UK Employment Law Update

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UK Employment Law Update – May 2026

Our May 2026 edition provides a round-up of interesting case law, including decisions which remind employers to take care with the wording of conditional offers of employment, that not all "protected conversations" are off the record if negotiations fail, and that non-payment of insured contractual benefits can be an unlawful deduction from wages. We have also seen a consultation launched on the appropriate use of NDAs in discrimination and harassment cases, and a call for evidence on whether the UK TUPE rules should be reformed.

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- FCA and PRA confirm changes to SM&CR to streamline senior manager accountability and boost growth
- Intra-Client Documents and Legal Advice Privilege: English High Court provides clarification

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Case law update

Offers of employment: A claimant who had an offer of employment withdrawn before starting his role has won a breach of contract claim and been awarded three months' notice pay. The claimant's employment as a project manager was conditional upon satisfactory references and right to work checks. The claimant brought a notice pay claim when the offer was withdrawn because of project delays. The Employment Tribunal (ET) dismissed the claim, finding there was no contract (and therefore no breach of contract) because the references and right to work checks were outstanding when the offer was withdrawn. The Employment Appeal Tribunal (EAT) overruled the ET, finding that the fact that the references and right to work checks were outstanding did not prevent a binding contract from having been formed, and that the employer was therefore required to give notice to terminate the contract. In the absence of agreed notice provisions in the offer letter, reasonable notice was needed – given the claimant's seniority, the EAT decided that three months' notice was appropriate rather than the statutory minimum of one week. The case highlights the need for carefully worded offer letters, ensuring that it is clear there will be no contract until the conditions are satisfied (i.e., conditions precedent). (*Kankanalapalli v. Loesche Energy Systems Ltd*)

Employment Tribunal litigation: A claimant's claim for discrimination has been struck out because delays meant that a fair trial was no longer possible. The proceedings had been substantially delayed by a combination of the Covid-19 pandemic and the respondent being subject to a company voluntary arrangement which meant listed hearings were vacated. By the time the claim could proceed, approximately four years had passed since the claimant's dismissal, with discrimination complaints going back several years before that. The claim

involved numerous allegations, but only a few of the alleged protagonists were still employed by the respondent, contactable, and willing to cooperate. The ET struck out the claims, a decision which was supported by the EAT on the specific facts, because the respondent would be put at an unfair disadvantage by the unavailability of key witnesses and therefore unable to defend the claim. Although fact-specific, the EAT judgment helpfully explores the issues for an ET to consider before granting a strike out. It will be interesting to see if applications of this nature become more prevalent as the ET struggles with capacity and claims now commonly taking several years to reach a hearing, even without a pandemic and insolvency intervening. (*Boateng v. Moss Bros Group*)

Legal advice privilege: Communications with a lawyer for the purpose of seeking and receiving legal advice are privileged and protected from being disclosed to third parties or the court, although the rules are complicated. The High Court has recently published an important judgment which suggests that communications created by or sent between members of a relevant client group, even without a lawyer in the loop, could still be protected by legal advice privilege - in this case, the relevant documents were for the purpose of identifying facts to communicate to the lawyer, and what issues to seek legal advice on. Notwithstanding this decision, employers should not assume that privilege will apply. (*Aabar Holdings SARL v Glencore plc)* Read more here

Permanent health insurance (PHI): An employee who was dismissed for ill health has succeeded with a claim for unlawful deduction of wages for the period of non-payment of contractual PHI payments, covering not only the relevant period before her dismissal but also a nine-year post-termination period. The contractual PHI entitlement was for 75% of her salary until she recovered or reached age 65, but due to an administrative error, the claimant was omitted from the insurance policy. The claimant successfully argued that her PHI benefits remained enforceable after dismissal, either because they were benefits which did not require ongoing employment and/or because there was an implied term preventing her dismissal whilst she was off sick and entitled to PHI payments. She also succeeded with an argument that the payments were "wages" rather than losses arising from a breach of contract (which would have limited her remedy to £25,000 in the ET). The case acts as a reminder to employers to take extreme care before terminating the employment of an employee on capability grounds where long-term sickness benefits exist, and to ensure that the contractual terms giving entitlement to the benefit are clearly made subject to the terms of the linked insurance policy. (*McMahon v. AXA ICAS Ltd*)

