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NEWSLETTER

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EMPLOYMENT BULLETIN

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One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

EMPLOYERS: WHAT TO EXPECT IN 2025

Several key pieces of legislation are expected to come into force in 2025, as highlighted in the Horizon Scanning section below, but the passage through Parliament of the **Employment Rights Bill** (ERB) will remain a key point of focus. Although some provisions of the ERB relating to trade unions and industrial action may come into force in 2025, much of the detail is yet to be clarified, and the Government has made it clear that the majority of reforms will take effect no earlier than 2026. For details of all the main provisions of the ERB see our briefing First look: The Employment Rights Bill 2024 and Labour's plans to reshape employment: a new era for the workplace from Slaughter and May's Horizon Scanning 2025 publication. What we can expect in the coming months are:

- Extensive consultations on the ERB (since the majority of its provisions require secondary legislation), along with the results of the consultations launched in October last year, covering collective redundancies, industrial relations, zero hours contracts and Statutory Sick Pay (please see our Employment Bulletin November 2024). As a result of responses to the consultations, changes may be made to the ERB as it continues its passage through Parliament.
- A separate Bill, the Equality (Race and Disability) Bill, set to be published shortly, is expected to set out the framework for extending pay gap reporting (for employers with more than 250 staff) beyond gender, to cover race and disability, giving equal pay rights to workers suffering discrimination on the basis of race or disability, and preventing outsourcing from being used to avoid equal pay obligations.
- The new corporate criminal offence of failure to prevent fraud will take effect from September. Large employers will need to have measures in place to prevent fraud, including to require, and monitor, compliance by employees. This is likely to entail expanding bribery and tax evasion policies to cover the new offence. For details, please see our Employment Bulletin November 2024.
- Early in the year, the Financial Conduct Authority is expected to publish its policy statement on a new regulatory framework on diversity and inclusion in the financial sector. This should provide clarity on the approach to the treatment of non-financial misconduct, such as sexual harassment, as misconduct for regulatory purposes.
- The Neonatal Care (Leave and Pay) Act 2023 will come into force in April, giving an entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care.

The ERB is making significant changes to **collective redundancy consultation**, requiring consultation whenever 20 or more redundancies are proposed within 90 days or less, and not (as currently) "at one establishment", and there may be further measures to strengthen remedies for employees. One change that has already taken effect is that Employment Tribunals are now able to increase (or decrease) a protective award (for failing to comply with collective consultation requirements), where there has been an unreasonable failure to comply with the statutory Code of Practice on dismissal and re-engagement. The Code of Practice applies where an employer is considering making changes to employees' contracts of

employment and envisages that, if the employees do not agree, it might opt for dismissal and re-engagement on amended terms. The Code does not cover collective redundancy consultation but, in order to strengthen its deterrent effect, the protective award (up to 90 days' gross pay per affected employee) has been added to the list of claims that can attract the compensation uplift for unreasonable failure to comply with a relevant code of practice.

EMPLOYEE WHO OBJECTED TO TUPE TRANSFER WITHOUT ELECTING TO TERMINATE CONTRACT TREATED AS DISMISSED BY TRANSFEROR

Summary: The Employment Appeal Tribunal (EAT) held that where an employee objected to a TUPE transfer which would have involved a substantial change in working conditions to his material detriment, but did not exercise his right to treat his employment as terminated, he was nevertheless treated as having been dismissed by the transferor (*London United Busways Limited v Marchi*).

Key practice point: The decision dealt with a novel point and establishes that, even if an employee who objects to a transfer does not exercise their right to terminate their contract with the transferor, then provided the objection is because of a substantial change in working conditions to their material detriment, it is treated as a dismissal by the transferor (and may be unfair), even though the changes are likely to have been initiated by the transferee. It is important for parties to a TUPE transfer to include appropriate indemnities addressing this scenario.

Background: The general rule that, on a TUPE transfer, the transferor's employees automatically become employees of the transferee does not apply to employees who inform the transferor or transferee that they object to the transferor; under Regulation 4(8) of TUPE, their employment is treated as terminated, but the termination is not treated as a dismissal by the transferor. However, this is subject to Regulation 4(9) which says that, if the transfer would involve a substantial change in working conditions to the employee's material detriment, the employee is entitled to treat their employment as having been terminated, and will be treated as dismissed by the transferor.

