ReedSmith
Driving progress
through partnership

# UK Employment Law Update – February 2025

Our February 2025 update provides the usual round-up of interesting recent cases, including a helpful reminder on the risks of dismissing for ill health where there are permanent health insurance benefits available, whether an 'air kiss' amounts to sexual harassment, and how a small and inexpensive oversight can result in a successful discrimination claim. We also provide an update on the Labour government's employment law reforms and the right to neonatal care leave and pay coming into force in April 2025.

## In this issue



## Recent publications

- New duty to prevent sexual harassment
- 2024 UK Data Protection and Privacy case law update
- Does the UK government's new AI Opportunities Action Plan change its approach towards AI regulation?

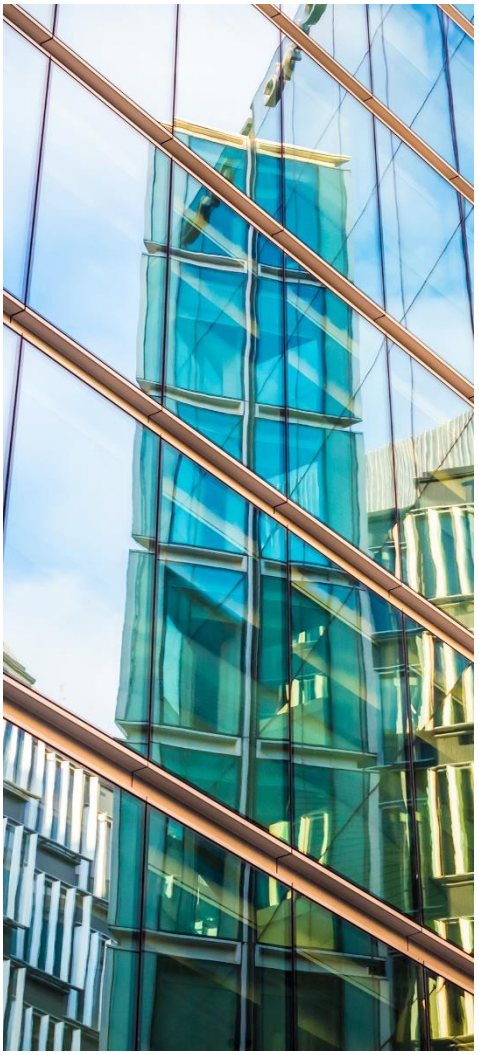
Follow us on LinkedIn to stay up to date with our latest news and publications.

# Case law updates

**Unfair dismissal – re-engagement:** This recent Employment Appeal Tribunal (EAT) case provides a helpful illustration of the circumstances in which a tribunal can order the employer rehire a dismissed employee. Re-engagement is a potential remedy for unfairly dismissed employees, with the rules saying that a tribunal must take the following into account: (i) the wishes of the dismissed employee; (ii) the practicability of re-engagement; and (iii) whether it would be "just" to reinstate the employee if the complainant caused or contributed towards their dismissal. In this case, the employment tribunal (ET) found that the claimant was unfairly dismissed after his employer had failed to carry out a reasonable investigation into alleged sexual misconduct, which was not rectified on appeal, and the claimant sought re-engagement. Before the remedies hearing took place, the employer instructed an external and independent investigation into the allegations which concluded that the alleged misconduct had occurred. The employer then relied on that new investigation report to argue that re-engagement should not be awarded. The employer argued that it had a reasonable belief that the claimant had committed sexual misconduct and that as a result it had lost trust and confidence in the claimant. The employer initially tried to argue that there was contributory fault by the employee, but later withdrew this argument. The ET ordered re-engagement, saying the external investigation was flawed and noting that there was no contributory fault by the employee. The order for re-engagement was overturned on appeal by the EAT, which found that the ET was wrong to think it was obliged to consider the issue of contributory fault in circumstances where this was not part of the ET's liability determination and where it was not an argument pursued by the respondent. The EAT also found that the ET had wrongly judged the fairness of the external investigation. Instead, the relevant issue was the practicability of re-engagement, and this should have been considered from the respondent's perspective. The EAT concluded that the findings of the independent report supported the conclusion that re-engagement was not appropriate. (*British Council v. Sellers*)

