SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

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EMPLOYMENT RIGHTS BILL: LATEST DEVELOPMENTS

The Employment Rights Bill has completed its House of Commons stage and has now gone to the House of Lords, where it will be in Committee from the end of this month. Our latest blog post: The Employment Rights Bill: Seven Questions for Employers is a summary of the core changes to be made by the Bill.

A number of amendments were made to the Bill before it went to the Lords, some as a result of consultations the Government issued last Autumn. The main changes are:

Collective redundancies: As originally drafted, the Bill amended the law so that employers would have to consult collectively when they were proposing 20 or more redundancies within 90 days, even if the dismissals were not all "at one establishment". Now the Bill says that the duty to consult collectively will apply where the employer is proposing to dismiss as redundant within a period of 90 days or less:

- at least the "threshold" number of employees, which could be a fixed number higher than 20 or a percentage of the workforce (presumably taking into account all the employer's establishments), or
- 20 or more employees at one establishment.

Amendments will also make clear that although consultation must be carried out with "all appropriate representatives", it does not require the employer to consult all the representatives together or with a view to reaching the same agreement with all the representatives.

The Government is going ahead with its proposal to increase the maximum protective award for failing to comply with collective redundancy consultation requirements from 90 to 180 days' full pay. However, the proposals to make "interim relief" available to employees who bring claims for the protective award, allowing them to apply to court for their employment contract to continue pending a full hearing of their claim, are not being pursued. The Government will monitor the level of compliance in light of the increased protective award and will consider if further measures are necessary should this prove not to be a sufficient deterrent.

Zero hours contracts: The regime under the Bill for those on zero or low hours contracts will be extended to agency workers. It will be the responsibility of the end hirer to make the "guaranteed hours offer" (of a contract that reflects the hours regularly worked during a reference period); both the agency and the end hirer will be responsible for providing reasonable notice of shifts; and payment for cancellation will be down to the agency. The Government has added a new clause allowing the zero hours rights (for all workers) to be excluded under the terms of a collective agreement incorporated into the worker's contract.

Holiday records: There will be a new duty on employers to keep records to show compliance with entitlements to annual leave and pay under the Working Time Regulations 1998, for at least six years, with failure to comply punishable by a fine.

Fair Work Agency: The Fair Work Agency is being given significantly enhanced enforcement powers, including to issue notices of underpayment (going back up to six years) for statutory payments (including holiday pay), and to bring tribunal proceedings on behalf of a worker, provide legal assistance to those bringing tribunal proceedings and recover the costs of enforcement action from employers.

Trade union legislation: The Government has confirmed additional amendments following its consultation. The most significant changes for employers are likely to be a reduction from 14 to 10 days in the notice of industrial action required to be given to employers, the extension of the expiry of the industrial action mandate from six to 12 months, extra protections during the trade union recognition process and a digital right of union access for employees.

NEW EMPLOYMENT RATES AND LIMITS

We have updated our Employment Rates and Limits document which summarises the various statutory rates of payment and limits on compensation for the main types of employment claim, applicable from April 2025. We have also included a summary of the current time limits and qualifying service requirements for claims, as well as a reminder of the various collective consultation timeframes. Although when the Employment Rights Bill becomes law, many of these limits and timeframes will change, we do not yet know the dates when these amendments will take effect.

The new increased compensation limits for Employment Tribunal claims include:

- A revised figure of £719 for the maximum amount of a week's pay. This figure is used to calculate awards including statutory redundancy payments and unfair dismissal basic awards, so the maximum is now £21,570 (up from £21,000).
- A maximum unfair dismissal compensatory award of £118,223 (previously £115,115), or 52 weeks' actual pay if lower.

The new limits apply where the "appropriate date" (effective date of termination, for dismissals) is on or after 6 April 2025.

DISMISSAL FOR FAILURE TO DISCLOSE PREVIOUS MISCONDUCT DISMISSAL ON APPLICATION FORM WAS REASONABLE

Summary: The Employment Appeal Tribunal (EAT) confirmed that an employer's decision to dismiss an employee for gross misconduct, following his failure to disclose, on a job application form, a previous dismissal for gross misconduct and subsequent period of unemployment, was reasonable in all the circumstances (*Easton v Secretary of State for the Home Department*).

Key practice point: Although this decision is employer-friendly, it also a reminder to make clear on application forms the level of detail required – for example, that any gaps in employment need to be explained. With the increased unfair dismissal protection in the Employment Rights Bill, employers are likely be more reliant on vetting and references. Having a rigorous application form and the clear ability to dismiss if wrong or incomplete information is provided should form part of the pre-employment procedures.

Facts: The claimant was dismissed by the Home Office in June 2016 for gross misconduct, in relation to which he brought tribunal proceedings which were later settled. After a three-month gap, he started a new role with another branch of the civil service. Three years later, he successfully applied for a role with the Border Force, part of the Home Office, as part of a large-scale recruitment exercise. On the application form, he had completed the section headed "Employment History" using years only. He had ticked a box agreeing that "*I understand my application may be rejected or I may be subject to disciplinary action if I've given false information or withheld relevant details*".

