to ensure employees are not put under undue pressure to agree settlement terms. (*Gallagher v. McKinnon's Auto and Tyres Ltd*)

Unfair dismissal: An employee has won his unfair dismissal claim after a judge determined that, whilst calling a female colleague a "f****** m**g" was offensive, his employer's decision to dismiss him for breach of the dignity at work policy was not reasonable in all the circumstances. The judge concluded that swearing was commonplace in this particular office (and generally in 'the North', where this office was based), but the employer had failed to set clear expectations about acceptable language and behaviour and had not acted consistently in its handling of this case. Looking at the factors holistically, along with the process the employer followed, rendered the dismissal unfair. (*Ogden v. Booker Ltd*)

Wages: A Premier League footballer who was not paid for two years whilst he was facing criminal charges for rape has succeeded with his unlawful deduction from wages claim and is expected to be awarded around £8.5 million. Over a 22-month period, the claimant was remanded in custody twice, and at other times was prevented from training or playing football due to bail conditions and FA suspension. The judge found that in the non-custody periods he was "ready, able and willing" to work but prevented from doing so for reasons which he could not avoid and that in the absence of a contractual right for his club to withhold wages, he was entitled to be paid. This contrasts with the time he was in custody, as this was due to his breach of bail conditions. Therefore, the inability to perform his contract was within his control and the club was entitled to withhold pay. This high-profile case is a reminder to ensure contractual provisions give employers a right to withhold or deduct wages in specified circumstances. (*Mendy v. Manchester City Football Club*)

Legislative developments

Fire and rehire – compensation for breach of code of practice: Legislation coming into force on **20 January 2025** will bring protective awards (for failing to comply with collective consultation requirements) within the scope of the 25 per cent compensation uplift where employers fail to follow the code of practice on fire and rehire.

Seafarers: Eight amendments to the Maritime Labour Convention 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.

Fraud: Large organisations will be criminally liable from **1 September 2025** if an employee, agent, subsidiary or other associated person commits fraud with the intention of benefiting the organisation, unless the organisation has reasonable processes in place to prevent it. New guidance has been issued to help organisations understand the upcoming new law and to provide a framework for establishing reasonable fraud prevention practices (see below). Read more about the new offence here.

Other news

Further employment reforms: The government has published a policy paper, Get Britain Working, outlining its £240 million initiative aimed at getting more people into – and keeping them in – work. Proposals include:

- Conducting an independent review of how employers can better support the employment of people with disabilities and health conditions by, for example, improving recruitment and retention, preventing ill-health, promoting healthy workplaces, undertaking early intervention for sickness absences, and facilitating returns to work. The review is expected to run until summer 2025 and will engage employers, employees, trade unions, health experts and those with disabilities and health conditions.
- Transforming job centres into a new 'national jobs and careers service' to focus on skills and careers, allowing staff flexibility to offer a personalised service and encouraging local councils and mayors to join up local work, health and skills support in their area.

- Delivering a 'youth guarantee' to provide access to apprenticeships, training, further education or job-seeking for all 18- to 21-year-olds, which will also see a transformation of the current apprenticeship levy into something more flexible.
- A 'connect to work' scheme offering voluntary employment opportunities for people with disabilities, health conditions or complex barriers to work.
- An overhaul of the health and disabilities benefits system, with a consultation launching in spring 2025.
- Expanded mental health support, including a 'prevention first' approach and steps to reduce waiting lists.

Statutory rates and limits: The DWP has announced a planned increase to various statutory payments, to apply from **April 2025**. This will see statutory sick pay increase to £118.75 per week, the statutory rates for maternity pay, maternity allowance, paternity pay, adoption pay, shared parental leave pay and parental bereavement pay increase to £187.18 per week, and the lower earnings limit increase to £125 per week.

Four-day week: A new four-day week trial involving 17 businesses has been launched in the UK, with approximately 1,000 employees working a four-day week or nine-day fortnight, with no loss of pay. A report into the trial is expected in mid-2025.

Modern slavery: Following an inquiry into the impact and effectiveness of the Modern Slavery Act 2015, a report has been published making several recommendations for improvement. These include holding companies more responsible for their supply chains by making modern slavery statements mandatory and introducing sanctions for non-compliance. The report also recommends revisiting immigration legislation to ensure it protects and supports victims of modern slavery. The government is due to respond to the recommendations by 16 December 2024.

