SLAUGHTER AND MAY

Newsletter

Employment Bulletin

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HR Spotlight 2026: 18 June 2026

We are holding our annual HR Spotlight on **Thursday 18 June.** This year's event will take the form of a one-hour webinar (09:00 - 10:00 (BST) / 10:00 - 11:00 (CEST), featuring senior members of our Employment team in conversation about the most pressing topics facing employers, HR professionals and in-house lawyers, such as:

- Unfair dismissal: practical implications of the ERA 25 changes
- Future-proofing employment contracts, for flexibility and forthcoming reforms
- Redundancy: higher stakes, lower thresholds
- Strategies for dealing with trade union access requests
- Managing the increased risk of harassment claims.

Please register here if you would like to attend.

Collective consultation obligation triggered on day administrators were appointed

Summary: The Employment Appeal Tribunal (EAT) held that the duty to consult collectively under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992, because the employer was proposing to dismiss as redundant 20 or more employees within a 90-day period, arose on the day administrators were appointed. At that point there was a fixed, clear (albeit provisional) intention to close the business (*Ellard v Alliance Transport Technologies Ltd*).

Key practice point: This decision confirms that the "proposing to dismiss" threshold for collective consultation collective obligations can be reached even if the employer is still considering alternatives and before the final decision to close the workplace is taken. This can happen very quickly in insolvency and administration scenarios. The financial consequences of a failure to consult can be considerable: from 6 April 2026, the maximum protective award increased from 90 to 180 days' actual pay.

Facts: In early April 2023, the employer, under financial pressure, sought additional investment and considered options for the future. At that time, there were several potential interested parties who were identified and contacted. Administrators were appointed on 2 May, and a number of staff identified as non-business critical were dismissed as redundant. On 5 May, confirmation was received from the final interested party that an offer for the business as a going concern would not be forthcoming and the majority of the remaining workforce was made redundant and a winding up initiated.

Several employees made Employment Tribunal claims for failure to consult in accordance with section 188. The Employment Tribunal decided that employees dismissed on 5 May

were entitled to a protective award for failure to consult, but those dismissed on 2 May (including the claimants in this case) were not. The Tribunal found that there had been an intention to sell the business as a going concern and therefore there was not a proposal to dismiss as redundant 20 or more employees on 2 May. The claimants appealed.

Decision: The appeal was allowed and the EAT made a protective award for failure to consult the claimants. It was likely that, on 2 May, there was a fixed, clear, albeit provisional, intention to close the business, giving rise to an obligation to consult under section 188.

The Tribunal had focused on whether there was "a proposal" to dismiss, rather than asking whether, as at 2 May, the employer "was proposing" to dismiss. "Proposing to dismiss" involves current and ongoing consideration of future events over a relatively lengthy period of time, even if there are uncertainties or contingencies which will impact the ultimate decisions on redundancies.

There was clear evidence in the administrators' report that, although they had hoped to sell the business as a going concern, that possibility did not materialise. By the time they were appointed, their objective was to wind up the business, taking steps to maximise compensation for creditors. As of 2 May, closure was envisaged if the one remaining interested party did not make an offer.

Government consults on exceptions to the new restrictions on non-disclosure agreements

The Employment Rights Act 2025 (section 24) makes significant changes to the use of non-disclosure agreements (NDAs), making them void if they prevent employees from making disclosures about workplace discrimination or harassment, unless they qualify as "excepted agreements" by meeting certain conditions. The changes are due to be implemented in 2027. The Government has published a consultation on excepted agreements, indicating that NDAs in settlement agreements will continue to be permitted, subject to some new safeguards. The consultation is open until 8 July and the Government is keen to hear from business on how the proposals might work in practice.