Facts: The transferor lost its bus route contract to the transferee. It told its employees, including the claimant, that they would transfer to the transferee under TUPE unless they objected and signed a new contract with the transferor on new terms, or resigned. The claimant objected to the transfer, mainly because of the additional commuting time to the garage where he was to be based. He refused the options offered, instead requesting redundancy. The transferor told him that redundancy was not available and that, as he did not wish to accept the alternative employment or resign, his employment would transfer to the transferee. After the transfer, the transferee informed the claimant that because he had failed to engage with the transferee, the decision had been taken to terminate his employment. The claimant brought tribunal claims for unfair dismissal against the transferor and transferee.

The Employment Tribunal found that the claimant had objected to the transfer and that, as the transfer would have involved a substantial change in working conditions to his material detriment, he was entitled, under Regulation 4(9) of TUPE, to treat the contract as having been terminated. However, despite his attempts to negotiate a redundancy payment he had not exercised this right; in fact, he had submitted requests for sick pay and had told the transferor that he had not resigned, and did not wish to do so.

The Tribunal concluded that, because he had objected, he remained employed by the transferor until the transferor dismissed him by purporting to transfer his contract of employment to the transferee despite his objection and by informing him that it no longer considered him to be its employee. Both the transferor and the claimant appealed the Tribunal's decision.

Decision: The EAT dismissed the appeals. The EAT agreed with the Tribunal that the claimant had been dismissed by the transferor but disagreed with the Tribunal's reasoning. Despite his decision not to terminate the contract, because of his objection in circumstances where Regulation 4(9) applied, the transfer operated to terminate his employment with the transferor automatically.

COMMENTS RELATED TO ACCENT COULD BE HARASSMENT

Summary: The Employment Appeal Tribunal (EAT) held that comments about an employee's accent could constitute harassment under the Equality Act 2010, even if they were not racially motivated. It also found that a decision not to

provide notes of a meeting to the employee could be victimisation if the employer was materially influenced by the fact that a complaint of unlawful discrimination might be made (*Carozzi v University of Hertfordshire*).

Key practice point: Equality and diversity training for staff should make clear that conduct may amount to unlawful harassment even if unintentional. The EAT commented that employers and employees can be expected to take greater care in how they speak and behave at work than they might in their social life. The value of comprehensive and regular training is even greater now that there is a duty to take reasonable steps to prevent sexual harassment (to be further expanded by the Employment Rights Bill to require "all" reasonable steps). Training should also include specific guidance for managers - this case illustrates the potential dangers in performance management where there is a possible link between criticism and a protected characteristic.

Facts: The claimant, a Brazilian national, was employed by the University in a marketing role. She resigned before completing her probationary period (which had been extended twice) and brought claims, including direct race discrimination, harassment related to her race, and victimisation, all of which were dismissed by the Employment Tribunal. The harassment claim concerned comments about the claimant's accent made in a meeting. The Tribunal concluded that the comments were not "related to" the protected characteristic as required by section 26 of the Equality Act 2010 because they were not motivated by race; they were "*all to do with the claimant's intelligibility or comprehensibility when communicating orally*". The Tribunal also rejected a victimisation claim based on the University's failure to disclose notes to the claimant. The claimant appealed.

Decision: The EAT upheld the appeal and sent the case back to a different tribunal to be reconsidered.

The Tribunal had been wrong to stipulate that the harasser had to be motivated by race for the conduct to be "related to" race. "Related to" has a broad meaning and is not confined to conduct such as mocking or mimicking an accent. The EAT gave the example of a person who unknowingly uses a word that is offensive because it is historically linked to oppression of those with a protected characteristic: the fact that the user did not know that it had that meaning would not prevent it being "related to" the protected characteristic. An accent may be an important part of a person's national or ethnic identity. If the comments are unwanted and reasonably have the purpose or effect of violating dignity, they can amount to harassment.