Shortly after he started employment, one of his former line managers drew the current line management's attention to the fact that his previous employment had been terminated on grounds of gross misconduct. Following a disciplinary investigation, he was dismissed on the basis that he had been dishonest in his application. The Employment Tribunal rejected the unfair dismissal claim; the claimant appealed.

Decision: The EAT rejected the appeal. The Tribunal had been entitled to find that the employer's genuine belief in the claimant's dishonesty in withholding relevant information in his job application was reasonable.

The EAT explained that a job applicant has a duty to take reasonable care to ensure that statements of fact, which are likely to be relied upon, are accurate. Although the claimant was not given instructions as to how to complete the form, he had understood the essence of what he was being asked and it was clearly within his skills and experience to present the information in a comprehensive manner. A reasonable applicant faced with a blank box headed "employment history" would have understood that the information needed to be presented in such a manner as to reveal any gaps in employment, education or training.

The EAT rejected the claimant's argument that he did not need to disclose the information, because the employer had employed (and dismissed) him previously. The employer was an umbrella organisation, and it could not be assumed that there was a single collective corporate memory of all HR records, especially in a large recruitment exercise where some tasks had been outsourced. It was also irrelevant that, had it been aware of the information, the employer might nevertheless have decided to take him on; the issue was whether the employer was entitled to conclude that what it considered to be deliberate withholding of that information was reasonable grounds to conclude that trust and confidence was destroyed and to dismiss as a result.

CONSULTATION ON MANDATORY ETHNICITY AND DISABILITY REPORTING

Last month, the Government published a consultation (closing on 10 June) on the measures it proposes to include in the Equality (Race and Disability) Bill to introduce mandatory ethnicity and disability pay gap reporting for large employers (with 250 or more employees). There will be a separate call for evidence on equal pay for ethnic minority and disabled employees "and other areas of equality law". The consultation gives no indication on implementation dates.

The key proposals on mandatory reporting are:

- Pay gap calculations will be the same as for gender pay gap (GPG) reporting – mean and median differences for hourly pay and bonuses, pay quarters based on hourly pay, and the percentage of employees with the protected characteristic receiving bonus pay. Additionally, employers will have to report on the overall breakdown of their workforce by ethnicity and disability, and the percentage of employees who did not disclose their data.
- Reporting (online) would use the same two sets of dates as for GPG reporting – a "snapshot date" of 5 April each year to collect data, and reporting within 12 months. The consultation asks for views on whether employers should have to produce action plans for ethnicity and disability pay gap reporting. Action plans are not currently required for GPG reporting but the Employment Rights Bill allows regulations to be made to require this for employers with 250 or more employees.
- Ethnicity data would be collected using the detailed ethnicity classifications in the Government Statistical Service (GSS) ethnicity harmonised standard (used for the 2021 Census), with a "prefer not to say" option. There would be a minimum of 10 employees in any ethnic group being analysed, so employers might have to aggregate groups, preferably using guidance on ethnicity data from the Office for National Statistics. The Government recommends that, in order to compare data consistently over time, employers should also report using binary classification (such as comparison between White British employees and all other ethnic minority groups combined). For employers with few ethnic minority employees, binary classification might be the only option (although they should keep this under review).
- For disability pay gap reporting, the comparison would be between the pay of non-disabled and disabled employees, using the Equality Act 2010 definition of disability.
- As with GPG reporting, the Equality and Human Rights Commission would be responsible for enforcement.

COURT OF APPEAL CONFIRMS SUMMARY CONDUCT DISMISSAL WAS UNFAIR

Summary: In *Hewston v OFSTED*, the Court of Appeal confirmed a decision of the Employment Appeal Tribunal (EAT) that an employee had been unfairly dismissed when he was summarily dismissed for conduct that the employer had not made

clear would lead to summary dismissal. The employee's attitude to the disciplinary action should not have been regarded as having increased the seriousness of the conduct.

Key practice point: When the EAT's decision was published, this case was viewed as demonstrating that a failure to list certain types of behaviour as gross misconduct in the employee's contract or other formal documentation may mean that the employer cannot rely on them to dismiss summarily. In the Court of Appeal, an additional point was that it will not generally be reasonable to "bump up" the seriousness of misconduct just because of the employee's subsequent attitude to it.

Facts: During a school inspection visit, an OFSTED inspector brushed rainwater off one of the children and put his hand on the child's shoulder. Following a complaint from the school, there was an investigation and then a disciplinary process which led to the inspector being summarily dismissed. The EAT found that the dismissal was unfair because he had not been forewarned, by a written policy, training or otherwise, that a single incident of physical contact of this sort (which had not given rise to any safeguarding issue) could result in dismissal. OFSTED appealed.

Decision: The appeal was rejected. The EAT had correctly found that, in the absence of a "no-touch" rule or other explicit guidance covering the situation, the employee had no reason to believe that he was doing anything so seriously wrong as to justify dismissal.