The consultation paper proposes that an NDA relating to discrimination or harassment should only be valid if it meets a number of criteria:

- The worker receives advice in writing from an independent adviser on the terms and effect and legal limitations of the proposed confidentiality obligations. There is no proposal to require employers to cover the cost of this advice, although the Government expects them to contribute to the cost, as is common practice with settlement agreements where the requirement to obtain independent legal advice already applies. There is currently no such requirement for Acas facilitated COT3 settlements, so the consultation paper mentions the possibility of expanding the definition of "independent advisor" to include Acas conciliators, to cover NDAs within a COT3 settlement.
- The worker expresses their preference (in writing, to the employer) to enter into the agreement, following receipt of the independent advice. The rationale behind this requirement, which would clearly be a limiting factor in settlement negotiations, is to protect the worker from pressure to settle. The Government has not decided whether an employer should be permitted to suggest confidentiality. The consultation paper comments that although allowing employers to propose NDAs might increase the risk of coercion, this could be mitigated by the independent advice requirement and the cooling off period mentioned below.
- The agreement includes a right for a worker to withdraw from the agreement without penalty within 14 calendar days. Where the excepted agreement forms part of a settlement agreement, the consultation paper recognises the practical difficulties of a cooling off period applying only to the NDAs, as well as the complications where time is short because of an approaching tribunal hearing. The paper therefore discusses further options, including allowing the worker to waive the cooling off period, a shorter cooling off period, and/or having a review period before an NDA is agreed.
- The agreement is provided to all parties in writing, in an accessible format.
- Excepted agreements would only be able to cover past incidents of harassment or discrimination.

- A potential additional safeguard could be to require a maximum time-limit for the confidentiality obligations (three years, for example), to be agreed as part of the settlement agreement.
- Broadly speaking, confidentiality agreements do not apply to disclosures to bodies such as legal, regulatory, law enforcement or support services, or to close family. This approach will also apply to section 24, although the Government is considering adding prospective employers to the list.

The consultation also asks whether, at some point after 2027, section 24 should be extended to cover those who do not meet the definition of "worker" in the Employment Rights Act 1996, or who work for someone other than their employer, such as agency workers supplied to a host employer, seconded employees, and certain categories of self-employed.

Cumulative effect of employer's conduct relevant to whether conversation was protected as a pre-termination negotiation

Summary: The Employment Appeal Tribunal (EAT) decided that the cumulative effect of the employer's conduct was relevant in deciding whether undue pressure had been put on the employee, such that a discussion would not be protected as a pre-termination negotiation under section 111A of the Employment Rights Act 1996 and would therefore be admissible as evidence in an unfair dismissal claim (*Tarbuc v Martello Piling Limited*).

Key practice point: This case is a reminder of the limitations of section 111A. Not only is protection confined to claims of ordinary unfair dismissal, but protection can be lost if the Tribunal finds that there has been "improper behaviour". Improper behaviour is not defined in section 111A, but Tribunals will refer to the *Acas Code of Practice on Settlement Agreements* which, whilst not binding, contains examples of what might be regarded as undue pressure, including not giving reasonable time to consider the proposed settlement. The Acas Code suggests that a minimum of 10 calendar days should be allowed, unless the parties agree otherwise.

Background and facts: Under section 111A of the Employment Rights Act 1996, evidence of discussions conducted with a view to termination on agreed terms is inadmissible in an unfair dismissal claim, unless there has been improper behaviour by the employer.

The claimant was dismissed purportedly by reason of redundancy and brought claims for unfair dismissal, unlawful deduction from wages, and less favourable treatment as a part-time worker. Prior to dismissal, the managing director had held a conversation with the claimant which the claimant wanted to refer to at the Tribunal. The Tribunal decided that the conversation was protected by section 111A and directed that evidence of it was inadmissible and should be redacted from all documents. The claimant appealed, contending that there had been improper behaviour by the employer.

Decision: The EAT allowed the appeal in part and sent the case back to another Tribunal. The Tribunal was wrong to have directed that the protected conversation should be excluded from the evidence in relation to the claimant's unlawful deductions and part-time worker claims; section 111A only applies to ordinary unfair dismissal claims.

