

# EMPLOYMENT BULLETIN

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## APRIL 2023 EMPLOYMENT RATES AND LIMITS AND OTHER DEVELOPMENTS

We attach an updated version of our [Employment Rates and Limits document](#). This document summarises the various statutory rates of payment and limits on compensation for the main types of employment claim, applicable from 6 April 2023. We have also included a summary of the time limits and qualifying service requirements for claims, as well as a reminder of the various collective consultation timeframes.

The compensation limits for Employment Tribunal claims have risen steeply, reflecting the 12.6% increase in the Retail Prices Index in the year to September 2022. The new increased compensation limits include:

- A revised figure of £643 (up from £571) 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 will become £19,290 (up from £17,130).
- A maximum unfair dismissal compensatory award of £105,707 (previously £93,878), 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 2023.

Recent Government employment law initiatives have mostly been in the form of support for Private Members' Bills (introduced by individual MPs rather than Government ministers). A number of measures are making progress through Parliament, as set out in our [Horizon scanning](#) section below.

In addition, the Government has [announced](#) a **review of whistleblowing** in the workplace, to conclude in Autumn 2023. The current legislation protects workers from detriment or dismissal where they report criminal offences, the endangerment of health and safety, causing damage to the environment, miscarriage of justice, or breach of any legal obligation. The review will examine whether the existing framework operates effectively and protects whistleblowers. The [terms of reference](#) for the review lists the core questions:

- Who is covered by whistleblowing protections. The legislation protects "workers" but it is unclear whether this covers those who do not have an employment relationship, such as company directors, for example, and there have been calls to extend protection to job applicants.
- The availability of information and guidance.
- How employers and prescribed persons (bodies authorised to receive specific disclosures) respond to whistleblowing disclosures.

The Government committed to the review back in 2019. At the time it confirmed that it would not transpose the EU Whistleblowing Directive into UK law, because of Brexit. Under the Directive, larger companies are required to establish whistleblowing reporting procedures. Since then, two versions of Private Members' Bills making changes to strengthen the

protection for workplace whistleblowers have been introduced into Parliament; the Government has declined to support them pending the outcome of the review.

Another significant development for larger employers is the Home Office's recent announcement that there will be an amendment to the Economic Crime and Corporate Transparency Bill, currently going through Parliament, to create a **new corporate criminal offence of failure to prevent fraud**, punishable by an unlimited fine. A Government [Factsheet](#) explains the Bill's provisions. Under the proposed offence, an organisation would be liable where an employee or agent committed a specific fraud or false accounting offence under UK law (listed in a Schedule to the Bill) with intent to benefit the organisation, or another person to whom they provide services on the organisation's behalf. It would not need to be demonstrated that the organisation ordered or knew about the fraud but it would be a defence for it to show that it had reasonable fraud prevention procedures in place. The Government will publish guidance on reasonable procedures before the new offence comes into force.

The offence would apply only to large bodies corporate and partnerships, including not-for-profit organisations, incorporated public bodies and bodies incorporated outside the UK, that meet at least two of the following three criteria:

- more than 250 employees;
- annual turnover of more than £36 million;
- total balance sheet assets of more than £18 million.

The scope of the offence would extend beyond the UK, in that if an employee commits fraud under UK law, or targeting UK victims, the employer could be prosecuted, even if the organisation (and the employee) are based overseas.

## NEW TARGETS FOR ETHNIC DIVERSITY ON BOARDS

The Parker Review has published [Improving the Ethnic Diversity of UK business](#), an update report on the progress made in 2022 against the targets for ethnic diversity on boards of UK companies. The report also sets new targets - on senior management and for the largest private companies.

The Review, which was commissioned by the Government in 2015 to look at the ethnic diversity of the management and boards of UK companies, notes that, as at the end of 2022, 60% of FTSE 250 listed companies had met the target to have at least one minority ethnic director; the target deadline is December 2024.