The Court of Appeal also confirmed the EAT's reasoning that it was not reasonable for an employer to "bump up" the seriousness of conduct only because the employee had failed during the disciplinary process to show proper contrition or insight. Lord Justice Underhill noted that how employees react to an allegation of misconduct is likely to vary greatly and inevitably some employees will be overly defensive. Also, if an employee says that they would not do the same thing again, they may be taken to be accepting guilt. There might be cases where a persistent failure to recognise wrongdoing could mean that there was a real risk that they would commit more serious misconduct in the future; and that might justify dismissal. However, this case was plainly not of that kind. The inspector told his employer that he would not repeat his misjudgement and that he would be willing to undergo training.

Lord Justice Underhill referred to his recent judgment in *Higgs v Farmor's School*, where he commented that a case should not be "marked up in seriousness" because of a failure to make an acknowledgement of fault which the employee would genuinely find difficult (please see our *Employment Bulletin March 2025*).

The Court of Appeal also supported the EAT's conclusion that the failure to give the employee three documents seen and relied upon by the dismissing officer - the school's complaint, the child's statement, and an email recording the view of the Local Authority Designated Officer, only one of which (the school's complaint) was provided to him at the appeal stage - made the dismissal unfair. At the disciplinary hearing, the employee had raised the possibility that the impetus behind the complaint was the school's animosity towards OFSTED. The school's complaint letter, on its own and when read alongside the pupil's complaint, would have supported that case. The unfairness was compounded by the fact that OFSTED criticised the employee for questioning the school's *bona fides* and treated it as evidence of his lack of contrition, at a time when he had seen neither document.

HORIZON SCANNING

What key developments in employment should be on your radar?

6 April 2025	Neonatal Care (Leave and Pay) Act 2023 and regulations now in force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Before 22 July 2025	Publication of the Equality (Race and Disability) Bill, to extend pay gap reporting to ethnicity and disability for employers with more than 250 staff, extend equal pay rights to workers suffering discrimination on the basis of race or disability, and ensure that outsourcing cannot be used to avoid equal pay

1 September 2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations in force
2025	Some provisions of the Employment Rights Bill relating to trade unions and industrial action may come into force
2026	Earliest date for the majority of Employment Rights Bill provisions to come into force, including on dismissal for failing to agree contractual variation, collective redundancies, zero hours contracts, flexible working, protection from harassment, family leave, equality action plans, tribunal time limits
Autumn 2026	Earliest date on which Employment Rights Bill changes to the law on unfair dismissal expected to come into force
Uncertain	• Three-month limit on non-compete clauses in employment and worker contracts proposed by previous government • Regulations to bring Victims and Prisoners Act 2024 into force: NDAs that prevent certain disclosures by victims of crime to be unenforceable

We are also expecting important case law developments in the following key areas during the coming months:

Discrimination / equal pay: *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *Augustine v Data Cars Ltd* (Court of Appeal: whether part-time status must be sole reason for less favourable treatment); *Bailey v Stonewall Equality Limited* (Court of Appeal: whether third party had caused employer to discriminate); *University of Bristol v Miller* (EAT: whether anti-Zionist beliefs were protected philosophical beliefs and summary dismissal was discriminatory); *Dobson v North Cumbria Integrated Care NHS Foundation Trust (No 2)* (EAT: whether dismissal of for refusal to work at weekends because of childcare responsibilities was objectively justified and not discriminatory); *Corby v Acas* (EAT: whether opposition to critical race theory was a protected belief); *Ngole v Touchstone Leeds* (EAT: whether the withdrawal of a conditional job offer for a Christian mental health support worker because of Facebook posts was discriminatory); *Legge v Environment Agency* (EAT: whether employee discriminated against for not holding feminist belief)

Employment status: *Ryanair DAC v Lutz* (Court of Appeal: whether pilot contracted through intermediary was an agency worker); *Groom v Maritime and Coastguard Agency* (Court of Appeal: whether volunteer could be worker in relation to remunerated activities)

Industrial relations: *Jiwanji v East Coast Main Line Company Ltd* (EAT: whether a pay offer directly to staff during collective negotiations was an unlawful inducement);

TUPE: *Bicknell v NHS Nottingham* (Court of Appeal: whether merger of NHS commissioning groups was a TUPE transfer)

Unfair dismissal: *Sandhu v Enterprise Rent-A-Car Ltd* (Court of Appeal: whether dismissal without prior warning was within band of reasonable responses)

Whistleblowing: *William v Lewisham & Greenwich NHS Trust* (Court of Appeal: whether the motivation of another person could be brought together with the act of the decision-maker to make an employer liable for whistleblowing detriment); *Rice v Wicked Vision Ltd* (Court of Appeal: whether an employer could be vicariously liable for the acts of a co-worker where the alleged detriment was a dismissal); *Barton Turns Development Ltd v Treadwell* (Court of Appeal: whether employer could be vicariously liable for whistleblowing detriment of dismissal).

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