The EAT also decided that the question of whether there had been improper behaviour had to be looked at again, because the original Tribunal had not given full consideration to the Acas Code of Practice on Settlement Agreements, in particular failing to consider whether the cumulative effect of the employer's conduct had put undue pressure on the claimant, amounting to improper behaviour. The Tribunal had referred to what the managing director had said in the meeting, and how he had said it, but did not mention the claimant's complaints of having been given no advance notice of the meeting or the option to bring a representative. Although similar allegations were insufficient to persuade the EAT in another recent case that the employer's behaviour was improper, it did not follow that the same conclusion would be reached in this case, if all aspects of the employer's conduct were considered.

Comment: To date, section 111A has been regarded as of somewhat limited use because inadmissibility relates only to claims of ordinary unfair dismissal; the evidence remains admissible in all other claims. With the upcoming removal of the unfair dismissal compensation cap, it may acquire more significance.

Horizon scanning

What key developments in employment should be on your radar?

Expected effective date	Development
19 June 2026	Data (Use and Access) Act 2025: employers required to have data protection complaints process
August 2026	ERA 2025: electronic and workplace balloting (for trade union ballots) in force
1 September 2026	New rules and guidance on non-financial misconduct in financial services
October 2026	ERA 2025: further provisions in force, including employers required to take all reasonable steps to prevent sexual harassment of employees and employer liability for third party harassment; enhanced protections against industrial action detriment; further trade union measures (strengthening rights of access, employer duty to inform workers of right to join, enhanced protections for reps)
1 October 2026	Expected extension of employer right to work checks to working arrangements other than under a contract of employment, under section 48 Border Security, Asylum and Immigration Act 2025
1 October 2026	ERA 2025: increase in employment tribunal time limits from three to six months
January 2027	ERA 2025: reduction of unfair dismissal qualifying period to six months for dismissals from 1 January 2027 and removal of compensation cap; fire and rehire protections
2027	ERA 2025: further provisions in force, including new collective redundancy consultation threshold; certain NDAs to be unenforceable to the extent they prevent workers from making allegations or disclosures about workplace harassment or discrimination; mandatory gender pay gap action plans; zero hours workers – right to guaranteed hours; enhanced dismissal protections for pregnant women/new mothers; bereavement leave; changes to flexible working requests; electronic and workplace balloting (recognition and derecognition)
Uncertain	Mandatory ethnicity and disability pay gap reporting

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

Discrimination / equal pay: *University of Bristol v Miller* (EAT: whether anti-Zionist beliefs were protected philosophical beliefs and summary dismissal was discriminatory); *Corby v Acas* (EAT: whether opposition to critical race theory was a protected belief); *Thandi v Next Retail Ltd* (EAT: whether there was a material factor defence to an equal pay claim by shop floor sales staff seeking to compare themselves with warehouse staff); *Lister v New College Swindon* (EAT: whether discrimination was due to objectionable manifestation of belief); *Augustine v Data Cars Ltd* (Supreme Court: whether part-time status must be the sole reason for less favourable treatment); *Bailey v Stonewall Equity Limited* (Supreme Court: whether a complaint by a third party caused or induced discrimination)

Employment contract: *Gagliardi v Evolution Capital Management LLC* (Court of Appeal: whether employer was in breach of contract in failing to pay discretionary bonus)

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)

Unfair dismissal: *Stobart v Zen Internet Ltd* (Court of Appeal: whether capability dismissal of senior executive was unfair; *Polkey* assessment of compensation)

Whistleblowing: *Wicked Vision v Rice* (Supreme Court: whether employer could be vicariously liable for whistleblowing dismissal detriment); *Argence-Lafon v Ark Syndicate Management Ltd* (Court of Appeal: whether employee was dismissed for making protected disclosures or because of subsequent behaviour).

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