The Review is now expanding its scope, in two areas:

- **Senior management group:** FTSE 350 companies are asked to set their own targets, by December 2023, for the percentage within their senior management group (Executive Committee or equivalent and those senior managers who report directly to them) who will self-identify as being in an ethnic minority in December 2027. The Review will start to collect company targets in its 2023 survey and expects companies to report the target in their annual reports from 2024 onwards. Companies are encouraged to describe in their annual reports the management development plans that they have in place to encourage and support the aim of a diverse and inclusive pipeline.
- **Private companies:** The Review will ask 50 of the UK's largest private companies (LPCs), using the same group of companies as the FTSE Women Leaders Review, to provide information about their ethnic diversity, from December 2023 onwards. The LPCs will be expected to have at least one ethnic minority director on the main board by December 2027 and to set targets for the percentage of ethnic minority individuals within senior management, in the same way as set out above for FTSE 350 Companies. The Review will start to collect this data in its 2024 survey. The Review adds that companies need to encourage as many of their employees as possible to self-declare their ethnicity, so that data is available to guide decision-taking.

**Analysis/commentary:** For comment on the Parker Review report, please see our blog: [Beyond “one and done”: new ethnic diversity targets from the Parker Review](#).

The 2024 Parker Review target is also reflected in the [Investment Association Shareholder Priorities for 2023](#), discussed in our [Employment Bulletin March 2023](#). The Investment Association will issue a “red top” (expressing a strong level of concern) to FTSE 100 companies that have not met the Parker Review target of one director from a minority ethnic group,

and “amber top” (requiring significant shareholder judgment) FTSE 250 companies that do not disclose either the ethnic diversity of their Board or a credible action plan to achieve the target by 2024.

## EMPLOYMENT TRIBUNAL FAILED TO ASSESS WHETHER RUSHED DISMISSAL TO AVOID ENHANCED PENSION WAS AGE DISCRIMINATION

**Summary:** The Employment Appeal Tribunal (EAT) found that an Employment Tribunal should not have dismissed a direct age discrimination claim resulting from a decision to hurry through the redundancy process for an employee in order to avoid making an enhanced pension payment. The Tribunal had not considered in sufficient detail whether the employer could rely on an argument that their action was justified because it prevented the employee benefiting from a “windfall” (*Cook v Gentoo Group Limited*).

**Key practice point:** The decision highlights the difficulties of defending an age discrimination claim where the proper process and timing for dismissal have not been followed. In *Woodcock v Cumbria PCT*, the Court of Appeal dismissed an age discrimination claim from an employee who, because of the timing of the dismissal, did not become entitled to enhanced pension rights. However, the key factor in *Woodcock* was that the employer could have achieved the dismissal under its proper processes before the claimant reached the trigger age for the pension entitlement; only a series of unexpected events prevented that from happening.

**Facts:** The employer undertook a restructure, with deletion of the claimant’s role. The employer decided to forgo the required board approval, to avoid the claimant becoming entitled to an enhanced pension on being made redundant after the age of 55, which would have required the employer to make a substantial payment into the Local Government Pension Scheme. One factor in the decision of the employer, a social housing landlord with charitable status, was that two years earlier, it had been assessed by its regulator as having exercised weak governance and internal control when agreeing executive contracts and severance payments.

An initial consultation meeting was held with the claimant, where he was told that he was going to be made redundant. He was signed off with stress soon after the initial meeting, and he failed to attend the second consultation meeting. He was subsequently dismissed without notice. He claimed unfair dismissal and direct age discrimination.

The Employment Tribunal found that the dismissal was unfair, due to the speed of the process and the fact that there had been no attempt to seek suitable alternative employment. The Tribunal concluded that, if the employer had acted fairly, the restructure would have been considered by the board at its next meeting. There would then have been consultation with the claimant, which would have led to his (fair) dismissal for redundancy. Termination would have taken effect after he had reached 55 and he would have been entitled to an enhanced pension. However, the Tribunal rejected the age discrimination claim, in part because it considered the employer’s decision to dismiss to be justified under the discrimination provisions of the Equality Act 2010 as “a proportionate means of achieving a legitimate aim”. The claimant appealed.