**Employment tribunal procedure:** It is a prerequisite to a claim that the claimant must first contact the Advisory, Conciliation and Arbitration Service (Acas) under the early conciliation (EC) scheme. In this case, the claimant failed to do so, but this was not spotted by the ET or the respondent, and the claim proceeded. When the oversight came to

light, the issue arose as to whether the claim could continue. The EAT concluded that it could – following another EAT decision in which it ruled that a claim that is not rejected at the outset for a failure to comply with EC requirements cannot be challenged at a later date as improperly accepted. (*Abel Estate Agent v. Reynolds*)



**Permanent health insurance (PHI):** The EAT has been considering a claim for unlawful deduction from wages in circumstances where an employee has been on long-term sickness (and was subsequently dismissed for ill health after around three years' absence). The employee did not receive any PHI benefits during her employment despite her employer operating such a scheme. The claimant had mistakenly been omitted from the employer's PHI policy and was successful with her ET claim, it having been found on the facts that she did have a contractual entitlement to PHI benefits for her period of employment. However, once her employment terminated, there was no further entitlement to PHI benefits and therefore no unlawful deductions claim. The EAT upheld the tribunal's decision, noting that although there is an implied right not to be dismissed for ill health where to do so would deprive the employee of PHI benefits, this was relevant to a claim for wrongful dismissal/breach of contract and not a claim for unpaid wages. The case is a helpful reminder for employers about the challenges around ill health dismissals where a PHI scheme operates and of the importance of the employment contract terms regulating access to such benefits. Employers should take care to ensure the employment contract is clear that access to PHI benefits is subject to the insurer's acceptance of a claim and the terms of the policy. (*McMahon v. AXA ICAS*)

**Sexual harassment:** A non-binding ET decision concluded that an 'air kiss' was not unwanted conduct of a sexual nature or, if it were sexual, it was not reasonable for it to have had the purpose or effect of violating the claimant's dignity or creating a hostile, degrading, humiliating, or offensive environment for her. The decision turned on the credibility of witness evidence. In contrast to the claimant's inconsistent version of events (which alleged an actual kiss), her colleague was found to be a straightforward and honest witness, and his evidence was preferred. (*Chen v. Cut Your Wolf Loose Ltd*).

**Sex discrimination**: A health care support worker was discriminated against on grounds of sex when her employer failed to provide her with a lockable room to express breast milk when she returned to work after maternity leave. Although her level of compensation still needs determining, it will likely be disproportionate to the cost of a lock, noted by the tribunal as being £5.50. (*Gibbins v. Cardiff and Vale University Local Health Board)*

**Unfair dismissal:** A claimant was unfairly dismissed for poor performance having not received any prior formal warning during the performance improvement process, contrary to her employer's policy. The claimant, a social media content creator for a museum, was under scrutiny for her performance for not posting much content, regularly missing deadlines, and content she did produce being full of errors. However, the performance improvement plan put in place to address these concerns was flawed, and the ET concluded that the claimant had a legitimate expectation that her employer's policy would be followed and that she would have at least one formal warning before dismissal – a helpful reminder that a fair process is a key part of a fair dismissal. (*Briggs v. The Trustees of the National Museums of Scotland*)

**Employment status:** In another non-binding decision, an ET has determined that an independent social worker who was placed for work by a recruitment agency via a service company was a worker of the agency and therefore succeeded with an unlawful deduction-from-wages claim in respect of deductions made by the agency for employer National Insurance contributions. Status claims always turn on their specific facts, but in this case, the ET found the reality of the relationship to be that of a worker. The claimant had sent time sheets to the agency rather than invoices, performed personal services on a full-time basis, and was not in business on her own account. (*Appiah v. Tripod Partners Ltd*)

# Employment Right Bill update

The Employment Rights Bill (ERB) has completed the House of Commons Committee stage of the legislative process, and all of the proposed amendments made by the government throughout that process to date have been accepted. This includes the proposal to extend employment tribunal (ET) time limits from three to six months and provision for the initial period of employment for the 'light touch' dismissal process being set at between three and nine months. The ERB will now progress to the next stage of the process where the content of the draft legislation will be further considered, with plenty more opportunity for further amendments. There is speculation in the media that amendments will be sought to reduce the impact on business, and we are awaiting more consultation.

