



## UK Employment Law Update – March 2022

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

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# Case law updates



**Holiday pay:** Overturning judgments of both the employment tribunal and EAT, the Court of Appeal has held that the right to paid annual leave can be carried over to another leave year in circumstances where the leave had been taken but the worker had not been paid for it because the claimant had wrongly been treated as an independent contractor. Previously the case law limited the right to carry over paid annual leave only to situations where the worker had not taken the time off. The Court of Appeal also cast doubt on the EAT's decision in *Bear Scotland* that a gap of three months between deductions or non-payment of holiday pay was sufficient to break the chain of a "series of deductions". This case is an important development in the way time limits for holiday pay claims work, and particularly relevant to holiday claims where there has been a misclassification of employment status. ([Smith v. Pimlico Plumbers](#))

**Fire and rehire:** The High Court has granted an injunction preventing an employer from using 'fire and rehire' (i.e., termination of employment on notice, with re-engagement on new terms) to remove a contractual entitlement to enhanced pay. Fire and rehire has come under increasing scrutiny over the pandemic, although the government has currently ruled out legislation to remove or restrict the ability for employers to use this approach when changing terms and conditions in the absence of consent. Although this case suggests that the courts are open to granting an injunction to prevent the practice, it is relevant to note that the circumstances of this case were described as "unusual" – the enhanced payment had been negotiated with a recognised trade union in response to particular circumstances, and with a number of conditions attached, including that it was to be a permanent entitlement to last as long as the employee remained in the same role. The court concluded that, in these circumstances there was an implied term preventing termination on notice for the purpose of removing the enhanced payment. ([USDAW v. Tesco Stores](#))

**Confidential information:** An employer has successfully obtained an interim injunction preventing a former employee from taking and retaining confidential information relevant to pending litigation. The employee claimed he required the information for the purposes of seeking legal advice, and because he had no faith that the documentation would be disclosed during litigation. However, the court was satisfied that the former employee had no proprietary, contractual or equitable interest in the documents, and made clear that compliance with the legal obligations of disclosure should not be pre-empted, and that there was scope for recourse if there was reason to believe disclosure obligations had not been complied with. This case will be a reassuring reminder for employers in respect of their confidential information, and that the return and/or deletion of property on the termination of employment is reasonable. ([Nissan v. Passi](#))

**Agency workers:** Although agency workers have the right to be notified about any vacancies at the hirer, the Court of Appeal has rejected an argument that this extends to a right to apply for such vacancies on the same basis as directly recruited employees. It was therefore not a breach of the Agency Worker Regulations 2010 for a hirer to allow directly employed staff to apply for vacancies ahead of agency workers. This decision will be of interest to employers relying on agency resource, reassuring them that although agency workers have some rights and protections, they are not fully comparable with permanent staff and when it comes to recruitment, it is not unreasonable or unlawful for existing directly employed staff to be given priority in applications for internal vacancies. ([Kocur v. Royal Mail Group](#))

**Employment status:** Upholding the EAT's decision, the Court of Appeal has held that the lack of any obligation on an individual to accept or perform a minimum amount of work is not fatal to establishing them as a 'worker' and entitling them to the associated employment rights. In this case the claimant worked as a fee-paid panel member on a fitness to practise committee and had an overarching contract in relation to the provision of those services. Although there was no obligation to be offered a minimum number of hearings or sitting dates, nor any obligation to accept any dates offered, any work provided had to be done personally. As such, it was found that there was an individual contract in place in respect of each hearing and the lack of an irreducible minimum of obligation was not inconsistent with worker status. ([Nursing and Midwifery Council v. Somerville](#))



**Settlement and waiver of claims:** On termination of his employment, the claimant brought a claim for race discrimination which was subsequently settled by way of a COT3 agreement conciliated through Acas. When the claimant then applied for, and was rejected from, a role with a subsidiary of his former employer, he brought a claim alleging victimisation. There was a factual basis for the claimant showing that his former employer had an involvement in the decision to reject his application, but the claim turned on whether he was prevented from proceeding because of the COT3 terms. The COT3 was drafted widely, settling claims which directly or indirectly arose out of or in connection with the claimant's employment, and including claims which the claimant may not have been aware of at the date of signing the terms. The EAT was satisfied that there was a sufficient link between the claimant's former and prospective employers to be caught by the waiver, and so the claim could not proceed. This case is a helpful illustration of how careful drafting of settlement terms can be important, and can successfully preclude future claims even involving linked businesses. ([Arvunescu v. Quick Release \(Automotive\) Ltd](#))

**Unfair dismissal:** An employer who invoked a contractual right to make a payment in lieu of notice (PILON) rather than requiring an employee who had resigned to work their full notice period, was found not to have dismissed the employee. The case turned on the statutory interpretation of section 95(1)(a) of the Employment Rights Act 1996, which provides that 'dismissal' includes where the contract of employment is terminated by the employer, with or without notice. The EAT was bound to follow an earlier EAT decision which had determined that an employer bringing forward the termination date in line with an express contractual term did not amount to a dismissal, although expressed doubt on whether that claim had correctly interpreted the legislation. It was suggested that the issue may need resolving by the Court of Appeal. ([Fentem v. Outform EMEA](#))

**Vexatious litigants:** The EAT has ordered a restriction of proceedings order (RPO), of unlimited duration, against a litigant who brought multiple and regular claims for discrimination after unsuccessfully applying for job vacancies. In addition to the claims having no merit, the claimant also threatened adverse publicity or reports to regulators, and used the tribunal process to put pressure on the respondents to reach a financial settlement. RPOs are rare, and in this case the RPO resulted after the claimant had issued in excess of 40 claims over a 10 year period, but it is nevertheless reassuring that there is scope for recourse against vexatious litigants. The claimant is not barred completely from issuing another claim, but must now have permission to do so. ([Attorney General v. Taheri](#))