The EAT also found that the Tribunal had been wrong to dismiss the victimisation claim. A manager, knowing that the notes might give the claimant "ammunition", had decided against providing them, even though she knew they would be disclosable in tribunal proceedings. However, because she would also have refused to supply them to an employee who might be making a claim that was not about discrimination, the Tribunal had concluded that there was no victimisation. This was not the right approach; the correct question was whether the decision not to provide the notes was to a material degree influenced by the fact that a discrimination complaint had or might be made. The Tribunal had also incorrectly concluded that withholding the notes could not be detrimental as the University was simply taking reasonable steps to preserve its position in discrimination proceedings. Detrimental treatment can occur if an employee might reasonably consider themselves to be disadvantaged. The Tribunal had not considered whether the claimant, bringing a grievance that might resolve issues without the need for tribunal proceedings, might reasonably consider herself disadvantaged by not being provided with the notes.

REDUNDANCY PRIORITY FOR EMPLOYEE ON MATERNITY LEAVE APPLIED ONLY AFTER SELECTION

Summary: The Employment Appeal Tribunal (EAT) decided that posts which remained following a redundancy exercise were not "suitable available vacancies" and therefore did not have to be offered to an employee on maternity leave (*Carnival PLC v Hunter*).

Practical impact: The case clarifies the scope of the duty to offer suitable alternative employment on redundancy to employees who are pregnant, on maternity, adoption or shared parental leave, or within the 18-month period after birth/adoption. The priority protection applies only once there is a redundancy - a selection process does not trigger it - and it relates only to newly created vacancies, not pre-existing posts. By contrast, if the redundancy exercise had involved existing roles ceasing to exist and new roles being created, priority rights would have applied.

Facts: The claimant was on maternity leave when a redundancy exercise took place. She was one of the five leader posts out of the pool of 21 who were selected for redundancy based on scores. The Employment Tribunal found that she had

been automatically unfairly dismissed because the 16 remaining roles amounted to "suitable alternative vacancies" within the meaning of Regulation 10 of the Maternity and Parental Leave Regulations 1999 and the employer had not complied with the requirement to offer them to the claimant. The employer appealed.

Decision: The EAT allowed the appeal and sent the case back to the Tribunal for a fresh hearing. The entitlement under Regulation 10 arises only where there is a vacancy. Each of the 16 posts pre-existed. There were no new roles created and Regulation 10 could not have been in play until after the redundancy process had been completed.

Commentary: Further protection from dismissal is expected under the Employment Rights Bill; the Government has said it will make it unlawful to dismiss pregnant workers within six months of their return except in specified circumstances.

HORIZON SCANNING

What key developments in employment should be on your radar?

Early 2025	Publication for pre-legislative scrutiny 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
20 January 2025	Employment Tribunals able to increase or decrease a protective award by up to 25% for unreasonable failure to comply with the statutory Code of practice on dismissal and re-engagement
2025	Some provisions of the Employment Rights Bill relating to trade unions and industrial action may come into force
6 April 2025	Neonatal Care (Leave and Pay) Act 2023 to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
1 September 2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations in 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:

Contracts of employment: *Ryanair DAC v Lutz* (Court of Appeal: whether pilot contracted through intermediary was an agency worker)

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); *Higgs v Farmor's School* (Court of Appeal: whether dismissal was because of the manifestation of protected beliefs, or a justified objection to the manner of manifestation); *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)

Employment status: *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: *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing); *Hewston v Ofsted* (Court of Appeal: whether employee was unfairly dismissed for misconduct that he had not been forewarned would lead to summary dismissal)

Whistleblowing: *SPI Spirits (UK) Ltd v Zabelin* (Court of Appeal: whether whistleblowing detriment compensation could be capped by termination agreement); *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); *Sullivan v Isle of Wight Council* (Court of Appeal: whether an external job applicant could bring whistleblowing detriment claim); *Barton Turns Development Ltd v Treadwell* (Court of Appeal: whether employer could be vicariously liable for whistleblowing detriment of dismissal).

CONTACT

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- PHILIPPA O'MALLEY
- PARTNER
- T: +44 (0)20 7090 3796
- E:Philippa.O'Malley@SlaughterandMay.com

- DAVID RINTOUL
- SENIOR COUNSEL
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

- SIMON CLARK
- ASSOCIATE
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

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For further information, please speak to your usual Slaughter and May contact.

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