Collective redundancy consultation: Collective consultation obligations arise where an employer "proposes to dismiss as redundant 20 or more employees at one establishment in a period of 90 days or less". In this recent case, administrators were appointed to assess options and undertook redundancies in two batches, making 15 redundancies on 2 May 2023 and five further redundancies on 5 May. The ET rejected claims for a protective award, finding there was no breach of collective consultation laws based on looking at the two batches in isolation. The EAT concluded the ET should have looked at the position on 2 May when the administrators were appointed. On the facts, there was a proposal to dismiss 20 or more employees on 2 May and so all 20 redundant employees were entitled to a protective award. Although this case pre-dated the changes, the maximum protective award is now 180 days' pay per employee. (*Ellard & others v. Alliance Transport Technologies Ltd*)

Negotiations: A recent EAT decision is a helpful reminder that the protection afforded by a "protected conversation" is only relevant to ordinary unfair dismissal claims. Section 111A of the Employment Rights Act 1996 allows an employer and employee to discuss leaving employment on agreed terms without that discussion and any negotiations being admissible as evidence in relation to ordinary unfair dismissal proceedings. In this case, the ET had wrongly disallowed "protected conversation" negotiations to feature as evidence for the claimant's unlawful

deductions of wages and part time worker claims. The rules on these "protected conversations" should be distinguished from circumstances where there is a discussion or negotiation about settling a dispute as such discussions are protected under the "without prejudice" rules. (*Tarbuc v. Martello Piling Ltd*)

ET procedure: A claimant whose name on his ET1 claim form did not match the name on the early conciliation (EC) certificate has had a decision to reject his claim overturned by the EAT. In the period between receiving an EC certificate and issuing a claim, the claimant had changed his name by deed poll from Annabel to Isaac to reflect his gender identity. As the names on the two documents did not match, the claim was rejected, but the EAT found that the ET was wrong to do so – the ET has a wide discretion and in circumstances where the reason for the differing names was clear, and where the claim being presented was for gender reassignment discrimination, the claim should be allowed to proceed. The EAT also noted how circumstances such as a change of name following marriage may similarly lead to a different name on an EC certificate and ET1 but should not prevent a claim being pursued. (*Bickley v. John Lewis plc*)

Annual leave: An employee who was repeatedly refused requests for holiday and told unused entitlements would roll forward or be paid in lieu has been awarded over £400,000 after leaving his job with over 800 days of untaken paid holiday. Whilst an extreme example, this case reiterates the importance of allowing employees to take annual leave for health and safety purposes and to avoid long-running informal agreements which run contrary to statutory entitlements. It is also a timely reminder that since 6 April 2026, employers are required to keep adequate records in relation to annual leave. (*Ageli v. Sabtina Ltd*)

Employment Rights Act 2025

Key points at a glance:

- The Employment Rights Act 2025 (ERA 25) received Royal Assent on 18 December 2025.
- The reforms will be phased in over the next couple of years. Most changes will take effect in April or October 2026 and 2027, although commencement regulations will be needed to confirm the implementation date.
- A raft of changes took effect from **6 April 2026**, including day one rights to paternity leave and parental leave, changes to statutory sick pay, whistleblowing protection for disclosing sexual harassment, an increase in the protective award for failing to collectively consult, a duty to keep records relating to annual leave, and that employers with over 250 employees can develop and publish equality action plans on a voluntary basis. In addition, the Fair Work Agency was established on **7 April 2026**.
- The next wave of changes, expected in October 2026, includes employer liability for harassment by third parties, a duty to take all reasonable steps to prevent sexual harassment, extended time limits for bringing ET claims, obligations to tell workers of their right to join a trade union, new rights of access and to facilities for trade unions, and tightened tip laws.
- Detail of many of the remaining reforms will still need to follow, shaped by consultation.
- Consultations on fire and rehire, flexible working, trade union recognition, detriment for taking industrial action, and tipping closed in April 2026. There is an open consultation on changes to the collective redundancy consultation threshold.
- We have updated our ERA 25 timeline and next steps.
- We will keep you updated here and on our Employment Law Watch blog.