# Legislative developments

**Fire and rehire – compensation for breach of code of practice:** Legislation came into force on **20 January 2025** which will bring protective awards (for failing to comply with any collective consultation requirements) within scope of the 25% compensation uplift where there is a failure to follow the code of practice on fire and rehire.

**Neonatal leave and pay:** Legislation giving a day-one statutory right to leave and pay for parents of babies requiring neonatal care will, subject to parliamentary approval, be in full force by **6 April 2025**. The new right provides for up to 12 weeks of leave and pay in the first 68 weeks after birth (if eligibility criteria are met) where babies need a continuous stay of seven days or more in hospital in the first 28 days of their life. The new statutory right sits alongside existing statutory rights (for example, maternity and adoption leave). Employers should start preparing an appropriate policy in anticipation of the changes. Read more in our employment law watch blog.

**Fraud:** Large organisations will be criminally liable from **1 September 2025** if an employee, agent, subsidiary, or other associated person commits fraud intending to benefit the organisation, unless the organisation has reasonable processes in place to prevent). Read more about the new offence here.

# Other news

**Nondisclosure agreements (NDAs):** The government has announced that it expects to revisit plans to ban the use of NDAs in higher education institutions where there is sexual misconduct, bullying, and harassment. Law in this area had been due to come into force in August 2024, but having just come into power, the new government put a hold on this while they considered their options. A policy paper is expected, but there is no current timescale. Though specific to the higher education sector, the proposals may be indicative of the government's general plans in this area and ongoing attempts to crack down on this type of behaviour.

**Immigration:** Since 8 January 2025, eligible non-European travellers to the UK need an electronic travel authorisation (ETA). This will extend to eligible European travellers from **2 April 2025.**

**Minimum wages:** From **1 April 2025**, the minimum wage for workers age 21 and over will increase to £12.21 per hour, £10 per hour for 18-20 year olds, and £7.55 for 16-17 year olds and apprentices.

**Statutory rates and limits:** The Department for Work and Pensions (DWP) has announced the planned increase to various statutory payments to apply from **April 2025**. These see Statutory Sick Pay (SSP) increase to £118.75 per week and require that the statutory rates for maternity pay, maternity allowance, paternity pay, adoption pay, shared parental leave pay, parental bereavement pay, and neonatal leave pay be set at £187.18 per week, and the lower earnings limit increase to £125.

**Miscarriage:** A report from the Women and Equalities Committee calls for a statutory right to a period of paid leave for women and their partners who experience pregnancy loss before 24-weeks, saying that sick leave is neither appropriate nor adequate in the circumstances, and that it is a bereavement in the same way as a post-24 week pregnancy loss (where statutory rights do apply). They call for this to be included in the ERB.

**Four-day week:** The campaign group, 4 Day Week Foundation, reports that 200 companies now operate a permanent four-day working week arrangement with employers whereby they work a shorter week with no loss of pay. A second research pilot on the four-day week started in November 2024, the results of which are likely to help further the campaign to widen its take-up.

# Consultations

**Brexit:** The House of Lords European Affairs Committee has launched an inquiry into resetting the UK's relations with the EU. Interested parties can submit written evidence by **7 March 2025**.

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

## Key contacts


**Robin Jeffcott**
Partner, London
rjeffcott@reedsmith.com

**David Ashmore**
Partner, London
dashmore@reedsmith.com

**Carl De Cicco**
Partner, London
cdecicco@reedsmith.com

**Joanna Powis**
Counsel, London
jpowis@reedsmith.com

**Alison Heaton**
Knowledge Management Lawyer,
Global Solutions - Leeds
alison.heaton@reedsmith.com


Follow us on LinkedIn

**Reed Smith is a dynamic international law firm, dedicated to helping clients move their businesses forward.**

Our long-standing relationships, international outlook, and collaborative structure make us the go-to partner for speedy resolution of complex disputes, transactions, and regulatory matters.




ABU DHABI
ASTANA
ATHENS
ATLANTA
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
ORANGE COUNTY
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

**reedsmith.com**