Neurodiversity: A recent study suggests that almost two thirds of neurodivergent workers perceive that they are seen as a 'red flag' by employers and are disadvantaged during the recruitment process. The study revealed that half hide or fail to disclose their condition, but that communication style or team fit is often a reason for applications not to progress. Employers should consider their recruitment processes to identify where adjustments could be made to be more inclusive for neurodivergent applicants.

Kinship carers: The government has confirmed that leave and legal safeguarding for kinship carers (those who look after children who cannot live with their parents) is something it is committed to reviewing as part of its general review of parental leave.

Whistleblowing: The government is considering introducing an office of the whistleblower to focus on ensuring whistleblowers have protection and that concerns are properly investigated and addressed.

Real Living Wage: The Living Wage Foundation has reported a 5% increase in the real Living Wage in the UK, which

New guidance

Sexual harassment: The Equality and Human Rights Commission (EHRC) has published checklist, action plan and monitoring log templates to help businesses navigate their new duty to take reasonable steps to prevent sexual harassment. Whilst these templates are designed for shifts and hospitality work, many of the points will be relevant in other contexts. These templates sit alongside the EHRC's existing technical guidance and eight-step guide.

Fraud: The Home Office has issued guidance for organisations on the upcoming new offence of failing to prevent fraud (see above). The guidance provides a framework for establishing reasonable fraud prevention procedures, which take a flexible and outcome-focused approach.

Recruitment: Following an audit earlier this year, the Information Commissioner's Office has published a report and recommendations for AI providers and recruiters when developing and using AI tools during recruitment.

Consultations

Equality and discrimination: The EHRC has launched a consultation on its Code of Practice to ensure people are not discriminated against in associations, service provision or public functions. It closes on **3 January 2025**.

Financial services: The FCA and PRA have published a joint consultation on reforming the remuneration regime for dual-regulated firms, with the aim to make it more simple, effective and proportionate whilst also facilitating international competitiveness. Responses are requested by **13 March 2025**.

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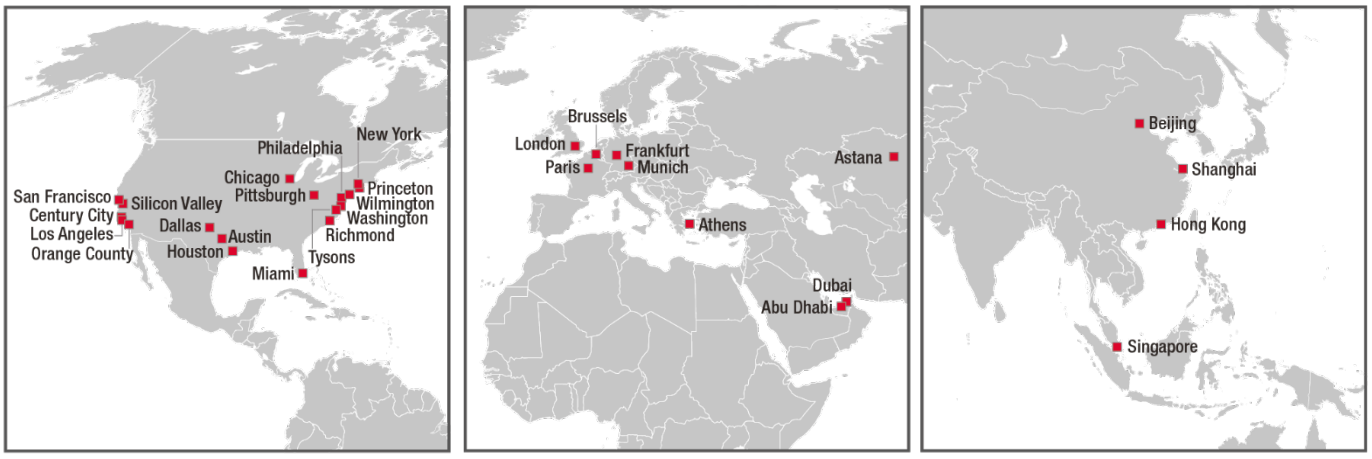

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