Open ERA 25 consultations

- **Trade union (TU) rights of access:** The government has published a consultation on a draft code of practice on TU rights of access (which is expected to apply from October 2026) and is seeking views on the content. The draft code covers how requests should be made, how access agreements should be negotiated and implemented, and the process to follow if agreement cannot be reached. The consultation closes on **20 May 2026**.
- **Collective redundancy consultation:** The ERA 25 includes an organisation-wide threshold test for triggering collective consultation obligations, in addition to the current test. A consultation has been launched to seek views on setting this new threshold, both in terms of the method and the level. The consultation explores methods including a single fixed number of organisation-wide redundancies (the government's lead proposal); a tiered fixed numbers system depending on the size of the organisation; or a variable or percentage-based test. It closes on **21 May 2026**.
- **Non-disclosure agreements (NDAs):** The government has launched a consultation on proposals to crack down on the use of confidentiality provisions or NDAs preventing workers from speaking out about harassment or discrimination. The consultation explores the circumstances in which it would be appropriate for an NDA to remain valid in discrimination and harassment cases (e.g. if requested by the worker, having first received independent legal advice) and who workers will still be permitted to speak to where an NDA is valid. It also explores whether employers should be able to suggest confidentiality, whether there should be a cooling-off period (and, if so, whether this can be waived), a mandatory requirement to provide a signed copy of the agreement to all parties, whether valid NDAs should nevertheless be time-limited, and whether the rules should be expanded to cover NDAs with individuals who are not employees (e.g., self-employed individuals, individuals on work experience or training, agency workers, and those on secondment). The consultation is open for comment until **8 July 2026.** The government has indicated that any new rules will be implemented during 2027.

Other legislative developments

ET time limits: Regulations have been published which will see the time limits for the following ET claims extended to six months where the "relevant date" (i.e., the date of less favourable treatment, breach, detriment, etc.) falls on or after **1 October 2026**: breach of contract claims, rights in relation to part-time workers, fixed-term employees, exclusivity in zero-hour contracts, information and consultation, blacklisting, protections for NHS whistleblowers during recruitment, and rights to be accompanied to meetings to discuss study and training. It is important to note that these regulations only deal with extending the time limits for the claims listed – the ERA 25 also extends the time limits for most other ET claims, but we await commencement regulations confirming that these will also apply from 1 October 2026.

Artificial intelligence (AI) and automated decision making: Regulations coming into force on 12 May 2026 will require the Information Commissioner to prepare a code of practice giving guidance on processing personal data when developing and using automated decision making and AI. The timescale for publication of the code is currently unknown.

Services, public functions, and associations: The Equality and Human Rights Commission (EHRC) has submitted an updated draft code of practice to the Minister for Women and Equalities. This code provides guidance for service providers, associations, and organisations exercising public functions on complying with equality laws, including the provision of single-sex spaces. Any approved draft will then be laid before parliament before taking statutory effect. This code is not guidance for employers generally; separate guidance for employers will follow in due course.

Other news

Financial Services – Senior Managers and Certification Regime (SM&CR): The Financial Conduct Authority and Prudential Regulation Authority have confirmed plans to reform the SM&CR to improve flexibility, ease compliance, and save costs for firms whilst maintaining accountability for senior managers. Reforms will be managed over a series of phases, and there will be consultations on further proposals for reform. The phase one reforms largely took effect from 24 April 2026, providing more flexibility in relation to senior manager applications, temporary senior manager cover arrangements under the 12-week rule, regulatory reporting timelines, and internal governance processes. Read more here

New guidance

Gender pay gap reporting and action plans: The government has updated its guidance on gender pay gap reporting and creating action plans to reduce any gender pay gap and support employees experiencing menopause. Employers can currently produce action plans on a voluntary basis, but this is expected to become mandatory for larger employers (250+ employees) from April 2027.

Whistleblowing: The Department for Business and Trade has published guidance for employers on whistleblowing and guidance for prescribed persons on dealing with disclosures.

Consultations and calls for evidence

Automated decision making: The Information Commissioner's Office has launched a consultation on its draft guidance about automated decision making and profiling. It is open for comment until **29 May 2026**.

Minimum wages: The Low Pay Commission has published its annual consultation on the next increases to the minimum wage rates, to apply from April 2027. As well as seeking views on the impact of the latest minimum wage rises, it asks about affordability and the effects of the next increase if it were to increase to £13.02 or £13.34 (i.e., to maintain a national living wage of two-thirds of median earnings). The consultation is open until **26 June 2026**.

Flexible working: The Women and Equalities Committee (WEC) has launched a call for evidence on disabled people's access to flexible working. The WEC is exploring the experiences of disabled people in accessing flexibility and whether there are differing experiences across sectors, or where individuals also have other protected characteristics. The call for evidence also seeks views on disabled people's experiences of progression at work, the impact of "return to office" requirements, and employers' understanding of their duties to make reasonable adjustments. It is open for comment until **26 June 2026**.

Transfer of Employment (TUPE): The government has issued a call for evidence as part of a review and potential reform of TUPE, having previously indicated an intention to strengthen the rules where there is a relevant transfer. The government is seeking views on whether existing rules strike the right balance between supporting employers and protecting employees; experiences with the current TUPE process; whether the rights and protections for transferring staff can be improved; ensuring that TUPE is easy to understand and follow for employers; and the value of existing guidance. It is open for comment until **1 July 2026**.

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