**Decision:** The EAT found that the Tribunal’s analysis did not support the decision it had reached and sent the case back to another tribunal. The Tribunal had failed to carry out a detailed analysis, first balancing the gravity of the discriminatory effect on the employee of the dismissal (in breach of the employer’s procedures) against the legitimate aim of the employer, and then considering whether early dismissal was appropriate and reasonably necessary to achieve that aim. Factors the Tribunal should have taken into account included:

- The employer was not attempting to justify a general policy; it had departed from its usual policies.
- Whether the circumstances in which the regulator had criticised previous severance payments were comparable to the enhancement of the claimant’s pension; or whether the regulator would have considered that failing to comply with the employer’s usual policies itself constituted poor governance.
- The Tribunal did not consider the specific facts of *Woodcock v Cumbria PCT*, where the dismissal of an employee involving a limited curtailment of the appropriate procedural requirements to avoid an enhanced pension entitlement was found to be justified. The special circumstances of *Woodcock* were that, had the employer acted fairly and complied with its procedures, the employer could have dismissed the employee before he reached the

age when he would obtain enhanced pension benefits. By contrast, in this case, the proper application of the employer's procedures would have meant that the claimant would have been dismissed after reaching 55.

In addition, the Tribunal had not explained how the receipt of an enhanced pension would have been a "windfall" - a financial advantage that was unexpected and/or undeserved. In *Woodcock*, it was clear that the enhanced pension would have been undeserved in the sense that, had the employer operated its procedure properly, he could have been fairly dismissed before he reached the age at which he would gain a pension enhancement.

## HORIZON SCANNING

What key developments in employment should be on your radar?

2023-2024	Strikes (Minimum Service Levels) Bill: minimum service levels on specified services
2023-2024	<p>Private Members' Bills with Government support:</p> <ul style="list-style-type: none"> <li>• Worker Protection (Amendment of Equality Act 2010) Bill (to come into force one year after Royal Assent): duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties</li> <li>• Protection from Redundancy (Pregnancy and Family Leave) Bill: extension of circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy</li> <li>• Workers (Predictable Terms and Conditions) Bill: right to request a more predictable working pattern</li> <li>• Carer's Leave Bill: entitlement to one week's unpaid leave for employees who are carers (expected to come into force in 2024)</li> <li>• Employment (Allocation of Tips) Bill: obligations on employers to deal with tips, gratuities and service charges</li> <li>• Neonatal Care (Leave and Pay) Bill: right to paid leave to care for a child receiving neonatal care</li> <li>• Employment Relations (Flexible Working) Bill: amendments to the flexible working request process; separate secondary legislation to make the right to request a "day one" right</li> </ul>
31 December 2023	Retained EU Law Bill: expiry of EU-derived secondary legislation on 31 December 2023 e.g. TUPE, Working Time Regulations and Regulations protecting part-time, fixed-term and agency workers, unless Government legislates to incorporate into UK law (or extends sunset to no later than 23 June 2026)
2023/24	Proposed removal of the bonus cap applicable to banks, building societies, and PRA-designated investment firms
Date uncertain	<p>Statutory Code of Practice on Dismissal and Re-engagement</p> <p>Economic Crime and Corporate Transparency Bill: criminal offence of failure to prevent specific fraud or false accounting offences</p>

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

**Employment status:** *Griffiths v Institution of Mechanical Engineers* (EAT: whether a trustee of a professional body is a worker for whistleblowing protection purposes); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)

**Employment contracts:** *Cox v Secretary of State for the Home Department* and *Secretary of State for DEFRA v Crane* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract)

**Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees); *Element v Tesco Stores* (Court of Appeal: whether an evaluation exercise that had rated the claimants and their comparator jobs as equivalent amounted to a Job Evaluation Study for the purposes of an equal pay claim)

**Redundancies:** *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *R (Palmer) v North Derbyshire Magistrates Court* (Supreme Court: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies); *easyJet plc v easyJet EWC* (Court of Appeal: whether CAC has jurisdiction to hear European Works Councils complaints post-Brexit where central management is situated in the UK); *Olsten (UK) Holdings Limited v Adecco Group EWC* (Court of Appeal: whether the EAT erred in finding that collective redundancies in two countries did not have to share a common rationale to be "transnational" and imposing a penalty for the employer's failure to comply with a requirement to inform and consult its EWC)

**Industrial action:** *Mercer v Alternative Future Group Ltd* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action); *UNISON v Secretary of State* (High Court: whether removal of the restriction on employment businesses supplying temporary workers to cover striking staff was lawful); *Independent Workers of GB v CAC* (Supreme Court: whether Court of Appeal was correct to find that Deliveroo riders did not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights because they were not in an employment relationship)

**Unfair dismissal:** *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown)

**Working time:** *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)



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