## Legislative developments

**Statutory limit increases:** The annual increases in statutory limits have been announced. From **6 April 2022**, the following shall apply:

- A 'week's pay': £571 (from £544)
- Maximum basic award for unfair dismissal: £6,959 (from £6,634)
- Maximum compensatory award for unfair dismissal: £93,878 (from £89,493)

**Apprenticeships:** The Apprenticeships (Miscellaneous Provisions) (Amendment) (England) Regulations 2022, which introduce a pilot of 'flexi-job' apprenticeships in the creative and construction sectors, have now been passed and come into force on **6 April 2022**. The pilot provides for variety and flexibility so apprentices can carry out short-term or project-based placements with a number of organisations. The pilot is expected to last up to 24 months, although it will be reviewed periodically. If successful, the flexi-job scheme may be extended.



# COVID-19 update

**Living with COVID (England):** The government has announced a significant relaxation of domestic restrictions in England as part of its strategy for [living with COVID](#) (NB: different provisions apply in [Wales](#) and [Scotland](#)):

- The requirement for staff and students in educational and health care settings to test twice a week was removed on 21 February 2022.
- Since 24 February 2022:
  - The legal requirement to self-isolate after a positive test has been removed, although it remains advisory for anyone testing positive to stay at home and limit contact with others.
  - Routine contact tracing has ended and the requirement for close contacts of a positive case to test daily (if vaccinated) or self-isolate (if unvaccinated) has been removed.
  - Self-isolation support payments stopped being available (unless the instruction to self-isolate was before this date).
  - Workers are no longer legally obliged to tell their employers when they are required to self-isolate.

Notwithstanding these relaxations, [guidance](#) published by the UK Health Services Agency is for employees who test positive or are a household contact of, or have stayed overnight with, a positive contact to work at home where possible, or otherwise discuss working arrangements with their employer.

- The statutory sick pay (SSP) rebate scheme (which allowed eligible employers to reclaim up to two weeks' SSP) will close on **17 March 2022**. Claims can be made up to 24 March 2022, although the absence must relate to the period up to 17 March.
- The COVID-related adjustments to eligibility for SSP will end on **24 March 2022**, meaning that eligibility for SSP will then be from the fourth day of absence, regardless of the reason.
- From **1 April 2022**:
  - Free testing for symptomatic and asymptomatic members of the public will cease to be available. Free symptomatic testing will remain available for care home staff and a small number of at-risk groups.
  - Employers will no longer be required to explicitly consider COVID risks in workplace risk assessments.
  - Guidance on domestic voluntary COVID-status certification will be removed, and use of the NHS COVID Pass will no longer be recommended.
  - Advice to remain at home after a positive test will be removed and replaced with an expectation to exercise personal responsibility.
  - Further guidance will be issued on how the public should limit contact with others, and guidance to business and the public will be consolidated in line with public health advice.

**Right to work:** The temporary right to work checks (which allow checks by video call and without seeing hard copy documentation) have been further extended to **30 September 2022** (from 5 April 2022). From 1 October 2022, employers will need to either conduct an online or electronic right to work check, or inspect original documentation.

**Travel:** Since 11 February 2022 there has been a relaxation in testing and quarantine rules for travel to England for fully vaccinated travellers. As a consequence there has been an update to the list of [jobs qualifying for exemptions](#).

**Mandatory vaccination:** Following a consultation during February, the government has announced its intention to revoke the legislation mandating that workers in health, social care and care home settings be fully vaccinated as a condition of deployment. The mandate has been in place in care homes since November 2021 and had been due to extend into wider health and social care settings on 1 April 2022.



## Other news

**Bereavement:** Acas has published new guidance for employers on [handling bereavement](#), setting out the statutory rights that bereaved employees have, as well as giving guidance on how best to support employees.

**Brexit:** An inquiry has been launched into the future of retained EU law, with the government indicating its intention to bring forward a bill to amend or repeal parts of the European Union (Withdrawal) Act 2018 to allow retained EU law to be more easily amended or repealed, and to cease EU law having special status in the UK.

**Ethnicity pay gap reporting:** Although the government has yet to commit to this, nor to respond to the consultation it held on the issue in 2019, the House of Commons' Women and Equalities Committee has issued a report recommending mandatory ethnicity pay gap reporting by April 2023. It remains to be seen what, if anything, is actioned as a result.

**IR35:** The National Audit Office has published a [report](#) following an investigation into the implementation of the IR35 reforms. While concentrating on the reforms in the public sector (which took place in 2017), a number of its observations apply to the private sector roll-out too. In particular, the report highlights difficulties with the online CEST tool (which aims to give a steer on status), tackling non-compliance and challenging status determinations.

**Women's health:** The government is expected to issue its women's health strategy later this year, with a focus on improving workplace awareness and support of women's health conditions.

## Consultations

**Disability:** A consultation has been launched to explore how disability workforce reporting for employers with 250 or more employees can be improved, looking at voluntary measures and also whether to impose mandatory reporting. The consultation closes on 25 March 2022 and responses can be submitted online.

**Human rights:** The government has launched a consultation on updating the Human Rights Act 1998 and replacing it with a bill of rights. It is exploring proposals aimed at restoring a balance between the rights of individuals, personal responsibilities and the public interest. The consultation closes on 8 March 2022 and responses can be submitted online.

## Upcoming events

**16 March 2022:** Webinar – [How can a multi-disciplinary approach to handling whistleblower complaints help those operating in the transportation industry?](#)

## Publications

**Data protection:** [Your ESGuide in 5: How might proposed new European legislation impact ESG?](#)

**DE&I:** [Diversity, Equity and Inclusion 2021 annual report](#)

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